1. Preliminary Observations

The motion of the defense counsel, dated November 20, 1945, makes a vigorous plea for applying to the trial before the ICT the doctrine of the non-admissibility of "ex post facto" laws. The order of the Court implies that this argument may be "heard at a later stage." It would therefore seem useful to discuss further the problem of the applicability of this doctrine to the trial before the ICT.

The question may be asked: Why do not the Agreement and the Charter expressly bar the ex post facto plea, while the defenses of Head of State and Superior Order are specifically declared to be inadmissible? The answer is to be found in the fact that the Charter as a whole, and Article 6 in particular, is a formal denunciation of the ex post facto doctrine.

It can hardly be suggested that the signatory powers were not aware of the fact that the definitions in Article 6 may be regarded as ex post facto legislation. The authors of the Agreement were fully aware of the dynamic character of the new principles of international penal law as formulated in the Agreement and the Charter. In fact, Justice Jackson stated this explicitly in his remarks: "Hence I am not troubled by the lack of precedent for the inquiry we propose to conduct."

But a second problem may arise: Are there no higher legal principles of sufficient force to override the Four Power Agreement? Is the Four Power Agreement the only source of law for the ICT, or are there other sources of unwritten law of such high authority that they may override the provisions of the Agreement?

There are no such generally recognized rules of international criminal law. The lack of any reference in the Charter to the right of the Tribunal to use particular sources of law, axioms of law, or definitions of such axioms
other than those contained in the Agreement itself, precludes the possibility of having recourse to them, in view of the specific character of the Tribunal.

For on the precedent of Article 81 of the Statute of the Permanent Court of International Justice, the Big Four could have inserted an analogous provision in the Charter of the IIT, empowering it to apply, along with the Agreement and the Charter, such legal sources as "general principles of customary international law," or the writings of distinguished authorities in this field; however it must be recognized that analogies, which are admissible in civil law (both domestic and international), are generally barred in criminal law. There is every reason to believe that the signatories were fully aware of this precedent. The fact that they did not use it constitutes decisive proof that the Agreement compels the Tribunal to act exclusively within the limits of the Charter, without having recourse to sources outside of the Charter.

Against explication of the Agreement and Charter as the exclusive source for the authority, jurisdiction and substantive law of the IIT, it may be argued that there appear to be gaps in both Agreement and Charter, and, consequently, that there must be a source to which recourse may be taken in order to fill in these gaps. However, this theory is based on a rather mechanical approach to the problem of interpretation. No legislation or contract ever contained the answers to all the questions that might arise in the process of their application. To bridge the avoidable gaps, we need not look for other sources of law, but rather to use the normal methods of interpretation, the most important being the one based on the general purposes and objectives of the specific instrument. We put ourselves in the place of the legislators or signatories, and ask ourselves how we would have solved the particular problem, had we been saddled with the responsibility of formulating the given legislation or contract. If we apply this basic principle to the so-called gaps of the Agreement and Charter, we shall have no difficulty in solving problems for which there may be no direct answers in the text of this instrument.
Under Counts Three (page 11) and Four (page 28) of the Indictment, the
same formula is used to characterize these two types of crimes, to wit: "These
methods and crimes constituted violations of international conventions, of
internal penal law, and of the general principles of criminal law as derived
from the criminal law of all civilized nations."

The question: crimes, what was the purpose of citing the last two types
of legal sources in the Statement of Offense (the first refer to agreements
mentioned in Article 6 (a) and (b))? Is not Article 6 sufficient? It is
obvious that these two references did not intend to change the legal basis of
the trial by substituting some vague references for the provisions of positive
law as enshrined in the Charter and the Agreement. It was probably the intent
of the prosecution to explain by indication that the crimes established
by Article 6 do not in fact represent any revolutionary innovation, but are in
line with developments in international and domestic penal law. Whatever may
have been the purpose of these references, the Indictment cannot have the power
to change or supplant the legal concepts and definitions in the Charter and
Agreement. Even if by some obvious methods of interpretation it could be
demonstrated that there was a conflict between the formulations of the Agree-
ment and the Charter on the one hand, and the references in question on the
other, it is obvious that the formulations of the Charter must overrule these
references.

