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**Formulation of the Nürnberg Principles – Report by J. Spiropoulos, Special Rapporteur**

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# FORMULATION OF NURNBERG PRINCIPLES

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Report by J. Spiropoulos, Special Rapporteur

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## Part I

### HISTORICAL SURVEY

#### A. THE CHARTER OF THE NÜRNBERG TRIBUNAL

1. On 26 June 1945 representatives of the Governments of France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, met in London to decide on a common course of action with respect to the trial of the major European war criminals.<sup>12</sup> The Conference had before it an American "Draft of Proposed Agreement"<sup>3</sup> submitted on 14 June 1945 to the Embassies of the above Governments in Washington in order to serve as a basis of discussion at the scheduled Conference. This draft contained a certain number of rules in a chapter entitled "Declaration of Legal Principles" which the proposed International Military Tribunal would have to follow. On the one hand, a certain number of acts were declared criminal; on the other hand, substantive rules concerning the liability and the defence of persons charged with the above crimes were laid down.

2. The acts which the Tribunal had to consider as criminal were the following:

"a. Atrocities and offences against persons or property constituting violations of international law, including the laws, rules and customs of land and naval warfare.

"b. Atrocities and offences, including atrocities and persecutions on racial or religious grounds, committed since 1 January 1933, in violation of any applicable provision of the domestic law of the country in which committed.

<sup>1</sup>The determination of the Allies to punish the major war criminals of the European Axis first found expression in the Moscow Conference, 1943. A "Declaration on German Atrocities" made by the Governments of the United Kingdom, the United States and the Soviet Union jointly on 30 October 1943 stated that "German officers and men and members of the Nazi party who have been responsible for, or have taken a consenting part, in the above atrocities, massacres and executions, will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be created therein", and added that this declaration was "without prejudice to the case of the major criminals, whose offences have no particular geographical localization and who will be punished by the joint decision of the Governments of the Allies".

<sup>2</sup>A "record of negotiations" of the London Conference has been published by the Department of State under the title *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials*, London, 1945, Department of State Publication 3080. In the present report this "record of negotiations" will be referred to hereafter as *Report R. Jackson*.

<sup>3</sup>See *Report R. Jackson*, p. 35. Before this draft was presented by the United States Government, another draft had been elaborated by the same Government. During the San Francisco Conference, the Government of the United States presented, in April 1945, to the Foreign Ministers of France, the Soviet Union and the United Kingdom, a "Draft of Definitive Proposal" concerning the punishment of the major European war criminals. It was on the basis of this proposed agreement that the Ministers of Foreign Affairs of the above countries adopted, in principle, the plan for a trial. See British Memorandum of 28 May 1945 (*Report R. Jackson*, p. 39) and Aide-Mémoire of 14 June 1945 from the Soviet Government (*Ibid.*, p. 61). The American draft of 14 June 1945 constituted a revised text of the American draft submitted to the interested Governments at San Francisco.

"c. Invasion of another country by force or threat of force, or the initiation of war, in violation of international law.

"d. Launching a war of aggression."

3. As to the rules of liability and defence, the above declaration provided that the International Military Tribunal to be created

"shall apply the general rule of liability that those who participate in the formulation or execution of a criminal plan involving multiple crimes are liable for each of the offences committed and responsible for the acts of each other;"

that

"any defence based upon the fact that the accused is or was the head or purported head or other principal official of a State is legally inadmissible and will not be entertained;"

and finally that

"the fact that a defendant acted pursuant to order of a superior or government sanction shall not constitute a defence *per se*, but may be considered either in defence or in mitigation of punishment if the tribunal determines that justice so requires."

4. The Conference began its work by an analysis and criticism of the above-mentioned American draft. On the proposal of the Soviet delegate, the delegations agreed that the instrument to be drafted should consist of two texts, a short Agreement and the Statute of the International Military Court to be created. It was further agreed that the representatives of the nations represented at the Conference, other than the United States, would present memoranda of objections and suggestions.<sup>4</sup>

5. On 30 June 1945 the American delegation presented a new Draft of Agreement ("Revised Draft"), which was composed of an "Executive Agreement relating to the Prosecution of European Axis War Criminals" and an annex.<sup>5</sup> The provisions of the annex of interest to the present report are the following:

"5. The Tribunal shall be bound by this declaration of the Signatories that the following acts are criminal violations of International Law:

"(a) Violations of the laws, rules, and customs of war. Such violations shall include, but shall not be limited to, mass murder and ill-treatment of prisoners of war and civilian populations and the plunder of such populations.

"(b) Launching a war of aggression.

"(c) Invasion or threat of invasion of, or initiation of war against, other countries in breach of treaties, agreements or assurances between nations, or otherwise in violation of International Law.

"(d) Entering into a common plan or enterprise

<sup>4</sup>The texts submitted in execution of the above decision are the following: Observations of French delegation on American draft, 28 June 1945; Comments and proposals of Soviet delegation on American draft, 28 June 1945, and Amendments proposed by the United Kingdom delegation, 28 June 1945. *Report R. Jackson*, pp. 86-96.

<sup>5</sup>*Ibid.*, p. 119.

aimed at domination over other nations, which plan or enterprise included or intended, or was reasonably calculated to involve, or in its execution did involve, the use of unlawful means for its accomplishment, including any or all of the acts set out in sub-paragraphs (a) to (c) above or the use of a combination of such unlawful means with other means.

"(e) Atrocities and persecutions and deportations on political, racial, or religious grounds, in pursuance of the common plan or enterprise referred to in sub-paragraph (d) hereof, whether or not in violation of the domestic law of the country where perpetrated.

...

"15. In the trial, the Tribunal shall apply the general rule of liability that those who participate in the formulation or execution of a criminal plan involving multiple crimes are liable for each of the offences committed and responsible for the acts of each other.

"16. Any defence based upon the fact that the accused is or was the head or purported head or other principal official of a State is legally inadmissible and will not be entertained.

"17. The fact that a defendant acted pursuant to order of a superior or to government sanction shall not constitute a defence *per se*, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

6. On 2 July 1945 a "Draft of Agreement", accompanied by a "Statute of the International Military Tribunal", was submitted by the Soviet delegation.<sup>6</sup> The provisions of the Statute of interest to the present report are the following:

"Article 2. Among the crimes coming under the jurisdiction of the Tribunal are:

"a. Initiation of war in violation of the principles of International Law and in breach of treaties;

"b. Launching a war of aggression;

"c. Atrocities and violence in regard to civilian populations, deportations of civilians to slave labour, murder and ill-treatment of prisoners of war, destruction of towns and villages, plunder and other violations of the laws and customs of war;

"d. The use of war as an instrument of Nazi policy intended for the extermination and plunder of other peoples.

...

"Article 28. The official position of persons guilty of war crimes, their position as heads of States or as heads of various departments shall not be considered as freeing them from or in mitigation of their responsibility.

"Article 29. The carrying out by the defendant of an order of his superior or government shall not be considered a reason excluding his responsibility for the crimes set out in Article 2 of this Statute. In certain cases, when the subordinate acted blindly in carrying out the orders of his superior, the Tribunal has a right to mitigate the punishment of the defendant.

"Article 30. Organizers, instigators and accomplices bear responsibility for the crimes set out in Article 2 of this Statute along with the perpetrators of those crimes."

7. The above two drafts were discussed during several meetings. At its meeting on 4 July 1945,<sup>7</sup> the Conference nominated a Drafting Sub-Committee which was requested to amalgamate the two texts into a new draft.

