MOTION ADOPTED BY ALL DEFENSE COUNSEL *

19 November 1945

Two frightful world wars and the violent collisions by which peace among the States was violated during the period between those enormous and world embracing conflicts caused the tortured peoples to realize that a true order among the States is not possible as long as such State, by virtue of its sovereignty, has the right to wage war at any time and for any purpose. During the last decades public opinion in the world challenged with ever increasing emphasis the thesis that the decision of waging war is beyond good and evil. A distinction is being made between just and unjust wars and it is asked that the Community of States call to account the State which wagers an unjust war and deny it, should it be victorious, the fruits of its outrage. More than that, it is demanded that not only should the guilty State be condemned and its liability be established, but that furthermore those men who are responsible for unleashing the unjust war be tried and sentenced by an International Tribunal. In that respect one goes now-a-days further than even the strictest jurists since the early middle ages. This thought is at the basis of the first three counts of the Indictment which have been put forward in this Trial, to wit, the Indictment for Crimes against Peace. Humanity insists that this idea should in the future be more than a demand, that it should be valid international law.

However, today it is not as yet valid international law. Neither in the statute of the League of Nations, world organization against war, nor in the Kellogg-Briand Pact, nor in any other of the treaties which were concluded after 1918 in that first upsurge of attempts to ban aggressive warfare, has this idea been realized. But above all the practice of the League of Nations has, up to the very recent past, been quite unambiguous in that regard. On several occasions the League had to decide upon the lawfulness or unlawfulness of action by force of one member against another member, but it always condemned such action by force merely as a violation of international law by the State, and never thought of bringing up for trial the statesmen, generals, and industrialists of the State which recurred to force. And when the new organization for world peace was set up last summer in San Francisco, no new legal maxim was created under which an international tribunal would inflict punishment upon those who unleashed an unjust war. The present Trial can, therefore, as far as Crimes against Peace shall be avenged, not

* The Tribunal rejected this motion 21 November 1945, ruling that insofar as it was a plea to the jurisdiction of the Tribunal it was in conflict with Article 3 of the Charter.
The Charter makes the planning or waging of a war of aggression or a war in violation of international treaties a crime; and it is therefore not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London Agreement. But in view of the great importance of the questions of law involved, the Tribunal has heard full argument from the Prosecution and the Defense, and will express its view on the matter.

It was urged on behalf of the defendants that a fundamental principle of all law—international and domestic—is that there can be no punishment of crime without a pre-existing law. *Nullum crimen sine lege, nulla poena sine lege.* It was submitted that ex post facto punishment is abhorrent to the law of all civilized nations, that no sovereign power had made aggressive war a crime at the time that the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders.

In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. Occupying the positions they did in the Government of Germany, the defendants, or at least some of them must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression. On this view of the case alone, it would appear that the maxim has no application to the present facts.

This view is strongly reinforced by a consideration of the state of international law in 1939, so far as aggressive war is concerned. The General Treaty for the Renunciation of War of 27 August 1928, more generally known as the Pact of Paris or the Kellogg-Briand Pact, was binding on 63 nations, including Germany, Italy, and Japan at the outbreak of war in 1939. In the preamble, the signatories declared that they were:

"Deeply sensible of their solemn duty to promote the welfare of mankind; persuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples should be perpetuated..."
all changes in their relations with one another should be sought only by pacific means... thus uniting civilised nations of the world in a common renunciation of war as an instrument of their national policy...

The first two articles are as follows:

"Article I. The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations to one another."

"Article II. The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or whatever origin they may be, which may arise among them, shall never be sought except by pacific means."

The question is, what was the legal effect of this Pact? The nations who signed the Pact or adhered to it unconditionally condemned recourse to war for the future as an instrument of policy, and expressly renounced it. After the signing of the Pact, any nation resorting to war as an instrument of national policy breaks the Pact.

In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in doing so. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the Pact. As Mr. Henry L. Stimson, then Secretary of State of the United States, said in 1923:

"War between nations was renounced by the signatories of the Kellogg-Briand Treaty. This means that it has become practicable throughout practically all the world... an illegal thing. Hereafter, when nations engage in armed conflict, either one or both of them must be termed violators of this general treaty law... We denounce them as law breakers."

