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**Draft Code of Offences Against the Peace and Security of Mankind – Report by
J. Spiropoulos, Special Rapporteur**

Topic:
Draft code of offences against the peace and security of mankind (Part I)

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States as a whole have not as yet reached such a degree of solidarity that they would entrust an international tribunal with these trials. Hereby the question of compulsory inclusion of the offences of the code in domestic penal law is a matter of foremost consideration while it is also assumed that, upon agreement, smaller groups of States may already be willing to accept jurisdiction of an international tribunal at the present moment.

The Annex contains a draft code. If the second view is held, the offences mentioned in articles 1 and 7 cannot be included in the domestic penal law since these offences can only be committed by a Government. It is not impossible, however, that in the future these crimes might be included in a code intended for a smaller group of States by which jurisdiction in criminal cases by an international tribunal is accepted.

DOCUMENT A/CN.4/19 Add. 2

Addendum to replies from Governments

7. Pakistan

[Original text: English]

Ministry of Foreign Affairs
and Commonwealth Relations
Karachi
24 March 1950

The Minister of Foreign Affairs and Commonwealth Relations presents his compliments to the Secretary-General of the United Nations and has the honour to say that the Government of Pakistan have the following comments to offer on the offences to be comprehended in the draft code of offences against the peace and security of mankind.

The crimes defined in the Charter of the Nürnberg

Tribunal include the killing of hostages. This implies that the taking of hostages is as legitimate as the taking of prisoners. The Government of Pakistan are of the view that the taking of hostages (i.e. living pledges for the good behaviour of third parties) is barbaric and should be included in the draft code of offences. They are further of the view that the crime of genocide as well as the attempt to overthrow another government by disruption from within should be included in the draft code of offences. They also suggest that the word "war" needs to be defined since the days when it meant physical violence are now long past and its instruments are manifold and operate in manifold spheres. In other words the term covers now not only a conflict carried on by means of the effective and engagement of armed forces but also by other means.

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Report by J. Spiropoulos, Special Rapporteur

[Original Text: English]

[26 April, 1950]

CONTENTS

	Page
PREFACE	255
I. INTRODUCTION	255
A. Correspondence between Justice Biddle and President Truman	255
B. Resolutions of the United Nations concerning the Draft of Offences against the Peace and Security of Mankind	256
C. The Problems of the Draft Code of Offences against the Peace and Security of Mankind before the International Law Commission	257
D. Replies of Governments to the questionnaire circulated by the International Law Commission	257
II. TASK OF THE INTERNATIONAL LAW COMMISSION	257
A. Meaning of the term "Offences against the Peace and Security of Mankind"	257
(a) Correspondence between Justice Biddle and President Truman	257
(b) Discussion of the Draft Code in the United Nations Organs	257
(c) Request of the General Assembly to the International Law Commission to indicate in the Draft Code the place to be accorded to the Nürnberg principles	258
(d) Special question	258
(e) Conclusion	259

	<i>Page</i>
B. The phrase "indicating clearly the place to be accorded to" the Nürnberg principles ..	259
III. THE SUBJECTS OF CRIMINAL RESPONSIBILITY UNDER THE DRAFT CODE	260
A. Individuals, Subjects of Criminal Responsibility under International Law	260
B. Organizations, Subjects of Criminal Responsibility under International Law	260
C. States, Subjects of Criminal Responsibility under International Law	261
IV. THE ACTS TO BE CHARACTERIZED BY THE DRAFT CODE AS CRIMES UNDER INTERNATIONAL LAW	261
Crime No. I	261
Crime No. II	262
Crime No. III	262
Crime No. IV	263
Crime No. V	263
Crime No. VI	263
Crime No. VII	263
Crime No. VIII	263
Crime No. IX	263
V. OTHER ACTS PUNISHABLE UNDER THE DRAFT CODE	267
VI. RULES CONCERNING CRIMINAL RESPONSIBILITY UNDER THE DRAFT CODE	268
A. General Rules of Responsibility	268
B. Particular Rules of Responsibility	270
(a) Effect of command of the law on criminal responsibility under the Draft Code	270
(b) Effect of Superior Order on criminal responsibility under the Draft Code	270
(c) Effect of official position of the perpetrator of a crime under the Draft Code ..	272
(d) Reprisals and criminal responsibility under International Law	273
(e) General principles of penal law	274
VII. IMPLEMENTATION OF THE CODE	275
A. Implementation by an International <i>Ad Hoc</i> Tribunal	275
B. Implementation by a Permanent International Criminal Tribunal	276
C. Implementation by Municipal Courts	276
VIII. INTERNATIONAL CONTROL OF THE EXECUTION OF THE CODE BY THE PARTIES TO IT	277
APPENDIX	277
TEXT OF A DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND SUGGESTED AS A WORKING PAPER FOR THE INTERNATIONAL LAW COMMISSION	277
Basis of Discussion No. 1	277
Basis of Discussion No. 2	278
Basis of Discussion No. 3	278
Basis of Discussion No. 4	278
Basis of Discussion No. 5	278
Basis of Discussion No. 6	278
Basis of Discussion No. 7	278

Preface

The present paper has been written at the request of the International Law Commission which, by General Assembly resolution 177 (II) of 21 November 1947 had been directed to "prepare a draft code of offences against the peace and security of mankind". In submitting it to the Commission, we wish to present some explanatory observations.

1. There were two methods of approaching our subject: one was to elaborate a text with detailed substantive and procedural provisions, an "ideal" draft, similar to the penal codes of municipal law, without paying any regard to the question whether such a draft would have any chance of obtaining the approval of the governments. The other consisted in the elaboration of a text which, based on a realistic approach to our task, could serve as a useful basis of discussion at an international conference. We did not hesitate as to the choice. The General Assembly, directing the International Law Commission to prepare a draft code of offences against the peace and security of mankind, could have in mind but the second method of approach.

2. The task entrusted to us by the Commission differs essentially from the work of those of our colleagues who have undertaken to codify existing rules of international law. Our work is, to a large extent, of a speculative nature. The difficulties we have been faced with consisted less in the collection and elaboration of the existing material than in the choice among several solutions of the various problems which we have encountered. The determining factor in this choice was the chance which each of the solutions would have of receiving the approval of the governments.

3. We tried to base our suggestions as much as possible on international practice. As to the substantive provisions of the text suggested by us (crimes, rules concerning liability, etc.), apart from the Nürnberg Charter, we have been able to find precedents in the Charter of the United Nations and in the Draft Declaration on Rights and Duties of States elaborated by the International Law Commission at its first session. From the non-official texts we should like to mention "The Plan for a World Criminal Code" drawn up by Mr. V. V. Pella to be used as a basis for the work of the International Association of Penal Law, the Inter-Parliamentary Union and International Law Association.

4. With regard to the implementation of the penal provisions to be established by the draft Code, we felt that we could not ignore the important precedent created by the Convention on the Prevention and Punishment of the Crime of Genocide of 1948. Whether one could go further than this convention in the present code, is a question which will be decided upon by the International Law Commission on the occasion of the discussion of a special report, since this question is closely connected with the problem of the eventual establishment of an International Criminal Court.

5. Our paper has not been confined to stating abstract reflections on the inherent value of the various answers to many questions arising out of the drafting of the code. Nor has it been limited to suggestions of

a general character. It aspires to give to the International Law Commission a working paper which will help the Commission in accomplishing its task. The experience of the first session of our Commission has convinced us that the only way of expediting our work is to base our discussion from the very beginning on texts. To meet this practical need the dogmatical part of our manuscript is supplemented by a draft code of offences against the peace and security of mankind in the form of "bases of discussion".

6. Finally, we want to add that the time at our disposal did not permit us to present as rich a material as we should have wished. Nor are all the problems appearing in this report examined in all their details. We felt that only after knowing the opinion of the Commission on the different subjects examined should we be in a position to decide which of them required further investigation.¹

7. In concluding our observations, we wish to express the hope that the concept of a code of offences against the peace and security of mankind, first expressed in the correspondence between Justice Biddle and President Truman, and endorsed by the United Nations General Assembly, will bear its fruit and that the international community is destined to have its penal code, which, when realized, will constitute a milestone in the development of international law.

I. Introduction

A. CORRESPONDENCE BETWEEN JUSTICE BIDDLE AND PRESIDENT TRUMAN

8. The idea of a "code of offences against the peace and security of mankind" was expressed, though not under this title, for the first time in the correspondence between Justice Biddle, American member of the Nürnberg Tribunal, and President Truman on the occasion of the termination of the trial before the Nürnberg Tribunal.²

9. In his report to President Truman of 9 November 1946 Justice Biddle suggested that the time had now come to "set about drafting a code of international criminal law". He also felt that the time seemed opportune for advancing the proposal that the United Nations "reaffirm the principles of the Nürnberg Charter in the context of a general codification of offences against the peace and security of mankind". Such actions would, according to him, not only "perpetuate the vital principle that war of aggression is the supreme crime" but in addition "afford an opportunity to strengthen the sanctions against lesser violations of international law and to utilize the experience of Nürnberg

¹ On this occasion we should like to mention that the *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London, 1948 (foreword by Lord Wright), as well as the *Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission*, London, 1947-1949 (hereafter cited: *Law Reports*) and particularly vol. XV of these reports (prepared by Mr. G. Brand), have proved to be of great help.

² See United States *Department of State Bulletin*, vol. 15 (1946), pp. 954-957.

in the development of those permanent procedures and institutions upon which the effective enforcement of international law ultimately depends".

10. In his reply to the above report President Truman expressed the view that "that tendency will be fostered if the nations can establish a code of international criminal law to deal with all who wage aggressive war". "The setting up", he continued, "of such a code as that which you recommend is indeed an enormous undertaking but it deserves to be studied and weighed by the best legal minds the world over. It is a fitting task to be undertaken by the governments of the United Nations. I hope that the United Nations, in line with your proposal, will reaffirm the principles of the Nürnberg Charter in the context of a general codification of offences against the peace and security of mankind".

B. RESOLUTIONS OF THE UNITED NATIONS CONCERNING THE DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND.

11. In accordance with the above-mentioned view of President Truman, 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, subparagraph (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 . . .

"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."^{2a}

12. The United States proposal was referred to the Sixth Committee which, in its turn, referred it to its Sub-Committee 1 which was charged with the question of the codification of international law. The report, containing a draft resolution, presented by the Sub-Committee was, in substance, approved by the Sixth Committee and submitted to the General Assembly.

13. At its 55th plenary meeting on 11 December 1946, the General Assembly adopted the following resolution (95 (1)):

"The General Assembly,

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

"Affirms the principles of international law recog-

nized 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."

14. The Committee on the Progressive Development of International Law and its Codification, after having studied the matter, submitted to the General Assembly a recommendation according to which the International Law Commission to be created 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

(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 principles mentioned in (a).

15. The Committee expressed at the same time 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.³

16. The report of the above Committee was submitted to the second session of the General Assembly which referred it to its Sixth Committee. The Sixth Committee, after a general discussion at its 39th meeting on 29 September 1947 referred the report to its Sub-Committee 2 which was concerned with the question of the development of international law and its codification.

17. The Sub-Committee, having considered the report of the Committee on the Progressive Development of International Law and its Codification decided that the task of the formulation of the Nürnberg principles and of the drafting of the code should be entrusted to the International Law Commission to be created.

18. The report of the Sub-Committee was adopted subject to slight modifications by the Sixth Committee.

19. Finally, the General Assembly at its 123rd meeting on 21 November 1947, adopted the following resolution (177 (1)):

"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

^{2a} A/C.6/69.

³ A/AC.10/52.

recognized in the Charter of the Nürnberg Tribunal and in 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."

C. THE PROBLEMS OF THE DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND BEFORE THE INTERNATIONAL LAW COMMISSION.

20. The question of the draft code of offences against the peace and security of mankind came before the International Law Commission at its 30th meeting on 31 May 1949.⁴ The Commission first examined the nature of the task entrusted to it. The view was accepted that the elaboration of the draft code was a matter of "progressive development of international law". In accordance with this view, the Commission decided that in conformity with article 16 of its statute a questionnaire should be circulated to governments inquiring what offences, apart from those defined in the Charter and judgment of the Nürnberg Tribunal, should, in view of the governments, be comprehended in the draft code.

21. At its 33rd meeting on 3 June 1949 the Commission appointed Mr. J. Spiropoulos special rapporteur and directed him to prepare for the next session of the Commission a working paper on the draft code of offences against the peace and security of mankind.⁵

D. REPLIES OF GOVERNMENTS TO THE QUESTIONNAIRE CIRCULATED BY THE INTERNATIONAL LAW COMMISSION.

22. During the preparation of the present report, replies to the questionnaire of the International Law Commission regarding the draft code from the governments of France, Poland and the United States were forwarded to the special rapporteur by the Secretariat of the United Nations.⁶

II. Task of the International Law Commission

A. MEANING OF THE TERM "OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND".

23. The International Law Commission which, as already stated, was directed to prepare a draft code of offences against the peace and security of mankind, considered it necessary to begin its work by defining its task. This definition primarily involved the interpretation of the term "draft code of offences against the peace and security of mankind". In order to determine the true meaning of this term, due regard should be paid to its origin and the following declarations, opinions, resolutions and facts connected with it:

⁴ See *Yearbook of the International Law Commission*, 1949, Part I, 30th meeting.