8. The text prepared by the Drafting Sub-Committee was submitted to the Conference on 11 July 1945.<sup>8</sup> The provisions of the draft charter of interest here are the following:

"6. The following acts shall be considered criminal violations of International Law and shall come within the jurisdiction of the Tribunal:

"(a) Violations of the laws, rules or customs of war. Such violations shall include murder and ill-treatment of prisoners of war; atrocities against and violence towards civil populations; the deportation of such populations for the purpose of slave labour; the wanton destruction of towns and villages; and plunder; as well as other violations of the laws, rules and the customs of war.

"(b) Launching a war of aggression.

"(c) [Invasion or threat of invasion of or] initiation of war against other countries in breach of treaties, agreements or assurances between nations or otherwise in violation of International Law.

"(d) [Entering into a common plan or enterprise aimed at domination over other nations, which plan or enterprise involved or was reasonably calculated to involve or in its execution did involve the use of unlawful means for its accomplishment, including any or all of the acts set out in sub-paragraphs (a) to (c) above or the use of a combination of such unlawful means with other means].

"(e) Atrocities and persecutions and deportations on political, racial or religious grounds [in pursuance of a common plan or enterprise referred to in sub-paragraph (d) hereof, whether or not in violation of the domestic law of the country where perpetrated].

"7. The official position of defendants, whether as heads of State or responsible officials in various Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

"8. The fact that the defendant acted pursuant to order of a superior or to government sanction shall not free him from responsibility but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

"9. Organizers, instigators and accomplices who participated in the formulation or execution of a common criminal plan or in the perpetration of individual crimes are responsible with other participants in the crimes."

<sup>6</sup> *Ibid.*, pp. 128 and 165.

<sup>7</sup> *Ibid.*, p. 155.

<sup>8</sup> *Ibid.*, p. 194.

9. While, as evidenced by the above text, the Drafting Sub-Committee succeeded in agreeing on the principles which would govern the liability of persons responsible for crimes under international law (official position of defendant, question of superior order, liability of accomplices),<sup>9</sup> there was no complete accord as to the definition of the crimes. The matters within square brackets were reserved by the Sub-Committee to be raised before the plenary session of the Conference, as mentioned in a report of 11 July 1945 by the American member of the Drafting Sub-Committee.<sup>10</sup>

10. On 11 and 23 July 1945, two texts (Draft Agreement and Charter) were submitted by the British delegation.<sup>11</sup> The principles of these drafts of interest here are the same as those contained in the text adopted by the Drafting Sub-Committee mentioned above.

11. From 19 July 1945, the Conference concentrated its activity on the definition of the "Crimes" to be established by the Charter. A considerable number of drafts regarding the definition of crimes were submitted by the various delegations.<sup>12</sup> The following survey of these texts accompanied by pertinent references to the discussions to which they gave rise is purported to give a picture of the evolution of the notion of "crime" in the negotiations during the London Conference.

12. On 19 July 1945 the French delegation presented a draft article on definition of "crimes", reading as follows:

"The Tribunal will have jurisdiction to try any person who has, in any capacity whatsoever, directed the preparation and conduct of:

"(i) The policy of aggression against, and of domination over, other nations, carried out by the European Axis Powers in breach of treaties and in violation of international law;

"(ii) The policy of atrocities and persecutions against civilian populations;

"(iii) The war, launched and waged contrary to the laws and customs of international law;

"And who is responsible for the violations of international law, the laws of humanity and the dictates of

the public conscience, committed by the armed forces and civilian authorities in the service of those enemy Powers."<sup>13</sup>

13. In the discussion which followed<sup>14</sup> the French text was criticized particularly along the following lines: First, it did not consider as criminal the launching of war *per se*, but only the launching of war "in breach of treaties and in violation of international law". Secondly, not only those who "directed the preparation and conduct" of the different crimes (i - iii of the draft) but also those who took part in a plan to further the preparation and conduct of the crimes in question, should be subject to trial. In this connexion, the fear was expressed that the French wording — as too narrow — would permit some major war criminals to escape punishment. Finally, the view was expressed that "aggression" should be defined in some form, for instance, by the enumeration of the treaties violated by the Axis Powers.

14. To meet the above objections to the French draft, the British delegation submitted a new text on 20 July 1945 (Proposed revision of definitions of "crimes" (Article 6). This text reads as follows:

"The Tribunal shall have power to try, convict and sentence any person who has, in any capacity whatever, directed or participated in the planning, furtherance, or conduct of any or all of the following acts, designs or attempts, namely:

"1. Domination over other nations or aggression against them in the manner condemned or foresworn in (*inter alia*) the following Pacts or Declarations . . . ;

"2. Systematic atrocities against or systematic terrorism or ill-treatment or murder of civilians;

"3. Launching or waging war in a manner contrary to the laws, usages and customs of warfare;

"And who is hereby declared therefore to be personally answerable for the violations of the international law, of the laws of humanity, and of the dictates of the public conscience, committed in the course of carrying out the said acts, designs or attempts by the forces and authorities whether armed, civilian or otherwise, in the service of any of the European Axis Powers."<sup>15</sup>

15. On 23 July 1945 the Soviet delegation submitted a redraft of definition of "Crimes" reading as follows:

"The Tribunal shall have power to try any person who has in any capacity whatever directed or participated in the preparation or conduct of any or all of the following acts, designs or attempts, namely:

"a. Aggression against or domination over other nations carried out by the European Axis in violation of the principles of international law and treaties;

"b. Atrocities against the civilian population including murder and ill-treatment of civilians, the deportation of civilians to slave labour and other violations of the laws and customs of warfare;

"c. Waging war in a manner contrary to the laws

<sup>9</sup> As a matter of fact, articles 7, 8 and 9 of the draft of the Sub-Committee were introduced with only slight modifications into the final text of the Charter of the International Military Tribunal.

<sup>10</sup> Report R. Jackson, p. 185.

<sup>11</sup> *Ibid.*, pp. 202 and 348.

<sup>12</sup> These drafts are the following: Revised definition of "Crimes" submitted by the British delegation, 20 July 1945 (*Ibid.*, p. 312); Redraft of definition of "Crimes", submitted by the Soviet delegation, 23 July 1945 (*Ibid.*, p. 327); Redraft of Soviet definition of "Crimes" (Article 6) submitted by the British delegation, 23 July 1945 (*Ibid.*, p. 359); Redraft of definition of "Crimes" submitted by the Soviet delegation 25 July 1945 (*Ibid.*, p. 373); Redraft of definition of "Crimes" submitted by the American delegation, 25 July 1945 (*Ibid.*, p. 374); Revised definition of "Crimes" prepared by the British delegation and accepted by the French delegation, 28 July 1945 (*Ibid.*, p. 390); Revised definition of "Crimes" prepared by the British delegation to meet views of the Soviet delegation, 28 July 1945 (*Ibid.*, p. 392); Revised definition of "Crimes" submitted by the American delegation, 30 July 1945 (*Ibid.*, p. 393); Revision of definition of "Crimes" submitted by the American delegation, 31 July 1945 (*Ibid.*, p. 395).

<sup>13</sup> Report R. Jackson, p. 293.

<sup>14</sup> Minutes of Conference Session of 19 July 1945, *Ibid.*, p. 295.

