11-10-1948

Final Plea for Baron Gustav Adolf Steengracht von Moyland

Military Tribunal IV

Military Tribunal Nuernberg

- Case No. 11 -

Final Plea

for

Baron Gustav Adolf Steengracht von Moyland

in the Trial

United States of America

against

Weizsaecker et al.

Attorney-at-Law
Dr. Carl HAENSEL

The Prosecution did not succeed in bringing before the Tribunal one single witness who did not see in Baron Steengracht a kind, helpful and always affable man. Not one Frenchman, Dane, Hungarian or Jew appeared against him. The Reichsverweser of Hungary, Admiral Horthy, who was for 25 years the representative of his country, confirmed to the Honorable Tribunal here, on 4 March of this year, that he esteemed him highly, that he never connected him in any way with ugly measures, and that he was convinced that he (Steengracht) was always in opposition to Hitler's brutalities (T.R. 285152). The Indictment, nevertheless, connects Steengracht with such brutalities, namely in France, Denmark, and Hungary. Baron Steengracht was never in France or in Denmark at the time in question; he only passed through Hungary on his way to the funeral of the Bulgarian king. We are confronted with the problem of liability for the guilt of another.

In the case of the first crime mentioned in the bible, the murder of Abel by Cain, it was simple to establish the connection between the deadly blows of Cain and the death of Abel, and to determine the question of guilt. But jurisprudence would have had a difficult task, if this connection had not been so clearly visible. If in the middle ages, a mad dog hurt a child, the dog was condemned, and there was no possibility of punishing the owner of the dog for neglecting to keep a watch on the dog. In modern law, the owner of a dog given to biting, who did not put a muzzle on the dog, could be punished because of bodily injury throug negligence, resulting perhaps in death. And what about the responsibility of the man who

supplied the muzzle, if it shows a flaw in the making? Would he also be liable to punishment for the causal connection which exists between the faulty seam of the muzzle and the subsequent fatal reason of the bite? The missionary Henri Nicod has just had published by the Librairie Payot in Lausanne, a book about his experiences with primitive tribes still living to-day. One of the stories he relates is about an Australian fisherman who having pulled his nets out of the water several times without a catch, suddenly sees a strange man appear from behind the bushes. The fisherman realizes at once, so says Nicod: that this man is responsible for the bad catch. And so convinced is he of this, that he throws himself upon the man and kills him. (Henri Nicod: "La Vie Mysterieuse de l'Afrique Noire", Librairie Payot, Lausanne, 1948.)

This example, which at first sight seems ludicrous, causes us to examine our normal thinking from two aspects: The chief of this South Sea fisherman's tribe would certainly not sentence him to death for manslaughter. A tribunal of the civilized State which has the Protectorship of this island, would most certainly do so, if the victim had been a white man. But according to which law? The other problem is even more difficult. Plato already held that there were three different stages in the formation of concrete knowledge, the Doxa, the Dianoia, and the Episteme. The Doxa is the reflection of an observation in our intellect, i.e. the ascertainment made by a witness of Cain's fratricide. The Dianoia is a conclusion reached in the sphere of thinking, for example the perception of the Australian fisherman that the stranger drove the fishes out of his nets by magic, and the Episteme in the "immediate comprehension", the evidence without proof which enables the judge of a civilized nation, to see in the action of the savage

an act of manslaughter which must be punished if men are to live together. As soon as we are confronted, in jurisdiction with facts which are not recognizable by immediate observation, we must be certain that we either follow a process of pure thoughts, or that we operate on perceptions derived from evidence uncolored by emotions, We have, therefore, to admit that we depend on a method, on a training of our thinking. For the jurist this is the law.

To connect Baron Steengracht, for instance, with the arrest of people in Paris, Copenhagen or Budapest, i.e. 500 to 1000 km distant, there must first of all be a law and furthermore a tribunal which can apply this law within its competencey.

The Indictment is based on Control Council Law No. 10. This Law No. 10 derives from the Moscow Declaration of 30 October 1943 and from the London Agreement of 8 August 1945. The Tribunal is established according to ordinance No. 7 of the United States Military Government. Since the Nuremberg trials started, not only the Defense, but also the entire jurisprudence have been discussing whether the London Charter, and thus also Control Council Law No. 10 is an ex-post-facto-law, and, therefore, contrary to one of the fundamental principles of law. The IMT itself in its judgment stated the legal maxim "nullum crimen sine lege" as a principle of justice. (Section 5). The Chief Prosecutor of the Soviet Union, Major General R.A.Rudenko, in his speech of 8 February 1946 before the IMT stated that this principle had lost all its significance in view of the fact

that "the Regulations of the Tribunal exists and are in force and all its directives have unconditioned and binding effect". (Official Transcript, Book VII, Page 168).

This conception appears at first sight to be very simple. But if one considers Law No. 10, one finds that it contains only 5 paragraphs, and it is absolutely impossible to develop and expound in these 5 paragraphs the method of thinking which must be applied to establish a legal connection between Baron Steengracht and the events which happened more than 500 km away. The law requires the interpretation, i.e. the application of a method of thinking which cannot even be hinted at in Control Council Law No. 10, but which, on the other hand, can be determined from considerations which were developed apart from Control Council Law No. 10 and prior to its promulgation. The Chief of the United States Prosecution, General Taylor, in his Opening Statement in this trial on 6 January adopts the point of view: "that crimes against humanity are a well recognized concept in international penal law". (Transcript Page 157). Thus the Prosecution adopts the standpoint which Military Tribunal No. III had defined in the Justices' Case, according to which the Nuremberg Military Tribunals had established a "judicial machinery for the punishment of those who have violated the rules of common international law". (Transcript Page 10630). In quoting Para. II of Control Council Law No. 10, the same Tribunal makes the observation: "Here we observe the controlling effect of common international law as such, for the statutes by which we are governed have adopted and incorporated the rules of international law". (Transcript Page 10631).

Our question therefore is: Is Baron Steengracht, according to general international law, of which Art. II of Control Council Law No.10 is to be regarded as the essence, responsible for the guilt of others in the cases submitted by the Prosecution?

Paragraph 2 of Art.II gives under a to f in 5 paragraphs directions to the judge also to punish besides the principal - Baron Steengracht does not come into question as such - the instigator, the accessory, the aider and abettor.

Baron Steengracht only gave one single direction on his own initiative, which is introduced in the documents. This does not incriminate him, but rather the contrary - I will revert later to this direction. It is therefore only legal and not criminal circumstances which could incriminate him at all. Without prejudice to the interests of my client, I can therefore make some fundamental legal statements regarding the forms of participation as set forth in Control Council Law No.10. This was the subject allotted to me when the various fundamental questi to be dealt with by my colleagues were distributed.

At the first reading it is clear that the paragraph f is different in content from paragraphs a to e, although outwardly it is placed in the same sequence. In accordance therewith, only such persons shall be regarded as guilty as held in Germany or in one of its allies States "a high political, civil or military position..... or such a position in the ..... economic life".

This regulation is set forth under the forms of participation dealt with in a to f

but has itself only a limiting tendency: According to Law No. 10 only such persons shall be punished who held a high political or military rank or a corresponding position in the economic life. In the case of a State Secretary, it will hardly be possible to cite this regulation. For the time prior to Baron Steengracht's appointment as State Secretary, the Prosecution itself characterizes him as a "figure of minor importance" (Transcript P. 33). According to paragraph b, apart from the principal, the accessory as well as the instigator and also those who "aided and abetted" the crime are to be punished. As is evident from the legal terms quoted, this formulation corresponds to Anglo-Saxon as well as to continental law; in respect of German Law it can only be observed that regulations regarding the "act of aiding and abetting" are not contained in the general part of the Penal Code, but this act constitutes a separate offense (Article 257, Penal Code). For us, being an accessory before the fact is not abetting, but a form of participation. It is further to be noted that continental law does not provide the same punishment for an accessory as it does for the principal in a crime, whereas Control Council Law No. 10 puts the accessory to a crime on the same level as the principal in respect of punishment, i.e. even capital punishment could be pronounced as in the case of a principal. Control Council Law No. 10 does not, however, confine itself to this inclusion of the forms of participation well-known to the legal expert, under crimes liable to punishment, but, under paragraphs c to e, it sets forth three more regulations meant to define further the term of accessory for the crimes dealt with in Control Council Law No. 10. An accessory is also one who " took a consenting part therein".

