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**The Charter and Judgment of the Nürnberg Tribunal – History and Analysis:
Memorandum submitted by the Secretary-General**

Topic:
Formulation of the Nürnberg Principles

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**THE CHARTER AND JUDGMENT
OF THE NÜRNBERG TRIBUNAL**
HISTORY AND ANALYSIS

(Memorandum submitted by the Secretary-General)



United Nations — General Assembly
International Law Commission
Lake Success, New York
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Introduction

The General Assembly, at its second session, on 21 November 1947, adopted a resolution (177 (II)) in which it entrusted 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 resolution reads as follows:

Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal

The General Assembly

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

Directs the Commission to

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

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

By another resolution adopted on the same day (175 (II)), the General Assembly instructed the Secretary-General to do the necessary preparatory work for the beginning of the activity of the International Law Commission. The following is the text of this resolution:

Preparation by the Secretariat of the work of the International Law Commission

The General Assembly,

Considering that, in accordance with Article 98 of the Charter, the Secretary-General performs all such functions as are entrusted to him by the organs of the United Nations;

Considering that, in the interval between the first and the second sessions of the General Assembly, the Secretariat of the United Nations contributed to the study of problems concerning the progressive development of international law and its codification;

Instructs the Secretary-General to do the necessary preparatory work for the beginning of the activity of the International Law Commission, particularly with regard to the questions referred to it by the second session of the General Assembly, such as the draft declaration on the rights and duties of States.

The present memorandum is prepared in pursuance of the above-quoted resolution.

PART I

Survey of the Nürnberg Charter and Trial

1. THE MOSCOW DECLARATION, 1943

The determination of the Allies to punish the major war criminals of the European Axis first found expression in the Moscow Conference, 1943. By a "Declaration on German Atrocities",¹ dated 30 October 1943, the Governments of the United Kingdom, the United States and the Soviet Union jointly declared that "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, "will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be created therein". They further stated that this declaration was "without prejudice to the case of the major criminals, whose offences have no particular geographical localization and who will be punished by the joint decision of the Governments of the Allies".

2. THE LONDON AGREEMENT, 1945

Pursuant to the Moscow Declaration, the Governments of the United States, France, the United Kingdom and the Union of Soviet Socialist Republics signed an agreement in London on 8 August 1945.² This Agreement provided that there shall be established, after consultation with the Control Council for Germany, an International Military Tribunal for the trial of war criminals whose offences have no particular geographical location (article 1). The constitution, jurisdiction and functions of the International Military Tribunal shall be set forth in the Charter annexed to the Agreement (article 2). Each of the signatories shall take the necessary steps to make available for the investigation of the charges and trial the major war criminals detained by them who are to be tried by the International Military Tribunal (article 3). Pursuant to article 5 of the Agreement, which stipulated that any Government of the United Nations may adhere to it, the following Governments subsequently expressed their adherence to the Agreement: Greece, Denmark, Yugoslavia, the Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxembourg, Haiti, New Zealand, India, Venezuela, Uruguay and Paraguay.

¹ For full text, see appendix 1.

² For full text, see appendix 2. As to the negotiations leading to the Agreement, see report of Robert H. Jackson, United States representative to the International Conference on Military Trials, London, 1945, Department of State Publication 3080, Washington, 1949.

3. THE CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL

The Charter of the International Military Tribunal,³ commonly known as the Nürnberg Charter, which was annexed to and formed an integral part of the London Agreement, provided that the Tribunal shall consist of four members, each with an alternate, one member and one alternate to be appointed by each of the signatories (article 2). Neither the Tribunal, its members, nor their alternates can be challenged by the prosecution, or by the defendants or their counsel (article 3). The Tribunal shall take decisions by a majority vote and in case the votes are evenly divided, the vote of the President shall be decisive. Convictions and sentences shall, however, only be imposed by affirmative votes of at least three members of the Tribunal (article 4 (c)).

The jurisdiction of the Tribunal was defined in article 6 of the Charter. This article provided that the Tribunal shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes:

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

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

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

³ For full text, see appendix 2.

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

The Charter also provided that the official position of defendants, whether as heads of State or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment (article 7). Furthermore, 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.

Article 9 stipulated that the Tribunal may declare that a group or organization was a criminal organization. In case a defendant could not be found, the Tribunal was empowered to take proceedings against him in his absence (article 12).

Investigation and prosecution were entrusted to a committee of chief prosecutors, each signatory to appoint one chief prosecutor, who, by a majority vote were to settle the final designation of major war criminals to be tried by the Tribunal and to lodge the indictment with the Tribunal (article 14).

The Tribunal was empowered to impose upon a defendant, on conviction, death or such other punishment as shall be determined by it to be just (article 27), and, in case of guilt, sentences shall be carried out in accordance with the orders of the Control Council for Germany, which may reduce or otherwise alter the sentence, but may not increase the severity thereof (article 29).

4. THE INDICTMENT

On 18 October 1945, in accordance with article 14 of the Charter, an indictment⁴ was lodged with the Tribunal against the following 24 defendants:

⁴ See "Trial of the Major War Criminals before the International Military Tribunal": Proceedings published by the secretariat of the Tribunal at Nürnberg; also, "The Trial of German Major War Criminals": Proceedings of the International Military Tribunal sitting at Nürnberg, Germany, published by His Majesty's Stationery Office, London, 1946, part I, pp. 2-46.

Herman Goering; Rudolf Hess; Joachim von Ribbentrop; Wilhelm Keitel; Ernst Kaltenbrunner; Alfred Rosenberg; Hans Frank; Wilhelm Frick; Julius Streicher; Walter Funk; Hjalmar Schacht; Karl Doenitz; Erich Raeder; Baldur von Schirach; Fritz Sauckel; Alfred Jodl; Martin Bormann; Frantz von Papen; Arthur Seyss-Inquart; Albert Speer; Constantin von Neurath; Hans Fritzsche; Robert Ley; and Gustav Krupp von Bohlen und Halbach.

In addition, the following were named as groups or organizations (since dissolved), which should be declared criminal:

The Reich Cabinet; the Leadership Corps of the Nazi Party; the *Schutzstaffeln*, known as the SS; the *Sicherheitsdienst*, known as the SD; the *Geheime Staatspolizei*, known as the Gestapo; the *Sturm-
abteilungen*, known as the SA; the General Staff and High Command of the German Armed Forces.

The indictment consisted of the following four counts:

Count one. The common plan or conspiracy;

Count two. Crimes against peace;

Count three. War crimes;

Count four. Crimes against humanity.

5. THE TRIAL

The trial⁵ which took place at Nürnberg began on 20 November 1945 and ended on 31 August 1946, during which time the Tribunal held 403 open sessions, heard 33 witnesses for the prosecution against the individual defendants, and 61 witnesses, in addition to 19 of the defendants, gave evidence for the defence. One hundred and forty-three witnesses gave evidence for the defence by means of written answers to interrogatories.

As regards the accused organizations, the Tribunal appointed commissioners to hear evidence and 101 witnesses were heard for the defence before these commissioners, while 1,809 affidavits from other witnesses were submitted. Six reports were also submitted, summarizing the contents of a great number of further affidavits. Thirty-eight thousand affidavits, signed by 155,000 people, were submitted on behalf of the political leaders, 136,213 on behalf of the SS, 10,000 on behalf of the SA, 7,000 on behalf of the SD, 3,000 on behalf of the General

⁵ For proceedings of the trial, see "Proceedings," *Ibid.*

Staff and OKW, and 2,000 on behalf of the Gestapo. The Tribunal itself heard 22 witnesses for the organizations.

One of the defendants, Robert Ley, committed suicide on 25 October 1945. Gustav Krupp von Bohlen und Halbach could not be tried because of his physical and mental condition, and the charges against him were retained for trial thereafter. On 17 November 1945 the Tribunal decided to try the defendant Bormann in his absence under the provisions of article 12 of the Charter.

All of the defendants pleaded not guilty. They were represented by counsel, in some cases appointed by the Tribunal at the request of the defendants, but in most cases chosen by the defendants themselves.

6. THE JUDGMENT AND SENTENCE

On 30 September and 1 October 1946 the International Military Tribunal rendered judgment.⁶ Groups within the following four organizations were declared criminal in character, viz., the Leadership Corps of the Nazi Party, the SS, the SD and the Gestapo. The Tribunal declined to make that finding with regard to the SA, the Reich Cabinet and the General Staff and High Command.