<sup>15</sup> *Ibid.*, p. 312.

and customs of warfare including murder and ill-treatment of prisoners of war, wanton destruction of towns and villages, plunder and other criminal acts; and who is therefore personally answerable for the violation of international law, of the laws of humanity and of the dictates of the public conscience, committed in the course of carrying out the said acts, designs or attempts by the forces and authorities whether armed, civilian or otherwise, in the service of any of the European Axis Powers.”<sup>16</sup>

16. The Soviet delegate, explaining the Soviet text, declared that it was based on the French draft of 19 July 1945. He explained furthermore that it did not contain any reference to pacts which condemned “aggression” and this because “when people speak about ‘aggression’ they know what that means, but, when they come to define it they come up against difficulties which it has not been possible to overcome up to the present time”.<sup>17</sup>

17. In the discussion which took place during the session of 23 July 1945 the Conference, after some criticism of the Soviet draft, compared the merits of the French text with those of the American draft. On the question what acts inside Germany should come within the purview of the Conference, an agreement was reached to the effect that only preparatory acts to the plan of aggression and domination would be included.<sup>18</sup> Finally, the United Kingdom delegate, Sir David Maxwell Fyfe, declared that he would undertake the preparation of a draft combining the merits of the American and the French drafts into a new text.<sup>19</sup> This draft was submitted on 23 July 1945. It reads as follows:

“The following acts or designs or attempts at any of them shall be deemed crimes on conviction of which punishment may be imposed by the Tribunal upon any person who is proved to have in any capacity whatever directed or participated in the preparation or planning for or carrying out of any or all of such acts, designs or attempts:

“a. Aggression against or domination over other nations carried out by the European Axis Powers in violation of treaties, agreements and assurances.

“b. Atrocities against civilian populations including (*inter alia*) murder and ill-treatment of civilians and deportation of civilians to slave labour, and persecutions on racial or religious grounds where such persecutions were inflicted in pursuance of the aggression or domination referred to in paragraph (a) above.

“c. Violations of the laws, rules and customs of

war. Such violations shall include (*inter alia*) murder and ill-treatment of prisoners of war, the atrocities referred to in paragraph (b) above when committed against the civilian populations of conquered or occupied countries, the wanton destruction of towns and villages, and plunder.

“Any person who is proved to have in any capacity whatever directed or participated in the preparation for or carrying out of any of the acts, designs or attempts referred to in (a), (b) and (c) above shall be personally answerable therefor and for each and every violation of international law, of the laws of humanity and of the dictates of the public conscience committed in the course of carrying out the said acts, designs or attempts or any of them by the forces and authorities whether armed, civilian or otherwise in the service of any of the European Axis Powers.”<sup>20</sup>

18. Before any discussion of the new British draft could take place, two new texts were submitted on 25 July 1945, one by the Soviet delegation (Redraft of Definition of “Crimes”)<sup>21</sup> and one by the American delegation (Redraft of Definition of “Crimes”).<sup>22</sup> In these two texts an effort was made to reconcile, as far as possible, the views expressed by the various delegations at the previous meetings of the Conference.

19. During the meeting of 25 July 1945,<sup>23</sup> the Conference discussed the points about which the views of the American delegation differed from those of the other delegations and particularly the questions of the common plan and the launching of a war of aggression. Finally, after long discussion, the members of the Conference for the purpose of coming to an agreement, in a spirit of compromise, accepted in principle, the inclusion of the above notions in the definition of “Crimes”.

20. On 28 July 1945 the British delegate, Sir Thomas Barnes, submitted a revised definition of “Crimes”, prepared by him, with the explanation that he had obtained French acceptance of it but that the Soviet delegation had rejected it.<sup>24</sup> On the same day, the British delegate prepared a new revised definition of “Crimes” in order to meet also the views of the Soviet delegation. This latter text reads as follows:

“For the purpose of the trials of the major war criminals of the European Axis Powers before the Tribunal established by the Agreement referred to in Article 1 hereof, the following acts or designs or attempts at any of them shall be deemed to be crimes coming within the jurisdiction of the Tribunal:

“a. Initiation of a war of aggression or participating in the waging of war or preparing for war in violation of treaties, agreements or assurances or participating in a common plan or conspiracy aimed at the

<sup>16</sup> *Ibid.*, p. 327.

<sup>17</sup> Minutes of Conference Session of 23 July 1945, *Ibid.*, p. 328.

<sup>18</sup> *Ibid.*, p. 337.

<sup>19</sup> *Ibid.*, p. 338. The sense of the Conference appears clearly from the following statement of the Soviet delegate Professor Trainin: “We are approaching common ground here. We are incorporating the best features of Justice Jackson’s draft and Professor Gros’, and we would leave the introductory words of Justice Jackson’s draft together with the part about personal responsibility. (Apparently Professor Trainin was referring to the sub-committee draft XXV). Section (a) would probably be left as it is in the American draft and (e) probably in a somewhat different draft. As for (d), it would as a matter of fact come under (a) of the French draft” (*Ibid.*, p. 338).

<sup>20</sup> Redraft of Soviet definition of “Crimes” (Article 6), submitted by the British delegation, *Report R. Jackson*, p. 359.

<sup>21</sup> *Ibid.*, p. 373.

<sup>22</sup> *Ibid.*, p. 374. While the Soviet draft is based on the French draft of 19 July 1945, the American draft reproduces in its general lines the principles of the original American Revised Draft of Agreement of 30 June 1945.

<sup>23</sup> Minutes of Conference Session of 25 July 1945, *Ibid.*, p. 376.

<sup>24</sup> *Ibid.*, p. 390.

domination of one nation over other nations and carried out by the European Axis Powers.

"b. Violations of the laws, rules and customs of war. Such violations shall include murder and ill-treatment of prisoners of war, atrocities against civilian populations of occupied countries and the deportation of such populations to slave labour, wanton destruction of towns and villages, and plunder.

"c. Atrocities against civilian populations other than those referred to in paragraph (b). These include murder and ill-treatment of civilians and deportations of civilians to slave labour and persecution on political, racial or religious grounds committed in pursuance of the common plan or conspiracy referred to in paragraph (a) above.

"Any person who is proved to have in any capacity directed or participated in the war or in the plan or conspiracy referred to in paragraph (a) above shall be personally answerable for each and every violation or atrocity referred to in paragraphs (b) or (c) above committed in furtherance of such war, or in pursuance of such plan or conspiracy, by the forces and authorities, whether armed, civilian or otherwise, in the service of any of the European Axis Powers."<sup>25</sup>

21. On 31 July 1945 a document, signed by R. Jackson, American delegate, and containing certain suggestions with regard to the last United Kingdom draft was submitted to the Conference.<sup>26</sup> These suggestions covered the following points:

(i) Though the jurisdiction of the International Military Tribunal would be limited to trial of those of the European Axis Powers, the definition of the crimes should not be made to depend on which nation commits the acts in question.

(ii) The maintenance in (a) of the words "participating in the waging of the war" would make the entire soldiery, conscript and volunteer, and numerous civilians guilty by definition. However, the guilt the Conference should reach was not that of numberless little people of no consequence or influence, but of those who planned and whipped up the war.

(iii) As to (b) and (c), which begin with the general statements and go on to more specific items, it should be made clear that these specific statements do not limit the general ones.

(iv) In (c) words should be inserted to make it clear that the Conference is reaching persecution, etc., of Jews and others in Germany as well as outside of it, and before as well as after commencement of the war.

(v) The objection of note (i) applies to "participated in the war" in the last paragraph, in that as it stands, it seems to render the entire draft meaningless. It may be interpreted as meaning that a person guilty under (a) shall not be answerable unless he is also guilty under (b) and (c), and that a person guilty of crimes under (b) and (c) shall not be answerable unless the crimes are committed in connexion with the planning or the initiation of

aggressive war. This would largely render all three paragraphs futile.