This formula is taken from a diplomatic document, namely, from the Moscow Declaration of 1 December 1943. This, for the first time, established the responsibility of the German officers, soldiers and members of the Nazi Party who "have been responsible for, or have taken a consenting part in the above atrocities" (United Nations Information Office, War and Peace Aims, January 30, 1946, p.116). The statesmen have thus in their language presented the judges who will have to pronounce judgment on the atrocities established by them with a definition, which will now have to be translated by the jurists into juridical language and methods of thinking: Mr. Robert H.Jackson, Chief Counsel of the United States, and Professor A.N.Trainin, the delegate of the Soviet Union, had decisive influence in the Commission which was responsible for the London Charter, which again was the basis for Control Council Law No.10. Both men signed the Charter for the Nuremberg Tribunal and the Statute for their countries. It can be seen from Trainin's books, for example "Hitlerite Responsibility under Criminal Law", 1945, and from the speeches of Mr. Jackson that many of their definitions have been adopted in the Charter and the Statute. The border line between the influence of the Russian juridical thought and that of the Anglo-Saxon can be still further narrowed, if the Finnish law of 12 September 1945 concerning the punishment of those responsible for the war, is taken into consideration, which law was issued by virtue of Article 13 of the peace treaty concluded on 19 September 1944 between the Soviet Union and Finland. (cf. Hjalmar J. Procopé, Soviet Justice and Finland, Zurich 1947). For these brief remarks, which must be limited, however, it is less important whose brain child

is recognizable in the formulas of Control Council Law No. 10. It is not the fatherhood that is important, but the fact that we can fairly accurately establish the begetting of the child and the date of its birth. It is a child which has more than one father. This is again important for the examination of the constitution of this child, i.e. the interpretation of this law. In Russian criminal law, the term "sawedome" plays a very important part. It is mostly translated in German as "wissentlich" ("knowingly"). It signifies, we are assured by philologists, actually much more. It has apparently found its consolidation in the English term, "consenting part". The geneology of the term, "consenting part", this relating of the Russian "sawedome" to the English "consent", leads to the recognition that, according to criminal law, only such consent as was expressed prior to the commission of the crime can make a person an accessory to the deed. It must therefore be proved that the alleged accessory, by his consenting participation, rendered moral assistance to the principal, either by his advice, or information or by strengthening him in his purpose already resolved upon. The term "accessory to" always only means premeditated support of a premeditated act. The announcement of consent, in the sense of "took a consenting part therein" can also only be relevant under criminal law, if the act was thereby promoted, if the principal thereby strengthened either before or during committal of the act. Subsequent approval is irrelevant in a criminal sense. Applied to our case, this means that subsequent cognizance of an act already concluded does not amount to being guilty of participation. Subsequent cognizance, which may be expressed as a sort of flourish, is not aiding and abetting, unless this subsequent knowledge might constitute a basis for a legal obligation to intervene.

This, however, is a different legal viewpoint to which I shall refer later.

Under d and e we find formulations which undoubtedly were taken over from Anglo-Saxon jurisdiction. In Anglo-Saxon penal law conspiracy plays an important role. Combination for the purpose of criminal aims will be punished. " Combination is the gist of the offense" (Gibson, Criminal and magisterial law, London 1934, Page 62 of the 10th edition). The combination with a planning as mentioned under d and e, or the belonging to a group which was connected with the execution of a crime points to conspiracy. In his dissenting opinion to the judgment in Case III, Judge Mallory B. Blair said:" There is no material difference between a plan or scheme to commit a particular crime and a common design or conspiracy to commit the same crime". (Transcript p. 10933). However, on the basis of the Plenary Meeting of 9 July 1947, all the Military Tribunals which at that time were in session decided that there is no regulation of Control Council Law No. 10, according to which the conspiracy to commit war crimes or crimes against humanity constituted an independent, material and criminal act. Therefore, not the planning alone of a crime against humanity is a criminal act, according to Control Council Law No. 10, but according to d and e there can only be a question of criminality, if a defendant co-operated in a plan which was subsequently carried out, if not by him, then by other persons.

or, if he belonged to a group which jointly plotted crimes. Thus also in these cases it denotes aiding and abetting in legal language - the sponsoring of an act committed by others by premediated assistance.

As in the case of the indictments of the earlier trials, the Prosecution made no distinction between the individual paragraphs of Article II 2, not even in the case of the charge of having acted as principal, or of aiding and abetting, nor in the latter case did it differentiate between instigation, encouragement, taking a consenting part or common planning. Acting as principal logically excludes the aiding and abetting and in the same way instigation is something basically different from encouragement. A continental attorney would have to decide when bringing his charge, whether he intends to impute participation as a principal or a definite degree of participation. But also in the pronouncements of the tribunals there was no sharp distinction made between the individual paragraphs of Control Council Law No. 10, paragraph II No.2. For instance, the judgement in Case No. 10 against Krupp et al. says of the defendants: " The kind and the degree of their participation were not the same in all cases, and these differences therefore will be taken into consideration in the establishment of the sentence". (Page 167). In its judgment against Pohl et al., Case No. 4 the Tribunal said in its general statement:

> " If any defendant is to be found guilty under Counts II or III of the indictment, it must only be because the evidence in the case has clearly shown beyond a reasonable doubt that such defendant participated as a principal in, accessory to, ordered, abetted, took a consenting part in, or was connected with plans or enterprises involving the commission of at least some of the war crimes and crimes against humanity with which the defendants are charged in the indictment. Only under such circumstances may he be convicted." (Transcript P. 8059).

In examining the question whether the Defendant Volk was to be pronounced guilty for crimes against humanity, the Tribunal stated:

> " It is enough if the accused took a consenting part in the commission of a crime against humanity to be convicted under Control Council Law No. 10. If Volk was part of an organization actively engaged in crimes against humanity, was aware of these crimes and yet voluntarily remained a part of that organization, lending his own professional efforts to the continuance and furtherance of these crimes, he is responsible under the law." (Transcript P.8174/75)

Therefore here also the Tribunal summarizes the points c to e and declares that the requirements of this ruling would be fulfilled if the defendant had full knowledge of the crime which was committed by a group, and still supported this group by active co-operation in the further execution of the crime. This shows clearly that the Tribunal required an active participation in full knowledge of the crime so aided. The Tribunal does not decide whether this aiding and abetting comes under c or e of Art II.2.

In Case 1 against Karl Brandt et al. it is clearly expressed that the knowledge of criminal experiments did not suffice to convict the Defendant Poppendick for

crimes against humanity. His knowledge was established, even his knowledge of the kind of experiments, but it was also stated that the evidence was not sufficient to establish a criminal responsibility. (Judgment, Page 158 of the German translation).

Thus the situation is as follows: Control Council Law No. 10 lists in Article II No. 1 four crimes, including war crimes and crimes against humanity and under Paragraph 2/gives the ruling that besides the principal also the accessory will be punished. However, it defines the forms of participation by using existing technical expressions and by describing elements of the offense which derive from legal statutes of the Anglo-Saxon and the Russian laws, but which are formulated only approximately, being more descriptive than definitive. The law lacks definition which would show the difference between the principal and the accessory, when it is a case of complicity of collectivity, of participation in the act committed by another. There are no rulings as to the dependance of the participation on the mjor share in the offense (accessority), whether the intent of the accomplice should extend to the major share in the offense in addition to the participation in the act, or whether the unintentional support of an act committed by another of itself could be punishable.

On the strength of which law can the judge supplement these rulings which are merely foreshadowed in Control Council Law No. 10, in order to make available a reliable standard by which to judge the acts? The following solutions would appear to be indicated:

1) The judge of the occupying power decides according to the laws of his country. For acts committed in violation of international law by a citizen of a belligerent country this is the American view point.

This derives from the well-known decision "Ex parte Quirin" (1942, 317 U.S. 1. - compare also American Journal of International Law, 1947, Page 21, Note 5). But according to the American Rules of Warfare the legislative and juridical power is bound up with military necessity. It pertains to the task of the occupying power to maintain peace and order in the occupied territory. (Compare Rules Art. 288). This legislative and juridical competency does not apply to acts committed prior to America's entry into th war on 8 December 1941, and which are in no way connected with the conduct of the war by the United States. The Prosecution expressly emphasizes that, according to its conception, Control Council Law No. 10 also refers to crimes against humanity committed even before 1939. It submits to the Tribunal not only war crimes, but also crimes against humanity, which, according to the statements of General Taylor to the Tribunal on 6 January 1948, are a "well known concept of international law". (Transcript Page 157).