But it is argued that the Pact does not expressly enact that such wars are crimes, or set up courts to try those who make such wars. To that extent the same is true with regard to the laws of war contained in the Hague Convention. The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters. Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as offenses against the laws of war; yet the Hague Con-
the civilized states and peoples, and may be regarded as strong evidence of the intention to brand aggressive war as an international crime.

At the meeting of the Assembly of the League of Nations on 24 September 1927, all the delegations then present (including the German, the Italian, and the Japanese) unanimously adopted a declaration concerning wars of aggression. The preamble to the declaration stated:

"The Assembly:

Recognizing the solidarity which unites the community of nations;
Being inspired by a firm desire for the maintenance of general peace;
Being convinced that a war of aggression can never serve as a means of settling international disputes, and is in consequence an international crime . . ."

The unanimous resolution of 18 February 1928 of 21 American republics at the Sixth (Havana) Pan-American Conference, declared that "war of aggression constitutes an international crime against the human species".

All these expressions of opinion, and others that could be cited, so solemnly made, reinforce the construction which the Tribunal placed upon the Pact of Paris, that resort to a war of aggression is not merely illegal, but is criminal. The prohibition of aggressive war demanded by the conscience of the world, finds its expression in the series of pacts and treaties to which the Tribunal has just referred.

It is also important to remember that Article 227 of the Treaty of Versailles provided for the constitution of a special Tribunal, composed of representatives of five of the Allied and Associated Powers which had been belligerents in the first World War opposed to Germany, to try the former German Emperor "for a supreme offense against international morality and the sanctity of treaties."

The purpose of this trial was expressed to be "to vindicate the solemn obligations of international undertakings, and the validity of international morality". In Article 228 of the Treaty, the German Government expressly recognized the right of the Allied Powers "to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war."

It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized. In the recent case of Ex Parte Quirin (1942 317 U.S. 1), before the Supreme Court of the United States, persons were charged during the war with landing in the United States for purposes of spying and sabotage. The late Chief Justice Stone, speaking for the Court, said:

"From the very beginning of its history this Court has applied the law of war as including that part of the law of nations which prescribes for the conduct of war, the status, rights, and duties of enemy nations as well as enemy individuals."

He went on to give a list of cases tried by the Courts, where individual offenders were charged with offenses against the laws of nations, and particularly the laws of war. Many other authorities could be cited, but enough has been said to show that individuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.

The provisions of Article 228 of the Treaty of Versailles already referred to illustrate and enforce this view of individual responsibility.

The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. Article 7 of the Charter expressly declares:

"The official position of Defendants, whether as heads of State, or responsible officials in Government departments, shall not be considered as freeing them from responsibility, or mitigating punishment."

On the other hand the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law.

It was also submitted on behalf of most of these defendants that in doing what they did they were acting under the orders of Hitler, and therefore cannot be held responsible for the acts committed by them in carrying out these orders. The Charter specifically provides in Article 8.
Nullum crimen sine lege

IMTFE, Araki et al., Judgment, Separate Opinion of Judge B.V.A. Röling, 12 November 1948, pp. 44 et seq.

From the above, it follows that “crimes against peace” were not regarded true crimes before the London Agreement, and were not considered as such before the end of 1943.

The question has to be faced and answered whether the concept of these crimes was, and could be, created as such by the London Agreement of August 8, 1943, or by the Charter for the IMTFE.

The defense in this case has submitted that this question is of no consequence, in view of the rule invalidating ex post facto law. This argument, however, will not stand examination. If the principle of “nullum crimen sine praevia lege” were a principle of justice, the Tribunal would be bound to exclude for that very reason every crime created in the Charter ex post facto, it being the first duty of the Tribunal to mete out justice. However, this maxim is not a principle of justice but a rule of policy, valid only if expressly adopted, as to protect citizens against arbitrariness of courts (nullum crimen, nulla poena sine lege), as well as against arbitrariness of legislators (nullum crimen, nulla poena sine praevia lege). Nor does this rule consider the question whether a certain act was criminally wrong at the moment it was committed, but only the question as to whether that act was or was not forbidden under penalty. As such, the prohibition of ex post facto law is an expression of political wisdom, not necessarily applicable in present international relations. This maxim of liberty may, if circumstances necessitate it, be disregarded even by powers victorious in a war fought for freedom. It is, however, neither the task nor within the power of the Tribunal to judge the wisdom of a certain policy.