22. These "notes" were accompanied by the following draft (30 July 1945) of the American delegation which intended to overcome the supposed defects of the United Kingdom draft (adopted by the Soviet delegation):

"The Tribunal established by the Agreement referred to in Article 1 hereof shall have power and jurisdiction to hear, try and determine charges of crime against only those who acted in aid of the European Axis Powers.

"The following acts, designs, or attempts at any of them, shall be deemed to be crimes coming within its jurisdiction:

"(a) Initiation of a war of aggression; or initiation of a war in violation of treaties, agreements or assurances, or otherwise in violation of International Law; or participating in a common plan or conspiracy aimed at the domination of one nation over other nations to be carried out by means of any such war.

"(b) Violations of the laws, rules or customs of war. Such violations shall include but are not limited to murder and ill-treatment of prisoners of war; atrocities against civilian populations of occupied countries; the deportation of such populations to slave labour; wanton destruction of towns and villages; and plunder or spoliation.

"(c) Atrocities against civilian populations other than those referred to in paragraph (b). These include but are not limited to murder and ill-treatment of civilians and deportations of civilians to slave labour or persecution on political, racial or religious grounds committed in any country, at any time, in pursuance of the common plan or conspiracy referred to in paragraph (a) above.

"Any person who is proved to have in any capacity directed or participated in the plan or conspiracy referred to in paragraph (a) above shall be personally answerable for each and every violation or atrocity referred to in paragraphs (b) or (c) above committed in furtherance of such plan or conspiracy by forces and authorities, whether armed, civilian or otherwise."<sup>27</sup>

23. The last draft of the definition of crimes was submitted by the American delegation on 31 July 1945.<sup>28</sup> It differs very little from the final text adopted by the Conference.

24. The *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, which was accompanied by the *Charter of the International Military Tribunal*, was signed on 8 August 1945. The provisions of the Charter of interest here are the following:

"Article 6. The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish

<sup>25</sup> *Ibid.*, p. 392.

<sup>26</sup> *Ibid.*, p. 394.

<sup>27</sup> *Report R. Jackson*, p. 393.

<sup>28</sup> Revision of definition of "Crimes", *Ibid.*, p. 395.

persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

"The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

"(a) Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

"(b) War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

"(c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

"Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

"Article 7. 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.

"Article 8. The fact that defendant acted pursuant to order of his government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."<sup>29</sup>

## B. THE JUDGMENT OF THE NÜRNBERG TRIBUNAL

25. The judgment of the International Military Tribunal contains a great number of comments on the interpretation and application of the principles of its Charter. Some of these comments are of a general character and refer to the legitimacy of the jurisdiction of the Tribunal, whereas others concern the substantive provisions of

the Charter. The latter comments are of primary importance for the formulation of the principles of international law recognized in the Charter and the judgment.

26. One of the main pronouncements of a general character is the one regarding the right of the Allies to try the major war criminals. The reasoning of the Court is very firm on this point. It said:

"The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world. The Charter is not an arbitrary exercise of power on the part of the victorious nations. . . . The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the trial. In doing so, they have done together what any one of them might have done singly."<sup>30</sup>

27. Another question of equally general importance arose at the beginning of the proceedings. It concerns the doubt of the defence as to whether certain provisions of the Charter were consistent with international law. The court dismissed a motion of the defence expressing doubts as to the consistency with international law of certain provisions of the Charter and requesting that an opinion regarding the legal basis of the trial should be obtained from recognized authorities on international law.<sup>31</sup> "The law of the Charter", said the Court, "is decisive and binding upon the Tribunal."<sup>32</sup> The same view is expressed in another passage of the findings in connexion with the question of the validity of article 6 of the Charter. "These provisions" said the Court, "are binding upon the Tribunal as the law to be applied to the case."<sup>33</sup> However, the above motion of the defence was disallowed only in so far as it constituted a plea to the jurisdiction of the Court. The Court declared itself ready to hear any argument of the parties as to the compatibility of the Charter with international law. It is characteristic of the attitude of the Court that the Court itself on various occasions examined this problem when discussing the interpretation and application of provisions of the Charter. Thus, for instance, the Court, commenting on the plea of the defence that article 6 of the Charter, which enumerates the crimes for which the major war criminals were to be punished, constitutes an *ex post facto* law, conflicting with the principle *nullum crimen sine lege, nulla poena sine lege*, said:

"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 neighbouring States without warning is obviously untrue, for in such circumstances

<sup>29</sup>After the signature of the above Agreement and Charter, a discrepancy was found to exist between the originals of Article 6 (c) of the Charter in the Russian language, on the one hand, and the originals in the English and French languages, on the other. Between the words "war" and "or" in the French and English texts was a semi-colon, which in the Russian text was a comma. By a Protocol of 6 October 1945, the semi-colon in the French and English texts was replaced by a comma (*Ibid.*, p. 429). The above text of Article 6 (c) contains the corrected text.

<sup>30</sup>*Nazi Conspiracy and Aggression, Opinion and Judgment*, United States Government Printing Office, Washington, 1947, p. 48.

<sup>31</sup>*Trial of the Major War Criminals, Record of Proceedings*, published by the International Military Tribunal, vol. I, 1947, p. 168.

<sup>32</sup>*Nazi Conspiracy and Aggression, Opinion and Judgment*, p. 48.

<sup>33</sup>*Ibid.*, p. 4.



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."<sup>34</sup>

28. As already stated, a considerable part of the findings consists of comments on the interpretation and application of articles 6 to 8 of the Charter, which contain the substantive principles of international law of the Charter. The ideas expressed in the comments which have particular importance for the formulation of the principles of international law recognized by the Charter and the judgment, are mentioned in Part IV of the present report since they may serve as an analysis of the principles enumerated therein.

## Part II

### RESOLUTIONS OF THE UNITED NATIONS CONCERNING THE FORMULATION OF THE NÜRNBERG PRINCIPLES

29. On the initiative of the United States delegation,<sup>35</sup> the General Assembly of the United Nations, at its 55th

<sup>34</sup> *Ibid.*, p. 49.

<sup>35</sup> The United States delegation on 15 November 1946 submitted to the United Nations the following proposal to be adopted as a resolution of the General Assembly:

"The General Assembly,

"Recognizing the obligation laid upon it by Article 13, paragraph 1, sub-paragraph (a), of the Charter to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification; and

"Taking note of the law of the Charter of the Nürnberg Tribunal of 8 August 1945 for the prosecution and punishment of the major war criminals;

"1. Reaffirms the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal;

"2. Directs the Assembly Committee on the Codification of International Law created by the Assembly's resolution of . . . to treat as a matter of primary importance the formulation of the principles of the Charter of the Nürnberg Tribunal and of the Tribunal's judgment in the context of a general codification of offences against the peace and security of mankind or in an International Criminal Code." (A/C.6/69, 15 November 1946).

The initiative of the United States delegation had its origin in a letter written by President Truman in reply to the report of Judge Biddle, American member of the Nürnberg Tribunal, of 9 November 1946. Mr. Biddle had recommended "that the United Nations as a whole reaffirm the principles of the Nürnberg Charter in the context of a general codification of offences against the peace and security of mankind". In his reply, President Truman stated that the setting up of a "code of international criminal law to deal with all who wage aggressive war . . . deserves to be studied and weighed by the best legal minds the world over", and he expressed the hope that the United Nations would carry out Judge Biddle's recommendation. (U.S. Department of State Bulletin 15 (1946),

plenary meeting on 11 December 1946, adopted the following resolution 95 (1):

"The General Assembly,

"Recognizes the obligation laid upon it by Article 13, paragraph 1, sub-paragraph a, of the Charter, to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification;

"Takes note of the Agreement for the establishment of an International Military Tribunal for the prosecution and punishment of the major war criminals of the European Axis signed in London on 8 August 1945, and of the Charter annexed thereto, and of the fact that similar principles have been adopted in the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, proclaimed at Tokyo on 19 January 1946;

"Therefore,

"Affirms the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal;

"Directs the Committee on the codification of international law established by the resolution of the General Assembly of 11 December 1946, to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal."