Military Tribunal No. IV to which we are referring, took the following attitude in the Case 5 against Flick et al:

> "The law existing when the defendants acted is controlling. To the extent that Law 10 declares or codifies that law, and no further, is this Tribunal willing to go." (Transcript Page 11010).

There cannot be any other principle for the occidental conception of law. The maxim "Nullum crimen sine lege", provided it is not formalistically exaggerated is really the "corner stone of occidental jurisdiction", as Procope has said in his book quoted above. (Page 298.)

This maxim was develcped in English literature during the 17th and 18th centuries, was taken cver intc the Censtitutien cf the United States in 1786 as the interdictien cf ex pcst facto laws and intc the 8 paragraphs cf the French Prcclamatien cf the Rights cf Man during the great Revelutien, as well as intc many cther later Censtitutiens. The IMT, besides recegnizing the legal maxim "nullum crimen sine lege" as a principle cf justice (Sectien 5) alsc expressly recegnized, as ene cf the mest impertant principles, the principle that criminal guilt must be personal. (Sectien 9). One cannet punish a man whe did net knew at the time cf the commissien cf the act that he was doing wreng.

2) Accerdingly, there enly remains the cther alternative cf supplementing Centrel Cehncil Law Nc. 10 in the case cf German defendants accerding te German law and cf thus interpreting the ferms cf participatien enumerated in Art. II 2 accerding tc German law. Neither in theery ner in practice is this selutien pessible.

It cannet be expected cf a judge whe has made his studies and carried en his legal activity in Anglc-Saxen legal circles that he shculd judge accerding tc a legal system, entirely alien tc him - a very complicated system which shews cenflicting epiniens and which amid the devastatien cf the Hitler Regime has suffered nc less than the German tewns. Thése practitieners and scholars, whc from ycuth up were skilled in this law, find it a difficult task tc separate the chaff frcm the wheat and determine in hew far pcsitive German law at the time cf the cellapse had remained a prcper law and hew far it had degenerated. Accerding tc the Judgment given in Case III(the Justices' Case)

" Hitler's decrees were a protection neither to the Fuehrer himself nor to his subordinates if in violation of the law of the community of nations". (Transcript page 10687). The legal thought behind the maxim "nullum crimen sine lege" that a person can only be punished according to the law in force at the time of the commission of the act, can in our case not be interpreted to mean that the law implied here is Nazi law during the war years, for this law was in itself a wrong, at least large portions of it were, and heavy penalties were imposed in Case III for having pronounced and applied it. The judges of the Military Tribunal therefore will have to determine: What was really law in Germany, what was right as opposed to law - the letter of the law as formally proclaimed in the Reich Legal Gazette? And where are the guiding principles by which this can be determined? According to what law can this degenerated German law be examined? This question necessarily brings in a third norm complex, according to which the Nuremberg Tribunals must judge and which stands above every national legal system or immanent international law.

3) In view of the fact that up to July 1947 the Prosecution had treated its charge also concerning crimes against humanity and war crimes from the angle of Conspiracy according to Anglo-Saxon Common Law, in making my statements to the plenary meeting of the Nuremberg Military Tribunals on 9th July 1947 I said it was impossible to apply these legal principles because Control Council Law No. 10 was a part of international law, and that in Nuremberg neither Anglo-American

nor German nor any other national law could be used, but only international law. Accordingly, the judgments given on 3 and 23 December 1947 in Cases III and V (Justice Trial and Flick Trial) adopt the point of view that the Nuremberg Military Tribunals are international in character and should make their pronouncements according to the principles of international law:

> "This Tribunal, although composed of American judges schooled in the system and rules of common law, is sitting by virtue of international authority and can carry with it only the broad principles of justice and fair play which underly all civilized concepts of law and procedure" (Case III, transcript page 10649).

> "It is an international tribunal established by the International Control Council, the high legislative branch of the Four Allied Powers now controlling Germany .... The Tribunal administers international law."
> (Case V, transcript page 10975).

I will not conceal the fact that in the course of the academic discussion the point of view adopted by me was partly accepted, partly contested. In his commentary on Control Council Law No.10, Professor H. Kraus adopts the view that Control Council Law No.10 should be interpreted according to international law. My standpoint was rejected by Dr. Franz Jerusalem ("Die Spruchgerichte",1948, page 129). On the other hand, Professor Dr. von Weber decided in favor of my standpoint ("Die Spruchgerichte", 1948, page 193 et seq.). The battle of opinions continues in a series of publications. (Finally, Windels and Mosler in "Die Spruchgerichte", 1948, pages 267 and 281 et seq.). But above all it must be stated that the De-nazification Courts of the British Zone apply the general rules of the German Penal Code when administering the law according to Control Council Law No.10, in conjunction with British Ordinance No. 69 ("Die Spruchgerichte", 1948, page 281 and the decisions therein quoted of the 1st and 5th De-nazification Court Senate.). But practice has shown that it leads to unjust results when one seeks to apply within the compass of a legal system a law which is known to be distinct from national law,

is conceived and formulated as a super-state law, but which is not on the same level as the law which is to be supplemented. A telling example of this is the treatment of the defense of necessity (Notstand-problem).

According to the positive provision of Control Council Law No.10, Art. II 1 d, supplemented by the IMT Judgment, coercion on the part of the state upon entry into the SS justifies the plea of necessity - but not the German plea of necessity according to Par. 52 - 54 of the Penal Code. Thus far we are agreed. Concerning the forced continuance of membership in an organization Control Council Law No. 10, II 1 d, and the IMT Judgment say nothing. If this provision of Control Council Law/No.10/ is not supplemented according to the idea of the defense of necessity under international law (necessity knows no law) - as I maintain it should be - then there is no alternative but to deduce: Control Council Law No. 10 is in confrontation to German law the overriding law of the occupation and has the precedence when it conflicts with German law. Thus the German plea of necessity avails nothing when confronted with Control Council Law No. 10. "This ruling laid down by the occupation law must be considered as exhaustive and final and cannot be interpreted in any other way" (so says Kramer - "Die Spruchgerichte", 1948, page 4. - Also my counter opinion contained therein - page 100 et seq.). Therefore, an SS man would have to be punished, who unsuspectingly joined the SS, learned afterwards about atrocities, wanted to resign, was refused, and instead sent to a concentration camp for insubordination. This is clearly unjust. I concede that one cannot partly invalidate Control Council Law No. 10 with the German law of necessity, but in this connection one must not forget that Control Council Law/No.10/ itself must be interpreted in the light of international law and that everywhere in the world

and ever since men started to administer justice they have recognized the maxim: "Necessity knows no law". Just as little as one can understand a person who talks a foreign language, can one correctly read a law if one does not interpret it from the legal circle on whose soil it was produced.

Against the conception that at the Tribunals here international law should be applied, the objection has been raised that up to now there had been no penal law within international law and therefore there were no rules of international law which could serve as supplements to the Control Council Law No. 10. (Thus says Windels in "Deutsche Spruchgerichte", 1948, Page 269).