⁵ *Ibid.*, 33rd meeting.

⁶ These replies together with replies from governments subsequently received by the Secretariat are reproduced in A/CN.4/19, A/CN.4/19/Add.1, and A/CN.4/19/Add.2.

(a) *Correspondence between Justice Biddle and President Truman.*

24. In his report to President Truman, Mr. Biddle, expressing the opinion that it seemed opportune to advance the proposal that the United Nations "reaffirm the principles of the Nürnberg Charter in the context of a general codification of offences against the peace and security of mankind", adds that such action would, in his opinion, not only perpetuate the vital principle that war of aggression is the supreme crime but also in addition "afford an opportunity to strengthen the sanctions against lesser violations of international law".

25. In his reply President Truman speaks of a code which would deal with "all who wage aggressive war".⁷

26. At the outset it should be observed that both phraseologies are restrictive. After a closer scrutiny, however, the one used by President Truman seems to be more so, inasmuch as he connects the crimes to be included into the code with the notion of "aggressive war", whereas the terms used by Justice Biddle allow a somewhat wider interpretation since he speaks also of "lesser violations" of international law. All the same it should be borne in mind that the term "lesser violations" of international law must also be interpreted as having a very restrictive sense inasmuch as the violations of international law to which it refers are not "lesser" violations in an objective sense of the word but "lesser violations" of the law *with respect to* "aggressive war", which is, the supreme international crime.

(b) *Discussion of the Draft Code in the United Nations Organs.*

27. The United States proposal of 15 November 1946 requested the General Assembly to direct the Committee on the Progressive Development of International Law and its Codification 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". As it appears from the above passage, the proposal distinguishes between two contemplated codes: the "code of offences against the peace and security of mankind" and the "international criminal code". It contains however no criteria on which this distinction should be based.

28. The United States proposal was referred to the Sixth Committee which, in its turn, referred it to its Sub-Committee. Both these organs together with the General Assembly accepted the proposal, subject to some modifications, which, however, shed no light on the difference between the two codes.

29. Very important, in this respect, is the discussion which took place in the Committee on the Progressive Development of International Law and its Codification. The French representative, Mr. Donnedieu de Vabres, who took a leading part in the discussion, made a distinction between the two codes on the following basis: The first

⁷ See United States *Department of State Bulletin*, vol. 15 (1946), pp. 954-957.

code (code of offences against the peace and security of mankind) would concern crimes which he characterized as "*crimes interétatiques*",⁸ while the international criminal code would be concerned "with every crime in which there was an international element, and should regulate what law should apply to crimes committed abroad or by foreigners, and whether extradition should be allowed or not, for extradition was really a part of criminal international law".⁹ This latter code "would contain the classic criminal international law . . .". "All the subject matters which would be regulated in this code were already provided for in the municipal legislation of the various countries. The only novelty would be that now there would be an international code on these subjects".¹⁰ According to Mr. Donnedieu de Vabres, the Nürnberg principles were something different and would find their place only in the code which would contain what he called "*crimes interétatiques*" and which in his view would be the subject matter of a codification of offences against the peace and security of mankind.

30. Along the lines of the above ideas a Sub-Committee, headed by Mr. Donnedieu de Vabres, submitted a report which made a clear distinction between the Nürnberg principles and the codification of offences against the peace and security of mankind, on the one hand, and the international criminal code, on the other. The report of the Sub-Committee reads as follows:

"A. The International Law Commission should be invited to prepare:

"1. A draft convention incorporating the principles of international law as recognized by the Statute of the Tribunal of Nürnberg and sanctioned by the judgment of that Tribunal, in order to give to these principles a binding force for all.

"2. A detailed plan of general codification of crimes against peace and security of mankind in such a manner that the plan should clearly indicate the place to be accorded to the principles mentioned in paragraph 1.

"B. Whereas the resolution of the General Assembly of 11 December 1946 concerns both the general codification of crimes against peace and security of mankind and an international criminal code, the Sub-Committee is of the opinion that the Rapporteur should stress in his report that the above-mentioned task does not preclude the I.L.C. from drafting, either at the same time or at a later date, a code that would regulate the concerted repression by States of offences bearing an international character."¹¹

31. In its report the Committee on the Progressive Development of International Law and its Codification recommended that the International Law Commission should be invited to prepare a draft convention incorporating the Nürnberg principles together with "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 these principles. The Committee, furthermore recorded its opinion that this task "would not preclude the I.L.C. from drafting in due course a code of international penal law".¹²

32. The above report of the Committee on the Progressive Development of International Law and its Codification was examined by the Sixth Committee of the General Assembly at its second session as well as by Sub-Committee 2 of the Sixth Committee. The Sub-Committee decided at its 15th meeting to adopt the passage in the report covering the invitation addressed to the International Law Commission to prepare a draft convention incorporating the Nürnberg principles and a detailed plan of general codification of offences against the peace and security of mankind. The passage of the report concerning the code of international penal law was not decided upon. Since then, this latter code is not mentioned in any subsequent reports or resolutions. The words "a detailed draft plan of general codification" were replaced at the 17th meeting of the Sub-Committee by the words "draft code", and the text adopted read that the International Law Commission should prepare "a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to" the Nürnberg principles,¹³ a formula which figures also in General Assembly resolution 177 (II).

(c) *Request of the General Assembly to the International Law Commission to indicate in the draft code the place to be accorded to the Nürnberg principles.*

33. The fact that the Nürnberg principles concern crimes which the classical theory of international law qualifies as "*crimes interétatiques*" and that these principles refer to acts connected with war, militates in favour of the view that it was not the intention of the General Assembly that the Nürnberg principles should find their place in the context of principles which in substance would differ essentially from the category of crimes provided for by the charter of the Nürnberg Tribunal.

(d) *Special question.*

34. Prior to any conclusion as to the intention of General Assembly resolution 177 (II) when speaking of "offences against the peace and security of mankind", we should dispose of the question of whether under this term we are to understand two separate categories of offences, namely, acts affecting the "peace" and acts affecting the "security of mankind". In our view there can be no doubt that both terms express the same idea. The term "peace and security of mankind" is a correlative to the expression "international peace and security" contained in the Charter of the United Nations. Both expressions refer to the same offences, i.e., to offences against peace. The contrary view would overlook the fact that any offence against "peace" is necessarily also an offence against the "security of mankind".

⁸ A/AC.10/SR.18, p. 15.

⁹ A/AC.10/SR.19, p. 2.

¹⁰ A/AC.10/SR.20, p. 9.

¹¹ A/AC.10/SR.20, p. 2.

¹² A/AC.10/52.

¹³ A/C.6/180/Rev.1.

(e) *Conclusion.*

35. The above-mentioned declarations, discussions, resolutions, facts and considerations lead to the *positive* conclusion that the "code of offences against the peace and security of mankind" is intended to refer to acts which, if committed or tolerated by a State, would constitute violations of international law and involve international responsibility. The main characteristic of the offences in question is their highly *political* nature. They are offences which, on account of their specific character, normally would affect the international relations in a way dangerous for the *maintenance of peace*.

36. From the same declarations, discussions, etc., follows *negatively* that the draft code to be elaborated by the International Law Commission cannot have as its purpose questions concerning conflicts of legislation and jurisdiction in international criminal matters. Consequently, such topics as piracy (*delicta juris gentium*), suppression of traffic in dangerous drugs (opium), in women and children (white slave traffic), suppression of slavery, of counterfeiting currency, protection of submarine cables, etc., do not fall within the scope of the draft code with which we are concerned here.

B. THE PHRASE "INDICATING CLEARLY THE PLACE TO BE ACCORDED TO" THE NÜRNBERG PRINCIPLES.

37. By General Assembly resolution 177 (II), the International Law Commission was directed to prepare a draft code of offences against the peace and security of mankind "*indicating clearly the place to be accorded to*" the Nürnberg principles. The question therefore arises: in what manner will this indication be made?

38. The Committee on the Progressive Development of International Law and its Codification in its report to the General Assembly had recommended that the International Law Commission should be invited to prepare a "detailed draft plan" of 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. In Sub-Committee 2 of the Sixth Committee of the second session of the General Assembly, the term "plan" was replaced by that of "code". Mr. Kernkapp and Mr. Amado drew the attention of the Sub-Committee to the fact that the place to be accorded to the Nürnberg principles could be indicated in a *plan* of codification but not in a draft *code*. On the contrary, Mr. Beckett, United Kingdom delegate, considered that this place could be indicated just as well in a code by leaving a blank chapter for these principles. The Sub-Committee took no further action on this matter.

39. In our opinion the International Law Commission must be considered free to give this problem the solution it thinks most appropriate. As to the best way to be followed we think that the place to be accorded to the Nürnberg principles can be indicated either in the report on the code or in the comments or footnotes accompanying the respective provisions of the code. Finally, as to the various "Nürnberg principles" themselves, we feel that they should find their place in the *context* of the principles and crimes to be set up by the draft code. A separate enumeration of them under a particular

chapter would destroy the unity or the system of the code. Perhaps it will be no exaggeration to say that, from a technical point of view, it would be almost impossible to separate the Nürnberg principles from the context of the other principles of the code.

40. Be that as it may, the indication of the place to be accorded to the Nürnberg principles in the draft code cannot be made at *this* stage because in the first place the formulation of the Nürnberg principles has not yet reached its final shape, and secondly, because we do not yet know what offences against the peace and security of mankind the International Law Commission will wish to comprise finally into the draft code. Only after the accomplishment of the above tasks of the Commission, the place to be accorded to the Nürnberg principles in the draft code can be finally determined.

41. While the answer to be given to the question discussed above in paragraphs 38-40 is, from a legal point of view, of minor importance, another aspect of the subject, i.e., the question whether the International Law Commission should consider itself bound to incorporate in the code the Nürnberg principles as they stand, *without* any appreciation of them, is of the greatest importance and deserves the full attention of the Commission.

42. Very significant in this connexion are the following statements made in the Sixth Committee of the fourth session of the General Assembly during the discussion of the report of the International Law Commission:

(a) Mr. Röling (Netherlands) remarked that: "whereas the first task appeared to be the very restricted one of extracting and formulating clearly the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, the second task—that of indicating clearly the place to be accorded to those principles in a draft code of offences against the peace and security of mankind—would seem to require evaluation of, and final judgment on, the principles in question. The Commission, in paragraph 30 of its report, however, appeared to take the view that the words "indicating clearly the place to be accorded" meant that the Nürnberg principles must be automatically inserted in the draft code. The Netherlands delegation was strongly opposed to that interpretation; in its opinion, those words could even be taken to mean that some of the Nürnberg principles should not be included in the draft code at all, if the Commission did not find them worthy of inclusion".¹⁴

Mr. Röling recalled that "the Nürnberg trials had been followed by the Charter and trials of the Tokyo Tribunal and by judgments of national tribunals, as well as by publications by authoritative international lawyers, all of which differed on important points of substance from the principles laid down at Nürnberg. The Commission must be able to take all those facts into account in evaluating the Nürnberg principles and deciding on the place to be assigned to them in the draft code: if the

¹⁴ Official Records of the Fourth Session of the General Assembly, Sixth Committee, Summary Records of Meetings 20 September-29 November 1949, p. 114.

Commission felt that it could not do so under resolution 177 (II), it should request an extension of its terms of reference, a request which the Netherlands delegation would heartily support".^{14a}

(b) Mr. Petren (Sweden) stated that "his Government like many others was anxious to see the completion of a draft code on the subject, the weight and importance of which his Government fully realized. His delegation assumed that the Commission's recommendations to the General Assembly on that subject would lead to the preparation of a draft convention which would then be submitted to Governments for their views. In that connexion, his delegation hoped that the opinion expressed by the representative of the Netherlands would be taken into consideration".¹⁵

43. The above statements of the delegates of the Netherlands and Sweden seem to us very pertinent. The Charter of the International Military Tribunal at Nürnberg offered, at that time, a solution *ad hoc* to the problem of the trial of the major European war criminals. The principles adopted by the London Conference of 1945 (which prepared the Charter of the Tribunal) cannot be now incorporated in the draft code without any further appreciation by the International Law Commission. In this connexion it might be useful to remember what M. Nikitchenko, Soviet delegate at the London Conference, endorsing a view expressed by the French representative, Professor Gros, stated: "I think", he said "that it is not our task to try to draft a code which would be applied at all times and under all circumstances".¹⁶

44. We do not deny that the International Law Commission ought to be very reluctant in throwing overboard, some years only after the Nürnberg trial, principles on the basis of which a great number of prominent Germans have been tried and executed. Yet, if the International Law Commission is convinced that one or more of the Nürnberg principles, for whatever reasons, should not be incorporated in the draft code, or, at least, not without some modifications, the Commission should not hesitate to act accordingly.

45. In conclusion the phrase "indicating clearly the place to be accorded to" the Nürnberg principles cannot be interpreted as having the meaning that the "incorporation" of the Nürnberg principles in the code will be a mechanical process. Their incorporation in the draft code by the International Law Commission entails "appreciation" of them.