With regard to individual defendants, the decision of the Tribunal was as follows:

Herman Goering, guilty on all four counts, sentenced to hanging;

Rudolf Hess, guilty on counts of conspiracy and crimes against the peace, sentenced to life;

Joachim von Ribbentrop, guilty on all four counts, sentenced to hanging;

Wilhelm Keitel, guilty on all four counts, sentenced to hanging;

Ernst Kaltenbrunner, guilty on counts of war crimes and crimes against humanity, sentenced to hanging;

Alfred Rosenberg, guilty on all four counts, sentenced to hanging;

Hans Frank, guilty on counts of war crimes and crimes against humanity, sentenced to hanging;

Wilhelm Frick, guilty on counts of crimes against the peace, war crimes and crimes against humanity, sentenced to hanging;

⁶ *Ibid.* Also "Nazi Conspiracy and Aggression: Opinion and Judgment", United States Government Printing Office, Washington, 1947.

Julius Streicher, guilty on the count of crimes against humanity, sentenced to hanging;

Walter Funk, guilty on charges of crimes against the peace, war crimes and crimes against humanity, sentenced to life;

Hjalmar Schacht, acquitted;

Karl Doenitz, guilty on counts of crimes against the peace and war crimes, sentenced to 10 years;

Erich Raeder, guilty on counts of conspiracy, crimes against the peace and war crimes, sentenced to life;

Baldur von Schirach, guilty on the count of crimes against humanity, sentenced to 20 years;

Fritz Sauckel, guilty on counts of war crimes and crimes against humanity, sentenced to hanging;

Alfred Jodl, guilty on all four counts, sentenced to hanging;

Martin Bormann, guilty on counts of war crimes and crimes against humanity, sentenced to hanging;

Frantz von Papen, acquitted;

Arthur Seyss-Inquart, guilty on counts of crimes against the peace, war crimes and crimes against humanity, sentenced to hanging;

Albert Speer, guilty on counts of war crimes and crimes against humanity, sentenced to 20 years;

Constantin von Neurath, guilty on all four counts, sentenced to 15 years;

Hans Fritzsche, acquitted.

Clemency to the Nazis found guilty was refused by the Allied Control Council and the sentences were put into effect. Herman Goering committed suicide before the execution.

PART II

**Consideration in the United Nations of plans for the formulation
of the principles of the Nürnberg Charter and judgment**

1. THE SECOND PART OF THE FIRST SESSION OF THE
GENERAL ASSEMBLY
(23 OCTOBER TO 16 DECEMBER 1946)

Three weeks after judgment was rendered at Nürnberg, the General Assembly convened in New York for the second part of its first session. At the opening meeting on 23 October 1946, the importance of the Charter of the Nürnberg Tribunal was given recognition. The President of the United States, addressing the General Assembly at that meeting, referred to the Nürnberg Charter as pointing "the path along which agreement may be sought, with hope of success," among the people of all countries "upon principles of law and justice". He said:

"In the second place, I remind you that 23 Members of the United Nations have bound themselves by the Charter of the Nürnberg Tribunal to the principle that planning, initiating or waging a war of aggression is a crime against humanity for which individuals as well as States shall be tried before the bar of international justice."⁷

In his Supplementary Report, delivered before the General Assembly on 24 October, the Secretary-General of the United Nations advanced the suggestion that the Nürnberg principles should be made a permanent part of international law. He pointed out that the Nürnberg trials had furnished a new lead in the field of the progressive development of international law and its codification, and declared:

"In the interest of peace, and in order to protect mankind against future wars, it will be of decisive significance to have the principles which were implied in the Nürnberg trials, and according to which the German war criminals were sentenced, made a permanent part of the body of international law as quickly as possible.

"From now on the instigators of new wars must know that there exist both law and punishment for their crimes. Here we have a high inspiration to go forward and begin the task of working toward a revitalized system of international law."⁸

The American member of the Nürnberg Tribunal, Mr. Francis Biddle, recommended, in his report to the President of the United States on 9 November 1946, "that the United Nations as a whole reaffirm the principles of the Nürnberg Charter in the context of a general codification of offences against the peace and security of mankind". In his reply, President Truman stated that the setting up of

⁷ 34th plenary meeting, Verbatim Record of the General Assembly, p. 684.

⁸ 35th plenary meeting, *ibid.* pp. 699-700.

"a code of international criminal law to deal with all who wage aggressive war . . . deserves to be studied and weighed by the best legal minds the world over"; and he expressed the hope that the United Nations would carry out Judge Biddle's recommendations.⁹

On 15 November 1946 the United States delegation introduced the following proposal:¹⁰

Resolution relating to the codification of the principles of international law recognized by the Charter of the Nürnberg Tribunal

The General Assembly

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

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

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

2. Directs the Assembly Committee on the Codification of International Law created by the Assembly's resolution of . . . to treat as a matter of primary importance the formulation of the principles of the Charter of the Nürnberg Tribunal and of the Tribunal's judgment in the context of a general codification of offences against the peace and security of mankind or in an International Criminal Code.

The United States proposal was referred to the Sixth (Legal) Committee along with an item on the agenda of the General Assembly relating to the implementation by the General Assembly of its obligation "to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law". The Sixth Committee in turn referred the proposal to its Sub-Committee I, which was charged with the question of the codification of international law.¹¹

The Sub-Committee took up the question during its 12th, 13th and 14th meetings.¹² With regard to the title of the proposal, the representative of the Union of Soviet Socialist Republics suggested

⁹ U. S. Department of State Bulletin 15 (1946), pp. 954-957.

¹⁰ Document A/C.6/69, 15 November 1946.

¹¹ This Sub-Committee consisted of representatives of the following countries: Belgium, Canada, China, Cuba, Czechoslovakia, Egypt, Norway, USSR, United Kingdom, U.S.A. The Norwegian representative was elected chairman and the Canadian representative was elected rapporteur. Summary record of 15th meeting of Committee 6.

¹² 3, 4 and 5 December 1946, documents A/C.6/Sub.1/W.35, 34 and 36.

that for the word "codification" be substituted "re-affirmation". The United Kingdom representative thought "confirmation" or "affirmation" more suitable. It was agreed to use "affirmation" instead of "codification".

As the Soviet representative objected to paragraph 2 of the United States proposal and moved its deletion, the representative of the United States proposed the insertion of the words "plans for" so as to make the sentence read "to treat as a matter of primary importance *plans for* the formulation of the principles of the Charter of the Nürnberg Tribunal".¹³

On the suggestion of the representative of China, the draft resolution referred in its preamble, not only to the Agreement for the establishment of an International Military Tribunal, for the prosecution and punishment of the major war criminals of the European Axis, signed in London on 8 August 1945, and of the Charter annexed thereto, but also took note of the fact that similar principles have been adopted in the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, proclaimed at Tokyo on 19 January 1946. The Sub-Committee felt that its view with regard to the Nürnberg principles was strengthened by this fact.

In its report to the Sixth Committee, the Sub-Committee further emphasized that the Committee, which it proposed that the General Assembly appoint on the progressive development of international law and its codification, "should give priority" to plans for the formulation of the principles of the Charter of the Nürnberg Tribunal and of the judgment of the Tribunal.

The report and draft resolution presented by the Sub-Committee were approved in substance by the Sixth Committee.¹⁴ The Cuban representative declared that he could not accept the proposal "because it affirmed the principles of international law without developing them". The Soviet representative persisted in his objection previously voiced in the Sub-Committee to the paragraph calling for plans for the formulation of the principles recognized in the Charter of the Nürnberg Tribunal and the Tribunal's judgment. He thought that it would suffice merely to affirm those principles.

The report containing the draft resolution of the Sixth Committee¹⁵ was considered by the General Assembly at its 55th plenary

¹³ Summary record of the 12th meeting, document A/AC.10/Sub. 1/W.35

¹⁴ For full text, see document A/C.6/116.

¹⁵ Document A/236, 10 December 1946.

meeting on 11 December 1946 and was adopted unanimously.¹⁶ The resolution (95 (I)) read as follows:

Affirmation of the principles of international law recognized by the Charter of the Nürnberg Tribunal

REPORT OF THE SIXTH COMMITTEE

Rapporteur: Professor K. H. BAILEY (Australia)

1. The General Assembly, at its forty-sixth plenary meeting on 31 October 1946 referred to the Sixth Committee the question of the implementation by the General Assembly of its obligation "to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law". The Sixth Committee referred the matter to a Sub-Committee, which had also before it a resolution proposed by the delegation of the United States relating to the principles of international law recognized by the Charter of the Nürnberg Tribunal (document A/C.6/69).

