

AFFIRMATION OF THE PRINCIPLES OF INTERNATIONAL LAW RECOGNIZED BY THE CHARTER OF THE NÜRNBERG TRIBUNAL

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1. Introduction

General Assembly resolution 95 (I) was adopted on 11 December 1946 on the initiative of the United States delegation. The adoption of this resolution followed the judgment of 1 October 1946 by the International Military Tribunal ('IMT') at Nürnberg which sentenced twelve Nazi defendants to death and seven to periods of imprisonment ranging from ten years to life. The agreement for the establishment of the IMT had been signed in London on 8 August 1945. Attached to this agreement was "The Charter of the International Military Tribunal" ('the IMT Charter').

In resolution 95 (I), the General Assembly affirmed the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal ('the Nürnberg principles'). By "affirming" those principles, the General Assembly (consisting at the time of fifty-five Member States) clearly intended to express its approval of and support for the general concepts and legal constructs of criminal law that could be derived from the IMT Charter and had been set out, either explicitly or implicitly, by the IMT. Translated into law-making terms, this approval and support meant that the world community had robustly set in motion the process for turning the principles at issue into general principles of customary law binding on member States of the whole international community.

By the same resolution, the General Assembly further directed the Committee on the Progressive Development of International Law and its Codification – established by resolution 94(I) – 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."

Resolution 95 (I) was followed by a second resolution 177 (II), adopted by the General Assembly on 21 November 1947, in which the Assembly directed the newly created International Law Commission ('the Commission') – established by resolution 174 (II) – to formulate these principles and to prepare a draft Code of Offences against the Peace and Security of Mankind ('the draft Code').

2. The Formulation of the Nürnberg Principles

At the first session of the International Law Commission, the question arose as to whether or not the Commission should ascertain to what extent the principles contained in the IMT Charter and judgment constituted principles of international law. The conclusion was that since the Nürnberg principles had been affirmed by the General Assembly, the task entrusted to the Commission was not to express any appreciation of those principles as principles of international law but merely to formulate them (*Yearbook of the*

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International Law Commission, 1950, vol. II, para. 96). At the same session, the Commission appointed a Sub-Committee which submitted to the Commission a working paper containing a formulation of the principles.

The Commission then appointed Mr. Jean Spiropoulos as Special Rapporteur tasked with redrafting the text adopted by the Sub-Committee and submitting a report to the Commission. In the report he submitted to the Commission, the Special Rapporteur made a distinction between (i) the principles *stricto sensu* (which included the liability of accomplices, the precedence of international law over inconsistent domestic law, the denial of immunity for individuals who acted in an official capacity, the prohibition of the defence of superior orders, and the right to a fair trial) and (ii) the crimes (crimes against peace, war crimes and crimes against humanity). This distinction was, however, eventually abolished by the Commission which in 1950 adopted the Nürnberg principles (see below).

Following the submission of the text adopted by the Commission, the General Assembly did not formally adopt the Nürnberg principles in their elaborated form. It merely invited Member States to make observations (General Assembly resolution 488 (V) of 12 December 1950). The Commission was also instructed to take into account the observations of Governments and their delegations in preparing the draft Code. The Nürnberg principles were not developed any further. The draft Code, adopted by the Commission in 1954, suffered a similar fate. In its resolution 897 (IX) of 4 December 1954, the General Assembly, considering that the draft Code raised problems closely related to that of the definition of aggression, decided to postpone further consideration of the draft Code until the new Special Committee on the Question of Defining Aggression had submitted its report. The issue was not taken up again by the General Assembly until 1978.

On 10 December 1981, the General Assembly adopted resolution 36/106 by which it requested the Commission to resume its work on the draft Code. In 1996, the work of the Commission resulted in its adoption of the “draft Code of Crimes against the Peace and Security of Mankind” (*Yearbook of the International Law Commission*, 1996, vol. II (Part Two)).

3. The Nürnberg Principles

The “principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal” adopted by the Commission in 1950 begin logically with that of individual criminal responsibility under international law. Principle I is essentially based on the IMT judgment which states that “crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced” (IMT Judgment, p. 41).