III. The subjects of criminal responsibility under the Draft Code

A. INDIVIDUALS, SUBJECTS OF CRIMINAL RESPONSIBILITY UNDER INTERNATIONAL LAW

46. That individuals are the subjects of the crimes to be comprehended in the draft code does not need any

^{14a} *Ibid.*

¹⁵ *Ibid.*, p. 118.

¹⁶ *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials*, London, 1945, Department of State Publication 3080, Washington 1949 (hereafter cited: *Report R. Jackson*), p. 382.

elucidation. The criminal responsibility of individuals in international law is an underlying principle in both the Charter of Nürnberg Tribunal and the judgment of the Tribunal. But it is questionable whether, besides the international responsibility of the individuals, a parallel penal responsibility of *organizations* and States should be established.

B. ORGANIZATIONS, SUBJECTS OF CRIMINAL RESPONSIBILITY UNDER INTERNATIONAL LAW

47. From a general theoretical point of view it is debatable whether organizations (abstract entities), as such, can be subjects of penal responsibility. From the point of view, however, of international practice, the precedent of the Nürnberg trial is decisive. The first paragraph of article 9 of the Charter of the International Military Tribunal reads as follows:

"At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization".

48. *Prima facie*, this provision, if taken separately, might seem to establish the penal responsibility of organizations. However, the Charter attaches no penal sanction to the declaration of criminality. The only consequence of the declaration of criminality is, according to article 10 of the Charter, that

"the competent national authority of any signatory shall have the right to bring individuals to trial for membership therein [i.e. in a group or organization declared criminal by the Tribunal] 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."

49. As it appears from the foregoing provision, the effect of the declaration of criminality of an organization was only to make individual members of the organization responsible for its reprehensible activity. No responsibility of the organization as such was established.

50. Moreover, the Nürnberg Tribunal applied the above provision of the Charter with certain reluctance and restrictively. None of the indicted organizations was declared criminal as a whole, only groups within them, composed of persons who either had directly participated in the commission of crimes referred to in article 6 of the Charter or had solidarized themselves with these criminal activities by becoming or remaining members of the organization. In other words, the Court did not impose a collective responsibility based solely on membership in any such organization.¹⁷

¹⁷ The following passages of the judgment are also characteristic. The Court, stressing that in virtue of article 9 of the Charter it was vested with discretion as to whether it would declare any organization criminal, added: "This discretion is a judicial one and does not permit arbitrary action, but 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. If satisfied of the criminal guilt of any organization or group this Tribunal should not hesitate to declare it to be criminal because the theory of "group criminality" is new, or because it might be unjustly applied by some

Conclusion

51. In our opinion the question whether organizations within a State shall be subjects of international penal responsibility ought to be answered *negatively*. The grounds for the answer are provided by the fact that the various municipal laws, with rare exceptions, do not establish the penal responsibility of legal persons, and by the position taken, in this respect, by the Nürnberg Tribunal.

52. Finally, it should be added that from a practical point of view, the lack of criminal responsibility in this regard is met, to a satisfactory extent, by the application of the notions of conspiracy and complicity. The pronouncements of the Nürnberg Tribunal to this effect seem to us decisive and must be fully endorsed (see footnote 17).

C. STATES, SUBJECTS OF CRIMINAL RESPONSIBILITY UNDER INTERNATIONAL LAW

53. In theory the question whether there should be established a criminal responsibility of States under international law has been much debated. International practice, on the other hand, provides no precedent for such responsibility. During the Second World War, when the Allies expressed their determination to punish "German atrocities" (Moscow Conference, 1943, "Declaration on German atrocities", 30 October 1943), there was no mention of punishment of the German State as such. The above declaration was confined to expressing the determination of the Allies to punish "German officers and men and members of the Nazi party who have been responsible for, or have taken a consenting part in atrocities, massacres and executions" in the countries overrun by German forces.

54. Similarly, at the London Conference of 1945 (engaged in the drafting of Charter of the International Military Tribunal forming the basis on which the major war criminals were tried), no attempt was made to establish the criminal responsibility of the German "Reich". Moreover, at the Conference session of 19 July 1945, the Russian delegate Nikitchenko speaking on the merits of a French proposal regarding the definition of "crimes", stated that the Russian delegation favoured the formula of the French delegation "first of

all, because it provide(d) not for the responsibility of States or any social organisms but for the responsibility of *persons*".¹⁸ This view was shared by the United States delegate Jackson who, speaking before the Conference on a formula defining the "crimes", said that he agreed entirely "that the formula should look . . . to the responsibility of *persons*, rather than of States".¹⁹

55. Very definite in this respect is also the opinion of the Nürnberg Tribunal. The Court, expressing itself on the subject of criminal responsibility under international law in connexion with the provision of the Charter concerning organizations, declared as "a well-settled" legal principle of greatest importance, that "*criminal guilt is personal*".²⁰ Even more absolute is the following pronouncement of the Court: "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".²¹

Conclusion

56. Following international practice up to this time, and particularly in view of the pronouncements of the Nürnberg Tribunal, the establishment of the criminal responsibility of States—at least for the time being—does not seem advisable.²²

IV. The acts to be characterized by the Draft Code as "Crimes under International Law"

CRIME NO. I

The use of armed force in violation of international law and in particular the waging of aggressive war.

57. (a) While the Charter of the Nürnberg Tribunal, with respect to the use of armed force by the State, declares illegal only the "waging of a war of aggression", Crime No. I, going further, declares punishable *any* use of armed force, provided that such use constitutes a violation of international law.

(b) "Aggressive war" is covered by the "use of armed force in violation of international law". It is only on account of the gravity of the crime of "war" (which has been called the "supreme" international crime) and for emphasis that this crime is mentioned expressly.

(c) The Nürnberg Charter, defining the "crimes against peace", speaks of "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances". "Planning, preparation and initiation" are not mentioned in the text suggested above since they are all covered by the acts declared punishable in Section V below (other

subsequent tribunals. On the other hand, the Tribunal should make such declaration of criminality so far as possible in a manner to insure that innocent persons will not be punished." (*Nazi Conspiracy and Aggression, Opinion and Judgment*, United States Government Printing Office, Washington, 1947, pp. 85-86). In another passage of the findings, the Court explaining the characteristics of criminal organizations said: "A criminal organization is analogous to a criminal conspiracy in that the essence of both is co-operation for criminal purposes. There must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter. 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." (*Ibid.*, p. 86).

¹⁸ *Report R. Jackson*, p. 298.

¹⁹ *Ibid.*, p. 299.

²⁰ *Nazi Conspiracy and Aggression, Opinion and Judgment*, p. 85.

²¹ *Ibid.*, p. 53.

²² It might be remembered that the limitation of criminal responsibility to individuals, in no way affects the traditional responsibility of States, under international law, for reparation, a topic which is independent of the question of criminal responsibility.

acts punishable under the draft code). The inclusion of the phrase "or a war in violation of international treaties, agreements or assurances" seemed to us superfluous.

(d) A very serious question in connexion with the crime under discussion is whether a *definition* of "aggressive war" would not be necessary. At the London Conference of 1945 the American delegation submitted the following definition of "aggression" with a view to having a definition of this crime included in the Nürnberg Charter:

"An aggressor, for the purposes of this Article, is that State which is the first to commit any of the following actions:

- "1. Declaration of war upon another State;
- "2. Invasion by its armed forces, with or without a declaration of war, of the territory of another State;
- "3. Attack by its land, naval, or air forces, with or without a declaration of war, on the territory, vessels, or aircraft of another State;
- "4. Naval blockade of the coasts or ports of another State;
- "5. Provision of support to armed bands formed in its territory which have invaded the territory of another State, or refusal, notwithstanding the request of the invaded State, to take in its own territory, all the measures in its power to deprive those bands of all assistance or protection.

"No political, military, economic or other considerations shall serve as an excuse or justification for such actions; but exercise of the right of legitimate self-defence, that is to say, resistance to an act of aggression, or action to assist a State which has been subjected to aggression, shall not constitute a war of aggression".²³

58. For the above text, the American delegation later substituted a new text reading as follows:

"An aggressor, for the purposes of this Article, means that State which is first to commit any of the following actions:

- "1. Declaration of war upon another State.
- "2. Invasion by its armed forces, with or without a declaration of war, of the territory, of another State.
- "3. Attack by its land, naval, or air forces, with or without a declaration of war, on the territory, vessels or aircraft of another State.

"No political, military, economic or other considerations may serve as an excuse or justification for such actions, but exercise of the right of legitimate self-defence, that is to say, resistance to an act of aggression or action to assist a State which has been subjected to aggression, shall not constitute a war of aggression".²⁴

59. The American initiative was met with the opposition of the Russian delegate, particularly, who reasoned as follows: "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".²⁵ The American initiative remained without practical result.

60. For the reasons offered by the Russian delegate at the London Conference we suggest that the International Law Commission abstain from any attempt at defining the notion of "aggression". Such an attempt would prove be a pure waste of time.

61. The text of Crime No. I envisages the case of a *State action* and, consequently, the criminal responsibility under international law of persons acting on behalf of the State. However, nothing excludes the responsibility of private persons if such a responsibility can be construed on the basis of the punishable acts mentioned in Section V below (other acts punishable under the draft code).

CRIME NO. II

The invasion by armed gangs of the territory of another State.

62. This text envisages an action of persons operating not as organs of the State but purely as members of a gang. Whereas, under Crime No. I, a soldier, when employed in a military action, is exempted from criminal responsibility under international law (it is in this way that the various military tribunals, including the Nürnberg Tribunal, have interpreted the "crime against peace"), according to the definition of Crime No. II *any person*, member of an armed gang, shall be considered as criminally responsible and consequently punished. This difference of treatment is justified. In the case of State action it would go beyond any logic to consider the simple soldier as criminally responsible for a State action which has been decided and directed by the government while, in the case of armed gangs, the participation in them, as a general rule, will result from the free decision of the persons—members of the gang.

CRIME NO. III

The fomenting, by whatever means, of civil strife in another State.

63. As a rule, fomenting of civil strife in another State is carried out through State action. In this case the State officials connected with such fomenting shall be considered responsible. If, on the other hand, the fomenting be due to private activities, the responsibility of the State officials of the State from which these private activities emanate will result from their *failure* to prevent or repress such fomenting by private activities. See below, Section VI (Rules concerning criminal responsibility under the draft code). The fomenting of civil strife is prohibited by article 4 of the Draft Declaration on Rights and Duties of States drafted by the International Law Commission, which reads as follows:

"Every State has the duty to refrain from fomenting civil strife in the territory of another State, and to

²³ Report R. Jackson, p. 294.

²⁴ *Ibid.*, p. 375.

²⁵ *Ibid.*, p. 328.

prevent the organization within its territory of activities calculated to foment such civil strife."^{25 a}

CRIME No. IV

Organized terroristic activities carried out in another State.

64. This crime may be the result of positive State or private activity. Terroristic activities of single persons without any organized connexion between them do not fall within the scope of Crime No. IV though the acts in question may constitute crimes under municipal law. In order that these activities be considered as a crime under the draft code, it is necessary that the acts to which the above text refers be effectuated on a more or less large scale by an *organized* group of individuals. Only under these conditions can terroristic acts be considered as affecting *peace*. Example: A political party organizes terroristic acts to be perpetrated in another State.

CRIME No. V

Manufacture, trafficking and possession of weapons the use of which is prohibited by international agreements.

CRIME No. VI

The violation of military clauses of international treaties defining the war potential of a State, namely, clauses concerning:

- (a) *The strength of land, sea and air forces.*
- (b) *Armaments, munitions and war material in general.*
- (c) *Presence of land, sea and air forces, armaments, munitions and war material.*
- (d) *Recruiting and military training.*
- (e) *Fortifications.*

CRIME No. VII

The annexation of territories in violation of international law.

CRIME No. VIII

1. *The commission of any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:*

- (a) *Killing members of the group.*
- (b) *Causing serious bodily or mental harm to members of the group.*
- (c) *Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.*
- (d) *Imposing measures intended to prevent births within the group.*
- (e) *Forcibly transferring children of the group to another group.*

2. *The commission of any the following acts in so far as they are not covered by the foregoing paragraph:*

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 war crimes as defined by the Charter of the International Military Tribunal.

65. The definition of the first paragraph of Crime No. VIII is taken from the Genocide Convention while the definition of the second paragraph of this crime is taken from article 6 (c) of the Nürnberg Charter (crimes against humanity). The distinction between these two crimes is not easy to draw. The military tribunals have discussed this subject at length. The outcome of these discussions is reported in the *Law Reports*, vol. XV, p. 138, to be the following:

"While the two concepts may overlap, genocide is different from crimes against humanity in that, to prove it, no connexion with war need be shown and, on the other hand, genocide is aimed against groups whereas crimes against humanity do not necessarily involve offences against or persecutions of groups."

66. Any attempt to include these two crimes in the draft code under any other form than the one suggested here will create considerable difficulties. That genocide cannot be omitted from the draft code should not be questioned. On the other hand, paragraph 2 of Crime No. VIII which constitutes the crime against humanity of the Nürnberg Charter should, in view of General Assembly resolution 177 (II), as far as possible also be included in the draft code. Perhaps it would be preferable to incorporate in the draft code only the crime of genocide, since governments might be very reluctant to accept the inclusion in the code of the acts constituting the crime against humanity as defined by the Nürnberg Charter.