Positive international law, as existing at this moment, compels us to interpret the “crime against peace,” as mentioned in the Charter, in a special way. It may be presupposed that the Allied Nations did not intend to create rules in violation of international law. This indicates that the Charter should be interpreted so that it is in accordance with International Law. There is no doubt that powers victorious in a “bellum justum,” and as such responsible for peace and order thereafter, have, according to international law, the right to counteract elements constituting a threat to that newly established order, and are entitled, as a means of preventing the recurrence of gravely offensive conduct, to seek and retain the custody of the pertinent persons. Napoleon’s elimination offers a precedent. […]

Mere political action, based on the responsibility of power, could have achieved this aim. That the judicial way is chosen to select those who were in fact the planners, instigators and wagers of Japanese aggression is a novelty which cannot be regarded as a violation of international law in that it affords the vanquished more guarantees than mere political action could do. […]

Crime in international law is applied to concepts with different meanings. Apart from those indicated above, it can also indicate acts comparable to political crimes in domestic law, where the decisive element is the danger rather than the guilt, where the criminal is considered an enemy rather than a villain, and where the punishment emphasizes the political measure rather than the judicial retribution.

In this sense should be understood the “crime against peace,” referred to in the Charter. In this sense the crime against peace, as formulated in the Charter, is in accordance with international law. It goes without saying that this conception of the character of the “crime” has certain consequences with regard to the appropriate “punishment”.

It appears to me that the Nuremberg Judgment is based upon a somewhat similar conception of the “crimes against peace.” Although it qualified the “crime against peace” of initiating a war of aggression as “the supreme international crime, differing only from other war crimes in that it contains within itself the accumulated evil of the whole,” yet those defendants found guilty of the crime against peace, who were not, or to a limited degree, found guilty of conventional war crimes, were given only prison sentences (Hess, Doenitz, Raeder, Funk, von Neurath).

As long as the dominant principle in the crime against peace is the dangerous character of the individual who committed this crime, the punishment should only be determined by considerations of security.
Nullum crimen sine lege

IMTFE, Araki et al., Judgment, Dissenting Opinion of Judge R. Pal, 12 November 1948, pp. 37, 61 et seq.

The so-called trial held according to the definition of crime now given by the victors obliterates the centuries of civilization which stretch between us and the summary slaying of the defeated in a war. A trial with law thus prescribed will only be a sham employment of legal process for the satisfaction of a thirst for revenge. It does not correspond to any idea of justice. Such a trial may justly create the feeling that the setting up of a tribunal like the present is much more a political than a legal affair, an essentially political objective having thus been cloaked by a juridical appearance. Formalized vengeance can bring only an ephemeral satisfaction, with every probability of ultimate regret; but vindication of law through genuine legal process alone may contribute substantially to the re-establishment of order and decency in international relations. […]

[61] Prisoners of war, so long as they remain so, are under the protection of international law. No national state, neither the victor nor the vanquished, can make any ex post facto law affecting their liability for past acts, particularly when they are placed on trial before an international tribunal. Their own state might try and punish them in its own national court, either already existing or created specially for the purpose; and, even if we assume that for this purpose, it might create some ex post facto law binding on such national tribunal, it does not follow that it could have been competent to create law for the application by an international tribunal. So long as the prisoners are placed on trial before an international tribunal, it does not matter whether as prisoners of war, by the victor state, or, as its citizens, by the vanquished state, neither state can legislate so as to give any ex post facto law to be applied by that international tribunal in order to determine their crime.