2. The majority of the Sub-Committee agreed, not only that a Committee should be appointed to consider the proper methods of implementing the obligation of the General Assembly under Article 13, paragraph 1, subparagraph a of the Charter, but that that Committee should give priority to plans for the formulation of the principles of the Charter of the Nürnberg Tribunal, and of the Judgment of that Tribunal, in the context of a general codification of offences against the peace and security of mankind or of an International Criminal Code. The Sub-Committee felt that this view was strengthened by the fact that similar principles had been adopted in respect of the trials of the major war criminals in the Far East.

3. The Sub-Committee's report (document A/C.6/116), presented by its Rapporteur, Mr. E. R. Hopkins (Canada), was adopted by the Sixth Committee which therefore recommends to the General Assembly the adoption of the following resolution:

Affirmation of the principles of international law recognized by the Charter of the Nürnberg Tribunal

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; and

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

¹⁶ Verbatim records of the General Assembly, p. 485.

Therefore,

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

Directs the Committee on 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.

At the same plenary meeting, the General Assembly adopted another resolution (94(I)) whereby it created a Committee on the Progressive Development of International Law and its Codification. On the recommendation of the President, the following States were appointed to serve on the Committee:

Argentina, Australia, Brazil, China, Colombia, Egypt, France, India, Netherlands, Panama, Poland, Sweden, Union of Soviet Socialist Republics, United Kingdom, United States of America, Venezuela, Yugoslavia.

2. THE COMMITTEE ON THE PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW AND ITS CODIFICATION (12 MAY TO 17 JUNE 1947)

A. SUMMARY OF PROCEEDINGS

The question of "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" figured on the agenda of the Committee on the Progressive Development of International Law and its Codification, in pursuance of the resolution of the General Assembly of 11 December 1946, quoted above.

After a preliminary discussion in its second meeting in connexion with the adoption of the agenda, the Committee, under the chairmanship of the representative of India (Sir Dalip Singh), had a general discussion on the subject at its 18th and 19th meetings on 4 and 5 June 1947.

The French representative (Professeur Henri Donnedieu de Vabres) submitted a proposal for the establishment of an international court of criminal jurisdiction.¹⁷ He also presented a memo-

¹⁷ Document A/AC.10/21, 15 May 1947.

random submitting certain definitions of the principles set forth in the Charter and judgment of the Nürnberg Tribunal.¹⁸

The Polish representative (Dr. Alexander Bramson) presented a proposal providing that "propaganda of a war of aggression constitutes a crime against peace under article 6a of the [Nürnberg] Charter".¹⁹

The United States representative (Professor P. C. Jessup), on his part, submitted another memorandum²⁰ in which he urged that the function of the Committee was to study methods or *plans* for the formulation of the Nürnberg principles rather than to undertake consideration of substantive provisions. He further suggested certain steps to be taken to accomplish this task.

The Committee decided at its 19th meeting to take the United States proposal as a basis of discussion, the main points of which are as follows:

"4. . . .

"(a) The Commission of Experts should be instructed to prepare a draft convention containing the Nürnberg principles. This draft convention need not be deferred until the preparation of a complete general code of offences against the peace and security of mankind or of a complete international criminal code is finished. In view of the fact that the General Assembly resolution of 11 December 1946 provides that the formulation of the Nürnberg principles should be considered as a matter of primary importance, this draft convention should be the first one to be prepared by the Commission.

"(b) The preparation of the above-mentioned codes may be begun by the Commission of Experts at the same time as the formulation of the Nürnberg principles.

"(c) In undertaking the formulation of the Nürnberg principles, the Commission of Experts should bear in mind that those principles may eventually be incorporated in the codes referred to in paragraph (a).

"(d) Upon the completion of the said two codes or of either of them, the Commission of Experts may consider the question of including therein the provisions contained in the convention regarding the Nürnberg principles.

¹⁸ Document A/AC.10/34, 27 May 1947.

¹⁹ Document A/AC.10/38 Corr. 1, 2 June 1947.

²⁰ Document A/AC.10/36, 29 May 1947.

"5. The question of enforcement of the Nürnberg principles by the establishment of an International Criminal Court or otherwise should be deferred for consideration and study by the Commission of Experts. However, in view of the importance of the proposals of the French delegation, the report of our Committee should contain special mention of this subject and should recommend that the attention of the Commission of Experts be called thereto."

At the suggestion of the United States representative, the Committee appointed a drafting Sub-Committee consisting of the representatives of Argentina, France, the Netherlands, the United States of America and the Union of Soviet Socialist Republics. The Rapporteur (Professor J. L. Brierly of the United Kingdom) was invited to attend the Sub-Committee's meetings. Upon the request of the Chairman, the representative of France served as convener for the Sub-Committee.

The Sub-Committee submitted its report to the Committee the following day, 6 June 1947, reading as follows:²¹

"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 ILC 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."

After long discussions, at its 20th and 21st meetings, the Committee adopted a report for submission to the next session of the General Assembly. The following is the text of the report:²²

²¹ Document A/AC.10/SR.20, p. 2.

²² Document A/AC.10/52, 17 June 1947.

Report of the Committee on the plans for the formulation of the principles of the Nürnberg Charter and judgment

1. By a resolution of 11 December 1946 the General Assembly directed this Committee "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".

2. The Committee considered the nature of the task entrusted to it by this resolution. In particular it noted that the General Assembly had requested it to propose "plans for the formulation" of the Nürnberg principles, and the Committee by a majority decided not to undertake the actual formulation of those principles, which would clearly be a task demanding careful and prolonged study. The Committee therefore concluded that it was not called upon to discuss the substantive provisions of the Nürnberg principles, and that such a discussion would be better entrusted to the International Law Commission, the establishment of which it had decided to recommend to the General Assembly. It recommends unanimously that the ILC should be invited to prepare:

(a) A draft convention incorporating the principles of international law recognized by the Charter of the Nürnberg Tribunal^{1a} and sanctioned by the judgment of that Tribunal;^{1b} 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 subparagraph (a) of this paragraph.

The Committee further desires to record its opinion that this task would not preclude the ILC from drafting in due course a code of international penal law.

3. The Committee also decided by a majority to draw the attention of the General Assembly to the fact that the implementation of the principles of the Nürnberg Tribunal and its judgment, as well as the punishment of other international crimes which may be recognized as such by international

Notes 1a, 1b and 1c form part of the report.

^{1a} The representative of France submitted a memorandum on 27 May 1947 concerning draft texts relating to the principles of the Charter and judgment of the Nürnberg Tribunal (A/AC.10/34).

^{1b} The representative of Poland desired to have it placed on record that the Polish Government considers that propaganda of aggressive wars constitutes a crime under international law and falls under the scope of preparation to such wars as listed in article 6a of the statute of Nürnberg. This crime is a dangerous form of preparation, likely to cause and increase international friction and lead to armed conflicts. It is a form of psychological armaments as opposed to the notion of moral disarmament. The Criminal Code of Poland, which is in force from 1 September 1932, contains the prohibition of propaganda of wars of aggression in its article 113.

The Polish Government expects that a similar provision will be incorporated into the codification of crimes against peace and security, and requests that the International Law Commission take appropriate action on this matter as one of primary importance.

The representatives of Yugoslavia and the Soviet Union associate themselves with this statement.

multipartite conventions, may render desirable the existence of an international judicial authority^{1c} to exercise jurisdiction over such crimes.

The representatives of Egypt, Poland, the United Kingdom, the Union of Soviet Socialist Republics and Yugoslavia desired to have their dissent from this decision recorded in this Report. In their opinion the question of establishing an international court falls outside the terms of reference from the General Assembly to the Committee.

B. RÉSUMÉ OF DISCUSSIONS ON THE MAIN POINTS AT ISSUE

The following is a resumé of the discussions on the main points at issue in the Committee on the Progressive Development of International Law and its Codification.

(1) *The question of the competence of the Committee: devising plans for the formulation of the Nürnberg principles*

From the outset, the question arose, in connexion with the adoption of the agenda, whether the task of the Committee on the Progressive Development of International Law and its Codification was to undertake the formulation of the substantive provisions of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, or whether the Committee should confine itself merely to devising plans for the formulation of such principles.

The representative of France considered that the resolution of the General Assembly expressly mentioned that the subject was of primary importance. It wanted the present Committee to give a concrete form to the Nürnberg principles. He argued that another item on the agenda dealt with genocide and gave to the Committee a definite task to give its opinion on the substance of that question. Hence, with regard to the Nürnberg principles which were already accepted as a part of international law, the Committee need not restrict itself to methods only. The resolution of the Committee, he concluded, should not only reaffirm the principles of Nürnberg but, in addition, give them a concrete formulation. The position of the representative of France was supported by the representative of Poland.