Principle II states that criminal liability exists under international law even if domestic law does not punish an act which is an international crime. This principle is considered to be a corollary to Principle I. The idea contained in Principle II was already set out in article 6 (c) of the Nürnberg Charter, concerning crimes against humanity – defined as certain categories of acts “whether or not [such acts were committed] in violation of the domestic law of the country where perpetrated”. In its judgment, the IMT held that “the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state” (IMT Judgment, p. 42).

Principle III affirms the denial of immunity for individuals who acted “as Head of State or responsible Government officials”. This principle is based on article 7 of the IMT Charter. The abolition of the ‘Act of State’ doctrine was also reaffirmed by the IMT: “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”. Further, the IMT added that: “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” (IMT Judgment, p. 42).

Pursuant to Principle IV, “The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.” This idea was already contained in article 8 of the IMT Charter. However, the substance of the two texts is slightly different. Firstly, the Commission added the element of the “moral choice” developed in the IMT judgment. Secondly, the Commission did not retain the last phrase of article 8 according to which acting under superior orders “may be considered in mitigation of punishment if the Tribunal determines that justice so requires”; indeed, the Commission considered that “the question of mitigating punishment is a matter for the competent Court to decide” (see *Yearbook of the International Law Commission*, 1950, vol. II, paras. 104 and 106).

The right to a fair trial is laid down in Principle V. This right was already defined and developed in chapter four of the IMT Charter entitled “Fair Trial for Defendants”. According to the Commission, the expression “fair trial” should be understood in light of the provisions of the IMT Charter (*Yearbook of the International Law Commission*, 1950, vol. II, para. 109).

Principle VI codifies the three categories of crimes established by article 6 of the IMT Charter (crimes against peace, war crimes and crimes against humanity). Crimes against peace are defined in Principle VI (a) as “(i) planning, preparation, initiation or waging 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)”. Neither the IMT Charter or judgment, nor the Commission gave a definition of the “war of aggression”. The IMT considered that certain defendants had “planned and waged aggressive wars against twelve nations, and were therefore guilty of this series of crimes”. The IMT thus considered it “unnecessary to discuss the subject in further detail, or even to consider at any length the extent to which these aggressive wars were also “wars in violation of international treaties, agreements, or assurances” (IMT Judgment, p. 36). Following the IMT judgment, the Commission, in its commentary, emphasized that the waging of a war of aggression could be committed only by “high ranking military personnel and high state officials” (*Yearbook of the International Law Commission*, 1950, vol. II, para. 117). As for war crimes, Principle VI (b) repeats the text of article 6 (b) of the IMT Charter with the formula that war crimes are “violations of the laws and customs of war”. With respect to crimes against humanity, Principle VI (c) also closely follows the IMT Statute (art. 6 (c)), by only proscribing crimes against humanity “carried on in execution of or in connection with any crime against peace or war crime”. The formulation is, however, slightly different in that Principle VI (c) removes the phrase “before or during the war”. The Commission

considered that the phrase contained in article 6 referred to a particular war, the war of 1939. However, the “omission of the phrase does not mean that the Commission considers that crimes against humanity can be committed only during a war. On the contrary, the Commission is of the opinion that such crimes may take place also before a war in connection with crimes of peace” (*Yearbook of the International Law Commission*, 1950, vol. II, para. 123). It is interesting to note that the link between crimes against humanity and crimes against peace and war crimes was later deleted by the Commission when it adopted the draft Code of Crimes against the Peace and Security of Mankind of 1996 (*Yearbook of the International Law Commission*, 1996, vol. II (Part Two), p. 48; see also Control Council Law No. 10 of 20 December 1945; art. 1 (b) of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, which did not require the link; and ICTY, *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para. 141).

Finally, Principle VII states that “complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.” It is surprising that this principle only retains complicity without explicitly mentioning other modes of responsibility such as planning, instigating, or ordering; nor does the principle include responsibility by omission (so-called “command responsibility”). It is not clear from the commentary of the Commission what modes of responsibility “complicity” entailed at the time (Robert Cryer, *Prosecuting International Crimes, Selectivity and the International Criminal Law Regime*, Cambridge University Press, 2005, p. 311). The IMT Charter provided under article 6 that “leaders, organizers and accomplices participating in the formulation or execution of a common plan or conspiracy [...] are responsible for all acts performed by any persons in execution of such a plan”. This was complemented – with regard to crimes against peace only – by article 6 (a) which stated that liability existed for the “participation in a common plan or conspiracy for the accomplishment of [crimes against peace]”.