This objection at the first glance brings us into a very big difficulty. Jacques Bernard Herzog, an excellent expert on the Nuernberg Trials, admitted in his article in the Swiss periodical for Penal Law (1946, Page 277 et seq., in particular on Page 293): "C'etait le première jurisdiction internationale de l'histoire". - "This was the first international court in history". The American Chief Prosecutor, Mr. Jackson in his address of 21 November 1947 also said that "there is no example or precedent for the Charter in legal history". In vain we scan the works of the authorities on international law for a description of norms which would apply to an international criminal court. There is no international penal code. When citizens of a foreign nation were judged by a court of an other State, it was done according to the laws of the land that exercised the jurisdiction. There is much literature on the question whether according to the customs of war a State has the jurisdiction over citizens

of the opponent who violated the customs of war, and where such jurisdiction ends, whether it is limited to the zone of operations or whether war crimes committed in enemy territory can also be punished by military tribunals. (Lauterpacht, British Year Book of International Law, 1944, Page 58 et seq.; Verdross, Voelkerrecht, 1937, Page 13 et seq.). But the punishment of crimes against humanity to the extent in time and place as has been undertaken here in Nuernberg and is still pending, cannot in the recognized literature - except in controversial writings and de lege ferenda - be found as an established custom of international law and still less in the judgments of courts before 1945. The only unmistakable attempt in this direction are the provisions of the Treaty of Versailles, Article 227/28, concerning the extradition of the former German Kaiser and others responsible for the war, for punishment by the Victorious Powers. This punishment did not take place, however. Holland's misgivings, based on the political right of asylum, were sufficient to frustrate this attempt. This start to make use of international law ran aground. The more we come to realize our situation, the more uncomfortable it gets. In this connection the maxim "nullum crimen sine lege" lies upon our soul as a crushing weight, for all the defendants who did not injure the person and life of another human being from personal motives as a major offender (Haupttaeter), unquestionably believed that in carrying out Hitler's orders they were responsible only to their own sovereign State and would not on account of their official actions (Staatsakte) be brought before a foreign military tribunal and they believed moreover, that the fact of a dictatorial order was binding and covered them. They were not reckoning with the promulgation

of a law on 20 December 1945 that would with one paragraph remove the objections which up to then they could raise against the possibility of prosecution. If a huge number of documents fell into allied hands, documents which serve as basis for the Prosecution's charges and are the only basis for them, then it is due to the fact that these documents had been written and had not been burned in order to cover the authors by giving proof of the existence of higher orders. Where, then, is the law to be found "which at the time of the defendants' actions was already in effect and was only put down in writing in the Control Council Law No. 10 ?" (Flick Case, Transcr. Page 11010).

Is it sufficient to refer perhaps to the norms of the Anglo-Saxon or the German domestic law? But what if these two norms of law contradict each other? This is the case with the norms which especially in our proceedings are of greatest importance. According to the German Law he who carries out a military order and thereby commits a crime can be punished only if he knew that the act of his superior had a crime for its purpose. But according to British Law the objective obviousness that a crime was involved is already sufficient. In American Law a change was made even after 1944 through the Amendment 34 to Article 443 of the Manual. According to Article 443 of the Manual and Article 366 of the Rules of Land Warfare up to the time of this Amendment the subordinate was not punishable for crimes committed by order, if their unlawfulness was not obvious. According to the Amendment an appeal on the basis of an order from a superior is inadmissable if the order offends recognized principles of the laws and customs of warfare

or clearly violates generally accepted principles of international law. What national norm then is international law? Or must one take all of them together and then work out an average using the same system which was used to develop Esperanto out of the living languages? Is such a lawyers' Esperanto international law? Or does the possibility of establishing a norm of international law exist only when there is unity in all national laws? One would not get very far in that direction, as every expert on comparative jurisprudence will confirm at once. From Pascal we have the statement: Three degrees of latitu completely upset the entire jurisprudence. (Pensées, Par. 319). Or the still more sceptical formulation: Just as fashion creates charm, so it also creates justice. (Pensées, Par. 253).

This statement of Pascal is only a partial truth; like lightning in the dark it shows up the contradictions in the various systems of law. The statement fails to recognize the fundamental truth that right is always only what is expressed in the opinio necessitatis, thus the conviction of right, the firm belief that it is right. A maxim of law is one only when the defendant who is not maliciously stubborn or irrational, also recognizes the justness of it, and the second requirement is that it applies to all and not only to a portion of humanity that does not voluntarily accept it. International law cannot be separated into international law for conquerors and conquered. The Tribunal therefore acted very wisely when in the Flick case it decla that the law in force at the time of the defendant's action was to be decisive. It moreover said that it intended to apply the Control Council Law No. 10

only to the extent that it contained this law in written form. Only to that extent can one really recognize international law in Control Council Law No. 10, for already according to the Preamble and Art. I of the Control Council Law No. 10, this law was not intended to create a new international law. It was rather to give effect to the provisions of the Moscow Declaration of 30 October 1943. But the Moscow Declaration only deals with the responsibility of Hitlerites for committed atrocities, and the London Agreement of 8 August 1945 deals only with the Prosecution and Punishment of the Major War Criminals of the European Axis. The law created here is primarily binding for the contracting parties only, a so-called particular international law, the object of which are the axis-adherents. Hence one can already gather from the text of this internationa law treaty that the individual provisions of the Charter or the Control Council Law No. 10 can, to begin with, be applied as a Law of Occupation only, in so far as the Occupation Powers, according to General International Law, have jurisdiction and legislation in the Occupied State Territory, hence for the time of war and for the security of the Occupation Power.

Where then is the source of the international law found in the Control Council Law No. 10 which goes beyond this mere Law of Occupation and seeks to punish crimes against humanity also against members of nations not at war and irrespective of whether these crimes were connected with the war?

Sources of international law one considered to be the customs, the treaties, the literature and the knowledge and the rules and agreements which have been developed by the world organization of the community under international law / within its sphere of activity.

(See Pitman B. Potter " An Introduction to the Study of International Organisation", London 1929. Valentin Tomberg, " Die Grundlagen des Voelkerrechts als Menschheitsrecht" ("The principles of International Law as Rights of Humanity"), Bonn 1947). Of what nature is the International Law from which the IMT draws the statement that it would not be unlawful to punish the aggressor who is aware that he is doing wrong; that rather it would be unjust if his misdeeds were allowed to go unpunished. (Section 5). What International Law has Military Tribunal No. III in mind when it speaks of an International Law against which "Hitler's decrees were a protection neither to the Fuehrer himself nor to his subordinates"? (Transcript P. 10687). Of what International Law does Military Tribunal No. III speak when it makes the statement : " As applied in the field of international law that principle requires proof before conviction that the accused knew or should have known that in matters of international concern he was guilty of participation in a nationally organized system of injustice and persecution shocking to the moral sense of mankind, and that he knew or should have known that he would be subject to punishment if caught." (Transcript P. 10639).

It seems unlikely that Military Tribunal III presumed that the defendants studied books, such as Lemkin's

"Genocide". On the contrary, this statement shows that it presupposes merely a sense of justice, a sense of what is wrong, which is part of man's innate nature. The law on which the Nuremberg Trials are based, is, therefore, founded neither on treaties of international law, nor on common practice, nor on unanimous findings of jurisprudence, nor on rules which have evolved from a world organization, but on Natural Law which is subsumed in international law and in which all these laws have their source.

I do not know how such a statement strikes an Anglo-Saxon judge. On a continental judge, at any rate, it has a frightening effect, because all of us, whether we like it or not, have been caught up in the stream of Positivism. Pascal already recognized that justice like any science has its fashions. I draw attention to the aforementioned quotation. Even so esteemed an author as Robert Campell, in his Principles of English Law (London 1907) proceeds from a definition in Erskine's Principles of Scotch Law (1754): "Law is the command of a Sovereign, containing a common rule of life for his subjects". According to this, natural law does not exist.

Jurisprudence in Germany, before the Hitler catastrophe, represented Positivism in Law, which identified law and legislative law.

Natural Law is dead, declared Berolzheimer triumphantly (System of Law and Economic Philosophy, Book II, 1905, page 15). For extreme Evolutionism,the law is only a form which changes with the stage of development, for instance for Charles Darwin, Herbert Spencer and the Darwinists, as well as for the followers of the materialistic conception of history since Carl

Marx, and the followers of pantheistic Monism, such as Fr. Paulsen and W. Wundt. But also for the Neo-Kantians who base their theories on the Idealistic School and whose most outstanding representative among the German jurists is R. Stammler. Law was only the "universally valid coercive regulation of social life".("Essence of Law and Jurisprudence" in "Modern Culture" Part 2, Chapter 8, 1906). The conception of right and the ideal of justice faded completely when confronted with the concrete form of valid law. The searching mind became more and more proud of its /purely/ intellectual achievements in the systematic process of codifications. Legal security seemed incomparately strengthened, in that the many books of commentary were able to give full information on all debatable questions which could be thought of. Reason was chained to the intellect and did not know the danger. Only the catastrophe opened our eyes. A man without ties and tradition, without any other contribution than the small physical pain caused by a well-aimed shot understood how easy it is to govern if one makes /the/ machinery of the law a servant of dictatorial despotism. Once a man has uncontrolled power in his hands, he can even use the police in their uniforms, who are there to uphold the law and protect the citizen, to exercize force and terror, and finally also the legislation and the tribunals. Then only did we realize that there was a law, which, to use a poet's words, is written in the stars, unalterable principles, without which life becomes a hell and living together chaos.