Opposed to this view, the United States representative urged that the function of the Committee was merely to study methods or plans for the formulation of the principles in question rather than to undertake consideration of substantive provisions. In his memorandum submitted to the Committee on 29 May 1947, he referred to the pro-

^{1c} The representative of France submitted a memorandum on 15 May 1947 concerning a draft proposal for the establishment of an international court of criminal jurisdiction.

ceedings of Sub-Committee I of the Sixth Committee of the previous session of the General Assembly to show that it was intended that the present Committee should confine itself to devising plans and not to undertake actual formulation.²³

This view of the representative of the United States was shared by most members of the Committee including the representatives of Brazil (Mr. Gilberto Amado), Yugoslavia (Professor Milan Bartos) and the Soviet Union (Professor Dr. Vladimir Koretsky) and was carried by a vote of the Committee, 14 in favour, 1 against and 1 abstention.

In this connexion it may be mentioned that the representative of France had, in his memorandum of 27 May 1947, submitted certain definitions of the principles set forth in the Charter and judgment of the Nürnberg Tribunal. As the Committee had decided to deal only with plans for the formulation of the Nürnberg principles, it decided not to go into the substance of the principles set forth in the French memorandum, which principles may be summarized as follows:²⁴

(a) The supremacy of international law over municipal law in the international penal sphere;

(b) The individual is subject to international penal law which can inflict penalties on the authors of international offences and their accomplices;

(c) An order issued by a superior does not justify the committing of an act contrary to penal law;

(d) Any war of aggression, i.e., any war undertaken in cases where the use of force is not authorized by the Charter of the United Nations, should be considered as a crime under the law of nations;

(e) The laws of war, that is, the Hague Convention and annexes, subject to any amendments which may be made thereto, should apply to belligerents irrespective of whether their cause is just or not.

²³ See section 2 A above.

²⁴ Document A/AC.10/34.

(2) *A draft convention incorporating the Nürnberg principles*

The proposal of the United States representative, referred to above, suggested, under paragraph (a), that "the Commission of Experts should be instructed to prepare a draft convention containing the Nürnberg principles".²⁵

This suggestion met with the general approval of the Committee. The Soviet and Yugoslav representatives were among the first to express agreement with it.²⁶

The report of the drafting Sub-Committee proposed that the International Law Commission should be invited to prepare "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".²⁷

When the Committee considered the report of the drafting Sub-Committee, the representative of Yugoslavia moved to delete the words "binding force for all" and replace them by "binding force for the signatory States" on the ground that conventions could only bind the signatory States.

The representative of France agreed with the point of view of the Yugoslav representative and suggested to delete the last part of the sentence altogether beginning from the words "in order to", etc. This suggestion was supported by the representative of the Soviet Union and approved by the Committee. The paragraph, as finally adopted by the Committee read: "(1) a draft convention incorporating the principles of international law as recognized by the Charter of the Nürnberg Tribunal and sanctioned by the judgment of that Tribunal".

(3) *General codification of offences against the peace and security of mankind, and/or an international criminal code*

The resolution of the General Assembly of 11 December 1946 directed the Committee "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 that Tribunal".

The United States proposal referred to above, which served as a basis of discussion, suggested, in paragraph (a), that the draft conven-

²⁵ Document A/AC.10/36, 29 May 1947, p. 4.

²⁶ Document A/AC.10/SR.19, p. 23.

²⁷ Document A/AC.10/SR.20, p. 2.

tion to be prepared by the International Law Commission containing the Nürnberg principles "need not be deferred until the preparation of a complete general code of offences against the peace and security of mankind or of a complete international criminal code is finished".

There was thus introduced the conception of three different codes or codifications: one concerning the Nürnberg principles; another relating to offences against the peace and security of mankind; and the third suggesting a complete international criminal code. The question therefore arose as to whether the Committee should make reference to either or both of the two last-mentioned codes or codifications.

The representative of Poland urged that the General Assembly's resolution left open whether the form of a general codification of offences against the peace and security of mankind should be chosen or that of an international criminal code. Since this Committee was dealing with methods only, it was not for the Committee to make this choice, which should be left to the International Law Commission.

The representative of the Soviet Union thought that the enormous task of completing international criminal codes would need time. The International Law Commission therefore should at this stage limit itself to the subject of crimes against the peace and security of mankind in which the peoples of the world were most interested. He thought therefore that the International Law Commission should be invited to prepare a draft codification of crimes against peace and humanity, in which codification a place would be found for the Nürnberg principles once these had been laid down in a multipartite convention.

After a lengthy debate, it was decided that the International Law Commission should be invited to prepare "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 sub-paragraph (a) of this paragraph", that is, the Nürnberg principles.

With regard to the question of an international criminal code, the report of the drafting Sub-Committee suggested that the preparation of a draft convention incorporating the Nürnberg principles and of a detailed plan of general codification of offences against the peace and security of mankind "does not preclude the International Law Commission 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".

The representative of Yugoslavia expressed himself as opposed to the paragraph in question. The United States representative proposed an amendment providing that the International Law Commission was not precluded "from drafting in due course a code that would incorporate the principles of international law relative to offences having an international character, but not included in the codification envisaged in A2", that is, in the codification of offences against the peace and security of mankind.

This amendment was supported by the representative of Argentina (Dr. Enrique Ferrer Vieyra). It was also preferred by the representative of the Soviet Union who objected to giving any definition to "international criminal code" such as the last part of the draft of the Sub-Committee would seem to imply, in the words "a code that would regulate the concerted repression by States of offences bearing an international character".

The representative of Yugoslavia was in agreement with this point of view as every definition would limit the scope of activities of the International Law Commission and this might prove to be dangerous.

The Soviet representative proposed an amendment to the United States amendment providing that "the above-mentioned task does not preclude the International Law Commission from drafting in due course an international criminal code as a whole or those chapters not dealing with offences against the peace and security of mankind".

The French representative suggested the following text which was agreed to by all the members:

"B. The Committee is of the opinion that the Rapporteur should indicate in his report that the above-mentioned task does not preclude the drafting, in due course, by the International Law Commission of a code of international penal law."

(4) The question of an international court of criminal jurisdiction

Early in the deliberations of the Committee on the Progressive Development of International Law and its Codification, at its second meeting, the representative of France advocated the setting up of an international criminal court. As a judge of the Nürnberg Tribunal, Professeur Donnedieu de Vabres said that he was very much alive to criticism of the Nürnberg judgment on the ground that the Tribunal was composed only of representatives of victor countries and did

not represent the international community. The Covenant of the League of Nations and the Statute of the Permanent Court of International Justice did not provide for any criminal jurisdiction. Neither the Charter of the United Nations nor the Statute of the International Court of Justice had filled this gap. Therefore, it has been necessary to set up an *ad hoc* tribunal at Nürnberg. The defective composition of this tribunal proved that it would be necessary to establish a truly international criminal court.

The proposal of the French representative for the establishment of an international court of criminal jurisdiction was elaborated in a memorandum submitted to the Committee on 15 May 1947.²⁸ It envisaged "two distinct fields of jurisdiction":

(I) Jurisdiction conferred on the criminal chamber to be established in the International Court of Justice. This chamber might be composed of fifteen judges elected under the same conditions as the other members of the International Court of Justice. It would deal with:

(a) Juridical matters such as conflicts regarding judicial and legislative competence and questions relating to the jurisdiction of a *res judicata* which are likely to arise between courts of different States;

(b) Indictments for the crime against peace (the crime of aggression in all its forms) brought against a State or its rulers;

(c) Indictments for the crime against humanity which might be brought against a State or its rulers.

(II) Jurisdiction conferred on an international court of justice. The organization of this court might be based on the Geneva Convention of 16 November 1937 on the international repression of terrorism. It would deal with:

(a) All international infringements capable of being committed in time of peace, including those known as offences against the law of nations;

(b) War crimes, that is to say, violations of common law which are also violations of the laws of war;

(c) All common law offences connected with crimes against humanity committed by the rulers of a State.

²⁸ Document A/AC.10/21, 15 May 1947.

The French proposal further provided that "the jurisdiction vested in the international court might be optional, the State holding the offender having the option, according to the case, of trying him in its own tribunals, to extradite him (if its jurisdiction is subsidiary) or, on the contrary, to hand him over to the international tribunal".