30. In the Committee on the Progressive Development of International Law and its Codification, the question arose whether this Committee should undertake the actual formulation of the principles recognized in the Charter and judgment of the Nürnberg Tribunal, or should confine itself merely to devising plans for the formulation of these principles. The Committee accepted the view that the General Assembly had only requested it to propose "plans for the formulation" of the Nürnberg principles. Therefore, the Committee concluded that it had not been called upon to discuss the substantive provisions of the Nürnberg principles, and that such a discussion would be better entrusted to the International Law Commission, the establishment of which it had decided to recommend to the General Assembly. According to the Committee's recommendation, the International Law Commission should be invited to prepare:

(a) A draft convention incorporating the principles of international law recognized by the Charter of the Nürnberg Tribunal and sanctioned by the judgment of that Tribunal; and

pp. 954-957). Prior to the above expression of opinion, the Secretary-General of the United Nations in his Supplementary Report, presented to the General Assembly on 24 October 1946, had made the following statement: "In the interest of peace, and in order to protect mankind against future wars, it will be of decisive significance to have the principles which were employed in the Nürnberg trials, and according to which the German war criminals were sentenced, made a permanent part of the body of international law as quickly as possible."

(Official Records of the second part of the first session of the General Assembly, pp. 699-700).

(b) A detailed draft plan of general codification of offences against the peace and security of mankind in such a manner that the plan should clearly indicate the place to be accorded to the Nürnberg principles.

31. The Committee further expressed the opinion, placed on record, that the above task would not preclude the International Law Commission from drafting in due course a code of international penal law.<sup>36</sup>

32. The report of the Committee on the Progressive Development of International Law and its Codification on plans for the formulation of the principles of the Charter and the judgment of the Nürnberg Tribunal was submitted to the second session of the General Assembly, which referred it to its Sixth Committee. After a general discussion at its 39th meeting, the Sixth Committee referred the report to its Sub-Committee 2, which was concerned with the question of the development of international law and its codification.

33. The Sub-Committee, having considered the report of the Committee on the Progressive Development of International Law and its Codification, decided to recommend that the task of the formulation of the Nürnberg principles should be entrusted to the International Law Commission to be created, and suggested that the Sixth Committee should propose to the General Assembly to adopt a resolution directing the International Law Commission to prepare:

(a) A draft convention incorporating the principles of international law, recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, and

(b) A draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in (a).<sup>37</sup>

34. The Sixth Committee, in the course of the discussion of the above proposal of the Sub-Committee, decided *inter alia* that the words "a draft convention incorporating" should be replaced by the term "formulation". The report of the Sixth Committee, including a draft resolution, was adopted by the General Assembly at its 123rd meeting on 21 November 1947.<sup>38</sup> As adopted, the resolution (177 (II)) reads as follows:

"*The General Assembly*

"*Decides to entrust the formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal to the International Law Commission, the members of which will, in accordance with resolution 174 (II), be elected at the next session of the General Assembly, and*

"*Directs the Commission to*

"(a) Formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal, and in the judgment of the Tribunal, and

"(b) Prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in sub-paragraph (a) above."

### Part III

#### FORMULATION OF THE NURNBERG PRINCIPLES BY THE INTERNATIONAL LAW COMMISSION

35. The International Law Commission dealt with the question of the formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal during its first session at its meetings of 9, 23, 24, 25, 26, 27, 31 May and 1, 3, 7 June 1949. The Commission had before it a memorandum submitted by the Secretary-General entitled "*The Charter and Judgment of the Nürnberg Tribunal; History and Analysis*".<sup>39a</sup>

36. The Commission began its work by discussing its task in this matter. One of the main questions in this connexion was whether or not the Commission had to ascertain to what extent the principles contained in the Charter and judgment constitute principles of international law. The conclusion of the Commission was that, since the Nürnberg principles had been affirmed by the General Assembly in its resolution 95 (I) of 11 December 1946, it was not the task of the Commission to examine whether these principles were or were not principles of international law. The Commission had merely to formulate them.

37. Another question examined by the Commission, in this connexion, was whether it should concern itself with any provision of the Charter of the Tribunal, whether of substantive or procedural character. The decision of the Commission was that its task was to formulate principles of a substantive character and, in particular, those contained in articles 6, 7 and 8 of the Nürnberg Charter.<sup>39</sup>

38. The Commission considered finally the question whether, in formulating the principles of international law recognized in the Charter and judgment of the Tribunal, it should also formulate the general principles of international law underlying the Charter and the judgment. A proposal to this effect submitted by Mr. Georges Scelle, though supported by some members of the Commission, was rejected by the majority.<sup>40</sup>

39. At its meeting on 9 May 1949, the Commission appointed a Sub-Committee, composed of Messrs. J. P. A. François, A. E. F. Sandström and J. Spiropoulos, which was directed to submit to the Commission a working paper containing a formulation of the Nürnberg principles.<sup>41</sup> The text elaborated by the Sub-Committee reads as follows:

"Principles of international law recognized in the

<sup>36</sup> See the Committee's report on the plans for the formulation of the principles of the Nürnberg Charter and judgment (A/AC.10/52).

<sup>37</sup> A/C.6/180/Rev.1.

<sup>38</sup> *Official Records of the second session of the General Assembly, Plenary Meetings, vol. II, p. 1282.*

<sup>39a</sup> United Nations Publication, Sales No. 1949, V. 7.

<sup>39</sup> A/CN.4/SR.17.

<sup>40</sup> A/CN.4/SR.29.

<sup>41</sup> A/CN.4/SR.17.

Charter of the Nürnberg Tribunal and in the judgment of the Tribunal.

"1. A violation of international law may constitute an international crime even if no legal instrument characterizes it as such.

"2. The categories of international crimes recognized by the Charter and the judgment of the Tribunal are crimes against peace, war crimes and crimes against humanity.

"3. The following acts constitute crimes against peace, namely :

"a. The planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances;

"b. Any participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (a).

"4. The following acts constitute war crimes, namely : violations of the laws or customs of war.

"5. The following acts constitute crimes against humanity, namely: murder, extermination, enslavement, deportation and other inhumane acts done against the civilian population before or during a war, or persecution on political, racial or religious grounds, where such acts are done or such persecution is conducted in execution of or in connexion with any crime against peace or any war crime, notwithstanding that the municipal law applicable may not have been violated.

"6. Any individual author of or accomplice in an international crime is responsible under international law and liable to punishment, whether or not his offence is punishable under municipal law.

"7. The official position of an individual as Head of State or responsible official does not free him from responsibility or mitigate punishment.

"8. The fact that an individual acts pursuant to order of his Government or of a superior does not free him from responsibility. It may, however, be considered in mitigation of punishment, if justice so requires."<sup>42</sup>

40. After consideration of the above text, the Commission retained, tentatively, the following articles, which it referred back to the Sub-Committee for redrafting:

"1. Any person who commits an act which constitutes a crime under international law is responsible therefor and is liable to punishment.

"2. All persons committing any of the acts above referred to shall be responsible under international law—whether or not such acts are punishable under any domestic law.