The hyperthrophy of the Positivism of Law did not even spare international law. Hartmann began with the "Institutions of Practical International Law "in 1874. The epitome in literature on this subject is Oppenheimer's standard

book on International Law, Volume I, Section 50, 1928 edition; he himself belongs to the Positivists. But Oppenheimer was no longer able to assess the catastrophe of the years 1939 - 1945.

The philosophical theory of knowledge has developed two ways for finding out what right is: - either by means of intellectual perception, or through the "reductio ad absurdum" through catastrophies. We now suddenly know with the force of Plato's Episteme that right is not always what seems to be right, and uses legislative forms to camouflage the naked force, and that there is a natural law, superior to such pseudo law, without which we would not be able to unmask this pseudo law. The world is an organic whole, with an order which imposes upon the individual unalterable duties and which obliges all to enforce these moral duties upon all, in order that human rights may prevail everywhere, unless we are always to stumble into new wars, each of which, with growing terror, starts where the other ended. Much more than national law has international law grown from this natural law. All international law is ultimately and initially natural law, because there is no legislator of national states who could promulgate binding laws. Already the principle "Pacta sunt servanda" is natural law. The customs which have gradually established themselves originated from natural law. The human reason which attempted to make it possible for men to live together in order to avoid chaos is the father of all international law. And the mind, which is not blind to ideas, is able to recognize behind the present form, that is, the modern formulation of paragraphs, the integration of the individual with the universe, the sublimation

of the jus naturale to the jus divinum - depending on the individuals's scope of vision. But this natural law is always the foundation of every law, not a mere illusion, no dream, no ideal, but, in the language of the legal parcemia, " law in force". The activity of the Nuremberg Military Tribunals hitherto proves that it is in force. For if it were not in force, if there existed no idea of mankind which united the individuals, there would also exist no endangering of humanity and no crimes against humanity nor would these have existed during the years of war and before the promulgation of Control Council Law No. 10 in 1945. Without the assumption of such a natural law, Military Tribunal No. III would not have been in a position, in regard to Control Council Law No. 10, to lay down that "its justification must ultimately depend upon accepted principles of justice and morality". (Transcript P. 10618). The same Tribunal would also not have reached the opinion in regard to Control Council Law No. 10: " It does not purport to establish by legislative act new crimes of international applicability". (Transcript P. 10622). The Tribunal could also not have established:" It is not the isolated crime by a private German individual which is condemned, nor is it the isolated crime perpetrated by the German Reich through its officers against a private individual." (Transcript P. 10634). For if the Tribunal had seen in Law 10 only the compilation of existing national legal maxims, such as the prohibition of murder and deprivation of liberty,

these are the crimes it would have had to prosecute if they had been committed against private persons. Every national penal law protects the private individual. If, consequently this crime against humanity was not newly introduced as a fact in 1945, but had already existed before, it could only have existed as natural law, for it is not traceable in any other legal sphere. But what is natural law and what does it call for? We have to lift our idea-blind eyes out of the fog of legal positivism and glance backward to the time of Hugo Grotius, when the humanistic natural law of Roman origin flourished. We must, however, not be blinded by the jack - o' lanters of the subjective natural law of the age of enlightenment (Rousseau!) which flickered from time to time and brought natural law into discredit. From this view, there result the following principles for our procedure:

1) The natural inborn right which, together with his human dignity belongs to every individual to defend not only his life, but his manhood, as well as humanity in general, against an attack endangering these sublime legal rights, has led, at a time of greatest emergency and human distress, to the establishing of courts of law, such as have never existed before, in order to summon individuals before their international tribunals on account of acts which they committed on the command and behalf of their government. In order to justify such a procedure, however, these acts should then be crimes of a nature endangering humanity to an extent hitherto unknown. The Control Council Law No. 10 only speaks of "crime", i.e. the gravest form of criminal offense, and of

"persecutions", that is, not of single offenses against individuals, but meaning Genocide, the wholesale extermination of peoples. Minima non curat praetor, is the principle of national law. In this instance, it would have to read: Nihil nisi maxima curat praetor.

2) This law has to be applied on a broad basis, corresponding with the vastness of the sphere of international law. In dubio pro reo. Only the outrageous baseness should be punished. The slightest doubt must lead to abstention from the application of this emergency law. In the digest of the Corpus juris there is already the sentence: "In poenalibus causis benignius interpretandum est." (cf. Schoenke, Monthly Revue of German Law, 1947, Page 87).

3) General Taylor, the Chief Prosecutor at the Nuremberg Military Tribunals in the plenary session of 9 July 1947, warned these tribunals against the danger in establishing criminal responsibility of getting lost in hairsplitting arguments over the legal interpretation of the various forms of participation. (Transcript P. 30). I should like to add to this that still greater care and restraint should be used in examining the question whether a defendant who is not a principal offender, should be punished at all on account of an act of participation. Only the notorious criminal should be punished by such high emergency court. He who was only a small wheel in a complicated machinery is of no interest at all to the large circle of the family of nations, the "orbis terrarum". He might perhaps/ be tried /before national courts. The interpretation of Article II, Para.2, offers the opportunity to realize this sound legal concept. That is where the beginning should be made and the circle of those called to account before the International Tribunal be limited.

This ruling should not be interpreted elastically but restrictively. Only he who saw the full extent of Hitler's conception and agreed with it, who consciously offered his services for persecution on racial or religious grounds, is an accomplice, if he collaborated in full knowledge of all the circumstances. He is not Hitler's accomplice who only came under the sway of his overall conception, without fully comprehending it, and without making it his own aim.

4) According to the decision of the Nuernberg Military Tribunals, Control Council Law No. 10 does not recognize conspiracy as an independant act in relation to war crimes and crimes against humanity (Case III, transcript, p.10933 v.). Thus the authors of Control Council Law No.10 rightly proclaimed that international law does not recognize conspiracy in the sense of Anglo-American common law. Conspiracy is a special institution developed for the Anglo-American legal sphere. But also in this legal sphere it has not escaped severe criticism (compare Sayre in the Harward Law Review, Volume 35, page 3977 et seq.), Also in England and America there is much uncertainty regarding this conception (compare Schoenke in "German Legal Journal", 1947, page 331). In contrast to the definite stand taken by the Military Tribunal against conspiracy, inasfar as it pertains to war crimes and crimes against humanity, one must take care that this conspiracy is not indirectly introduced again into international law via the participation forms. The IMT has emphasized that criminal guilt is a personal one and that mass punishments should be avoided. Personal guilt, however, does not mean that there were only individual offenders as principals and not also accomplices in a collective offense.

Continental law also recognizes complicity. But it draws a sharp distinction between the complicity, the collective commission of a uniform offense, which is for each participant his own offense, committed together with others, and a participation by aiding and abetting or any of the other forms of participation, in an offense committed by another person. Continental penal law has developed the concept of "the control over one's actions". The perpetrator is he who, in full control of his actions, himself carries out, or gets another person to act for him (Reinhard Maurach "Grundriss des Strafrechtes, 1948, Par.45, I). Participation, however, is the mere collaboration in the act committed by another. And when passing sentence for the participation one must always be guided by what picture the abettor had formed of the principal offense. Such circumstances surrounding the act as were unknown to him should not be taken into account when assessing the guilt (Maurach, a.a.O. Par. 50 II).

Here we are confronted with a fundamental difference between the legal conceptions of the Anglo-American and the Continental law. A Tribunal which "administers international law" (Case III, transcript p. 10975), must not overlook this difference, and must according to the above mentioned principle of natural law "in dubio pro reo" or "in dubio mitius" consider this difference in favor of the defendant. Anglo-American law perceives two elements to be essential for a crime, the "actus", i.e. the actual commission or omission of an act, and "mens rea" the guilt. According to our law, however, a crime is a culpable illegal act liable to punishment. Thus it still requires a definite criminal act which must be committed; and the guilt, i.e.

the intention, must cover <u>all</u> the characteristics of the act. According to Anglo-Saxon Law it is sufficient if the offense was directed towards a criminal behavior. Therefore, a failed guilt is conceivable, a "one should have been able to perceive" which, according to continental law, is not accepted in the case of an intention. Here one must have perceived. According to our legal conception it is not sufficient to prove that a defendant carried on anti-Semitic propaganda in order to make him responsible for acts which others committed, and who interpreted this propaganda in a way foreign to him and who misunderstood and exaggerated it. Only the concrete act of racial persecution, in which he participated as principal, accessory or abettor, makes him criminal (compare "Die Spruchgerichte", 1948, page 264).