CRIME No. IX

Violations of the laws or customs of war.

67. This crime is comprised in article 6 (b) of the Nürnberg Charter. In reality it does not affect the peace and security of mankind and, consequently, from a purely theoretical point of view, it should have no place in the draft code. Nevertheless, as we have seen, it figures among the crimes enumerated in the Nürnberg Charter. It is only on account of this connexion that we suggest its inclusion in the draft code.

68. Serious difficulties arise with regard to the definition of this crime.

(a) The first problem which has to be solved in this connexion is whether every violation of the laws or customs of war is to be considered as a crime under the code or whether only acts of a certain gravity should be classified as such.²⁶

²⁶ Article II, 1 (b) of the Control Council Law No. 10 could be interpreted as supporting the latter view, since it defines war crimes as "atrocities or offences against persons or property constituting violations of the laws or customs of war" (*Official Gazette of the Control Council for Germany*, No. 3, 31 January 1946, p. 50). However, there are violations of the laws of war which do not affect "persons or property" and which are of minor importance.

^{25a} Report of International Law Commission Covering its First session 12 April - 9 June 1949 (G.A. Official Records: Fourth Session. Supplement No. 10 (A/925), p. 8. Also in *Yearbook of the International Law Commission, 1949*, part. II.

In our view *any* violation of the laws and customs of war should be considered as a crime under international law.

(b) The second problem is whether one should enumerate all war crimes *exhaustively* or whether one should confine himself to a *general definition* of war crimes to which one would eventually add an indicative list of crimes.

International practice.

69. *The Commission on the Responsibility of the Authors of the War and the Enforcement of Penalties* created in 1919 by the Preliminary Peace Conference of Paris which had been directed to report upon the facts as to the breaches of the laws and customs of war committed by the forces of the German Empire and their Allies during the 1914-1918 war compiled the following list of crimes or group of crimes:

1. Murders and massacres; systematic terrorism.
2. Putting hostages to death.
3. Torture of civilians.
4. Deliberate starvation of civilians.
5. Rape.
6. Abduction of girls and women for the purpose of enforced prostitution.
7. Deportation of civilians.
8. Internment of civilians under inhuman conditions.
9. Forced labour of civilians in connexion with the military operations of the enemy.
10. Usurpation of sovereignty during military occupation.
11. Compulsory enlistment of soldiers among the inhabitants of occupied territory.
12. Attempts to denationalize the inhabitants of occupied territory.
13. Pillage.
14. Confiscation of property.
15. Exaction of illegitimate or of exorbitant contributions and requisitions.
16. Debasement of currency and issue of spurious currency.
17. Imposition of collective penalties.
18. Wanton devastation and destruction of property.
19. Deliberate bombardment of undefended places.
20. Wanton destruction of religious, charitable, educational and historic buildings and monuments.
21. Destruction of merchant ships and passenger vessels without warning and without provision for the safety of passengers and crew.
22. Destruction of fishing boats and of relief ships.
23. Deliberate bombardment of hospitals.
24. Attack on and destruction of hospital ships.
25. Breach of other rules relating to the Red Cross.
26. Use of deleterious and asphyxiating gases.
27. Use of explosive or expanding bullets and other inhuman appliances.
28. Directions to give no quarter.
29. Ill-treatment of wounded and prisoners of war.
30. Employment of prisoners of war on unauthorized works.
31. Misuse of flags of truce.
32. Poisoning of wells²⁷

70. *The United Nations War Crimes Commission* established during the Second World War accepted in principle the list drawn up by the Commission of 1919 and confined itself to completing it. We quote from the *History of the United Nations War Crimes Commission*, pp. 170-172, the following statement with regard to decisions of this Commission on the question of the definition of war crimes:

"The question of defining the concept of war crimes *stricto sensu* arose in the earliest stages of the Commission's activities. It arose in direct connexion with its terms of reference and the scope of its competence.

"... Many questions as to ways and means of carrying out the assignment were discussed, and, among them, the question of what should be considered a war crime. The question was raised by the British member, later the first Chairman of the Commission, Sir Cecil Hurst. He pointed out that there was a choice between two courses. One was to draw up a list of war crimes, as had previously been done by several bodies, and in particular by the 1919 Commission on Responsibilities. The alternative was to attempt a general definition of the concept, for example, that it consisted in violations of the laws of war. Opinions in favour of the first course prevailed ...

"The subject was referred to a Sub-Committee ... Considering the drawing up of a list of war crimes, the Sub-Committee deprecated the compiling of an extensive and binding list, and suggested that this be done as a general guide only, leaving freedom to effect further developments in the light of facts and evidence. It proposed the adoption of the list prepared by the 1919 Commission on Responsibilities ...

"... From 2 December 1943 the list of the 1919 Commission on Responsibilities was implemented as a working instrument, and the fact recognized that it had not the effect of preventing acts lying outside its scope to be treated as war crimes, or of binding governments to regard as a war crime every act contained therein. In other words, it was recognized that there were or at least might be war crimes not included in the body of the violations of the laws and customs of war as envisaged at the time of the elaboration of the 1919 Commission's list.

"Soon after the list was adopted, proposals were submitted to the Legal Committee for its extension to cover other violations.

"In April 1944 the Polish representative suggested that the practice of taking hostages, as exercised by the Nazi authorities, as well as other acts committed with the result of humiliating and degrading inhabitants of occupied territories, should be recognized as separate war crimes ...

"The Legal Committee submitted its opinion to the Commission on 9 May 1944. In its report it recommended that the following acts should be regarded as a war crime:

"(a) Indiscriminate mass arrests for the purpose of terrorizing the population, whether described as taking of hostages or not;

"(b) Acts, violating family honour and rights, the lives of individuals, religious convictions and liberty of worship, as provided for in Article 46 of The Hague Regulations.

"It suggested further that this extension be effected on the basis of the Preamble to the 4th Hague Convention of 1907, which reads as follows: 'Until a more complete code of the Laws of War can be drawn up, the High Contracting Parties deem it expedient to declare that, in cases not covered by the rules adopted by them, the inhabitants and the belligerents remain under the protection and governance of the principles of the law of nations, derived from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience.

²⁷ *American Journal of International Law*, vol. 14 (1920), pp. 114-115.

" This statement was taken as evidence that the field of war crimes was not limited to the violations of the laws of war as embodied in The Hague conventions, and that extensions had consequently a legal basis whenever required in the light of new facts and circumstances. The Commission accepted the above recommendation of the Legal Committee and added indiscriminate mass arrests to the list of the 1919 Commission on Responsibilities. As regards the second type of offences, it declared that the above quoted Preamble would at any time be taken into account and make possible the extensions suggested. As a consequence, the principle was adopted that the Commission was not bound by the said list of war crimes and that it was to proceed in all cases on the basis of general sources of international law and general principles of penal law."

71. The *Charter of the International Military Tribunal* at Nürnberg speaks generally of "violations of the laws or customs of war" enumerating, as examples, the following violations:

"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." (Article 6 (b).)

72. Identical in substance is the enumeration of war crimes in *Control Council Law No. 10* (Art. II, 1 (b)).²⁸ The *Charter of the Military Tribunal for the Far East* speaks simply of "violations of the laws or customs of war" (Article 5 (b)).

73. The municipal laws on war crimes vary as to the system of definition of war crimes. The *British Royal Warrant* of 14 June 1945 (Regulation 1) provides that "war crime" means a violation of the laws and usages of war committed during any war in which His Majesty has been or may be engaged at any time since 2 September 1939.²⁹ Article 1, paragraph 1, of a *French Ordinance* of 28 August 1944 concerning the suppression of war crimes and applicable to Metropolitan France, to Algeria and the Colonies runs as follows:

"Enemy nationals or agents of other than French nationality who are serving the enemy administration or interests and who are guilty of crimes or delicts committed since the beginning of hostilities . . . shall be prosecuted by French military tribunals and shall be tried in accordance with the French laws in force, and according to the provisions set out in the present Ordinance, where such offences even if committed at the time or under the pretext of an existing state of war, are not justified by the laws and customs of war".³⁰

74. Article 1 of the *French Ordinance No. 20* of 25 November 1945, which establishes the jurisdiction of

Military Government Tribunals in the *French Zone of Germany* reads as follows:

"Military Government Tribunals are competent to try all war crimes defined by international agreements in force between the occupying Powers whenever the authors of such war crimes, committed after 1 September 1939, are of enemy nationality or are agents, other than Frenchmen, in the service of the enemy, and whenever such crimes have been committed outside of France or territories which were under the authority of France at the time when the crimes were committed."³¹

75. Section 3 of the *Australian War Crimes Act* of 1945 provides, *inter alia*, that in the Act

"unless the contrary intention appears . . . 'war crime' means:

"(a) a violation of the laws and usages of war; or

"(b) any war crime within the meaning of the instrument of appointment of the Board of Inquiry appointed on the third day of September, one thousand nine hundred and forty-five, under the National Security (Inquiries) Regulations (being Statutory Rules, 1941, No. 35, as amended by Statutory Rules, 1941, Nos. 74 and 114 and Statutory Rules, 1942, No. 273)

"committed in any place whatsoever, whether within or beyond Australia during any war".³²

76. The instrument of appointment referred to provided for the setting up of a Board of Inquiry to investigate war crimes committed by enemy subjects and, on the matter of definition states that, for the purposes of the inquiry envisaged

"the expression 'war crime' includes the following:

(i) 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. (ii) Murder and massacres — Systematic terrorism. (iii) Putting hostages to death. (iv) Torture of civilians. (v) Deliberate starvation of civilians. (vi) Rape. (vii) Abduction of girls and women for the purpose of enforced prostitution. (viii) Deportation of civilians. (ix) Internment of civilians under inhuman conditions. (x) Forced labour of civilians in connexion with the military operations of the enemy. (xi) Usurpation of sovereignty during military occupation. (xii) Compulsory enlistment of soldiers among the inhabitants of occupied territory. (xiii) Attempts to denationalize the inhabitants of occupied territory. (xiv) Pillage and wholesale looting. (xv) Confiscation of property. (xvi) Exaction of illegitimate or exorbitant contributions and requisitions. (xvii) Debasement of the currency and issue of spurious currency. (xviii) Imposition of collective penalties. (xix) Wanton devastation and destruction of property. (xx) Deliberate bombardment of undefended places. (xxi) Wanton destruction of religious, charitable, educational and historic buildings and monuments. (xxii) Destruction of merchant ships and

²⁸ *Official Gazette of the Control Council for Germany*, No. 3, 31 January 1946, p. 50.

²⁹ *Law Reports*, vol. I, p. 105.

³⁰ *Ibid.*, vol. III, p. 93.

³¹ *Ibid.*, vol. III, p. 101.

³² *Ibid.*, vol. V, p. 94.

passenger vessels without warning and without provision for the safety of passengers and crew. (xxiii) Destruction of fishing boats and of relief ships. (xxiv) Deliberate bombardment of hospitals. (xxv) Attack and destruction of hospital ships. (xxvi) Breach of other rules relating to the Red Cross. (xxvii) Use of deleterious and asphyxiating gases. (xxviii) Use of explosive or expanding bullets and other inhuman appliances. (xxix) Directions to give no quarter. (xxx) Ill-treatment of wounded and prisoners of war, including—(a) transportation of prisoners of war under improper conditions; (b) public exhibition or ridicule of prisoners of war; and (c) failure to provide prisoners of war or internees with proper medical care, food or quarters. (xxxi) Employment of prisoners of war on unauthorized work. (xxxii) Misuse of flags of truce. (xxxiii) Poisoning of wells. (xxxiv) Cannibalism. (xxxv) Mutilation of the dead.”³³

77. The *Chinese Law* of 24 October 1946 concerning war criminals enumerates in its article III the following acts which it characterizes as war crimes in a narrower sense:

“1. Planned slaughter, murder or other terrorist action. 2. Killing hostages. 3. Malicious killing of non-combatants by starvation. 4. Rape. 5. Kidnapping children. 6. Enforcing collective torture. 7. Deliberate bombing of non-defended areas. 8. Destroying freighters or passenger boats without previous warning and without regard to the safety of passengers and crew. 9. Destroying fishing boats and relief ships. 10. Deliberate bombing of hospitals. 11. Attack or sinking of hospital ships. 12. Use of poison gas or bacteriological warfare. 13. Employment of inhuman weapons. 14. Ordering wholesale slaughter. 15. Putting poison on food or drinking water. 16. Torturing of non-combatants. 17. Kidnapping females and forcing them to become prostitutes. 18. Mass deportation of non-combatants. 19. Internment of non-combatants and inflicting on them inhuman treatment. 20. Forcing non-combatants to engage in military activities with the enemy. 21. Usurpation of the sovereignty of the occupied territory. 22. Conscription by force of inhabitants in the occupied territory. 23. Scheming to enslave the inhabitants of occupied country or to deprive them of their status and rights as nationals of the occupied country. 24. Robbing. 25. Unlawful extortion or demanding of contributions or requisitions. 26. Depreciating the value of currency or issuing unlawful currency notes. 27. Indiscriminate destruction of property. 28. Violating Red Cross regulations. 29. Ill-treating prisoners of war or wounded persons. 30. Forcing prisoners of war to engage in work not allowed by the International Convention. 31. Indiscriminate use of the armistice flags. 32. Making indiscriminate mass arrests. 33. Confiscation of property. 34. Destroying religious, charity, educational, historical constructions or memorials. 35. Malicious insults. 36. Taking money or property by force or extortion. 37. Plundering of historical artistic or other cultural treasures. 38. Other acts violating the law or usages of war, or acts whose

cruelty or destructiveness exceeds their military necessity, forcing people to do things beyond their obligation, or acts hampering the exercise of legal rights.”³⁴

Conclusions

78. With international practice as a background, we can now proceed to the solution of the problem we are dealing with here, namely, the definition of war crimes. In connexion with the draft code, the view has been expressed that one should set up an *exhaustive* enumeration of all acts which would constitute war crimes. However, the realization of this view would pre-suppose an authoritative *interpretation* of existing international treaties referring to the laws of war as well as a *codification* of the customs of war. The real question which confronts us, in connexion with this view, is therefore whether such an interpretation and codification is, at present, possible.