"3. The official position of an individual as Head of State or responsible official does not free him from responsibility or mitigate punishment.

"4. The fact that an individual acts pursuant to order of his Government or of a superior does not free

him from responsibility. It may, however, be considered in mitigation of punishment, if justice so requires.

"5. The following acts constitute crimes against peace, namely :

"a. The planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances;

"b. Any participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (a).

"6. The following acts constitute war crimes, namely : violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

"7. The following acts constitute crimes against humanity, namely: murder, extermination, enslavement, deportation and other inhumane acts done against a civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

"8. The accused must have a right of defence."<sup>43</sup>

41. The Sub-Committee, thereafter, presented the following draft to the Commission :

"1. Any person who commits or is an accomplice in the commission of an act which constitutes a crime under international law is responsible therefor and liable to punishment.

"2. Such person is responsible under international law whether or not his act is punishable under any domestic law.

"3. The official position of a person as Head of State or responsible official does not free him from responsibility (or mitigate punishment).

"4. The fact that a person acts pursuant to order of his Government or of a superior does not free him from responsibility. It may, however, be considered in mitigation of punishment, if justice so requires.

"5. The following acts constitute crimes under international law:

"a. Crimes against peace: namely

"(i) Planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances;

"(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

"b. War crimes : namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation

<sup>42</sup> A/CN.4/W.6. (See *Yearbook of the International Law Commission*, 1949, 25th meeting, footnote 9.)

<sup>43</sup> A/CN.4/SR.25-29.

to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

"c. Crimes against humanity: namely, murder, extermination, enslavement, deportation and other inhumane acts done against a civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

"6. Any person accused of a crime under international law has the right of defence."<sup>44</sup>

42. Without discussing the new text, the Commission, at its 33rd meeting, appointed Mr. J. Spiropoulos rapporteur to continue the work of the Commission in the interval between the first and second sessions. It was understood that the rapporteur should submit to the Commission a report on the Nürnberg principles to be discussed at the next session of the Commission. The rapporteur, in carrying out the above decision of the Commission, redrafted the text adopted by the Sub-Committee and accompanied the principles adopted by the Commission with comments based principally on the findings of the Court. The new text and the comments on it constitute Part IV of the present report.

#### Part IV

### THE PRINCIPLES OF INTERNATIONAL LAW RECOGNIZED IN THE CHARTER AND THE JUDGMENT OF THE NÜRNBERG TRIBUNAL; TEXTS AND COMMENTS

#### A. THE PRINCIPLES "STRICTO SENSU"

43. The Charter and judgment of the Nürnberg Tribunal recognize the following principles:

##### *Principle I*

*Any person who commits or is an accomplice in the commission of an act which constitutes a crime under international law is responsible therefor and liable to punishment.*

(1) The above principle is based on the first paragraph of article 6 of the Charter which established the competence of the International Military Tribunal to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the crimes provided for by sub-paragraphs (a), (b), and (c) of article 6. While this text declares punishable only persons "acting in the interests of the European Axis Powers", Principle I is drafted in general terms.

(2) Principle I declares liable to punishment not only

the perpetrators of international crimes but also the accomplices in the commission of those acts.

(i) *Prima facie*, this principle seems to go further than the Charter. The only provision in the latter regarding responsibility for complicity is that of the last paragraph of article 6 which reads as follows: "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such a plan." In fact, as worded, this paragraph does not concern all cases of complicity but is limited to the participation in a common plan of conspiracy. Complicity in individual crimes is not mentioned.<sup>45</sup>

(ii) The Tribunal, commenting on the last paragraph of article 6 in connexion with its discussion of Count One of the indictment, which charged the conspiracy not only to commit aggressive war but also to commit war crimes and crimes against humanity, said that, in its opinion, "these words [namely, the last paragraph of article 6] does not add a new and separate crime to those already listed". In the view of the Court, "these words were designed to establish the responsibility of persons participating in a common plan to prepare, initiate and wage aggressive war".<sup>46</sup>

(iii) Interpreted literally, this statement would seem to imply that the complicity rule does not apply to individual crimes. On the other hand, the Tribunal must have applied some complicity rule to crimes other than the common plan or conspiracy to prepare, initiate or wage aggressive war. Several of the defendants were convicted of war crimes and crimes against humanity because they

<sup>45</sup> The above paragraph had its origin partly in a Soviet text (Draft of Agreement, 2 July 1945) and partly in a United States draft (Revised draft of Agreement, 30 June 1945). The Soviet proposal contained the following article concerning the "liability of accomplices": "Organizers, instigators and accomplices bear responsibility for the crimes set out in Article 2 of this Statute along with the perpetrators of those crimes" (See Part I of the present report). The United States proposal included a paragraph which read: "In the trial, the Tribunal shall apply the general rule of liability that those who participate in the formulation or execution of a criminal plan involving multiple crimes are liable for each of the offences committed and responsible for the acts of each other" (See Part I of the present report).

The Soviet article, having a wider scope, made accomplices, in a wide sense, responsible for the crimes along with the actual perpetrators, while the United States proposal limited the responsibility to persons participating in a criminal plan.

The Drafting Sub-Committee, which amalgamated the two texts quoted above, reported back the following paragraph: "Organizers, instigators and accomplices who participated in the formulation or execution of a common criminal plan or in the perpetration of individual crimes are equally responsible with other participants in the crimes" (See Part I of the present report). The substance of the two previous texts was thus retained in the Sub-Committee's text which referred both to complicity in individual crimes and to participation in a common criminal plan. The new text was included, without change, in the two subsequent drafts proposed by the British delegation to the Conference (see above). In the end, however, the passage concerning complicity in individual crimes was dropped, and the paragraph was drafted so as to refer only to participation in the formulation or execution of a common plan or conspiracy to commit any of the crimes enumerated in article 6 of the Charter of the Tribunal. There is no indication in the records of the London Conference, published by the Department of State, as to why this change was made.

<sup>46</sup> *Nazi Conspiracy and Aggression, Opinion and Judgment*, p. 56.

<sup>44</sup> A/CN.4/W.12. (See *Yearbook of the International Law Commission*, 1949, 31st meeting, footnote 7.)

gave orders resulting in atrocious and criminal acts which they did not commit themselves. They were accomplices in the wide sense of the word. In practice, therefore, the Tribunal must be considered as having applied either the last paragraph of article 6 by analogy or general principles of criminal law regarding complicity. This view is corroborated by the expressions used by the Tribunal in assessing the guilt of particular defendants.<sup>47</sup>

(3) The general principle of law underlying Principle I is that international law may impose duties on the individual, without any interpretation of domestic law directly a conception which in theory is considered as involving the "international personality" of individuals. The findings of the Court are very definite on the question of whether rules of international law may apply to individuals. "That international law imposes duties and liabilities upon individuals as well as upon States", says the Court, "has long been recognized."<sup>48</sup> And elsewhere: "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."<sup>49</sup>

### Principle II

*The fact that domestic law does not punish an act which is an international crime does not free the perpetrator of such crime from responsibility under international law.*

(1) The idea contained in Principle II is stated expressly only in sub-paragraph (c) of article 6 of the Charter which deals with crimes against humanity. Nevertheless, it applies to all the three categories of crimes provided for by Article 6. In reality, once the responsibility of individuals for international crimes is admitted, Principle II seems unnecessary, since the implementation of Principle I presupposes that domestic law cannot keep in check the international responsibility of individuals.