According to Wisliceny's examination in the Commission of the IMT on 6 October 1945 (transcript p.778) it must be assumed that Hitler gave Himmler the order for the "final solution of the Jewish Question" at the latest in August 1942. A great number of unfortunate people subsequently died in Auschwitz, Maidanek and Treblinka. But from the fact that a report which, for instance, gives an account of the employment of Jewish labor in Auschwitz and which was seen by an employee who was neither subordinate to Himmler nor a member of the SS, one cannot conclude that the word Auschwitz would have conveyed anything to him and still less that he had taken a consenting part in Hitler's genocide. For this, apart from a purely outward connection, one would have to prove a personal feeling about the execution of Hitler's order, and an activity in the sense of an approval of this order, an active participation in the racial persecution which had been expressed in this order.

If in these discussions one tries to find signs which would lead to such a knowledge it is impossible to be satisfied with a " he must have known it". The more decent and the more unsuspecting a man is, the more difficult it is for him to believe that others could think differently, much less act differently. The witness Sonnleithner has stated that as late as September 1944 Hitler denied to his associates the reports from abroad about the annihilation of Jews with the remark: "Here we have the mutilated children's hands in Belgium". By this he was referring to a propaganda report of the first World War, which was proved to be false. To my question whether Hitler's remark was received with any credibility by his associates, Sonnleithner replied: "Yes, but I must add what I have already said, that when I heard such things I clung with all my optimism to the belief that these horrible things were not true". (Transcript P. 18464). In his famous book " The Yogi and the Commissar" (New York 1946) Arthur Koestler repeated his essay "On Disbelieving Atrocities" which appeared in January 1944 in the New York Times Magazine. He talks of a meeting with American journalists who were amongst the best informed about Hitler's persecution of Jews and the propaganda which had started in USA.

> " He told me that in the course of some recent public opinion survey nine out of ten average American citizens, when asked whether they believed that the Nazis commit atrocities, answered that it was all propaganda lies, and that they didn't believe a word of it." (P.89).

It would be a false conclusion to assume that a high government official such as a State Secretary should know more than a simple citizen about occurences outside his sphere of duties for the mere reason that he held a high title. The responsible Gestapo agencies certainly did not inform Baron Steengracht of their activity.

As we know to-day, enquiries they answered with lies. The possibility of an investigation did not exist for him and an inspection of the Camp Theresienstadt by the Red Cross and the Danish Government, which Baron Steengracht was the only one, to have carried out, was, on the contrary, bound to refute opposing news from abroad. We must not forget that elementary experience of life that a husband or wife, is known to be the last to learn of his or her conjugal partner's escapades. When finally he is told by a friend, he would sooner break with him then give credence to him.

There remains the question to be discussed briefly at what time does action become imparative according to natural international law, when does omission imply a responsible accomplice?

"Crimes committed by omission" have often been discussed by jurists in all civilized countries. The inception of this discussion can be traced back to Roman law, compare the "actio libera in causa". Penal law consists, essentially, of prohibitions and punishes him who violates a prohibition. Whoever commits an action detrimental to another, is punished, but only in exceptional cases is he punished who fails to do something. In crimes committed by omission it is non-intervention which establishes a violation of the law. The perpetrator does not prevent a threatening event that may hurt other people. An example: An official passes on an order, which he finds on his desk, to another office, which carries out this order and in the course of this a human being is ruined. Based on legal discernment, that is to say, on considerations of the law of nature, and not pursuant to positive legal regulations,

jurisprudence has developed the following principles: He who is guilty of omission must have had a legal obligation to act. The omission must have been done on purpose, there is no perpetration through negligence. An obligation to act can exist only where it is recognized. (Compare Reinhard Maurach: "Grundriss des Strafrechts" (Outlines of Penal Law) 1948, Article 15/II). A person who is asleep cannot, for instance, be guilty of "omission". Omission must be a result of the deliberate application of will-power: A paralytic or one impeded by violence cannot "omit" to do an action. This is a principle of special importance for our problems. I cannot see that in the Nuernberg Trials reference has been made to it so far. After all, every argument must first be discovered, but in contemplating Paragraph II/4 b, it is forced on us that the latter refers to actions only and not to omissions as well. According to this regulation, the cover of superior orders in committing an action does not exempt from responsibility. But what happens if, by order of a superior, someone neglects to act, if, by order of his superior, and with all the risk for his life implied in times of war, he was hampered in preventing others from acting? Can a person become the accomplice of another man's action by being eliminated, by a binding order, from an association which finally represents a crime on the part of the person who acts? Whoever has studied the problems of the actio libera in causa cannot doubt that a paralytic or one impeded by violence cannot commit a crime by omission. There is no moral difference, nor, on closer investigation, a legal one, between a paralytic, impeded by his bodily ailment and another whose will has been rendered impotent

by a compulsory order under pain of death. There is no deliberate application of will-power, indispensable in establishing a crime by omission.

This will also be the result of another deliberation, the investigation as to the connection between cause and effect. An action or the omission of an action can only be considered as the cause of a subsequent effect if it has formed a link in the chain of events and cannot be eliminated without modifying the effect. As to omission, the question arises: Can the omitted action not be construed as an addition without eliminating the effect? (See German Supreme Court of the Reich, Volume 75, Page 50). An omission in this sense can become relevant only if the person committing the omission was not only unhampered in his decision but also in a position to realize his resolve. If his decision had been opposed by the order of a superior, who would have immediately eliminated him and his opposition, thereby removing at once the obstacle to his order to a third party, if this had happened, the omission of such opposition could never have become the cause of the final effect. The final effect was guaranteed by the authority of the superior the opposition, by the subordinate, would merely have presented an interlude and without effect on the event which finally did happen.

In Case II against Milch the Military Tribunal II divided into the following sub-questions the problem whether Milch shares the guilt in the medical experiments, possibly as an accessory, though actually he did not take part in them:

1) Did Milch know of the experiments?

2) On the basis of his knowledge, did he know that they were criminal in regard to their aim and execution?

3) Did he obtain the knowledge in time in order to be able to take steps to prevent the experiments?

4) Did he have the power to prevent them? (Judgment page 92)

This wording is the interpretation of the above sentences developed from theory into the practice of international law.

It seems to me that it will put in to our hands the key with which to unlock the door of the prison where Baron Steengracht is still being held, and to solve the problem of his case in regard to criminal law.

If he is involved in this trial at all it is not for the reason that persecutees themselves who had suffered loss of life and limb through him - or their relatives- have complained about him and demanded his punishment, but only because his title of State Secretary got mixed up with his actual functions, and the conceptions derived from parliamentary forms of state were applied to the organisatory pell-mell of the Hitler dictatorship.

The following story is told of a State Secretary of the Third Reich: During the so-called period of struggle, i.e. prior to the seizure of power, Hitler had promised him: When I come to power I will appoint you Regierungsrat. On 31 January 1933 the man reported to Hitler in order to congratulate him on his chancellorship. Hitler made him and his friends wait for a long time.

At last he was called into his room. When he re-appeared his friends assailed him with questions: Well, what happened? What job did you get?- The old fighter was very sad and said: Well, that's the way with all the great men of history. The Fuehrer promised me that I would become Governmental Counseller (Regierungsrat), and now he has made me Secretary - State Secretary. In his naive-way the man made a better estimate of his new job than a democratic theorist, who assumes that a State Secretary of the Hitler regime must be an important political figure, only because of the title. This anecdote dates from 1933, whereas Baron Steengracht became State Secretary only on 5 May 1943, ten years later, when everything was already in utter confusion.

What, then, was the position which Baron Steengracht encountered on 5 May 1943? Hitler had been in power for ten years. Policy was fixed down to the smallest detail. Up to that date, Baron Steengracht had not taken any part in it. The Reich was at war. The war was lost. Foreign political negotiations were impossible since the allied statesmen had stated as their maxim - unconditional surrender.