79. In our opinion such an undertaking would meet with the most serious difficulties, since there are deep divergencies of opinion on very important subjects concerning the laws and customs of war. One example will suffice to illustrate these difficulties: article 6 (b) of the Nürnberg Charter and paragraph 1 (b) of article II of the Control Council Law No. 10 declare without any qualification the “*killing* of hostages” as a “war crime”. In contradiction to this the Tribunal in the *Hostages Trial* held that, subject to a number of conditions, the killing of reprisal victims or hostages, in order to guarantee the peaceful conduct in the future of the population of occupied territories, was *legal*.³⁵

80. In *Kesselring's Trial*, the Judge Advocate expressed the opinion that there was

“nothing which makes it absolutely clear that in no circumstances—and especially in the circumstances which I think are agreed in this case—an innocent person properly taken for the purpose of a reprisal cannot be executed”.³⁶

81. In the *High Command Trial* the Tribunal, which examined facts concerning reprisal killings in occupied territories, similar to those proved in the *Hostages Trial*, found it “unnecessary to approve or disapprove the conclusions of the law [announced in the judgment delivered in the latter trial] as to the permissibility of such killings”. Consequently, it confined itself to pronouncing that the killings proved to have taken place, would not fall within the field of what was permissible according to the judgment in the *Hostages Trial*.³⁷

82. In our opinion the codification of the rules of war constitutes an *undertaking per se* which cannot be entered upon *within the framework* of the code of offences against the peace and security of mankind. To embark on such a venture now will render the attainment of our present goal, namely, the drafting and adoption

³³ *Ibid.*, vol. XIV, pp. 153-154. It should be observed that this list is in many respects wider in scope than the terms used in the 1919 list of war crimes.

³⁴ *Ibid.*, vol. VIII, pp. 76-88.

³⁵ *Ibid.*, vol. VIII, p. 85. Cf. pp. 12-13 and 83.

³⁷ *Ibid.*, vol. XV, p. 180.

³³ *Ibid.*, vol. V, pp. 94-96.

by the governments of such a code in the near future, illusory. What the Commission can do, in our opinion, is to adopt a general definition of the above crimes, leaving to the judge the task of investigating whether, in the light of the recent development of the laws of war, he is in the presence of "war crimes". However, we do not object to adding a list of violations of the rules of war to the general definition, provided, however, that this list does not exhaust the acts to be considered as "war crimes".

V. Other acts punishable under the Draft Code

83. That responsibility under international law cannot be limited to the crimes as defined above is beyond any doubt. The difficulty, therefore, in this regard is what further acts should be considered as punishable. A precedent of decisive character, in our opinion, is provided by the *Convention on the Prevention and Punishment of the Crime of Genocide* of 1948. This convention, apart from the crime of genocide, declares as punishable: conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide. We therefore suggest that the example of the above convention be followed here with the addition that *preparatory* acts, too, should be included in the list of the acts to be declared punishable.

84. Consequently, it is suggested that the text to be adopted should declare as punishable:

(a) Any one of the acts declared as crimes under international law by the draft code.

(b) Conspiracy to commit any one of these acts.

(c) Direct and public incitement to commit any one of these acts.

(d) Attempt to commit any one of these acts.

(e) Preparatory acts to any one of these acts.

(f) Complicity in any one of these acts.

85. *International practice* offers a number of examples where international responsibility has been accepted with regard to the acts listed above.

(a) *Conspiracy*: apart from the Genocide Convention, responsibility for conspiracy is recognized by the Nürnberg Charter, by the Charter of the International Military Tribunal for the Far East, and by Control Council Law No. 10. However, the provision of the Nürnberg Charter of interest here, as well as the corresponding provisions of the other two texts, declare punishable only conspiracy to commit "crimes against peace", not conspiracy to commit "war crimes" or "crimes against humanity". Generally speaking, there seem to be few examples of trials where the notion of conspiracy has been applied, because for the most part the notion of "common design" has been applied instead, though this notion does not coincide absolutely with conspiracy. Nevertheless, as it is reported in *Law Reports*, vol. XV, p. 90, war crime trials involving charges referring to conspiracy are not altogether missing. We quote from the above publication the following passage of interest here:

"Article 265 of the *French Code Pénal* provides that 'Any association formed, whatever its duration or

the number of its members, and any undertaking arrived at for the purpose of preparing or committing crimes against persons or against property, constitutes a crime against the public peace'. This provision, *inter alia*, was relied upon in the trial of Henri Georges Stadelhofer by a French Military Tribunal at Marseilles, 15 April 1948; in finding him guilty of the crime of *association de malfaiteurs*, among other offences, the Tribunal gave an affirmative answer to the question whether he, a German national, was guilty, during time of war, of 'having formed with various members of the German Gestapo an association with the aim of preparing or committing crimes against persons of property, without justification under the laws and usages of war'. A further example of a French prosecution for conspiracy is the trial of Horst Hebestreit, once chief of the S.D. at St. Girons. In the trial of Albert Raskin by a French Military Tribunal at Lyon, 16 January 1947, the only charge was that of *association de malfaiteurs*, the accused being found guilty and sentenced to two years' imprisonment. His offence was that of having taken part in the work of German units which exercised police functions in France."³⁸

(b) *Incitement* to commit a war crime which, however, was not committed, has been considered by Military Courts as punishable. The trials in question were concerned with the giving of unlawful orders, which were not executed. Thus, for instance, Brigadeführer Kurt Meyer was found guilty on charges including one according to which "in violation of the laws and usages of war [he] incited and counselled troops under his command to deny quarter to Allied troops."³⁹

(c) *Attempt* to commit a crime under international law has been characterized as punishable by several *municipal enactments* on war crimes. Thus, for instance, article 4 of the *Norwegian Law* of 13 December 1946 on the punishment of foreign war criminals provides that

"the attempted commission of any crime referred to in Article No. 1 of the present law is subject to the same punishment as an accomplished act. Complicity is likewise punishable."⁴⁰

Article 13 (1) of the *Yugoslav Law* of 25 August 1945 on the punishment of war criminals and traitors says that

"an attempt to commit acts outlined in this law shall be punishable as a complete criminal act."⁴¹

The same principle is established by the *Dutch war crimes laws*.⁴² The above principle has also been applied by *French Military Courts*.

(d) *Preparatory acts* are declared punishable by the Nürnberg Charter, the Charter of the International Military Tribunal for the Far East and by the Control Council Law No. 10 in the case of aggressive war or war in violation of international treaties, agreements or assu-

³⁸ *Ibid.*, vol. XV, pp. 90-91.

³⁹ *Ibid.*, vol. XV, p. 133.

⁴⁰ *Ibid.*, vol. XV, p. 89. For an application of this provision, see *Ibid.*, vol. VI, p. 120.

⁴¹ *Ibid.*, vol. XV, p. 89.

⁴² *Ibid.*, vol. XI, pp. 97-98.

rances. The great importance of the crimes to be established by the draft code, renders advisable the declaration that the preparatory acts to these crimes are punishable.

(e) The culpability for *complicity* in the commission of one of the acts declared as international crimes by the draft code does not need any comment.

VI. Rules concerning criminal responsibility under the Draft Code

A. GENERAL RULES OF RESPONSIBILITY

86. As we have seen in the preceding paragraphs, subjects of international criminal responsibility are individuals. It remains now to be determined whether with regard to this responsibility any distinction based on the official status, etc., of the individuals is to be made. The general principle is that *any* individual, whether acting in an official position or as a private person, may become the subject of international criminal responsibility. The crimes listed above — with the exception of those which presuppose a State action — can be committed either by State organs or by private persons. Thus, for instance, the fomenting of civil strife in a foreign country might be the result of activities of State organs, acting either on behalf of the State or independently, as well as the result of activities of a private organization. Yet, even in the case of crimes committed through State action, such as the waging of aggressive war, the responsibility of private persons may be involved if for instance their actions are covered by one of the punishable acts enumerated in Section V, above. From this it follows that the rule establishing responsibility for crimes under international law ought to be drafted in a *general* way, without distinction as to the position occupied by the individual or the capacity in which he acted.

87. We therefore suggest the following text:

“Any person, whether acting in an official capacity or as a private individual, who commits an act which constitutes a crime under international law, is responsible therefor and liable to punishment.”

88. In the case of persons invested with public authority (civil or military) the question arises whether their responsibility should be limited only to cases of *positive* criminal actions or whether it should also comprise the cases of *failure* to act (crime of omission). In the latter case this responsibility would find its parallel in the international (civil) responsibility of States for the conduct of their organs. As a State is internationally responsible for unlawful acts and omissions of its organs, so would its organs be criminally responsible for the same acts and omissions. Thus, to mention an example, in the case of armed gangs invading the territory of another State, we would have to distinguish the following responsibilities:

(a) The *traditional* international (civil) responsibility of the State in the event of its organs having supported the gangs (positive acts or omissions).

(b) The *criminal* responsibility under international law of the *public officials* for positive help given to the gangs of for their eventual *failure* to suppress their activities.

88a. The *criminal* responsibility under international law of all private persons responsible for the crime of armed gangs invading the territory of another State (participation in the gangs, incitement, etc.). The above thesis that public officials must be considered as criminally responsible under international law for *omissions* does not result from theoretical considerations; it is based on the recent practice from which we mention the following examples quoted from *Law Reports* vol. XV, pp. 67-68.

88b. Article 4 of the *French Ordinance* of 28 August 1944 concerning the suppression of war crimes, provides that:

“Where a subordinate is prosecuted as the actual perpetrator of a war crime, and his superiors cannot be indicted as being equally responsible, they shall be considered as accomplices in so far as they have organized or *tolerated* the criminal acts of their subordinates.”

89. In a similar manner, article 3 of the Law of 2 August 1947, of the *Grand Duchy of Luxembourg* on the suppression of war crimes, reads as follows:

“Without prejudice to the provisions of Articles 66 and 67 of the *Code Pénal*, the following may be charged, according to the circumstances, as co-authors or as accomplices in the crimes and delicts set out in Article 1 of the present law: superiors in rank who have *tolerated* the criminal activities of their subordinates, and those who, without being the superiors in rank of the principal authors, have aided these crimes or delicts.”

90. Article IX of the *Chinese Law* of 24 October 1946 governing the trial of war criminals States that:

“Persons who occupy a supervisory or commanding position in relation to war criminals and in their capacity as such have not fulfilled their duty to *prevent* crimes from being committed by their subordinates shall be treated as the accomplices of such war criminals.”

91. A special provision was also made in the *Netherlands* relating to the responsibility of a superior for war crimes committed by his subordinates. The Law of July 1947 adds, *inter alia*, the following provision to the Extraordinary Penal Law Decree of 22 December 1943:

“Article 27 (a) (3): Any superior who deliberately *permits* a subordinate to be guilty of such a crime shall be punished with a similar punishment as laid down in paragraphs 1 and 2.”

92. A similar provision is contained in article 9 of the *Netherlands East Indies Statute Book Decree* No. 45 of 1946 which reads:

“He whose subordinate has committed a war crime shall be equally punishable for that war crime, if he has *tolerated* its commission by his subordinate whilst knowing, or at least must have reasonably supposed, that it was being or would be committed.”

93. Finally, it might be mentioned that the *Greek Constitutional Act* No. 73 “Re punishment and trial of war criminals, etc.”, contains the following provision:

“When a subordinate is charged as principal of a

war crime and his superiors in the hierarchy cannot be punished also as principals in accordance with articles 56 and 57 of the Penal Law, the said superiors are considered as accessories, if they have organized the criminal act or have *tolerated* the criminal act of their subordinate."

94. The jurisdiction of the *Military Tribunals* established after the Second World War for the trial of war criminals has been exercised on the same lines. The principle that a duty rests on a commander to prevent his troops from committing crimes, and that the *omission* to fulfill this duty would give rise to liability, is illustrated by a number of trials, of which three trials by United States Military Commissions in the Far East and various trials by Australian Military Courts are described or referred to in *Law Reports*, vol. IV, pp. 86-87. See also *Ibid.*, vol. XV, p. 65.