<sup>47</sup> With respect to Goering, the Tribunal said that the record was filled with his admissions of "his complicity in the use of slave labor" (*Ibid.*, p. 109). Ribbentrop was "responsible for war crimes and crimes against humanity because of his activities with respect to occupied countries and Axis satellites" (*Ibid.*, p. 115). He had also "assisted in carrying out criminal policies, particularly those involving the extermination of the Jews" (*Ibid.*, p. 116). Rosenberg "helped to formulate the policies of Germanization, exploitation, forced labor, extermination of Jews and opponents of Nazi rule, and he set up the administration which carried them out" (*Ibid.*, p. 123). Franck "was a willing and knowing participant in the use of terrorism in Poland; in the economic exploitation of Poland . . . ; in the deportation to Germany as slave laborers of over a million Poles" (*Ibid.*, p. 126). Funk "participated in the economic exploitation of occupied territories" and was also "indirectly involved in the utilization of concentration camp labor" (*Ibid.*, p. 133). Doenitz permitted an order to shoot certain prisoners of war "to remain in full force when he became Commander-in-Chief" and was "to that extent . . . responsible" (*Ibid.*, p. 141). Von Schirach, "while he did not originate the policy of deporting Jews from Vienna, participated in this deportation after he had become Gauleiter of Vienna" (*Ibid.*, p. 146). Sauckel "set up a program for the mobilization of the labor resources available to the Reich" (*Ibid.*, p. 147), and "had overall responsibility for the slave labor program" (*Ibid.*, p. 148). Seyss-Inquart "was a knowing and voluntary participant in war crimes and crimes against humanity" (*Ibid.*, p. 156).

<sup>48</sup> *Nazi Conspiracy and Aggression, Opinion and Judgment*, p. 52.

<sup>49</sup> *Ibid.*, p. 53.

Nevertheless, since sub-paragraph (c) of article 6 expressly mentions the idea expressed by Principle II and since, on the basis of general considerations, it applies also to the other two sub-paragraphs of article 6, the formulation of Principle II seems opportune in order to exclude any doubt about the general applicability of this principle with regard to responsibility for the commission of international crimes.

(2) The principle that a person committing an international crime is responsible therefor and liable to punishment under international law, independently of the attitude of domestic law, implies what is commonly called the "supremacy" of international law over domestic law. It is accordingly considered that international law can bind individuals even if domestic law does not direct them to observe the rules of international law. (It is in this sense that the term "supremacy" is used here). Characteristic of the above inference is the following passage of the Court's findings: "... The very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State."<sup>50</sup>

### Principle III

*The fact that a person who committed an international crime acted as Head of State or public official does not free him from responsibility under international law or mitigate punishment.*

The above text reproduces in a more precise form the principle laid down in article 7 of the Charter. If, according to a general rule, a person acting as a State organ is considered as acting on behalf of the entity "State", and as such not responsible for his actions, in cases of acts constituting international crimes, according to the Charter and the judgment, the fact that an individual acted in an official capacity does not free him from responsibility under international law. "The principle of international law which, under certain circumstances, protects the representatives of a State", says the Court, "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 . . ." <sup>51</sup> The same idea is also expressed by the following passage of the findings: "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."<sup>52</sup>

### Principle IV

*The fact that a person acted pursuant to order of his Government or of a superior does not free him from responsibility under international law. It may, however, be considered in mitigation of punishment, if justice so requires.*

This text in a somewhat different wording reproduces the principle contained in article 8 of the Charter. The

<sup>50</sup> *Ibid.*, p. 53.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

idea expressed by the above principle is that superior order is not a defence but that it might be considered in mitigation of punishment. In conformity with this conception, the Court rejected the argument of the defence claiming that there could not be any responsibility since most of the defendants acted under the orders of Hitler. The Court declared the provision of article 8 to be "in conformity with the law of all nations". "That a soldier", the Court continued, "was ordered to kill or torture in violation of the international law of war has never been recognized as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment."<sup>53</sup> The same view is encountered in two passages of the findings concerning the guilt of particular defendants.<sup>54 55</sup> Finally, as regards the criterion for the determination of the degree of responsibility of a person acting pursuant to superior command, the Court said: "The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible."<sup>56</sup>

#### Principle V

*Any person charged with a crime under international law has the right to a fair trial on the facts and law.*

(1) The principle that the defendants charged with crimes under international law must have the right to a fair trial was unanimously recognized at the London Conference. All the drafts submitted to the Conference provided rules aiming at insuring such a right to the defendants.

(2) The Charter contains, a particular chapter entitled "Fair Trial for Defendants", which for the purpose of insuring a fair trial to the defendants directs the observance of the following procedure:

"a. The indictment shall include full particulars specifying in detail the charges against the defendants. A copy of the indictment and of all the documents lodged with the indictment, translated into a language which he understands, shall be furnished to the defendant at a reasonable time before the trial.

"b. During any preliminary examination or trial of a defendant he shall have the right to give any explanation relevant to the charges made against him.

"c. A preliminary examination of a defendant and

his trial shall be conducted in, or translated into, a language which the defendant understands.

"d. A defendant shall have the right to conduct his own defence before the Tribunal or to have the assistance of counsel.

"e. A defendant shall have the right through himself or through his counsel to present evidence at the trial in support of his defence, and to cross-examine any witness called by the prosecution."

(3) Finally, it may be added that the right to a fair trial is also mentioned by the judgment itself. The Court, commenting on the lawfulness of the institution of the International Military Tribunal, said that "all that the defendants are entitled to ask is to receive a fair trial on the facts and law".<sup>57</sup>

#### B. THE CRIMES

44. According to the Charter and the judgment, the following acts constitute crimes under international law.

(a) *Crimes against peace*: namely,

(i) *Planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances;*

(ii) *Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).*

(i) Both categories of crimes are characterized by the fact that they are both connected with "war of aggression or war in violation of international treaties, agreements or assurances".

(ii) Though the Court had made a general statement to the effect that the Charter "is the expression of international law existing at the time of its creation"<sup>58</sup>, it also offered a certain number of arguments in order to refute the objection of the defence that aggressive war was not an international crime under international law. For this refutation the Court relied primarily on the Kellogg-Briand Pact, which in 1939 was in force between sixty-three nations. "The nations who signed the pact or adhered to it unconditionally", says the Court, "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 so doing."<sup>59</sup>

(iii) In support of its interpretation of the Kellogg-Briand Pact, the Court cited some other international documents condemning the war of aggression as an international crime. These documents were the draft of a Treaty of Mutual Assistance sponsored by the League of Nations in 1923 which in its article 1 declared "that

<sup>53</sup> *Ibid.*

<sup>54</sup> With respect to Keitel, the Tribunal said: "In the face of these documents Keitel does not deny his connexion with these acts. Rather, his defence relies on the fact that he is a soldier, and on the doctrine of 'superior orders', prohibited by article 8 of the Charter as a defence" (*Ibid.*, p. 118). A similar statement was made by the Tribunal in the case of Jodl: "His defence, in brief, is the doctrine of 'superior orders' prohibited by article 8 of the Charter as a defence" (*Ibid.*, p. 151).

<sup>55</sup> The American drafts submitted to the London Conference of 1945 (see Part I of the present report) do not exclude the "superior orders" as a defence. All the Soviet drafts excluded the plea of "superior orders" as a defence (see Part I). The discussion on this subject at the Conference was very short as far as available records go. All participants agreed that "superior orders" should not be an absolute defence (See *Report R. Jackson*, pp. 367-368).

<sup>56</sup> *Nazi Conspiracy and Aggression, Opinion and Judgment*, pp. 53-54.