The leadership of the Reich was at the Headquarters where Hitler, Bormann, Goering, Himmler, Ribbentrop and many others were staying with their staffs. Baron Steengracht was charged with a purely administrative task. The developments had changed the system of tasks of this post. This was also de jure taken into account at the appointment by Ribbentrop. By special service regulations Baron Steengracht was excluded from policy. He had not applied for this job.

It was transferred to him by a surprise order. Baron Steengracht tried to have the order reversed. He volunteered for front-line duty. He was rejected.

It is a principle of democracy not to regard a man more highly because of his title. However, one should not consider him as being inferior just for that reason and believe him less than one would believe a man without title. In a democracy, one can speak one's mind without risking to lose one's head for it. During the Hitler régime the voicing of opinions criticizing the government meant endangering one's life. However, everybody who knew Baron Steengracht personally, or knew him in an official capacity, says that in spite of that he risked his life daring to fight a tenacious battle against the persecution of the Jews and the church, against the arbitrary legislation, against everything which could turn a decent person against the leadership of the Third Reich.

Baron Steengracht may be compared to an officer who is ordered to one of the bridges by the captain of a ship that has been badly hit, not to the conning bridge, but to one of the points where something can still be done for the crew after the ship is out of commission.

The decisions made before Baron Steengracht's assumption of duty were already historical facts, just as the damage which had been done to the ship of state itself. Hitler's order which forbade all Jews to leave the country, in particular to emigrate to Palestine, had been promulgated, as also his order that all Jews were to be returned to their country of origin. Only Hitler could have countermanded his own orders. In spite of that, Baron Steengracht saw Ribbentrop immediately after assuming office and was able to prevent diplomatic negotiations

with other countries directed against the Jews from being continued. The order for the deportation of the Danish Jews was then given by Hitler in the autumn of 1943, in spite of all representations made by Ribbentrop. Baron Steengracht took no part in this or any other deportation. Himmler and his men carried out these orders. Therefore, if he chose, he could omit to follow them up in individual cases. However, Baron Steengracht was not in a position to do so, since he was not officially competent in the matter, either as State Secretary in the Foreign Office or on the strength of the duties allocated to him personally. This was also the case with the events in France, Denmark and Hungary. Hitler had given specific orders to his executive bodies. The activity of Hitler's representatives abroad, who were directly subordinate to Ribbentrop, was controlled by these orders. Baron Steengracht was not concerned with the matters in question here. They were neither routine matters nor did they come within this general sphere of duties. If the orders came direct from Headquarters to these representatives abroad, then any responsibility was borne by them alone, and Baron Steengracht could not take it away from them.
The fact that the Foreign Office received reports from abroad on all events is wrongly interpreted by the Prosecution to mean that the Foreign Office was competent for all these matters. In everyday life one is usually only informed of something when one has some connection with it, and if one asks about other matters, then one is considered curious. A Foreign Office has to be curious. This is one of its duties, since it is from such information that the political situation can be assessed.

Thus news was received from all parts of the world; news concerning new postage stamps, the theatre, strikes, matters concerning police measures in the occupied countries and a great deal more, all of which came under the heading "transmission of news". If anything connected with these matters displeased the A.A., it could not take action by issuing its own orders, for it had no administrative tasks and no executive. It could only contact other offices which were competent. If it was a question of measures which were to be taken beyond the frontiers, then the foreign Government had to be approached. Thus a foreign element was introduced, the causal connection was interrupted and a new chain of causality began in a new legal circle.

In this trial we have heard a great deal of the darker side of the Third Reich. We have been able to see that heavy punishment was meted out, particularly if it concerned cases of disobeying orders or of the abhorred defeatism. It was therefore the duty of people to help all those who resisted Hitler's orders. This not only for the sake of the person concerned, but in order to safeguard the influence he exerted through his job, and perhaps to protect the sovereignty of another people, thus serving Germany's proper interests. The two disciplinary investigations conducted by Baron Steengracht as examining judge have to be looked at from this angle. I am thinking of the investigations into the activities of Abetz and Best.

The fact that Baron Steengracht was charged with this investigation proves that he had in no way been connected with the substance of the case until then,

for otherwise he would have been acting in his own cause as judex inhabilis.

The form and contents of these reports had then to be adjusted to Hitler's and Ribbentrop's mentality, as they were supposed to impress them. In none of these instance did anything happen to any of the defendants. In the case of Abetz reprisals which had been planned were prevented. In the case of Best, the attempt at replacing counter-terror by ordinary court procedure failed. The report had no influence on the passing-on of Hitler's order to Denmark.

Words can only be correctly understood if one considers the atmosphere and circumstances in which they were pronounced or written down. What matters is the will which prompted them and which was expressed by them. Everybody will probably agree to that. However, there is one more fact which will have to be considered: i.e. it must be taken into consideration that the diplomatist had to adjust his remarks to the circumstances and the recipient. It was his professional duty to take this into account and carefully judge the effect. The diplomatist is not a pastor or a confessor. He sometimes has to talk in the language of his adversary in order to reach his goal and persuade the other party to drop an unwelcome decision. Therefore, all that matters in the judgment of the human qualities of such diplomatist is the aim he has in mind, and not the words dictated to him by circumstances. I would like to remind you of an example from recent history. It hails from Mr. Elliott Roosevelt's description of the Yalta Conference, page 238 et seq. in the Zuerich edition of the Book "As He Saw It". At the end of a meal during this conference Marshal Stalin proposed a toast which Mr. Elliott Roosevelt quotes as follows:

> " I drink to the swiftest possible justice for all the German war criminals – to the justice of an execution unit. I drink to our determination to execute them immediately after their capture, and I mean all of them, and there must be at least fifty thousand of them." (A.a.O. page 238).

" Churchill immediately jumped to his feet", Elliot Roosevelt continues , and said, " Such a procedure is in sharp contrast to the British conception of justice. The British people will never approve of such mass murder." It was President Roosevelt's task to save the situation. As Mr. Elliot Roosevelt remarks, he considered it best to introduce a note of jocularity:

> " As usual", he began, " it seems to be my task to act as mediator in a conflict. It seems certain that a compromise between your conception,Mr.Stalin, and that of my good friend, the Prime Minister, must be found. Perhaps we could say that we will agree not on 50;000 but perhaps a smaller number, let us say about 49,500 war criminals, which are to be summarily executed." (A.a.O. Page 239).

We know that no summary procedure took place later on, but rather wearisome trials. Thus President Roosevelt had found the words to have Marshal Stalin see the point in Mr. Churchill's stubborn resistance. Who would dare to tear the words of the late President from their context, and in doing so, give them an entirely different meaning than they had in that particular situation. I would like to request the same also for my client: Not to disconnect the words from their context, but to interpret them according to the purposes Baron Steengracht had at that time and in the light of his general conduct. Beside being mentioned in connection with the events in France, Denmark and Hungary, Baron Steengracht is also mentioned under Para.23 of the Indictment, which deals among other things with the death of General Mesny. But in this case also, there is no other documentary evidence than that Baron Steengracht

on 18th November 1944 learned of a Hitler order to do away with a French General in reprisal for the death of a German general. He protested very strongly, and obtained the assurance that the Foreign Minister would never give his consent to this deed. Baron Steengracht's protest in the name of the Foreign Office was also submitted to Hitler. Hitler had not wanted the Foreign Office to define its attitude with regard to this matter. He only wanted to know Ribbentrop's personal opinion. After Steengracht was informed of Hitler's opinion, and his decision to give up the proposition, he felt sure that nothing of the sort would take place. Baron Steengracht also never heard that Ribbentrop subsequently gave his consent. The documents show that he actually did not give it and that the execution of General Mesny was ordered by Hitler much later with the Foreign Office being completely excluded. Of the fact itself, of the execution of the general, Baron Steengracht only learned in the summer of 1946.