2. Discussion

I. The Charter of the International Military Tribunal has already
decided the corpus delicti of the defendants.

Article 6 of the Charter declared all acts enumerated therein as crimes.
All these acts were committed, and must have been committed, before the enactment
of the Four Power Agreement, since this Agreement was signed after the conclusion
of the European war, i.e., at a time when the defendants were no longer in a
position to commit any of the acts enumerated in the Agreement. The Powers
which defined the Agreement and defined these acts as crimes falling within the jurisdiction of the Tribunal were fully aware of the fact that Article 6 of the Charter deals with acts perpetrated prior to the enactment of the law which serves as the basis for the trial and punishment. Thus, if the law of the case is the Charter (and there is no other basis), this law excludes any reference to prior enactment for, if the latter be admitted, the whole basis for the action of the Court would be destroyed. As the Charter is the sole legal act on which the activity of the Court is based, the Court is an organ created by this act. It can, therefore, have no authority to question the legality of the Charter: it exists only within the scope and provisions of the Agreement, which is indisputably its basic law.

II. The international character of the Tribunal and of the crimes prescribes consideration of the ex post facto exception.

A. General non-applicability of the ex post facto principle in international criminal law

The proponents of the non-applicability of the present case of the rule of ex post facto necessarily base their argument on domestic law. However, the present case is not one decided on the basis of the domestic law of any country or by a national court. The Agreement and Charter are international legal acts and deal with offenses not against the public order of a single state but against international security and humanity. Therefore, the only applicable law is international criminal law. "There is no rule of general customary international law forbidding the enactment of norms with retrospective force, so called ex post facto laws" (Jens Nilsen, "Collective and Individual Responsibility in International Law with Particular Regard to Punishment of War Crimes," California Law Review, December, 1949, p. 545).

International and domestic criminal law differ not only in jurisdiction (courts) and law (legal maxims), but also in the concept and the character of these legal systems. Not all acts considered criminal in domestic legislation are, or must at any time be, considered criminal in the international legal and
...and crimes, although the crimes of the international order may be inspired by the nations. In our case the defendants are arraigned before the Tribunal for acts declared to be international crimes, i.e., for transgressions against what the courts of nations considers to be the present international legal order. Legally it is irrelevant whether or not they are also crimes according to any domestic criminal law. The latter is created by a single-purpose organization — the State — to be applied (except for military jurisdiction on foreign territory) against its residents for punishable acts of one person against another or the community; its main task is to maintain the status quo in all spheres of life. On the other hand, international criminal law can operate only from a loose conglomeration of states — the courts of nations — which possess various legal systems and practices; and its purpose is to punish individuals who act against the interests of this country, which changes from time to time in composition, character, and laws.

In sum, domestic and international criminal law are of different characters. The first is usually static, the second essentially dynamic; the first is governed by strict rules, the second is more flexible and adjusted to the exigencies of its specific purposes. Also, the first is set in advance for years to come; the second is adapted to the specific case. It is, therefore, impossible to apply rules of domestic law to cases of international jurisdiction, and consideration of previous enactment is out of order here.

Unlike normal international relations involved in the interchange of goods and peaceful disputes among nations, which long ago created international law and jurisdiction in such fields, no authoritative attempt has been made to extend international law to cover the condemned and forbidden conduct of individuals (Majury C. Hudson, International Tribunals, Past and Future, Washington, D.C., 1964, pp. 101-103). This means that at present there is no written international penal code which prescribes what acts are considered international crimes; nor
are there any regular international criminal courts. Nevertheless, the notion of sovereignty has restricted the possibility of applying criminal sanctions in international relations (except in cases of piracy) to such acts crests as rare and their aftermaths, which, respectively, create the punishable acts and the necessity for punishment (in the various amounts following the close of war). The non-existence of such a case necessarily makes it impossible to apply its corollary (see Section III below) — the prohibition of ex post facto laws. Furthermore, international penal law now, under existing circumstances, evolve only in the case-to-case way, i.e., whenever the necessity arises to apply criminal sanctions, the society of nations creates the necessary presumptions and the relevant penal law. Many of the best law systems of the world have been created in this manner. In the same way, the lack of ordinary international criminal jurisdiction forces the states concerned to create ad hoc courts. It has been generally assumed that in creating an ad hoc tribunal, states are free to stipulate what law shall apply (Hobsom, op. cit., p. 105); otherwise, because of the absence of applicable law, such tribunals could not function at all. It has also been generally recognized that all case law operates retroactively, for only fictionally could it be said that all acts found to be criminal upon trial were criminal when committed (Forcese v. Hall, "Male move more here," Yale Law Journal, Vol. 67 (1997), p. 171). Therefore, the principle of ex post facto could not be applied to international penal law as it exists today, even if other rules would have favored its application.