4. Influence on Subsequent Legal Developments

A. Statutes of the International Criminal Tribunals

The Nürnberg principles affirmed by General Assembly resolution 95 (I) have considerably influenced the development of international criminal law. All of the principles are contained – in a slightly different and generally more elaborated manner – in the various international instruments establishing the international criminal tribunals. The principle of individual criminal responsibility at the international level – which at the time among other things marked the end of the doctrine whereby only States had rights and duties, that is, possessed legal personality under international law – is now a well-established principle in international criminal law. It was thus naturally inserted in the statutes of the international criminal tribunals (arts. 7 (1) ICTY Statute, 6 ICTR Statute and 25 ICC Statute). Likewise, the right to a fair trial is laid down in articles 21 ICTY Statute, 20 ICTR Statute, and 67 ICC Statute.

The principle of the irrelevance of official capacity is stated in articles 7 (2) ICTY Statute, 6 (2) ICTR Statute and 27 ICC Statute. Article 27 of the ICC Statute applies the rule to all the offences falling under the Court’s jurisdiction. It is more complete than Principle III in that it refers to “official capacity as a Head of State or Government, a

member of a Government or parliament, an elected representative or a government official”.

The fact that action under superior orders does not relieve an individual from responsibility for criminal acts is set out in articles 7 (4) ICTY Statute and 6 (4) ICTR Statute. The ICC Statute, however, contains a significantly different formulation from Principle IV. Although article 33 (2) excludes that a superior order may be relied upon for genocide and crimes against humanity, for war crimes, it provides that superior orders shall not relieve a person of criminal responsibility unless (a) the person was under a legal obligation to obey orders of the Government or a superior; (b) the person did not know that the order was unlawful; and (c) the order was not manifestly unlawful.

The principle concerning complicity was extensively developed in the ICTY Statute. Article 7 (1) (and art. 6 (1) ICTR Statute) provides that “a person who plans, instigates, orders, commits or otherwise aids and abets in the planning, preparation or execution of a crime incurs individual criminal responsibility”. Furthermore, article 7 (3) ICTY Statute provides for the individual criminal responsibility of superiors. Article 25 (3) of the ICC Statute sets out all the modes of liability except command responsibility, which is provided in article 28.

With respect to crimes, the statutes of the ICTR, ICTY and ICC prohibit crimes against humanity (arts. 5 ICTY Statute, 3 ICTR Statute and 7 ICC Statute) and war crimes (arts. 2 ICTY Statute, 4 ICTR Statute and 8 ICC Statute). It is the notion of crimes against humanity which appears to have undergone the greatest development. While crimes against humanity were defined in Principle VI (c) in connection with war crimes and crimes against peace they are now a separate category of crimes. Crimes against peace are now referred to as the crime of aggression. However, despite the Nürnberg precedent and although elements of aggression existed in the context of both the former-Yugoslavia and Rwanda, the crime of aggression was not included in the statutes of the ICTY and ICTR. With respect to the ICC, since the Rome Conference could not reach a consensus on whether or not to include the war of aggression in the ICC Statute, the compromise was to confer on the ICC jurisdiction over this crime without defining it, and subject to its future definition.

B. Case Law

The Nürnberg principles and General Assembly resolution 95 (I) have been expressly referred to in national case law (see for instance, *R. v. Finta*, Supreme Court of Canada (1994) 1 S.C.R. 701 and Court of Bosnia and Herzegovina, *Prosecutor v. Ivica Vrdoljak*, 10 July 2008). In the *Eichmann* case, the Israeli Supreme Court held that General Assembly resolution 95 (I) is evidence that the Nürnberg principles form part of customary international law. According to the Court, “if there was any doubt as to this appraisal of the Nuremberg Principles as principles that have formed part of customary international law ‘since time immemorial,’ such doubt has been removed by two international documents. We refer to the United Nations Assembly resolution of 11.12.46 which ‘affirms the principles of international law recognized by the Charter of the Nuremberg Tribunal, and the judgment of the Tribunal,’ and also to the United Nations Assembly resolution of the same date, No. 96 (1) in which the Assembly ‘affirms that genocide is a crime under international law’” (*Attorney General of Israel v. Eichmann*, Supreme Court of Israel (1962) 36 ILR 277).