Mr. Justice Jackson of the United States in his report as Chief of Counsel for the United States in prosecuting the principal war criminals of the European Axis observed:

“We could execute or otherwise punish them without a hearing. But undiscriminating executions or punishments without definite findings of guilt, fairly arrived at, would violate pledges repeatedly given, and would not sit easily on the American conscience or be remembered by our children with pride.”

It is, indeed, surprising that no less a person than Mr. Justice Jackson, in his considered report to no less an authority than the President of the United States, could insert these lines in the Twentieth Century. On what authority, one feels inclined to ask, could a victor execute enemy prisoners without a hearing? […] I do not think that during recent centuries any victor has enjoyed any such right as is declared by Mr. Justice Jackson in his report. If the victor really had such a right then perhaps it might have been possible for him to give a new definition of a crime in respect of past acts and punish the prisoners as criminals according to such new definition after hearing them if that would ease the conscience of any nation. In that case it would have been mere adaptation of a particular method to the enforcement of an existing right. But I do not see anything anywhere in the existing international law conferring any such power on the victors. […]

Whatever view of the legality or otherwise of a war may be taken, victory does not invest the victor with unlimited and undefined power now. International laws of war define and regulate the rights and duties of the victor over the individuals of the vanquished nationality. In my judgment, therefore, it is beyond the competence of any victor nation to go beyond the rules of international law as they exist, give new definitions of crimes and then punish the prisoners for having committed offense according to this new definition.
Nullum crimen sine lege praevia


The principle forbidding the enactment of norms with retroactive force as a rule of positive national law is not without many exceptions. Its basis is the moral idea that it is not just to make an individual responsible for an act if he, when performing the act, did not and could not know that his act constituted a wrong. If, however, the act was at the moment of its performance morally, although not legally wrong, a law attaching *ex post facto* a sanction to the act is retroactive only from a legal, not from a moral point of view. Such a law is not contrary to the moral idea which is the basis of the principle in question. This is in particular true of an international treaty by which individuals are made responsible for having violated, in their capacity as organs of a State, international law. Morally, they were responsible for the violation of international law at the moment when they performed the acts constituting a wrong not only from a moral but also from a legal point of view. The treaty only transforms their moral into a legal responsibility. The principle forbidding *ex post facto* laws is, in all reason, not applicable to such a treaty.

Hans Kelsen, *Will the Judgment in the Nuremberg Trial Constitute a Precedent?*, 1(2) Int’l L.Qu. 153 (1947)

A retroactive law providing individual punishment for acts which were illegal though not criminal at the time they were committed, seems also to be an exception to the rule against *ex post facto* laws. The London Agreement is such a law. It is retroactive only in so far as it established individual criminal responsibility for acts which at the time they were committed constituted violations of existing international law, but for which this law has provided only collective responsibility. The rule against retroactive legislation is a principle of justice. Individual criminal responsibility represents certainly a higher degree of justice than collective responsibility, the typical technique of primitive law. Since the internationally illegal acts for which the London Agreement establishes individual criminal responsibility were certainly morally most objectionable, and the persons who committed these acts were certainly aware of their immoral character, the retroactivity of the law applied to them can hardly be considered as absolutely incompatible with justice. Justice required the punishment of these men, in spite of the fact that under positive law they were not punishable at the time they performed the acts made punishable with retroactive force. In case two postulates of justice are in conflict with each other, the higher one prevails; and to punish those who were morally responsible for the international crime of the second World War may certainly be considered more important than to comply with the rather relative rule against *ex post facto* laws, open to so many exceptions.

Oberster Gerichtshof für die Britische Zone, OGHSt 1, 1, 4 f.


Nullum crimen sine lege praevia


III. ETHISCH-NATURRECHTLICHE FUNDIERUNG

Das Grundrecht »n.c.s.l.« ist an sich kaum aus ethischen Erwägungen entwickelt worden, ist aber trotzdem im Ethos fundiert und findet in ihm seine Grenzen. Der Staat darf keine Tat bestrafen, gegen die bei Begehung keine Verbotsnorm bestand; eine bei Begehung normfreie Tat zu bestrafen, wäre unethisch und widerspräche dem Wesen der Strafe. Das wäre nicht weniger Unrecht, wie wenn der Staat einem beliebigen Nichttäter ein Strafübel zufügte, etwa um allgemein Abschreckung zu erreichen.