B. Procedures for the application of international criminal law

It may be true that in the past the number of cases involving international criminal jurisdiction has been small. However, this cannot be construed as an argument against its application, as it is only a consequence of the particular evolution of international criminal law. The paucity of such cases in the past highlights the extraordinary character of the acts committed by the accused being tried before the ICTY, who, by their misdeeds, have set the clock.
centuries back in a world which was unprepared to anticipate such enormities as they have perpetrated. After the First World War similar acts, although much less extensive, evoked similar reaction and led to similar consequences. The treaties of peace concluded at that time set a precedent in affirming the principle of individual responsibility in international relations (see Articles 227-230 of the Versailles Treaty and the comparable provisions in other treaties). Article 231 of the Versailles Treaty explicitly provided for the arraignment of William the Second for a “crime against international morality and the sanctity of treaties,” which unquestionably was not an act that had been declared criminal by international law before that time. Article 233 of the Treaty of Sèvres, concluded between the Allied Powers and Turkey, went further and affirmed the international responsibility of all persons responsible for “measures committed during the continuance of the state of war on territory which formed part of the Turkish Empire on August 1, 1914,” even though the victims of the measures were Turkish citizens at the time of the measures, and no international rule existed in 1914, according to which persons committing wrongs against fellow citizens could be arraigned before an international court. According to the same Article, the Allied Powers retained the right to designate the tribunal which would try the persons so accused; this provision implied the possibility of establishing an ad hoc tribunal. Both Articles created in fact and in law almost the same rules as have been embodied in the Agreement and the Charter of the IIT. It is true that for certain reasons the quoted rules were not applied, but this is irrelevant from the legal point of view; they show how international criminal responsibility is being created and how the rules created by the IIT Agreement are, in essence, only the application of existing precedents, which were known to the accused or should have been known. The defendants cannot claim that the provisions of the Agreement concerning the applicable law violate international law; on the contrary, they are in perfect agreement with its principles and precedents.
III. Even in domestic law the ex post facto principle is of relative validity only; the legal systems of the United Nations do not consider enactment of retroactive laws.

Even if the defendants claim that general principles of domestic legislation are applicable in international criminal law (which is not the case), the legal position would not change in any way.

A. Ex post facto in ordinary domestic legislation

The proponents of the view that the principle of the non-admissibility of ex post facto legislation applies to this case think in terms of the general domestic criminal legislation of certain countries, which bars such laws either by constitution or by usage.

However, a law can be challenged on the ground of the non-admissibility of ex post facto legislation only where the judge of the given court is competent to rule on this objection, because ex post facto legislation is declared inadmissible by the basic laws of the country or by constant judicial practice (in countries with a common law system). Nowhere is this rule conceived as existing above or apart from the written or common law. Furthermore, this principle is everywhere of relative importance only, i.e., where it is based on a constitutional provision, a law exceeding the Constitution could undoubtedly be prohibited by any act which, at the time of commission, was not in the criminal statutes. Where this principle is based on judicial practice only, any law can dispose with it. For instance, in England where the idea against ex post facto legislation is deeply imprinted in the common law, Parliament, by virtue of its supreme power, may pass such laws at any time (Blackstone's Commentaries 16, 169, cited in Bouvier's Law Dictionary and Concise Encyclopedia, 1914, Vol. I, p. 1104, and Hall, p. 611, p. 170). Many recent constitutions (among them the Czechoslovak Constitution of February 29, 1920; the Polish Constitution of 1921; the Yugoslav Constitution of June 28, 1922; and the Belgian Constitution, as amended in 1929) confine themselves to the general
statement that no penalty shall be established or enforced except by virtue of a law (Belgium), or that punishment can be administered only by law and applied only to the acts for which the law prescribes and prescribes such punishment (Hungary). Obviously, even if the criminal code of the country makes provision for the usual application of nulla poena sine lege, any ordinary law of those countries may prescribe punishment for acts declared criminal at the time when the law is enacted, although they have been committed prior to the effective date of the law.