The Nürnberg Principles were also developed in the French cases *Touvier* and *Barbie* (see Leila Sadat Wexler, “The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again”, 32 *Colum. J. Transnat’l L.*, p. 289). With respect to the definition of crimes against humanity, the French Court of Cassation added the requirement that crimes against humanity be committed “in the name of a State practicing a hegemonic political ideology”. It also stated that crimes against humanity could be committed “not only against individuals because of their membership in a racial or religious group but also against the adversaries of that policy whatever the form of the opposition” (*Barbie*, French Court of Cassation, 20 December 1985).

The European Court of Human Rights recognized the “universal validity” of the Nürnberg principles in *Kolk and Kislyiy v. Estonia*. According to the Court, “Although the Nuremberg Tribunal was established for trying the major war criminals of the European Axis countries for the offences they had committed before or during the Second World War, the Court notes that the universal validity of the principles concerning crimes against humanity was subsequently confirmed by, *inter alia*, resolution 95 of the United Nations General Assembly (11 December 1946) and later by the International Law Commission” (*Kolk and Kislyiy v. Estonia*, Decision on Admissibility, 17 January 2006).

The customary law status of the Nürnberg Charter was expressly noted by the United Nations Secretary-General (Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), UN Doc. S/25704, 3 May 1993, para. 35) and confirmed by the ICTY (*Tadić*, Opinion and Judgment, Trial Chamber, 7 May 1997, para. 623; and *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para. 141). The Trial Chamber in *Tadić* held that both the concept of direct individual criminal responsibility and personal culpability for assisting, aiding and abetting, or participating in a criminal endeavour or act have a basis in customary international law (*Tadić*, Opinion and Judgment, Trial Chamber, 7 May 1997, para. 666).

The ad hoc tribunals have also played a key role in expanding and clarifying the Nürnberg principles, for instance, by distinguishing between the modes of responsibility – committing, planning, ordering, instigating, aiding and abetting (ICTY, *Tadić*, Judgment, Appeals Chamber, 15 July 1999, para. 185 *et seq.*) and acknowledging joint criminal enterprise as a form of commission in customary international law (see *ibid.*, paras. 185 *et seq.*; and *Krnjelac*, Judgment, Appeals Chamber, 17 September 2003, para. 31).

5. Summary and Conclusion

It has been stated that, in affirming the Nürnberg principles in resolution 95 (I), the General Assembly appeared to declare that the principles laid down in the IMT Charter and judgment were principles of customary international law and simply acknowledged as such by the IMT judgment (H.-H. Jescheck, The Development of International Criminal Law after Nuremberg, in Guénaél Mettraux (ed.), *Perspectives on the Nuremberg Trial*, p. 411). However, it must be noted that the Nürnberg principles as elaborated by the Commission were never formally adopted – or rejected – by the General Assembly. In addition, it would seem that some of the Nürnberg principles were in fact new. The proposition that they constituted customary international law at the time of their adoption by the Commission is therefore debatable. It would seem more appropriate to hold that

General Assembly resolution 95 (I) strongly contributed to giving the Nürnberg principles the customary law status they have today.

Indeed, since 1946, the Nürnberg principles have been reaffirmed and developed in the statutes of the international criminal tribunals and in international and national case law. They are today widely considered to represent customary international law. The right to a fair trial (Principle V) is laid down in all the international instruments establishing international criminal tribunals (see arts. 21 ICTY Statute, 20 ICTR Statute, and 67 ICC Statute) and also in many human rights treaties (see arts. 14 (1) and 26 of the International Covenant on Civil and Political Rights, art. 8 of the American Convention on Human Rights and art. 6 of the European Convention on Human Rights) and in national and international case law. It therefore indubitably belongs to the category of customary international law. One could even argue that, given the general recognition by all States and international courts and tribunals of both its crucial importance and of the inadmissibility for States and national and international courts to derogate or deviate from it, it has also attained the status of a *jus cogens* norm.

In contrast, the other principles, being simply part of customary international law, may be derogated from by treaty. As mentioned above, this is the case, for instance, for the defence of superior orders as set out in article 33 (2) of the ICC Statute.