The discussion in the Committee on the question of an international court of criminal jurisdiction was resumed at its 19th meeting. The proposal of the United States, as contained in point 5 of its memorandum,²⁹ referred to above, was taken as a basis of discussion. This paragraph read as follows:

"5. With respect to implementing the Nürnberg principles by the establishment of an International Criminal Court or of a criminal chamber in the International Court of Justice, it may be pointed out that, if our Committee is not to undertake discussion of substantive provisions regarding the Nürnberg principles, *a fortiori* it should not undertake discussion as to what means should be adopted with a view to enforcing substantive provisions not yet agreed upon. The question of jurisdiction and appropriate means of enforcement can obviously be considered more appropriately after the substantive provisions are settled. For these reasons, it is believed that the question of enforcement of the Nürnberg principles by the establishment of an International Criminal Court or otherwise should be deferred for consideration and study by the Commission of Experts. However, in view of the importance of the proposals of the French delegation, the report of our Committee should contain special mention of this subject and should recommend that the attention of the Commission of Experts be called thereto."

The representative of Poland observed that he could not agree to the United States proposal, as crimes against peace could be treated only after a war. In times of peace it was for the Security Council to take action when peace was threatened. Therefore there was no need to create in times of peace an international tribunal which could only function after a future war.

The representative of Yugoslavia objected to the suggestion for an international criminal court on the ground that it was contrary to the Charter of the United Nations. The creation of a criminal chamber in the International Court of Justice would violate Article 34 of the Statute of the Court, which provided that only States could be parties in cases before the Court. Consequently a recommendation to

²⁹ Document A/AC.10/36.

the International Law Commission that it study the possibility of creating a criminal chamber would consist in suggesting to that Commission that it alter the Charter. Similarly, the setting up of an international criminal court as an organ of the United Nations would be impossible under the provisions of Article 7 of the Charter. As to the creation of an independent international criminal court, this was a matter for the Governments to take action on and not for the United Nations. It was urged, moreover, that the question was beyond the terms of reference of the Committee.

As against these arguments of the Yugoslav representative, the French representative urged that the International Law Commission was perfectly entitled to make a recommendation to the General Assembly with regard to giving criminal jurisdiction to the International Court of Justice, although it was granted that this would require an alteration of the Statute of the Court. As to the provision of the Statute that only States could be parties in cases before the Court, this was true for civil cases, but the rule would have to be changed for criminal cases. As to whether an independent international criminal court should be set up, he had never intended that this Committee make a choice between the two possibilities. He further argued that there was a close connexion between the Nürnberg principles and an international criminal jurisdiction. The General Assembly resolution referred both to the Charter and the judgment of the Nürnberg Tribunal.

The representative of the Netherlands (Dr. de Beus) observed that he agreed that the Committee was not competent to decide on the creation of an international criminal court or its organization, but he considered that the Committee was entitled to discuss the desirability of the creation of such a court.

The report of the drafting Sub-Committee, referred to above, made no mention of an international criminal jurisdiction. At the 21st meeting of the Committee, the representative of the Netherlands submitted a proposal as follows:

"That the Committee requests the rapporteur to draw the attention of the General Assembly to the fact that the implementation of the principles of the Charter of the Nürnberg Tribunal and its judgment, as well as the punishment of other international crimes which may be recognized as such by international legislation, may render desirable the existence of an international judicial authority to exercise jurisdiction over such crimes."

The Netherlands proposal met with objections on the part of the representatives of the Union of Soviet Socialist Republics, the United Kingdom, Yugoslavia and Poland. The arguments advanced by these representatives were, in the first place, that the question was beyond the terms of reference of the Committee. Furthermore, it was urged, as the London Agreement and the Nürnberg Charter clearly showed, it was for the national jurisdiction of the various States to judge war criminals. Only those criminals should be judged by the Nürnberg Tribunal whose crimes had no particular geographical location. The Committee had decided not to take up the substance of the Nürnberg principles. The Netherlands proposal, if adopted, would be contrary to this decision. The Netherlands proposal mentioned that implementation of the Nürnberg principles may render desirable the existence of an international criminal court. However, there are many other points which such implementation might make desirable as, for instance, a regulation concerning the enforcement of such judgments on international criminals.

The representative of the United States agreed that as the Committee had already decided to refrain from certain discussions connected with the Nürnberg principles, it would be inconsistent to mention criminal procedure in this matter. He therefore proposed that in the report of the Committee, the proposal of France should be mentioned only and brought into connexion with the Committee's decision that it could not discuss the substance of the Nürnberg principles and therefore refrained from a discussion of the French representative's document.

The Netherlands proposal, on the other hand, found support from the majority of the Committee. It was argued that the Committee was concerned with the development of international law and the creation of an international criminal jurisdiction was part of such development. It concerned a method of development and even a very important method. The fact that the Committee was only to study plans for the formulation of the Nürnberg principles did not preclude it from expressing the view that the existence of an international criminal court was desirable. The Nürnberg Tribunal was the first international criminal court, at least by implication. The question of an international criminal court was so closely connected with the Nürnberg principles that its mention seemed inevitable. The Netherlands representative especially emphasized that his proposal was intended merely to draw the attention of the General Assembly to the suggestion made and did not embody any recommendation for the International Law Commission. It was certainly permissible, he contended, to draw the attention of the General Assembly to such a question. As regards the argument that under the London Agreement the jurisdiction of national criminal courts was

maintained over war criminals, it was pointed out that an international criminal court was needed to deal with those crimes for which in 1945 an international court had been considered necessary.

As to the observation that the Nürnberg principles referred only to crimes committed during the war, it was argued that the terms of reference did not limit the Committee to these crimes only, since the Committee had before it the question of genocide which could also be committed in times of peace. Independently of the Nürnberg principles, the Committee had envisaged the matter of an international criminal code for international crimes. If this code were to be applied only by national courts, the result would be a widely diversified interpretation of its provisions and there would be no *cour de cassation* which could ensure the uniformity of judicial decisions. An international criminal court was therefore necessary, as the very fact of having an international criminal code would render it indispensable, to settle the conflicts of jurisdiction, to ensure observance of the rule of *res judicata*, and finally to ensure uniformity in the interpretation and application of the international criminal code.

After a lengthy debate, the Soviet representative moved the following proposal:

"To mention in the report that the French delegate has submitted a proposal in favour of an international criminal court. The Committee has recognized that this question is *ultra vires* of the terms of reference given to the Committee by the General Assembly and for this reason do not give their views on this question."

This motion was put to the vote and was lost with 5 votes in favour and 12 against.

The Chairman then put to the vote the proposal submitted by the representative of the Netherlands. It was carried by 10 votes in favour with 5 against and 2 abstentions.

The question was thus resolved by the inclusion of paragraph 3 in the report of the Committee, which read as follows:

"3. The Committee also decided by a majority to draw the attention of the General Assembly to the fact that the implementation of the principles of the Nürnberg Tribunal and its judgment, as well as the punishment of other international crimes which may be recognized as such by international multipartite conventions may render desirable the existence of an international judicial authority to exercise jurisdiction over such crimes.

"The representatives of Egypt, Poland, the United Kingdom, the Union of Soviet Socialist Republics, and Yugoslavia desired to have their dissent from this decision recorded in this report. In their opinion the question of establishing an international court falls outside the terms of reference from the General Assembly to the Committee."

(5) *The proposal of the Polish representative relating to war propaganda*

The representative of Poland submitted to the Committee on the Progressive Development of International Law and its Codification a proposal that the Committee should recommend:

"That the formulation of principles recognized by the Charter of the Nürnberg Tribunal and its judgment should include Chapter II of the Charter with the indication: (1) that propaganda of a war of aggression constitutes a crime against peace under article 6a of the Charter; (2) that the words "before or" in article 6c should be deleted."³⁰

At the 19th meeting of the Committee, however, the Polish representative declared that in order to facilitate the work of the Subcommittee, he withdrew his proposal with the exception of point 1. He thereupon submitted the following statement:

"The Polish Government considers that propaganda of aggressive wars constitutes a crime under international law and falls under the scope of preparation for such wars as listed in article 6a of the Statute of Nürnberg. This crime is a dangerous form of preparation, likely to cause and increase international friction and lead to armed conflicts. It is a form of psychological armament as opposed to the notion of moral disarmament. The Criminal Code of Poland, which is in force from 1 September 1932, contains the prohibition of propaganda of wars of aggression in its article 113.

"The Polish Government expects that a similar provision will be incorporated into the codification of crimes against peace and security, and requests that the International Law Commission take appropriate action on this matter as one of primary importance."