Bestand bei Begehung kein staatliches Verbot, so genügt ein ethisches. Dieser Satz ist auf das unethische Verhalten zu beschränken, das das Gemeinschaftsleben berührt. Für diesen Bereich stellt das Naturrecht die Übereinstimmung von Ethos und Recht als Ideal auf. Solche ideale Übereinstimmung darf der Staat auch noch rückwirkend herstellen, indem er rückwirkend eine unethische Tat auch als staatlich verboten bezeichnet.


Der Grundsatz »n.c.s.l.« gilt also naturrechtlich nur in der wesentlich eingeschränkten Fassung: Keine Staatsstrafe ohne, wenn nicht rechtliche, so doch ethische Verbotsnorm zur Begehungszeit. Umgekehrt gefäßt: War die Tat bei Begehung rechtlich oder auch nur ethisch verboten, so kann ein staatliches Strafmaß rückwirkend nachgeholt werden; das Ethos hindert Gesetzgeber und Richter jedenfalls nicht grundständlich daran. Es ist nicht zu verkennen, daß damit der Grundsatz »n.c.s.l.« vom Ethischen her einen anderen Inhalt bekommt.

IV. ANWENDUNG AUF DIE HUMANITÄTSVERBRECHEN

[…]

Wir glauben damit folgendes bewiesen zu haben: Es besteht eine unabweisbare ethische Verpflichtung des Staates, alle Humanitätsverbrecher zu bestrafen, und es gibt keinen anderen Weg zur Sühnung und Prävention; das deutsche Strafrecht reicht hierzu nicht in allen Fällen und in jeder Beziehung aus; insoweit hat der Grundsatz »n.c.s.l.« ausnahmsweise zurückzustehen hinter der ethischen Notwendigkeit, ein neues, rückwirkendes Ausnahmestrafgesetz zu schaffen. Durch dieses Ausnahmegesetz ist im allgemeinen und für die Zukunft das Grundrecht nicht angetastet.

Ja, die Rechtssicherheit im ganzen, von der dieses Grundrecht nur ein Teil ist, kann im Bewußtsein der Rechtsgenossen und in den Augen der ganzen zivilisierten Menschheit nur dann wiederhergestellt werden, wenn das Grundrecht nicht dazu mißbraucht wird, die vergangenen Verbrechen gegen die Menschlichkeit teilweise ohne die gerechte Strafe zu lassen.
Nullum crimen sine lege

European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950

Article 7  No punishment without law
1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

International Covenant on Civil and Political Rights, 16 December 1966

Article 15
1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Geneva Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949

Article 99
(1) No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977

Article 75
4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:
   ...
   (c) no one shall be accused or convicted of a criminal offence on account or any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977

Article 6. Penal prosecutions
...
2. No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality.
   In particular:
   ...
   (c) no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
Zum Vergleich: Das Rückwirkungsverbot im deutschen Recht

§ 2
Eine Handlung kann nur dann mit Strafe belegt werden, wenn diese Strafe gesetzlich bestimmt war, bevor die Handlung begangen wurde. Bei Verschiedenheit der Gesetze von der Zeit der begangenen Handlung bis zu deren Aburtheilung ist das mildeste Gesetz anzuwenden.

Gesetz zur Änderung des Strafgesetzbuches vom 28. Juni 1935. RGBl. I, 839:
Aufgehoben durch Art. I KRG Nr. 11 vom 30.1.1946, ABl.KR Nr. 1, S. 55

Gesetz gegen Straßenraub mittels Autofallen vom 22. Juni 1938, RGBl. I, 651:

Gesetz gegen Straßenraub mittels Autofallen.