In addition, these principles have been spelled out over the years. For instance, since the rather “archaic” Nürnberg rules on participation in criminal conduct (Gerhard Werle, Individual Criminal Responsibility in Article 25 ICC Statute, *Journal of International Criminal Justice*, vol. 5, 2007, p. 953), the principles on the various modes of international criminal liability have been considerably developed. The definitions of the crimes have also evolved since Nuremberg. For instance, crimes against humanity now explicitly include the element of a “widespread or systematic attack against a civilian population” (art. 7 ICC Statute). The ICC Statute also contains four new categories of punishable acts as crimes against humanity: torture (art. 7(1) (f)), sexual crimes (art. 7(1) (g)), enforced disappearance of persons (art. 7(1) (i)) and the crime of apartheid (art. 7(1) (j)). Finally, in 1948, the General Assembly approved the Convention on the Prevention and Punishment of the Crime of Genocide, which confirmed that genocide is a crime under international law. Genocide was also provided for in the statutes of the ICTY, ICTR and ICC (arts. 4 ICTY Statute, 2 ICTR Statute, and 6 ICC Statute). In light of the adoption of so many treaty or quasi-treaty provisions prohibiting and punishing genocide, and of the case law on the matter, it can now safely be held that genocide is a crime proscribed by customary international law.

Related Materials

A. Legal Instruments and Documents

London Charter of the International Military Tribunal, 8 August 1945.

General Assembly resolution 177(II) of 21 November 1947 (Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal).

International Law Commission, Report on the formulation of Nürnberg principles, prepared by the Special Rapporteur, Mr. J. Spiropoulos (A/CN.4/22, 12 April 1950, reproduced in *Yearbook of the International Law Commission*, 1950, vol. II).

Report of the International Law Commission to the General Assembly on the work of its second session, 5 June – 29 July 1950, Official Records of the General Assembly, Fifth session, Supplement No. 12 (A/1316, reproduced in *Yearbook of the International Law Commission*, 1950, vol. II).

General Assembly resolution 488(V) of 12 December 1950 (Formulation of the Nürnberg principles).

B. Jurisprudence

International Military Tribunal for Nuremberg, Judgment, 1 October 1946.

Supreme Court of Israel, *Attorney General of Israel v. Eichmann*, 1962, 36 ILR 277.

International Criminal Tribunal for the former Yugoslavia, (*Prosecutor v. Dusko Tadić*, IT-94-1-AR-72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para. 141.

International Criminal Tribunal for the former Yugoslavia, (*Prosecutor v. Dusko Tadić*, IT-94-1-T), Opinion and Judgment, Trial Chamber, 7 May 1997, para. 623.

International Criminal Tribunal for the former Yugoslavia, (*Prosecutor v. Dusko Tadić*, IT-94-1-A), Judgment, Appeals Chamber, 15 July 1999, para. 185 *et seq.*

International Criminal Tribunal for the former Yugoslavia, (*Prosecutor v. Milorad Krnojelac*, IT-97-25-A), Judgment, Appeals Chamber, 17 September 2003, para. 31.

C. Doctrine

Henry L. Stimson, “The Nuremberg Trial: Landmark in Law”, *International Affairs*, vol. 25, 1947, pp. 179-189.

Telford Taylor, *Nuremberg and Vietnam – An American Tragedy*, Chicago, Quadrangle Books, 1970, pp. 95-97, 113-120.

Stéfan Glaser, “La Charte du Tribunal de Nuremberg et les nouveaux principes du droit international”, *Revue pénale suisse*, vol. 63, 1948, pp. 13-38 (translated into English in Guénaël Mettraux (ed.), *Perspectives on the Nuremberg Trial*, Oxford, Oxford University Press, 2008, pp. 55-71).

Henri Donnedieu de Vabres, “Le procès de Nuremberg devant les principes modernes du droit pénal international”, *70 Recueil des Cours*, vol. I, 1947, pp. 477-582 (translated into English in Guénaël Mettraux (ed.), *Perspectives on the Nuremberg Trial*, Oxford, Oxford University Press, 2008, pp. 213-273).

Telford Taylor, *The Anatomy of the Nuremberg Trials*, London, Bloomsbury, 1993, pp. 629-641.

Hans-Heinrich Jeschek, “The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute”, *Journal of International Criminal Justice*, vol. 2, 2004, pp. 38-55.