This statement was discussed at the 21st meeting of the Committee. The Polish representative emphasized that he did not wish that the Committee should vote on the substance of his statement, but only

³⁰ Document A/AC.10/38/Corr.1, 2 June 1947.

that it be inserted in the report as representing his Government's point of view. The representatives of Yugoslavia and the Soviet Union both declared that they associated themselves entirely with the Polish statement. The statement was accordingly recorded in the report of the Committee.

3. THE SECOND SESSION OF THE GENERAL ASSEMBLY (16 SEPTEMBER TO 29 NOVEMBER 1947)

The report of the Committee on the Progressive Development of International Law and its Codification on plans for the formulation of the principles of the Charter of the Nürnberg Tribunal and the judgment of the Tribunal was submitted to the second session of the General Assembly and was referred to the Sixth Committee. After a general discussion at its 39th meeting on 29 September 1947, the Sixth Committee decided to refer the report to its Sub-Committee 2, which was concerned with the question of the development of international law and its codification.³¹

The Sub-Committee of the Sixth Committee considered the report of the Committee on the Progressive Development of International Law and its Codification at its 15th and 17th meetings.³² Although it was recognized that the General Assembly, in its resolution of 11 December 1946, attached great importance to the work of formulating, in the context of a general codification of offences against the peace and security of mankind, or of an international criminal code, the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, several representatives expressed their conviction that this work should be held over as the trials of war criminals were still in progress. The representative of France reserved the position of his delegation on this point. It was decided, therefore, as had been proposed by the Committee on the Progressive Development of International Law and its Codification, to entrust the work to the International Law Commission, the members of which, according to a recommendation of the Sixth Committee, were to be elected at the next session of the General Assembly. The Sub-Committee proposed that the Sixth Committee recommend to the General Assembly that it adopt a resolution directing the International Law Commission to prepare: "(a) a draft convention incorporating the principles of international law, recognized in the Charter of the Nürnberg Tribunal

³¹ This Sub-Committee consisted of representatives from the following countries: Australia, Brazil, China, Colombia, Dominican Republic, France, Greece, Netherlands, Poland, Sweden, Union of Soviet Socialist Republics, United Kingdom, United States of America, Yugoslavia. The representative of China was elected Chairman and the representative of the Netherlands Rapporteur.

³² Summary records of 15th and 17th meetings, documents A/C.6/SC.5/SR.15, 17.

and in the judgment of the Tribunal and, (b) a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in (a).”³³

The report of Sub-Committee 2 was considered by the Sixth Committee at its 59th meeting on 20 November 1947.³⁴ The representative of the Union of Soviet Socialist Republics submitted an amendment to paragraph (b) of the draft resolution of the Sub-Committee so as to direct the International Law Commission to prepare “(b) a draft general plan of a code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in (a).”³⁵ This amendment was opposed by the representative of the United Kingdom who pointed out that the Soviet amendment would call for only an outline or plan of a code, which was quite unworthy of a group of eminent jurists such as those who would compose the International Law Commission. Either they should prepare a code itself or they should do nothing at all. The amendment was put to the vote and was rejected by 21 votes to 8.

With regard to paragraph (a) of the draft resolution of the Sub-Committee, the United States representative proposed that the words “a draft convention incorporating” should be deleted, since such wording “limited the Committee too much”. He preferred the term “*formulation*”. This amendment was accepted by 22 votes to 7.

The representative of Cuba urged that the draft resolution should not be adopted, since it was dangerous to proceed to the codification of the principles of the Nürnberg Charter while the process of carrying out these principles was still going on. This project should be left until later. A draft code should be prepared on war crimes with no reference to the Nürnberg Charter or the judgment of the Tribunal. In response to these remarks, the United Kingdom representative pointed out that the Sub-Committee had already suggested postponement of this work so long as the trials of war criminals were still in progress.

The Chairman put the report of the Sub-Committee, as amended, to the vote. It was adopted by 21 votes to 8.

The report of the Sixth Committee,³⁶ including a draft resolution on the formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, was

³³ Document A/C.6/180/Rev.1, 18 November 1947.

³⁴ Summary record of the 59th meeting, document A/C.6/SR.59.

³⁵ Document A/C.6/202.

³⁶ Document A/505.

presented to the General Assembly and was considered by the latter at its 123rd plenary meeting on 21 November 1947. The representative of the Soviet Union declared that he would abstain from voting upon this draft resolution, because there was a disagreement between the Soviet delegation and the majority of the members of the Sixth Committee with regard to the methods to be followed in respect of the formulation of the principles recognized in the Charter of the Nürnberg Tribunal. The delegation of the Soviet Union, he added, considered it essential to draft a convention in which the aforementioned principles would be set forth and to prepare a draft code on the punishment of crimes against the peace and security of mankind. As the draft resolution adopted by the Sixth Committee did not provide for such a convention, the Soviet delegation would abstain from voting. The resolution was put to the vote and was adopted by 42 votes to 1, with 8 abstentions.³⁷

As adopted, the report and resolution (177 (II)) read as follows:³⁸

Plans for the formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal: Report of the Committee on the Progressive Development of International Law and its Codification

REPORT OF THE SIXTH COMMITTEE

Rapporteur: Mr. G. KAECKENBEECK (Belgium)

At its 91st meeting on 23 September 1947, the General Assembly referred to the Sixth Committee the report on plans for the formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal (document A/332), submitted by the Committee on the Progressive Development of International Law and its Codification.

At its 39th meeting, on 29 September 1947, the Sixth Committee after a general discussion, referred the report to its Sub-Committee 2, which, under the chairmanship of Mr. Liu Chieh (China), studied the report at its 15th meeting on 30 October 1947.

Although in its resolution 95 (I) of 11 December 1946 the General Assembly attached great importance to the work of formulating, in the context of a general codification of offences against the peace and security of mankind, or of an international criminal code, the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, several representatives expressed their conviction that this work should be held over until the trials of war criminals were further advanced. The representative of France reserved the position of his delegation on this point.

³⁷ Verbatim records of the General Assembly, Vol. II, p. 1282.

³⁸ Document A/505. Resolution 177 (II), document A/519, pp. 111-112.

Having rejected by a majority of nine votes the proposal to refer the matter to an interim organ, the Sub-Committee decided, as had been proposed by the Committee on the Progressive Development of International Law and its Codification, to refer the question to the International Law Commission, the members of which, according to the Sixth Committee's recommendation, will be elected at the next regular session of the General Assembly.

The Committee therefore proposes that the General Assembly should adopt the following resolution:

Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal

The General Assembly

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

Directs the Commission to

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

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

PART III

**Application of the Charter by the
Nürnberg Tribunal**

1. LEGAL NATURE OF THE CHARTER

The London Agreement and the Charter annexed to it provide for the trial by a special tribunal (or eventually several special tribunals) of a group of well-defined cases. The Agreement enacts that there shall be established an International Military Tribunal for the trial of war criminals whose offences have no particular geographical location, and that the constitution, jurisdiction and functions of the Tribunal shall be those set out in the annexed Charter. According to the more detailed provisions in the Charter, the Tribunal is to try and punish the major war criminals of the European Axis as designated by the prosecution. The Charter also lays down the substantive law to be applied and authorizes the Tribunal to impose upon a defendant, on conviction, death or such other punishment as shall be determined by it to be just. Furthermore the Charter prescribes that the Tribunal can not be challenged by the parties and that the judgment of the Tribunal as to the guilt or the innocence of any defendant shall be final. The Agreement and the Charter thus appear as a *lex in casu* to be applied by an *ad hoc* tribunal to a special case or group of cases.

This situation was recognized by the Tribunal. "The jurisdiction of the Tribunal", it said in its judgment, "is defined in the Agreement and Charter, and the crimes coming within the jurisdiction of the Tribunal, for which there shall be individual responsibility, are set out in article 6. The law of the Charter is decisive, and binding upon the Tribunal."³⁹ In another passage it stated with respect to article 6 of the Charter: "These provisions are binding upon the Tribunal as the law to be applied to the case."⁴⁰ And when discussing the criminal character of aggressive war the Court made the following pronouncement: "The Charter makes the planning or waging of a war of aggression or a war in violation of international treaties a crime; and it is therefore not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London Agreement."⁴¹

But, on the other side, the Court allowed the prosecution and the defence to present extensive arguments as to whether or not the Charter could be considered as compatible with existing international law. It is true that the Tribunal dismissed a motion made by the defence at the beginning of the proceedings, expressing doubts as to the consistency with international law of certain provisions in the Charter

³⁹ *Nazi Conspiracy and Aggression, Opinion and Judgment*. United States Government Printing Office, Washington, 1947 (hereafter cited: *Judgment*), p. 48.

⁴⁰ *Judgment*, p. 4.