<sup>57</sup> *Ibid.*, p. 48.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*, p. 50.

aggressive war is an international crime", and the Preamble to the League of Nations 1924 Protocol for the Pacific Settlement of International Disputes (Geneva Protocol) which, after "recognizing the solidarity of the members of the International Community", declared that "a war of aggression constitutes a violation of this solidarity, and is an international crime", and that the contracting parties were "desirous of facilitating the complete application of the system provided in the Covenant of the League of Nations for the pacific settlement of disputes between the States and of insuring the repression of international crimes". Furthermore, the Court cited the Declaration concerning wars of aggression adopted on 24 September 1927 by the Assembly of the League of Nations, the preamble of which declared war "an international crime", and the unanimous resolution adopted on 18 February 1928 by twenty-one American Republics at the sixth (Havana) Pan-American Conference, declaring that "war of aggression constitutes an international crime against the human species".<sup>60</sup>

(iv) The Charter does not contain any definition of the term "war of aggression", nor is there any such definition in the findings of the Court.<sup>61</sup> It is by evaluation of the historical events before and during the war that the Court decided that certain of the defendants planned and waged aggressive wars against ten nations and were therefore guilty of this series of crimes. According to the Court, this made it even unnecessary to discuss the subject in further detail, or to consider at any length the extent to which these aggressive wars were also "wars in violation of international treaties, agreements or assurances".<sup>62</sup>

(v) The terms "planning and preparing" of a war of aggression are considered by the Court as comprising all the stages in the bringing about of a war of aggression from the planning to the actual initiation of the war. In view of that, the Court did not make visible distinctions between planning and preparation.

(vi) A legal notion of the Charter which was attacked by the defence is the one concerning "conspiracy" (last sentence of article 6 (a) of the Charter). The Court, rejecting the objection of the defence against the adoption of this notion, applied it, though only in a restricted way. "In the opinion of the Tribunal", says the Court, "the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action. The planning, to be criminal, must not rest merely on the declarations of a party programme, such as are found in the 25 points of the Nazi Party, announced in 1920, or the political affirmations expressed in 'Mein Kampf' in later years. The Tribunal must examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan."<sup>63</sup>

(b) *War Crimes : namely, violations of the laws or customs of war. Such violations shall include, but not be limited to murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.*

Here too the Court emphasized that the crimes defined by article 6 (b) of the Charter were already recognized as war crimes under international law. "They were covered," says the Court, "by Articles 46, 50, 52 and 56 of The Hague Convention of 1907, and Articles 2, 3, 4, 46 and 51 of the Geneva Convention of 1929. That violation of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument."<sup>64</sup>

(c) *Crimes against humanity : namely murder, extermination, enslavement, deportation and other inhuman acts done against a civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime.*

The above text distinguishes two categories of punishable acts: (a) murder, extermination, enslavement, deportation and other inhuman acts committed against a civilian population, before or during the war and (b) persecution on political, racial or religious ground. Both these acts, according to the Charter, constitute international crimes only inasmuch as they have been committed "in execution of or in connexion with any crime within the jurisdiction of the Tribunal". Crimes falling within the jurisdiction of the Tribunal are (a) crimes against peace; (b) war crimes. The Court applied article 6 (c) in a very restrictive way. Though it admitted that "political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty", that "the policy of persecution, repression and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out," and that "the persecution of Jews during the same period is established beyond all doubt," the Court did not consider that the acts relied on before the outbreak of war had been committed "in execution of, or in connexion with, any crime within the jurisdiction of the Tribunal". For this reason the Tribunal declared itself unable to make a general declaration to the effect that acts before 1939 "were crimes against humanity within the meaning of the Charter".<sup>65</sup> Article 6 (c) characterizes as crimes against humanity murder, exter-

<sup>60</sup> *Ibid.*, p. 51-52.

<sup>61</sup> At the London Conference an attempt was made by the American delegation to have a definition of "aggression". See "Definition of Aggression" suggested by the American delegation as a basis of discussion, 19 July 1945, and "Proposed Definition of Aggression" submitted by the same delegation on 25 July 1945. See *Report R. Jackson*, pp. 294-375. The American initiative had no success.

<sup>62</sup> *Nazi Conspiracy and Aggression, Opinion and Judgment*, p. 46.

<sup>63</sup> *Ibid.*, p. 54-55.

<sup>64</sup> *Ibid.*, p. 83.

<sup>65</sup> *Ibid.*, p. 84. Nothing is said in the findings as to whether the above acts would be considered as international crimes under international law in the event of their not being connected with crimes against peace and war crimes.



mination, enslavement, etc., committed against "any"<sup>66</sup> civilian population. This means that the above acts are crimes against humanity even if they are committed by the aggressor against his own population.<sup>67</sup>

<sup>66</sup>The Commission substituted the word "a" for the word "any".

<sup>67</sup>The question arises whether a further principle may be formulated on the basis of articles 9 and 10 of the Charter in the sense of the establishment of the penal responsibility of organizations. Article 9 empowers the Court to declare, at the trial of any individual member of a group or organization, that the said group or organization is a "criminal one", and the next article of the Charter declares that "in cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned."

At first sight this provision might be interpreted as establishing the penal responsibility of organizations. However, neither the indictment nor the findings of the Court allow such an interpretation. The prosecution admitted that the organizations indicted were not on trial in the ordinary sense of that term, inasmuch as the Tribunal which was empowered to declare them criminal could not impose any sentence upon them as entities (*Trial of Major War Criminals*, vol. VIII, 1947, pp. 358-359). The effect of this provision was to make only individual members of any organization responsible for the reprehensible activities of the organization. Moreover, the Nürnberg Tribunal applied the said provision in a restrictive manner. Speaking of its power of discretion to declare or not to declare an organization as criminal, the Court declared: "This discretion . . . should be exercised in accordance with well-settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishment should be avoided." In another passage of the findings the Court, defining the characteristics of a criminal organization, declared: "A criminal organization is analogous to a criminal conspiracy . . . . Since the declaration with respect to the organizations and groups will, as has been pointed out, fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by article 6 of the Charter as members of the organization. Membership alone is not enough to come within the scope of these declarations." (*Nazi Conspiracy and Aggression, Opinion and Judgment*, pp. 85-86.) As the result of the above passage of the findings, the Court endeavoured to reconcile, as far as possible, the provisions of articles 9 and 10 with ordinary principles of complicity.

## Appendix

### PROPOSED TEXT OF THE NÜRNBERG PRINCIPLES AS FORMULATED BY THE INTERNATIONAL LAW COMMISSION

#### A. The principles "Stricto Sensu"

Principle I. *Any person who commits or is an accomplice in the commission of an act which constitutes a crime under international law is responsible therefor and liable to punishment.*

Principle II. *The fact that domestic law does not punish an act which is an international crime does not free the perpetrator of such crime from responsibility under international law.*

Principle III. *The fact that a person who committed an international crime acted as Head of State or public official does not free him from responsibility under international law or mitigate punishment.*

Principle IV. *The fact that a person acted pursuant to order of his Government or of a superior does not free him from responsibility under international law. It may, however, be considered in mitigation of punishment, if justice so requires.*

Principle V. *Any person charged with a crime under international law has the right to a fair trial on the facts and law.*

#### B. The Crimes

##### a. Crimes against peace : namely,

(i) *Planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances;*

(ii) *Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).*

b. *War Crimes : namely, violations of the laws or customs of war. Such violations shall include, but not be limited to murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.*

c. *Crimes against humanity: namely murder, extermination, enslavement, deportation and other inhuman acts done against a civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime.*