Die Reichsregierung hat das folgende Gesetz beschlossen, das hiermit verkündet wird:

Artikel 1
Rechtsschöpfung durch entsprechende Anwendung der Strafgesetze
Die §§ 2 und 2a des Strafgesetzbuches erhalten folgende Ausfassung:

§ 2
Bestraft wird, wer eine Tat begeht, die das Gesetz für strafbar erklärt aber die nach dem Grundgedanken eines Strafgesetzes und nach gesundem Volksempfinden Bestrafung verdient, findet auf die Tat kein bestimmtes Strafgesetz unmittelbar Anwendung, so wird die Tat nach dem Gesetz bestraft, den Grundgedanken auf sie am besten zutrifft.

Völkerstrafrecht
Prof. Dr. C.-F. Stuckenberg, LL.M. (Harvard)
Zum Vergleich: Das Rückwirkungsverbot im deutschen Recht

Art. 103 Abs. 2 GG ist nicht verletzt. […]

1. a) Art. 103 Abs. 2 GG ist eine Ausprägung des Rechtsstaatsprinzips (…). Dieses fundiert den Gebrauch der Freiheitsrechte, indem es Rechtssicherheit gewährt, die Staatsgewalt an das Gesetz bindet und Vertrauen schützt. Das Rechtsstaatsprinzip umfaßt als eine der Leitideen des Grundgesetzes aber auch die Forderung nach materieller Gerechtigkeit (…). […][131]

Art. 103 Abs. 2 GG schützt diese Ziele, indem er die Bestrafung wegen einer Tat nur zuläßt, wenn sie in dem Zeitpunkt ihrer Begehung mit hinreichender Bestimmtheit in einem gesetzlichen Tatbestand mit Strafe bedroht ist. Art. 103 Abs. 2 GG schützt darüber hinaus vor der Verhängung einer höheren als der im Zeitpunkt der Tat gesetzlich angedrohten Strafe. Im Interesse von Rechtssicherheit und Gerechtigkeit gewährleistet Art. 103 Abs. 2 GG, daß im Bereich des Strafrechts, auf dessen Grundlage der Staat in die Persönlichkeit auf das schwerwiegendste eingreifen darf, nur der Gesetzgeber die strafwürdigen Rechtsgutsverletzungen bestimmt. Dies findet in Art. 103 Abs. 2 GG dadurch seinen Ausdruck, daß die strafstaatliche Gesetzesbindung zu einem strengen Parlamentsvorbehalt verschärft wird (…). Für den Bürger begründet Art. 103 Abs. 2 GG das Vertrauen darauf, daß der Staat nur ein solches Verhalten als strafbare Handlung verfolgt, für das der Gesetzgeber die Strafbarkeit und die Höhe der Strafe im Zeitpunkt einer Tat gesetzlich bestimmt hat. Der Bürger erhält damit die Grundlage dafür, sein Verhalten eigenverantwortlich so einzurichten, daß er eine Strafbarkeit vermeidet. Dieses Rückwirkungsverbot des Strafrechts ist absolut (…). Es erfüllt seine rechtsstaatliche und grundrechtliche Gewährleistungsfunktion durch eine strikte Formalisierung. Das ist ein Spezifikum unter den Garantien der Rechtsstaatlichkeit (…).


aa) Art. 103 Abs. 2 GG hat als Regelfall im Blick, daß die Tat im Anwendungsbereich des vom Grundgesetz geprägten materiellen Strafrechts der Bundesrepublik Deutschland begangen und abgeurteilt wird. In diesem Normalfall bietet das unter den Bedingungen der Demokratie, der Gewaltenteilung und der Verpflichtung auf die Grundrechte zuständige gekommene und damit den Forderungen materieller Gerechtigkeit prinzipiell genügende Strafrecht die rechtsstaatliche Anknüpfung für den von Art. 103 Abs. 2 GG gewährten absoluten und strikten Vertrauensschutz.


In dieser ganz besonderen Situation untersagt das Gebot materieller Gerechtigkeit, das auch die Achtung der völkerrechtlich anerkannten Menschenrechte aufnimmt, die Anwendung eines solchen Rechtfertigungsgrundes. Der strikte Schutz von Vertrauen durch Art. 103 Abs. 2 GG muß dann zurücktreten. Anderenfalls würde die Strafrechtspflege der Bundesrepublik zu ihren rechtsstaatlichen Prämissen in Widerspruch geraten. […]