95. The judgment of the majority of the United States Supreme Court on the *Yamashita Case* includes the following passage:

"It is urged that the charge does not allege that petitioner has either committed or directed the commission of such acts, and consequently that no violation is charged as against him. But this overlooks the fact that the gist of the charge is an unlawful breach of duty by petitioner as an army commander to control the operations of the members of his command by "permitting them to commit" the extensive and widespread atrocities specified. The question then is whether the Law of War imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the Law of War and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his *failure* to take such measures when violations result."⁴³

96. During the *Belsen Trial* the Judge Advocate, speaking of the allegations regarding camp chief Kramers' actions at Belsen, said that he did not think it mattered very much whether he acted wilfully or merely with culpable neglect. There was no charge against Dr. Klein of any deliberate acts of cruelty, and it was for the Court to consider whether Klein had a fair opportunity to do anything with regard to the conditions in Belsen and whether he so failed to act that a Court would have to find him guilty of the charge. What had to be decided was whether, at the time when he was really responsible and could improve matters, he failed either deliberately or in a culpable way deserving of punishment to do what he should have done.⁴⁴

97. In the judgment of the *High Command Trial* it was stated that a high commander "has the right to assume that details entrusted to responsible subordinates will be legally executed". Criminal responsibility does not automatically attach to him for all acts of his subordinates. There must be an unlawful act on his part or

a failure to supervise his subordinates constituting criminal negligence on his part. Later the Tribunal stated explicitly that "the commander must have knowledge of these offences and acquiesce or participate or criminally neglect to interfere in their commission". A similar test was applied to offences committed by units taking orders from other authorities: "The sole question then as to such defendants in this case is whether or not they knew of the criminal activities of the Einsatzgruppen or the Security Police and S. D. and neglected to suppress them" ⁴⁵

98. The judgment of the *Tokyo Trial* includes an interesting passage on responsibility for offences against prisoners of war which is significant as showing that the International Military Tribunal for the Far East also was willing to postulate a *duty* on the part of a superior to *find out* whether offences were being committed by his subordinates:

"In general the responsibility for prisoners held by Japan may be stated to have rested upon: 1. Members of the Government; 2. Military or naval officers in command of formations having prisoners in their possession; 3. Officials in those departments which were concerned with the well-being of prisoners; 4. Officials, whether civilian, military or naval, having direct and immediate control of prisoners.

"It is the duty of all those on whom responsibility rests to secure proper treatment of prisoners and to prevent their ill-treatment by establishing and securing the continuous and efficient working of a system appropriate for these purposes. Such persons fail in this duty and become responsible for ill-treatment of prisoners if:

"(1) They fail to establish such a system;

"(2) Having established such a system, they fail to secure its continued and efficient working.

"Nevertheless, such persons are not responsible if a proper system and its continuous efficient functioning be provided for, and conventional war crimes be committed, unless:

"(1) They had knowledge that such crimes were being committed, and having such knowledge they *failed* to take such steps as were within their power to prevent the commission of such crimes in the future, or,

"(2) They are at fault in *having failed* to acquire such knowledge."⁴⁶

99. In the *Hostages Trial* it is said, *inter alia*:

"We must assert again, in view of the defendants' statement that the responsibility for the taking of reprisal measures rested with the divisional commanders and the Croatian Government, that a corps commander must be held responsible for the acts of his subordinate commanders in carrying out his orders and for acts which the corps commander *knew* or ought to have known about."⁴⁷

⁴³ *Ibid.*, vol. XV, p. 66.

⁴⁴ *Ibid.*, vol. XV, p. 67.

⁴⁵ *Ibid.*, vol. XV, p. 70.

⁴⁶ *Ibid.*, vol. XV, pp. 72-73.

⁴⁷ *Ibid.*, vol. XV, p. 76.

Conclusion

100. In view of the above practice, we suggest the adoption of the following principle:

Any person in an official position, whether civil or military, who fails to take the appropriate measures in his power and within his jurisdiction, in order to prevent or repress punishable acts under the draft code shall be responsible therefor under international law and liable to punishment.

B. PARTICULAR RULES OF RESPONSIBILITY

(a) *Effect of command of the law on criminal responsibility under the draft code.*

101. The concept that command of the law may be taken into consideration in mitigation of punishment is found in certain municipal laws on war crimes. The following two questions arise with regard to the above concept:

(a) Does the fact that a crime under international law has been committed on command of municipal law deprive this act of its criminal character?

(b) Must the fact that an act, constituting a crime under international law, was commanded by municipal law have any influence in determining the penalty to be imposed?

102. With regard to the first question there can be no doubt that command of municipal law does not affect the *criminal* character of an act which is a crime under international law. It seems therefore hardly necessary to introduce into the code a rule to this effect.

103. The answer, however, to the second question is not devoid of difficulties. Moreover, international practice on this point does not afford any great help. The Charter of the Nürnberg Tribunal does not contain any rule permitting mitigation of punishment in the event of a criminal act being commanded by municipal law. Such a rule is only established in the case of criminal acts committed in execution of superior orders. On the other hand, there is nothing in the Charter of the Nürnberg Tribunal prohibiting the judge from taking into account the command of municipal law.

104. The Draft Convention on Genocide, elaborated by the Secretary-General of the United Nations contained the following article V:

“Command of the law or superior orders shall not justify genocide.”⁴⁸

In an explanatory note to this text it was said:

“In certain cases, of course, a command of the law or superior orders may constitute extenuating circumstances. That is a question for the judge.”⁴⁹

105. This provision was later excluded by the *Ad Hoc* Committee of the Economic and Social Council, and when introduced as an amendment by the Soviet Union in the Sixth Committee of the General Assembly, it was rejected. The final text of the Genocide Convention

does not contain any article prohibiting the command of municipal law from being taken into account in the determination of the punishment.

106. Finally, it should be added that the effect of command of the law on criminal responsibility under international law is expressly stated in certain municipal laws on war crimes. Thus the Greek Constitutional Act No. 73 “Re punishment and trial of war criminals, etc.” provides in article 3:

“Laws, decrees or regulations of enemy authorities, orders or authorizations issued by these authorities or authorities dependent on them may be taken into consideration by the Court in determining the responsibility of authors of war crimes only in mitigation of punishment and in accordance with the attempt rules.”

Conclusion

107. Though we are of the opinion that the rule eventually to be established should permit the judge to consider command of the law both as a defence and in mitigation of punishment, the experience gained from the discussions on the Genocide Convention makes it seem doubtful whether a provision to the above effect would have any chance of being adopted by the governments.

(b) *Effect of superior order on criminal responsibility under the draft code.*

108. This topic is connected in substance with the foregoing problem.

(i) *International practice*

109. The question of the effect of superior order is one of those which in general are dealt with in the various manuals of military law. The solution given to this problem by the older manuals is that superior order constitutes an absolute defence.

110. The *British Manual of Military Law* provided that

“Members of the armed forces who commit such violations of the recognized rules of warfare as are ordered by their government or by their commander are not war criminals and cannot therefore be punished by the enemy.” (Chapter XIV, paragraph 443.)⁵⁰

111. The *United States Basic Field Manual* ran as follows:

“Individuals of the armed forces will not be punished for these offences in case they are committed under orders or sanction of their government or commanders. The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall.” (Article 347.)⁵¹

112. The above view was abandoned towards the end of the Second World War in favour of a more severe conception. It was feared that the above provisions of

⁴⁸ E/447, p. 36.

⁴⁹ *Ibid.*

⁵⁰ *Law Reports*, vol. I, p. 18.

⁵¹ Cf. *Ibid.*, vol. I, p. 31.

the said manuals would permit a great number of Axis war criminals to escape punishment under the pretext that they had acted pursuant to "superior order".

113. The new text introduced into the *British Manual* in April 1944 reads as follows:

"The fact that a rule of warfare has been violated in pursuance of an order of the belligerent government or of an individual belligerent commander does not deprive the act in question of its character as a war crime; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent. Undoubtedly, a court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, not obviously unlawful, is the duty of every member of the armed forces and that the latter cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received. The question, however, is governed by the major principle that members of the armed forces are bound to obey lawful orders only and that they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity."⁵²

114. Similar is the new text of the *United States Manual* which in November 1944 replaced the older provision:

"Individuals and organizations who violate the accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defence or in mitigation of punishment. The person giving such orders may also be punished."⁵³

115. The *Charter of the Nürnberg Tribunal*, article 8, establishes the following rule:

"The fact that the 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."

116. This rule is a combination of an American and a Soviet proposal, submitted to the London Conference.

117. In the *American draft* of 14 June 1945 which was submitted to the Embassies of the United Kingdom, the Soviet Union and the Provisional Government of France at Washington in order to serve as a basis of discussion at the scheduled London Conference, the provision concerning superior order reads as follows:

"In any trial before an International Military Tribunal 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."⁵⁴

118. In an *aide-mémoire* of 14 June 1945 the *Soviet Government* submitted that the provision concerning the effect of superior command should be drafted as follows:

"The fact that the accused acted under orders of his superior or his government will not be considered as justifying the guilt circumstance."⁵⁵

119. The final text of article 8 of the Charter of the Nürnberg Tribunal as it stands today is that of the British draft of 23 July 1945.⁵⁶

120. The discussion on the above provision at the London Conference was very short. We quote from *Report R. Jackson*, pp. 367-368, the following:

"General Nikitchenko: . . . I do not propose any change but would like to point out two considerations. Would it be proper really in speaking of major criminals to speak of them as carrying out some order of a superior? This is not a question of principle really, but I wonder if that is necessary when speaking of major criminals.

"Sir David Maxwell Fyfe: There are two points: first, they have already said they were just doing what Hitler said they should do; and secondly, in international law, certainly in some cases superior orders were a defence, but in the sixth and seventh edition of Oppenheim it appears that they aren't a defence. If we don't make it clear, we may have some trouble on it.

"General Nikitchenko: There is a misunderstanding. I wasn't against disallowing orders of a superior as a defence, but I thought that in regard to major criminals it would be improper to say that superior orders could be used in mitigation of punishment.

"Sir David Maxwell Fyfe: It seems to me difficult. Suppose someone said he was threatened to be shot if he did not carry out Hitler's orders. If he wasn't too important, the Tribunal might let him off with his life. It seems to be a matter for the Tribunal. In one of the German cases on trial which were such a farce after the last war they did say that superior orders were no defence but could be taken into account on mitigation. That has been the general rule on superior orders in international law books.

"General Nikitchenko: If the other heads of the delegations consider it best, we have no intention of pressing it. In general, it should be considered in mitigation; we think it is proper.

"Mr. Justice Jackson: Of course, that was put in when we were considering trial of organizations, which would reach thousands of people who are not major criminals but would be reached through major criminals. And if you are going to get members of the Gestapo and S.S. through the conviction of the organization, it would be quite unfair if you would not take into consideration in fixing punishment the degree of real responsibility that they had. I think it would be a useful provision if we are to try organizations.

"Judge Falco: Leave it. Is it necessary to indicate to the Tribunal the reason for mitigation? If we say

⁵² *Ibid.*, vol. I, p. 18.

⁵³ *Ibid.*, vol. I, p. 32.

⁵⁴ *Report R. Jackson*, p. 58.

⁵⁵ *Ibid.*, p. 62.

⁵⁶ *Ibid.*, p. 352.

simply that orders are not a defence, it would seem to be left to the Tribunal to say that they may be a mitigation.

"Mr. Justice Jackson: That is about what we proposed originally—not an absolute defence but a mitigation.

"Sir David Maxwell Fyfe: The important part is that it should not be an absolute defence.

"Judge Falco: That is the important part. Must we add that that is the reason for the Tribunal to consider mitigation?"

121. As it appears from the above discussion all the members at the conference agreed that superior order could not be an absolute defence but that it might be considered only in mitigation of punishment.

122. The rule of article 8 of the Charter, according to which superior order is no defence, was applied in the same way by the Nürnberg Tribunal. Thus, the Court, rejecting the argument of the defence to the effect that there could not be any responsibility as most of the defendants acted under the orders of Hitler, declared the provision of article 8 to be "in conformity with the law of all nations".⁵⁷

123. The solution given to the question of superior order by the *Charter of the International Military Tribunal for the Far East* is the same as that of article 8 of the Charter of the Nürnberg Tribunal. Article 6 of the Charter of the International Military Tribunal for the Far East reads as follows:

"Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

124. From the above, it is evident that the answer as to the effect of superior order on the responsibility for crimes under international law can hardly be considered as easy. If, on the one hand, there is unanimity as to the fact that superior order might be taken into account for mitigation of punishment, on the other hand, no accord exists as to whether superior order might be a defence or not.

(ii) *From the point of view of dogmatic consideration*

125. The question of the effect of a superior order can only arise if the perpetrator of the unlawful act under international law, though mentally opposed to the order given to him, executed it because of the pressure exerted on him on account of the military or other discipline to which he was submitted. Actually, this was the main argument of the defendants in the war crime trials. They alleged that if they had not obeyed they would have been shot or otherwise punished.⁵⁸

126. The Charter of the Nürnberg Tribunal and the

Charter of the International Military Tribunal for the Far East do not admit superior order as a defence. Should the draft code endorse the example of the above two charters?