How can one attempt then to connect with General Mesny's murder a man who did everything he could to oppose this proposition, and who, moreover, had proved in numerous other cases that by his intervention he had saved people from the danger of falling a victim to one of Hitler's brutalities? For years he kept the son of a Jew in his house as if he had been his own child. Other Jews and persecutees have only him to thank that they were able to get to safety abroad. As early as the turn of the year 1943/44 Baron Steengracht found out about the plans of the resistance movement against Hitler, as Graefin Moltke and Graefin York

testified, and on his part actively supported a peace in spite of Hitler. He put forth the utmost effort to effect the release of the leader of the young opposition, Graf Helmut Moltke. He had already succeeded when the events of 20 July 1944 upset everything again. In the time that followed he himself was under strict observation and was in danger of being arrested. In spite of that, he helped the relatives of those who made the attempt on Hitler's life, who approached him, in spite of the fact that it was forbidden. He did not hesitate to receive these people even in his own office, as many of the affidavits submitted show. The former Chief of the Cabinet of the Queen of Holland and the envoy Meyer-Falkenberg testify how he helped Dutchmen and Belgians, and how he obtained freedom for hundreds of people, and this without being directly connected with Dutch or Belgian affairs. Scarcely had Baron Steengracht become State Secretary, when he created a special committee for PW's and one for foreign workers, in order to improve their lot. Since this was not within the competency of the Foreign Office, this caused special difficulties. The Italian Military Internees have to thank him for the improvement of their hard conditions, and finally for their release. Holidays and rest camps for the other PW's were organized on his instigation, and the Nuntius, as well as the Red Cross, were given the possibility of giving help to innumerable PW's. He maintained contact with the Nuntius, by which the Nuntius was informed on many matters of which he was not supposed to have any knowledge, but which relieved many people from suspense about the fate of their relatives or made concrete assistance possible.

In one single document 87 such cases are mentioned. I only mention these things here, without going into details, because they show the humane conduct and the trend of mind of Steengracht, who never saw in his position anything else than the possibility of alleviating hardship, of opposing cruelty, and of preventing wrong. This was not an easy thing to do in the Third Reich. He who stood firm against the avalanche, ran the risk of getting crushed by it. To this belongs also the so-called "Schutzpass-Aktionen" in Hungary which exempted tens of thousands of Hungarian Jews from those measures. One has to proceed from this basic attitude of a person, if one seeks to judge him from the high level of international law. The law should not be used to forge shackles which would hinder the kind helper in his intervention. A law that would throw a man who tried to lend a hand to mitigate the consequences of the criminal actions of others, or at least endeavored to check them, into one pot with the guilty, is no law, but a completely mistaken measure, for it would discourage all men from helping others, because in giving their assistance, they would run the risk of being drawn into current of events caused by criminal intention. He, who assists so eagerly in putting out a fire that he risks his own life is, according to usual logic, not the incendiary. Nor is he the incendiary who has lived in the house and had an office in the administration of the house, unless it can be proven that he had a part in the arson.

No sooner had Baron Steengracht come to office, than the German-Italian army capitulated in Tunis.

At the same time the third conference between President Roosevelt and Prime Minister Churchill took place in Washington, in the course of which the invasion in France was decided for the summer of 1944. Immediately before that the 6th German Army had been wiped out at Stalingrad. On 23 January 1943 President Roosevelt and Prime Minister Churchill had met at Casablanca and proclaimed the demand for unconditional surrender. One can truthfully say that Baron Steengracht stepped on to the bridge of a sinking ship.

In order to show the High Tribunal how little he could really do and also how little he had done, how small his sphere of influence was, a precise statement is being submitted in the Closing Brief, comprising all the documents which the Prosecution had introduced against the Foreign Office before their closing and which merely covers the period of Baron Steengracht's assignment. About half of these documents bear no relation whatever to Baron Steengracht. Of the documents which were sent via the State Secretary, i.e. his office, again two thirds came there only afterwards. He signed only 24 documents, i.e. one fifteenth of all documents comprised in this statement. And of these 24 documents only one eigth, i.e. 3 documents, contain instructions which primarily pertain to the trial. Of these 3 instructions only one single instruction was not issued on the express order of the Minister, but on his own initiative. This is the telegraphic order Exh.1802B in Document Book 62 A, which constitutes the exact opposite of a racial persecution, since it enabled the General Consul at Monaco to protect the few Jews living there from Heydrich's men. On the other hand, 5 orders of the departments and 55 of the Minister were submitted. The remaining seven eighths of the documents signed by Baron Steengracht are merely reports (Informationen

Half of these again are based on directives from the Minister and two thirds are of a purely administrative character.

The opinion of the Regent of Hungary, von Horthy, concerning Baron Steengracht I have already mentioned at the beginning. I finally wish to draw attention to the description by the Swedish Minister, who said that, unlike his superiors, he had always found Baron Steengracht to show good will. And the Danish Minister, who today is the Danish representative in Rome, says that at all times Baron Steengracht eagerly supported Danish interests. In two further instances he states that Baron Steengracht was the most fearless of all the officials of the Foreign Office, who criticized the measures of his Government most severely. The Vicar of Moyland, the aged Karl Rocker, who has known Baron Steengracht since he was born and who has followed every phase of his life from near or from afar, although he could say very little about the documents submitted, he could say much about the man who is standing before you as a defendant. In the district from where he comes he is so well reputed and respected, so trusted and loved, that, as the aged vicar, who was deeply moved, said at the end of his testimony, the people there are praying for a favorable sentence.

We here beg for a fair trial.

" All that the defendants are entitled to ask is to redeive a fair trial on the facts and law", says the IMT Judgment about the rights of the defendants. (The Law of the Charter, End of Paragraph 3). For the individual defendant the most important thing is the right which is granted to him; for him it means everything, but in truth there is here much more at stake.

Henry L. Simson, who as prominent authority on international law was quoted in the Justice-Judgment, has said:

> "We can understand the law of Nuernberg only if we see it for what it is - a great new case in the book of international law, and not a formal enforcement of codified statutes." (Case III, Transcript Page10637).

In international law, the clausula rebus sic stantibus is immanent in a particularly large measure. Even as Natural Law it could undergo changes and become outdated through events; the actual legal status of the community under international law is decisive when it is contradictory to Natural Law. One thing, however, is absolutely sure: The world to-day does not stand where it stood in the summer of 1945, when the London Charter and later the Control Council Law No. 10 were created, and it no longer stands where it stood in October 1946 when the IMT Judgment was given. Besides the question which was already discussed in the Flick Case, namely in how far the ascertainments and legal arguments of the IMT can be in any way prejudicial - compare Case V, Transcript Page 10978 - the much greater problem arises: Have the legal maxims which at that time were considered as Natural Law proved effective in the years which have elapsed since then? / The Tribunal administers international law. It therefore must use as a basis the state of the world to-day, and in contrast to the conception of Natural Law of the year 1945 consider what in the meantime has actually emerged as legal customs in the treatment of PW's and of parts of the population of occupied territories through the administration of occupied territories by all four signatory powers.

If Nuremberg is supposed to begin a new chapter in the book of international law, as was stated by no less a person than Henry L. Simson, then this chapter must be written with the care taken by every clever author with the beginning of a book, so that the reader does not close it after the first few pages and disappointedly lay it aside. There is really more at stake here than merely the fate of the defendants, although this is very much, too, and means everything for these men. The matter at stake is whether a new international law can be laid down which would be capable of restoring order in this world. Walther Rathenau, in whom was combined profound spiritual education and international experience in economic affairs, in 1919 wrote a book ("Kritik der dreifachen Revolution" - Criticism of the Triple Revolution) in which he conceived the then just concluded World War and the later world war, which he prophetically foresaw, outwardly still only as the fights of national States, but actually as signifying the outbreak of a world revolution. Walther Rathenau was right when he stated that the new war would break out in our country and, as he said, in that of our eastern neighbor (loco citato, p.48) "as the place of the least world-political resistance". Perhaps he will also prove to have been right in considering it was not possible to eliminate the difficulties in the world by purely economic measures, but that this aim could only be achieved if it were found possible to create a new feeling for justice and of confidence in justice in the world.

CERTIFICATE OF TRANSLATION

10 November 1948

We hereby certify that we are duly appointed translators for the German and English languages and that the above is a true and correct translation of Final Plea Steengracht.

Marguerite KATER, ET # 20035, (pages 1-4,23-29,49) .....

Anne MARTIN, ETO # 20144, (pages 5-8, 50) .....

Jan H. FRIEDLAENDER, ETO # 20067, (pages 9-13,30-33, 47-48) .....

Victoria ORTON, ETO # 20129, (pages 14-17,34-42) .....

E.M.REDELSTEIN, AGO-X-046289, (pages 18-22,43-46) .....

"END"