⁴¹ *Judgment*, pp. 48-49.

and requesting that an opinion on the legal basis of the trial be secured from internationally recognized experts on international law. The motion was disallowed, however, only in so far as it constituted a plea to the jurisdiction of the Court. In so far as it contained other arguments the Court declared itself prepared to hear them at a later stage.⁴² And not only was the compatibility of the Charter with existing international law discussed by the parties. The Court itself examined this problem carefully when interpreting and applying several of the provisions of the Charter.

The outcome of this examination may be summarized by citing the following general statement of the Court: "The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world. The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal . . . it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.

"The signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law. With regard to the constitution of the Court, and that the defendants are entitled to ask is to receive a fair trial on the facts and law."⁴³

According to the Court, the Charter has then a double foundation in international law. Firstly, it was created by the signatory Powers in the exercise of their competence under international law; and secondly, the Charter does not, as to its contents, deviate from the law of nations, it merely gives expression to already existing international law.

The Court thus considerably widened the scope of the Charter and, at the same time, of its own findings. It affirmed the validity of the Charter not only as a *lex in casu*, as the law of the case which it had been set to judge, but also as an authoritative expression of general international law. And it consequently presented its interpretation and application of the Charter as an interpretation and application not only of a *lex in casu* but also of general international law.

⁴² *Nazi Conspiracy and Aggression*, supplement B, United States Government Printing Office, Washington, 1948, pp. 1 and foll.

⁴³ *Judgment*, p. 48.

2. CRIMINAL RESPONSIBILITY OF INDIVIDUALS UNDER INTERNATIONAL LAW. ACTS OF STATE. SUPERIOR ORDERS

The most important provisions of the Charter are laid down in its section II and especially in article 6. This article gives to the Tribunal the power to try and punish persons who, acting in the interests of the European Axis countries, had committed any of the following crimes, as defined in the article: crimes against peace, war crimes and crimes against humanity. The application of these provisions led the Court to important pronouncements concerning the fundamental principle involved: the criminal responsibility of individuals under international law. It seems appropriate to give an account of the position of the Court as to this general problem and other general questions connected with it before going on to an analysis of its interpretation and application of the provisions concerning the particular crimes punishable under the Charter.

A. OBJECTIONS OF THE DEFENCE

In its pleadings before the Court, the defence argued, in the first place, that, as only States are subjects of the law of nations, individuals cannot be criminally responsible under present international law. "As the law stands", said counsel for Frank, "it rests on the principle that only a sovereign State, not an individual, can be a subject of international law."⁴⁴ And counsel for Seyss-Inquart cited a pronouncement by A. von Verdross to the effect that, according to the prevailing opinion, States, but not individuals, could be subjects of an "international legal crime".⁴⁵ The defence furthermore endeavoured to show that certain incriminated acts were acts of State and therefore could be imputed only to the State, but not to the individuals who had committed them as organs of the State. "Statesmen", it was argued by counsel for Ribbentrop, "are committed to take care of their people's interests. If they fail in their politics, then the countries they were acting for have to bear the consequences, and they themselves are judged by the judgment of history. But in a legal sense they were responsible only to their proper country for acts which their country was charged with, acts looked upon as infringing international law. The foreign country injured by the action in question could not hold responsible the acting individual."⁴⁶

Counsel admitted, however, that the usages of war had, exceptionally, in regard to certain war crimes removed "the partition

⁴⁴ *Nazi Conspirac, and Aggression*, supplement B, p. 379.

⁴⁵ *Ibid.*, p. 850.

⁴⁶ *Ibid.*, p. 186.

erected by international law, respectful of national sovereignty, between the acting individual and foreign Powers".⁴⁷ The plea of act of State was relied on by the defence especially as to acts incriminated as crimes against peace. If the German Reich, it was argued,⁴⁸ attacked other countries in violation of international law, it committed an offence under the law of nations and was responsible therefor according to the rules of that law. But only the Reich, not the individual, even if he were the head of the State. For the last four centuries the State had gained the dignity of a super-person. As such it had to act through individuals. But acts carried out by individuals as its organs were in fact acts of State, not private acts of the individuals.

To punish individuals for their decisions regarding war and peace would be to destroy the notion of the State. It could be done only by abandoning the fundamental principles of the international law currently valid. "Should things reach the point where, according to general world law, the men who participated in the planning, preparation, launching and prosecution of a war forbidden by international law could be brought before an international criminal court, the decisions regarding the State's ultimate problems of existence would be subject to super-State control. One could, of course, still call such States sovereign, but they would no longer be sovereign."⁴⁹

B. CONTENTIONS OF THE PROSECUTION

On the part of the prosecution the matter was discussed principally by the British prosecutor, Sir Hartley Shawcross. In his concluding speech⁵⁰ concerning the individual defendants he attacked the argument that only the State and not the individual could be made responsible under international law. It had been contended, he said, that only States, not individuals, are subjects of international law. Shawcross denied the existence of any such principle of international law. He mentioned the cases of piracy, breach of blockade, spies and war crimes as examples of duties being imposed by international law directly upon individuals. As to the crimes dealt with in the Charter he declared that "in no other sphere is it more necessary to affirm that the rights and duties of States are the rights and duties of men and that unless they bind individuals they bind no one". Shawcross thereafter criticized the argument for the defence based on

⁴⁷ *Ibid.*, p. 186 (*cf.* p. 174).

⁴⁸ Dr. Jahrreiss for all the defence counsels. *Ibid.*, pp. 24 and foll.

⁴⁹ *Ibid.*, p. 24.

⁵⁰ For the following see *The Trial of German Major War Criminals. Speeches of the Chief Prosecutors . . . at the close of the case against the individual defendants.* His Majesty's Stationery Office, London 1946 (hereafter cited *Concluding speeches concerning individual defendants*), pp. 57 and foll.

the theory of act of State. He said: "Then the argument is put in another way. Where the act concerned is an act of State, those who carry it out as the instruments of the State are not personally responsible, and they are entitled, it is claimed, to shelter themselves behind the sovereignty of the State. It is not suggested, of course, that this argument has any application to war crimes and as we submit that each of these men is guilty of countless war crimes it might be enough to brush the matter aside as academic. But that course would perhaps diminish the value which these proceedings will have on the subsequent development of international law. Now it is true that there is a series of decisions in which Courts have affirmed that one State has no authority over another sovereign State or over its head or representative. Those decisions have been based on the precepts of the comity of nations and of peaceful and smooth international intercourse: they do not in truth depend upon any sacrosanctity of foreign sovereignty except in so far as the recognition of sovereignty in itself promotes international relations. They really afford no authority for the proposition that those who constitute the organs, those who are behind the State, are entitled to rely on the metaphysical entity which they create and control when by their directions that State sets out to destroy that very comity on which the rules of international law depend."

C. FINDINGS OF THE COURT

The Court had no hesitation in affirming the criminal responsibility of individuals under international law. "It was submitted", said the Court in its judgment, "that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected."⁵¹ The Court went on to state that it had been long recognized that international law imposes duties and liabilities upon individuals as well as upon States. It thereafter affirmed that individuals can be punished for violations of international law and continued: "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."⁵²

Concerning the contention that individuals are not responsible for acts of State the Court said: "The principle of international law, which under certain circumstances protects the representatives of a

⁵¹ *Judgment*, p. 52.

⁵² *Judgment*, p. 53.

State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings."⁵³ In addition to this statement of principle, the Court, when rejecting the doctrine of act of State, relied on the express provision in article 7 of the Charter, which is worded 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."

The Court, in fact, did not content itself with dismissing the plea of act of State. It went further and stated: "On the other hand the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law."⁵³ The Court thus quite generally affirmed the primacy of international duties over rights and obligations under internal law. An individual who violates international law cannot avoid his responsibility therefor on the ground that his act was authorized by the State, or even that it was obligatory under internal law.

This principle does not, however, seem to exclude every possibility of taking into consideration the fact that a delinquent under international law acted in conformity with the authorization of the State or, especially, under the pressure of national obligations. Such circumstances do not, it is true, automatically exclude the responsibility of the perpetrator but it would seem that in the particular case they might be of importance when considering the subjective requisites of the crime, such as the question if the perpetrator acted as a free agent or not. That this was the opinion of the Court appears from its interpretation of article 8 of the Charter, which provides: "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 . . ." The true test when applying this article, the Court declared, "is not the existence of the order, but whether moral choice was in fact possible".⁵⁴

3. INTERNATIONAL CRIMES IN GENERAL

When laying down that individuals are liable to be punished for crimes against international law, the Court did not give any precise

⁵³ *Judgment*, p. 53.