127. Another way of solving this problem would be to avoid any rule on this matter. This solution was adopted in the case of the Genocide Convention. The draft convention elaborated by the Secretary-General of the United Nations originally contained a particular provision to the effect that superior order could not justify genocide. This provision was omitted by the *Ad Hoc* Committee and an attempt by the Soviet delegation to introduce it again during the discussion of the above draft convention in the Sixth Committee of the General Assembly was defeated, the majority of this Committee considering that such a rule would be too rigid and that it could not be reconciled with the principles of criminal law applied in several countries.

Conclusion

128. Though it is not agreeable to depart, a few years only after the Nürnberg trial from a rule established by the Nürnberg Charter, we do not hesitate to suggest a solution which would not exclude superior order as a defence. Undoubtedly, from a purely dogmatical point of view, the principle adopted by the Nürnberg Tribunal might be absolutely correct. Yet, we have the feeling that public opinion would hardly give its approval to such a rigid rule. If necessary, in order to facilitate the adoption of the draft code by governments, one could envisage the possibility of omitting in the draft code any rule regarding the matter.

(c) *Effect of official position of the perpetrator of a crime under the draft code*

129. According to classical international law a State organ, acting as such, is, in principle, not responsible for his activities under international law (exception: war crimes). According to the new conception, this principle is not applicable if the action of the organ constitutes a "crime under international law". This conception is expressed in article 7 of the Nürnberg Charter as follows:

"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."

130. The *revised draft of agreement* of 30 June 1945 submitted by the American delegation to the London Conference contained the following rule:

"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."⁵⁹

131. The Soviet draft of 2 July 1945 contained the following text:

"The official position of persons guilty of war crimes, their position as heads of States or as heads

⁵⁷ *Nazi Conspiracy and Aggression, Opinion and Judgment*, p. 53.

⁵⁸ *Law Reports*, vol. XV, p. 157.

⁵⁹ *Report R. Jackson*, p. 124.

of various departments shall not be considered as freeing them from or in mitigation of their responsibility." ⁶⁰

132. The text elaborated by the *Drafting Subcommittee*, 11 July 1945 reads as follows:

"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." ⁶¹

133. The final text of article 7 of the Nürnberg Charter, as it stands, is the one of a draft submitted by the British delegation on 23 July 1945.⁶²

134. The rule according to which the official position of the perpetrator of an international crime does not free him from responsibility, is also found in article 6 of the Charter of the International Military Tribunal for the Far East. Its wording is as follows:

"Neither the official position, at any time, of an accused, nor . . . shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

135. The principle that the official position of the perpetrator does not free him from responsibility under international law has also been laid down in a number of municipal enactments concerning trials of war criminals. Thus the *Chinese Law* of 24 October 1946, governing the trial of war criminals provides in its Article VIII that the fact that the crimes were committed as a result of official duty or in pursuance of governmental policy shall not exonerate war criminals.⁶³ Again article 4 of the Law of 2 August 1947 of the *Grand Duchy of Luxembourg* on the suppression of war crimes lays down that:

"In no instances can the application of the laws mentioned in Article 1 be set aside under the pretext that the authors or co-authors of, or the accomplices in, the offences set out therein acted in the capacity of an official, a soldier, or an agent in the service of the enemy . . ." ⁶⁴

136. In view of the above practice, there can be no doubt as to the necessity of expressing the above principle in the draft code. What could be doubtful, *prima facie*, is whether the fact that the perpetrator of a crime under international law acted in an official position, could be considered in *mitigation* of punishment.

137. Article 6 of the *Charter of the International Military Tribunal for the Far East* accepts the view that the official position may be considered in mitigation of punishment. This, however, is taking us too far, since the simple fact that a person acted in an official capacity cannot affect his personal responsibility under international law and particularly after the substitution of

personal responsibility for State responsibility, which has been the great achievement of the Nürnberg Charter.

138. The question of mitigation of punishment, therefore, should be limited to cases where the perpetrator, acting in an official position, obeyed superior orders.

(d) *Reprisals and criminal responsibility under international law*

139. A very serious question which deserves careful consideration by the International Law Commission is whether the international responsibility for a crime under international law ceases, if the criminal act has been committed in connexion with the exercise, by a government, of the right of reprisals. In this connexion the fear has been expressed that the acknowledgment of such a plea would seriously affect the authority of the code to be drafted.

140. In the practice of the last war, a certain confusion surrounded the use of the term "reprisal", since this term was also used to justify the "taking and killing" of hostages, etc., in occupied countries. It seems, therefore, necessary to begin with a clear definition of this term.

141. By "reprisals" in international law, one understands the commission by a State of a violation of international law (reprisal) in reply to a preceding violation of this law on the part of another government and in order to induce the latter to stop its unlawful actions. With this meaning of the term "reprisals" in mind, we can now approach the question whether a person in an official position (only organs of States are entitled to exercise the right of reprisals) who commits an international crime may be declared free from responsibility on the ground that his act was committed in the exercise of the right of reprisals. For instance: a government, as a reprisal, issues to the commanders of submarines an order to attack and sink merchant vessels in violation of the respective rules of international law, an action which, if not committed as a reprisal, would constitute a *war crime*. Could the commanders of the submarines, acting under the above orders, be freed from responsibility on the ground that the order given by their government was covered by the exercise of the right of reprisals? In spite of the serious fears which have been expressed for the authority of the code to be drafted, in the event of its acknowledging the plea of reprisals, we cannot see how the plea of reprisals could not be admitted.

142. The right of reprisals is a *right* as long as it is exercised in conformity with international law and we cannot conceive how we could consider a person responsible for his actions if by these very actions he only contributes to the implementation of this right. As long as the right of reprisals exists in international relations — and any attempt to abolish it, in connexion with the code, would be a pure waste of time — an act carried out in the exercise of this right cannot be considered as involving international responsibility.

143. The question of criminal responsibility for violations of international law in the form of reprisals did not arise during the trials of the war criminals of the last war. This was mainly due to the paucity of trials

⁶⁰ *Ibid.*, p. 180.

⁶¹ *Ibid.*, p. 197.

⁶² *Ibid.*, p. 352.

⁶³ *Law Reports*, vol. XV, p. 161.

⁶⁴ *Ibid.*

in which allegations were made of the use of illegal methods of conducting hostilities during the last world war.⁶⁵

144. Some comments on the question of reprisals as a defence can be found in the records of the London Conference of 1945. The American delegation, in its "Redraft of Definition of Crimes" of 25 July 1945, after having enumerated the various acts characterized as "crimes", added a last paragraph reading as follows:

"No political, military, economic or other consideration may serve as an excuse or justification for any such action . . ."⁶⁶

145. During the discussion in the conference session of 25 July 1945, the French delegate, Professor Gros, attacked the above passage saying, *inter alia*:

"We have criticized the American draft on two things: one, it covers all violations — it is an article which gives jurisdiction for all war criminals, not only the major; and two, in the last paragraph it wants to dispose of the whole question of reprisals. The question of reprisals in international law is one existing for the last 500 years and you cannot wipe it out in just one word. That is the real reason we cannot go on the American draft."⁶⁷

146. There was no further discussion on this particular subject in the conference but the fact remains that the above-mentioned paragraph of the American draft was withdrawn.

Conclusion

147. On the basis of the above reflections, we conclude that there cannot be any doubt that the plea of reprisals must be admitted, provided the reprisals are legal, i.e., are exercised in conformity with international treaties and customary law. The answer to the question, however, whether a specific provision to this effect should be included in the code is more than doubtful. Personally, we think it wise to omit any reference to the plea of reprisals. It goes without saying that the right of reprisals, which is a fundamental right, cannot be abolished without a positive rule expressly providing for its abolition.

(e) General principles of penal law

148. The trial of crimes under international law involves the question of the applicability, of various general principles which are recognized and applied in municipal law. These general principles cover the questions whether a mistake of law or of fact may constitute a defence, whether vagueness, uncertainty or obsolescence of the law may serve as a good plea, whether the existence of duress has as a consequence the exemption from punishment, whether self-defence is a good plea, whether the knowledge of the character of an act as a crime is necessary for the punishment of the perpetrator of such an act, etc.

149. In the war crime trials after the last world war

these questions have been dealt with on the basis of application, by analogy, of the relevant rules in force in domestic penal law, although some deviations from these rules have sometimes proved necessary on account of the particularity of some of the problems of international law.

(i) As to *ignorance of the law*, which is not regarded as an excuse under municipal law, there has been some tendency to admit that an alleged war criminal cannot be expected to have been quite as well aware of the position of international law as of that of his own municipal law.⁶⁸

Thus, for instance in the *Scuttled U-Boats* case, the Judge Advocate in concluding his summing up, advised the Court in the following way:

"In my view, if the accused *did not have any knowledge of these terms* [he meant the terms of the act of surrender of the German armed forces in the Northwest region of Germany, which can be compared to a law in domestic law] and he did believe honestly that he had an order of this kind, and that he carried it out; well, then, gentlemen, you will be entitled to acquit him."⁶⁹

In the judgment delivered in the *High Command Trial* we find the following passage:

"Military commanders in the field with far-reaching military responsibilities cannot be charged under international law with criminal participation in issuing orders which are not obviously criminal or which they are not shown to have known to be criminal under international law. Such a commander cannot be expected to draw fine distinctions and conclusions as to legality in connection with orders issued by his superiors. He has the right to presume, in the absence of specific knowledge to the contrary, that the legality of such orders has been properly determined before their issuance. *He cannot be held criminally responsible for a mere error in judgment as to disputable legal questions.*"⁷⁰

(ii) According to the practice in trials of war crimes a *mistake of fact* may constitute a defence, just as it may in trials before domestic courts. Thus, for instance, in the trial by a *British Military Court* at Hamburg of Carl Rath and Richard Thiel, 23-29 January 1948, the Judge Advocate advised the court that it would be a good defence to the charge of having unlawfully executed certain Luxembourg nationals if an accused could show that he had *honestly believed* that he was participating in a lawful execution upon someone who was lawfully conscripted into the German army and had been sentenced to death.⁷¹

(iii) The plea of alleged *vagueness, uncertainty or obsolescence* of the law was put forward in the *Peleus Trial* and in the *Flick, I. G. Farben and Krupp Trials*. The United States Military Tribunal which conducted the *I. G. Farben Trial* showed a willingness to admit that changing international custom may render a rule of law obsolete and so take away its obligatory nature: "As

⁶⁵ *Law Reports*, vol. XV, p. 177.

⁶⁶ *Report R. Jackson*, p. 374.

⁶⁷ *Ibid.*, p. 381.

⁶⁸ See *Law Reports*, vol. XV, p. 182.

⁶⁹ *Ibid.*, vol. I, p. 70.

⁷⁰ *Ibid.*, vol. XV, p. 183.

⁷¹ *Ibid.*, vol. XV, p. 184 (footnote). See further examples, *ibid.*

custom is a source of international law, customs and practices may change and find such general acceptance in the community of civilized nations as to alter the substantive content of certain of its principles". "Technical advancement in weapons and tactics used in the actual waging of war" may have rendered obsolete or inapplicable certain rules relating to "the actual conduct of hostilities and what is considered legitimate warfare".⁷² Similarly, the judgment delivered in the *Flick Trial* stated that certain specified technical developments occurring since 1907

"make plain the necessity of appraising the conduct of defendants with relation to the circumstances and conditions of their environment. Guilt, or the extent thereof, may not be determined theoretically or abstractly. Reasonable and practical standards must be considered."⁷³

(iv) A considerable number of war crime trials contain statements regarding the validity of the plea of *duress*.

In the judgment delivered in the *Krupp Trial* it is said with regard to the plea of *duress* that:

"the question is to be determined from the standpoint of the honest belief of the particular accused in question The effect of the alleged compulsion is to be determined not by objective but by subjective standards."⁷⁴

In the *Einsatzgruppen Trial* we find the following pronouncement:

"Let it be said at once that there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever."⁷⁵

Some *municipal laws* on war crimes also contain provisions concerning the the case of *duress*. As it is also stated in *Law Reports*, vol. XV, p. 174, the general view in the after-war practice seems to be that *duress* may prove a defence if (1) the act charged was done to avoid an immediate danger both serious and irreparable; (2) there was no other adequate means of escape; (3) the remedy was not disproportionate to the evil.

(v) That *knowledge* of the criminal character of an act was a prerequisite for punishment has been recognized in various trials.

Thus, the Tribunal which conducted the *I. G. Farben Trial*, commenting on the findings of the Nürnberg Tribunal as to Kaltenbrunner, Frank, Frick, Streicher, and others, said:

"From the foregoing it appears that the International Military Tribunal approached a finding of guilty of any defendant under the charges of participation in a common plan or conspiracy or planning and waging aggressive war with great caution. It made findings of guilty under Counts I and II only where the evidence of both knowledge and active participation was conclusive. No defendant was convicted

under the charge of participating of participating in the common plan or conspiracy unless he was, as was the defendant Hess, in such close relationship with Hitler that he must have been informed of Hitler's aggressive plans and took action to carry them out or attended at least one of the four secret meetings at which Hitler disclosed his plans for aggressive war."⁷⁶

150. With the above practice in mind, we can now approach the question whether it would be advisable to include in the code any provision dealing with the above principles. In our opinion the task of elaborating general principles of penal law to be applied in trials of crimes under international law must be left to the tribunals. Moreover, it might be remembered that principles of municipal law are *ipso iure* applicable in trials of crimes under international law in so far as they are "general principles of law", in the meaning of Article 38 of the Statute of the International Court of Justice.