It must also be borne in mind that the principle of prohibiting any such factus lege laws is a corollary to the existence of an exhaustive penal code, which usually provides for all probable cases of crimes. Its purpose is to safeguard the innocent individual against the tyranny of the state, which would otherwise make punishable any inoffensive action on the part of its citizens. This principle, based on the fear of tyrannical legislation, is to be found in countries which have had to free themselves from foreign yoke (United States) or their own despotic government (England, France, Germany after the First World War). On the other hand, nations which have created their own democratic government have not found it necessary to bind it by such rules. Furthermore, the safeguard against factus lege laws has never been intended as a guarantee against violation of the vital interests of the community, especially when new circumstances arise which could not have been foreseen and hence could not have been written into the penal code before they appeared. The principle of nullum crimen has in law a static meaning only; dynamically and historically the crime always precedes the criminal rule. New crimes create new laws (Professor Goochart, quoted in "The Inter-Allied Conference on War Crimes and the Problem of Retribution," by Strodey, The Keg Commonwealth Quarterly, April 1942, p.350). This is especially true of turbulent acts that were perpetrated during this war, and in the period immediately preceding its outbreak, acts which the modern civilized mind, habituated to the reign of law and decency, could not have for-
seen. "The degree of the quiet past are inadequate to the stormy present... as our case is now, so must we think now and act now." (Abraham Lincoln, Message to Congress, December 1, 1862). In fact, countries which had to deal with the new phenomena disclosed during this war, did not hesitate to enact legislation against collaboration and similar acts, which formally would seem to violate the aforementioned rule. Among them are the most progressive nations of Europe, such as Norway, Holland, Belgium, France and others. The provision of the Moscow Declaration that the criminals will be judged in accordance with the laws of the free governments which will be established in the various regions formerly under German occupation, clearly indicates the possibility and necessity of new legislation.

In certain cases the principle of retroactivity has even found explicit statutory recognition, as for instance in the admittance of analogies in criminal law (Denmark introduced it in the 1930's -- Ball, op. cit., p. 186), or in the right of the Courts to punish morally dangerous behavior (the Russian penal code of 1920). In Britain the Courts frequently punished, from 1660 to 1850, without any specific precedent, conduct which was contra bonas moras, or which openly outraged public decency or was unaccountable under some similar generalisation (e.g., misbehavers or specifically juvenile delinquency). There are scattered instances of Courts having continued this practice after 1850, the most recent being *Dow v. Hanley* in 1939 (Ball, op. cit., p. 279).

The DNH was established by a decision of the Four Great Powers acting in the interest of all the United Nations; to this decision a score of other States have signalized their adherence. As may be seen from the foregoing discussion, not all of the Four Great Powers recognize the rule of *ex post facto*; and in the majority (Great Britain, France, Russia), retroactive laws are either possible by simple action of the legislative organ (Great Britain), or have been enacted in order to deal with similar cases (France), or are usual in ordinary criminal law (URS). The same is generally true of the
affair of nations. Thus, even if the principles of ordinary criminal law of the nations — parties to the Agreement — should be applied in deciding the question of admissibility of non-applicability of retroactive laws, and if the law of the Agreement should be considered as being ex post facto in nature, this law would undoubtedly be recognized as valid.

3. Ex post facto in military courts

The trial is being held in Germany. According to the Act of Unconditional Surrender and the Declaration Regarding Defeat of Germany and Assumption of Supreme Authority by Allied Powers, dated September 20, 1945, the supreme power is exercised there by the four commanders-in-chief of the Big Four. There can, therefore, be no doubt that that territory and all persons found there are subject to military administration and jurisdiction by the occupying armies. The fact which cannot be overlooked in considering the problem of applicable law is that the NRM is a military court. It is generally recognized (and this principle has also been maintained by the U.S. Supreme Court) that military courts are a part of the military power of the executive and do not constitute a part of the judiciary established by the Constitution. (Henry B. Kirch, “Military Tribunals and Their Jurisdiction,” American Journal of International Law, 1931, p. 966; Horst Hahn, “Deutsche und franzoesische Gerichtshoheit in der Nachkriegszeit,” Rechtsvergleichende Abhandlungen, Hefte 6, Berlin, 1938, p. 53).

According to American law, the “military commission” (military court) does not belong to the judicial branch of the government, being an agency of the executive power (William Nourse, Military Law and Precedents, second edition, Washington, paragraphs 54-55). Military jurisdiction exercised in time of war outside the boundaries of the state which established it can therefore obviously not be subject to the rules created for ordinary domestic criminal jurisdiction. Thus, even if the principle of non-applicability of ex post facto laws is to be found in a given country, it does not apply to military jurisdiction.
3. Conclusion

The probable exception by the counsel for the defense, that their clients cannot be punished for all the crimes with which they are charged or even for a part of them, on the ground that such punishment would constitute a violation of the principle of the non-admissibility of ex post facto laws, is ill-founded and cannot be entertained by the Court, for the following reasons:

a. The Charter of the Tribunal has clearly placed these crimes within the jurisdiction of the Court;

b. Even if the problem is considered independently of the explicit provisions of the Charter (which is inadvisable), the objection must be rejected on these grounds:

(1) The Court and the applicable law are international, not domestic. International law contains no provisions prohibiting retroactive laws; on the contrary, the precedents admit them.

(2) In domestic legislation the principle has a restricted application only.

(3) The principle, even when recognized by ordinary law, is not applicable to military jurisdiction.