VII. Implementation of the Code

151. General Assembly resolution 177 (II) which directed the International Law Commission to prepare the draft code of offences against the peace and security of mankind does not contain any guidance as to whether the code must contain rules concerning the implementation of its provisions. Neither does the history of the above resolution. Consequently, the International Law Commission must be considered free to give to this problem the solution it thinks most appropriate.

152. Three ways of implementation of the provisions of the code can be envisaged: Implementation by an international *ad hoc* tribunal, implementation by a permanent international criminal tribunal and, finally, implementation by the municipal courts of the parties to the code.

A. IMPLEMENTATION BY AN INTERNATIONAL *Ad Hoc* TRIBUNAL

153. The Nürnberg Tribunal constitutes an historic example of this kind of implementation. If the International Law Commission should adopt such an implementation of the proposed code, the code could be confined to a list of acts, characterized as criminal under international law, supplemented by some principles concerning liability.

154. The limitation of the code to a list of offences only has been considered as very unsatisfactory. In our opinion, the adoption of a list of offences supplemented by rules considering liability would be a considerable progress in the development of international law, which will have considerable practical value. Undoubtedly, no one can claim that this is the ideal solution to be aimed at. Yet, if a far-reaching code should prove unobtainable under the present circumstances, to reject the obtainable alternative of a code limited to a list of offences would be tantamount to an unrealistic approach to the problem of the code of offences against the peace and security of mankind and its importance in international life.

⁷² *Ibid.*, vol. XV, p. 185.

⁷³ *Ibid.*

⁷⁴ *Ibid.*, vol. X, p. 148.

⁷⁵ *Ibid.*, vol. VIII, p. 91.

⁷⁶ *Ibid.*, vol. X, p. 34. See further examples, *ibid.*, vol. XV, p. 142.

155. It is very widely known that at Nürnberg a serious objection made by the deference against the legitimacy of that trial — and which has greatly impressed public opinion — was the plea that the acts for which the defendants were accused were not punishable under "existing" international law ("*nullum crimen sine lege*"). Such a plea would not be possible in the future with respect to acts declared punishable previous to the trial, by a tribunal *ad hoc*, of persons for such acts. A *realistic* approach to the problem of the code of offences against the peace and security of mankind cannot ignore this aspect of the question.

B. IMPLEMENTATION BY A PERMANENT INTERNATIONAL CRIMINAL TRIBUNAL

156. This implementation presupposes the existence of an international judicial organ having competence in criminal matters. The examination of the desirability and possibility of creating such an organ, constituting the subject of a special report to be examined by the Commission, lies beyond the scope of our present task.

157. However, some remarks may be made in connexion with the possibility of bringing perpetrators of crimes under the code before an international court. In order to answer this question it will be necessary to consider the *substance* of the crimes established by the draft code. That in the case of "aggressive war", the perpetrators of this crime could not be brought before an international judicial organ as long as the aggressor is not defeated and the perpetrators have not been captured, needs no further explanation. In fact, it would be very unrealistic to believe that a State, waging aggressive war, would extradite its public officials in order that they might be tried by an international court. The same applies to any other crime included in the draft code which is committed by State organs, pursuant to orders of their government.

158. However, some of the crimes in question might be perpetrated by *private* persons. Would this alter the situation now discussed? If these crimes — for instance, invasion of another country by armed gangs, commission of organized terroristic acts in another country, manufacture of weapons the use of which has been prohibited by international agreement, etc., — are committed at the instigation of the government, or tolerated by it, the probability of having the perpetrators of the above acts brought before an international judicial organ for trial would not be much greater than in the case of criminal State activities (aggressive war). If one does not want to close his eyes to realities, the crimes listed in the draft code cannot as a rule be committed in an organized State unless the acts in question are at least tolerated by the government. It is only when the criminal acts have been committed *against* the will of the government concerned, that trials before an international judicial organ would, in theory at least, be possible. The qualification "in theory at least" is due to the fact that a trial in the above case presupposes that States would accept to extradite their own nationals and that a government would have the courage to extradite persons whom public opinion might consider as national heroes.

159. In view of the above situation we think that, under the present organization of the international com-

munity, which does not possess *executive organs* for the arrest, against the will of the governments concerned, of perpetrators of international crimes, it would be very unrealistic to envisage seriously the possibility of having persons, responsible for international crimes, brought before an international criminal court with the rare exception of cases of crimes committed *against* the will of the governments. These exceptions, however, again presuppose that government will agree to the extradition of their nationals, such agreement being anything but certain.

160. Be it as it may, to above reasoning regarding the possibility of trials of perpetrators of crimes under the draft code by an international judicial organ should not be taken as an *a priori* refutation of the concept of an international organ of permanent character for the trial of persons having committed crimes established by the draft code. Independently of the *possibility* of having perpetrators of international crimes brought before an international court, there may be serious reasons of another nature supporting strongly the establishment of such an international criminal organ.

16. First of all, a judgment *in absentia* is not absolutely devoid of practical value. Furthermore, we must take into account that the existence of an international criminal court might have also *preventive* effects. As a matter of fact, as long as a government is not *determined* to commit, through its organs or private persons, acts prohibited by the draft code, the fear of a trial before an international organ, even *in absentia*, will not remain without effect.

C. IMPLEMENTATION BY MUNICIPAL COURTS

162. The Convention on the Prevention and Punishment of the Crime of Genocide offers an important precedent for the punishment of perpetrators of international crimes by municipal courts. Article V of this convention contains the obligation of the contracting parties to "provide effective penalties" for the crime of genocide and article VI establishes the obligation to try persons charged with genocide "by a competent tribunal" of the State on the territory of which the acts were committed.

163. Consequently, the question arises: can the above example of the genocide convention be followed here? That in the case of State activities (aggressive war, etc.) a trial of public officials before the municipal courts of their own country would be practically impossible needs no further explanation. The same must be accepted as applying more or less to the cases of crimes committed by private persons, who have been incited by the government to commit them, or with respect to acts tolerated by the Government. It is only when the government (a realist may ask: what about public opinion?) disapprove of the commission of crimes under the draft code that a trial before municipal courts does not risk to degenerate into a farce.

164. Though the categories of crimes, the trial of which may be entrusted to municipal courts, will be *very limited* in practice, such cases might really exist. With respect to our draft code the existence of such cases militates in favour of the adoption of the system of implementation accepted by the Genocide Convention.

Moreover, this convention constitutes a precedent which, in our opinion, is bound to influence the future development of international law.

165. As regards the particular problem of the form which the implementation of the code by municipal courts should take, we suggest the solutions adopted by the Genocide Convention. It is only after long discussions and concessions from all parts that the provisions of the above convention have been accepted. They represent, in our opinion, the *maximum* that governments would be inclined to accept, at least for the time being.

166. The above suggestion entails the following:

(a) That the parties to the code would have to undertake to enact the necessary legislation giving effect to the provisions of the code and in particular to provide "effective penalties" for persons responsible under the code.

(b) The parties to the code would have to undertake to try persons responsible under the code by the competent tribunals of the State in the territory of which the criminal act was committed.

(c) The parties to the code would have to undertake not to consider as political crimes, for the purpose of extradition, acts declared punishable by the code, as well as pledge themselves, in such cases, to grant extradition in accordance with their laws and treaties in force.

VIII. International control of the execution of the code by the parties to it

167. On this matter, too, the Genocide Convention constitutes, in our opinion, a *decisive* precedent. We do feel that it would be of great value to have in the code a provision which would correspond to article IX of the Genocide Convention and, according to which any party to the code would have the right to bring before the International Court of Justice, by unilateral action, any dispute relating to the interpretation, application of fulfilment of the code, including disputes relating to the responsibility of a State for acts declared punishable by the code.

168. As we have already stated, the chance of having serious trials of crimes under the code in the event of a government being in any way implicated in them is more than weak. However, the fear of the control by the International Court of Justice of the implementation of the code by the municipal courts is a factor which, under certain conditions, will not remain ineffective. Undoubtedly, a government, determined to commit or tolerate an act punishable under the code, will, under one pretext or another refuse to observe the provision of the code establishing the obligatory jurisdiction of the Court. Yet, such a conduct would constitute a violation of the code by the government concerned, a fact which would necessarily expose that government to the censure of public opinion.

169. An eventual decision of the International Court of Justice declaring that a government has failed to "prevent or punish" a crime under the code, or the fact that a government refuses to appear before the Court or does not allow an inquiry on its territory, etc.,

can not be without importance, particularly if the *situation* created as a consequence of the failure of a government to fulfil its obligation under the code is brought before the *United Nations organs*.

APPENDIX

Text of a Draft Code of Offences against the Peace and Security of Mankind suggested as a working paper for the International Law Commission

Basis of discussion No. 1

The parties to the code declare that the acts mentioned below are crimes under international law which they undertake to prevent and punish :

Crime No. I The use of armed force in violation of international law and, in particular, the waging of aggressive war.

Crime No. II The invasion by armed gangs of the territory of another State.

Crime No. III The fomenting, by whatever means, of civil strife in another State.

Crime No. IV Organized terroristic activities carried out in another State.

Crime No. V Manufacture, trafficking and possession of weapons the use of which is prohibited by international agreements.

Crime No. VI The violation of military clauses of international treaties defining the war potential of a State, namely, clauses concerning;

- (a) The strength of land, sea and air forces.
- (b) Armaments, munitions and war material in general.
- (c) Presence of land, sea and air forces, armaments, munitions and war material.
- (d) Recruiting and military training.
- (e) Fortifications.

Crime No. VII The annexation of territories in violation of international law.

Crime No. VIII 1. The Commission of any the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such :

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

2. The commission of any of the following acts in so far as they are not covered by the foregoing paragraph :

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 war crimes as defined by the Charter of the International Military Tribunal.

Crime No. IX Violations of the laws or customs of war. [namely, . . .]

- Crime No. X*
- (a) Conspiracy to commit any of the acts enumerated under Crimes I - IX.
 - (b) Direct and public incitement to commit any of the acts under Crimes I - IX.
 - (c) Preparatory acts to commit any of the acts under Crimes I - IX.
 - (d) Attempt to commit any of the acts under Crimes I - IX.
 - (e) Complicity in any of the acts under Crimes I - IX.

Basis of discussion No. 2

1. Any person, whether acting in an official capacity or as a private individual, who commits any of the acts mentioned in Basis of discussion No. 1 shall be responsible therefor under international law and liable to punishment.

2. Any person in an official position, whether civil or military, who fails to take the appropriate measures in his power and within his jurisdiction, in order to prevent or repress acts punishable under this code shall be responsible therefor under international law and liable to punishment.

Basis of discussion No. 3

[The fact that a person acted under command of the law or pursuant to superior order may be taken into consideration either as a defence or in mitigation of punishment if justice so requires.]

Basis of discussion No. 4

The parties to the code undertake to enact the necessary legislation giving effect to the provisions of the present code and, in particular, to provide effective penalties for persons guilty of any of the acts declared punishable by the code.

Basis of discussion No. 5

1. The parties to the code undertake to try by a competent tribunal persons having committed on their territory any of the acts declared punishable by the present code.

2. The foregoing provision does not affect the penal jurisdiction possessed by States under their municipal law.

Basis of discussion No. 6

1. The acts declared punishable by the present code shall not be considered as political crimes for the purpose of extradition.

2. The parties to the code pledge themselves to grant extradition for perpetrators of crimes under this code in accordance with their laws and treaties in force.

Basis of discussion No. 7

The parties to the code accept the jurisdiction of the International Court of Justice for disputes between them relating to :

(a) The interpretation, application or fulfilment of the present code;

(b) The responsibility of a State under international law for any of the acts declared punishable under the present code.

A dispute may be brought before the Court at the request of anyone of the parties to the code.

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Mémoire présenté par le Secrétariat

[*Texte original en français*]

[24 novembre 1950]

NOTE DU SECRÉTARIAT

Ce mémorandum a été préparé par le professeur Vespasien V. Pella, président de l'Association internationale de droit pénal, à la demande du Secrétariat. Le Secrétariat n'entend assumer aucune responsabilité quant aux opinions exprimées par l'auteur, mais considère que la documentation contenue dans ce mémorandum peut présenter un intérêt pour le Rapporteur spécial de la Commission du droit international et les autres membres de la Commission dans leurs travaux relatifs à la préparation d'un projet de code des crimes contre la paix et la sécurité de l'humanité.

TABLE DES MATIÈRES

	<i>Pages</i>
INTRODUCTION	281
Idéologie de la Charte	281
Difficultés rencontrées dans l'élaboration du mémorandum	281
Acceptations différentes du terme "droit pénal international"	282
Projets et études non officiels pouvant servir à l'élaboration d'un Code des crimes contre la paix et la sécurité de l'humanité	282