⁵⁴ *Judgment*, pp. 53-54.

definition of international crimes. Nor does such a definition appear in the Charter which only contains provisions for the punishment of certain crimes or groups of crimes.

However, in demonstrating that the crimes listed in article 6 of the Charter were crimes under international law already before the execution of the London Agreement, the Tribunal gave some indication as to what, in its opinion, makes certain acts crimes against international law.

The question was, during the proceedings, intimately connected with a plea of the defence maintaining that article 6 constituted an *ex post facto* law and conflicted with the principle "*nullum crimen sine lege, nulla poena sine lege*". This was said to be true especially with respect to the provision making resort to aggressive war an international crime. "It was submitted", the Tribunal said, "that *ex post facto* punishment is abhorrent to the law of all civilized nations, that no sovereign Power had made aggressive war a crime at the time the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders."⁵⁵

But the Tribunal continued, "the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice".⁵⁶ As such it had, in the opinion of the Court, no application to the facts of the case. "To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring States without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished."⁵⁷

The Court did not, however, content itself with this affirmation of the justice of punishing the individuals responsible for the German aggressions. It went on to show that, already at the outbreak of the war, resort to aggressive war was an international crime. In its demonstration the Court relied in the first place on the Kellogg-Briand Pact, binding, in 1939, 63 nations, among them Germany, Italy and Japan. It cited the first two articles wherein the Parties solemnly declare that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy between themselves, and wherein they further agree that the settlement of disputes of every kind, which may arise among them, shall never be

⁵⁵ Judgment, p. 49.

⁵⁶ Judgment, p. 49.

⁵⁷ Judgment, p. 49.

sought except by pacific means. The Court thereafter expounded the legal effect of the pact in the following way: "The nations who signed the pact or adhered to it unconditionally condemned recourse to war for the future as an instrument of policy, and expressly renounced it. After the signing of the pact, any nation resorting to war as an instrument of national policy breaks the pact. In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the pact."⁵⁸

In support of its interpretation of the Kellogg-Briand Pact the Court mentioned several international documents which condemn aggressive war as an international crime: the draft Treaty of Mutual Assistance, sponsored by the League of Nations in 1923, the unratified Geneva Protocol of 1924, the unanimous resolution passed by the Assembly of the League of Nations on 24 September 1927 and the unanimous resolution of 18 February 1928, adopted at the sixth Pan-American Conference. The Court relied on these documents as strong evidence of the intention of the international community to brand aggressive war as an international crime. It said: "All these expressions of opinion, and others that could be cited, so solemnly made, reinforce the construction which the Tribunal placed upon the Pact of Paris, that resort to a war of aggression is not merely illegal, but is criminal. The prohibition of aggressive war demanded by the conscience of the world, finds its expression in the series of pacts and treaties to which the Tribunal has just referred."⁵⁹

The argument that the Kellogg-Briand Pact does not explicitly qualify aggressive war as a crime or provide for the trial and punishment of those who wage such war, was met by a reference to the legal situation created by the Hague war regulations. The Court said: "But it is argued that the pact does not expressly enact that such wars are crimes, or set up courts to try those who make such wars. To that extent the same is true with regard to the laws of war contained in the Hague Convention. The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters. Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as

⁵⁸ *Judgment*, p. 50.

⁵⁹ *Judgment*, p. 52.

offences against the laws of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention. In the opinion of the Tribunal, those who wage aggressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the Hague Convention. In interpreting the words of the pact, it must be remembered that international law is not the product of an international legislature, and that such international agreements as the Pact of Paris have to deal with general principles of law, and not with administrative matters of procedure. The law of war is to be found not only in treaties, but in customs and practices of States which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing.”⁶⁰

It appears from the foregoing quotations that the Court does not identify international crimes with internationally illegal acts, in other words, with violations of international law. The Court stated, as its construction of the Kellogg-Briand Pact, that by virtue of this pact resort to aggressive war “*is not merely illegal, but is criminal*”. The Tribunal thus makes a distinction between illegality and criminality; a criminal act is certainly an illegal act, but not every illegal act is criminal. An international crime is something more than merely a violation of international law. The need of making a distinction between what is illegal and what is criminal under international law is easily comprehensible. Without this distinction every violation of international law would be considered as a criminal act, for which the individual who committed the act could be punished. As has been seen above, the Court refused to accept, as far as international crimes were concerned, the plea that acts of State ought not to be imputed to the acting individual. If, therefore, international crimes were identified with internationally illegal acts, individuals would be subject to punishment for every violation of international law committed by a State. The international responsibility of the State would thus automatically involve the criminal responsibility of the individuals acting in the name of the State.

As to what, in the eyes of the Court, qualifies a violation of international law as an international crime, certain inferences can be

⁶⁰ *Judgment*, pp. 50-51.

drawn from the passages quoted above, although they do not include a precise definition of international crimes. It must be said, however, that the reasoning of the Court permits more definite conclusions concerning what is not necessary than what is imperative in order to establish the criminality of an illegal act. It appears from the passage regarding the legal effects of the Hague Convention of 1907 that the Court held that acts prohibited by a treaty can be crimes even if they are not expressly designated as such in the treaty. Nor is it necessary, in the opinion of the Court, that the treaty provides for the trial and punishments of individuals committing such acts. The Court attached some importance to the fact that military tribunals have in practice tried and punished individuals for violations of the rules of land warfare laid down in the Hague Convention. But as the Court considered the waging of aggressive war to be an international crime already before the London Agreement, although no judicial practice comporting punishment for aggression can be shown to have existed, it seems evident that the Court did not hold such practice to be a necessary criterion of international crimes. It need not be doubted that any of the above facts, the explicit branding of certain acts as criminal, express provisions for the punishment of perpetrators of such acts or the actual punishing in practice of those who commit them, would in the opinion of Court be sufficient proof of the criminal character of the acts. But even in the absence of all these criteria internationally illegal acts can, according to the Court, be considered as international crimes. The Court held that the solemn renunciation, through the Kellogg-Briand Pact, of war as an instrument of national policy made such a war both illegal and criminal in international law, and reinforced its construction of the pact by citing international documents which it regarded as strong evidence of the intention entertained by the vast majority of the civilized States and peoples to brand resort to aggressive war as an international crime. The existence of such an intention within the international community was apparently, in the eyes of the Court, the deciding factor making prohibited acts criminal under international law.

4. CRIMES AGAINST PEACE

A. CATEGORIES OF CRIMES AGAINST PEACE

In article 6 of the Charter crimes against peace are defined in the following manner:

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

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

The Charter thus distinguishes between two categories of crimes against peace:

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

(2) Participation in a common plan or conspiracy for the accomplishment of "any of the foregoing".

The indictment followed this distinction. Count one of the indictment charged the defendants with participating "in the formulation or execution of a common plan or conspiracy to commit, or which involved the commission of, crimes against peace, war crimes, and crimes against humanity, as defined in the Charter. . . ." ⁶¹ Count two charged the defendants with participating "in the planning, preparation, initiation and waging of wars of aggression, which were also wars in violation of international treaties, agreements and assurances". ⁶² The Tribunal disregarded the charges on count one that the defendants conspired to commit war crimes and crimes against humanity, on the ground that "the Charter does not define as a separate crime any conspiracy except the one to commit acts of aggressive war". ⁶³ Of the charges on count one it consequently considered only "the common plan to prepare, initiate and wage aggressive war". ⁶⁴

The two categories of crimes against peace have a common characteristic in that they are both connected with aggressive war or war in violation of international treaties, agreements or assurances.

B. AGGRESSIVE WAR

The Charter does not define the term "aggressive war". Nor did the Tribunal find it necessary to give a definition. The Court said that it had "decided that certain of the defendants planned and

⁶¹ *Trial of War Criminals*. Department of State Publication 2420. United States Government Printing Office, Washington, 1945, p. 25.

⁶² *Ibid.*, p. 37.

⁶³ *Judgment*, p. 56.

⁶⁴ *Ibid.*

waged aggressive wars against 10 nations, and were therefore guilty of this series of crimes", and that it therefore was "unnecessary to discuss the subject in further detail".⁶⁵ The determination of the Court as to the existence of aggressive war was founded on an elaborate historical review of the events before and during the war period and was a result of its evaluation of these facts.

The occupation of Austria and Czechoslovakia was not regarded by the Tribunal as aggressive war. It said: "The first acts of aggression referred to in the indictment are the seizure of Austria and Czechoslovakia; and the first war of aggression charged in the indictment is the war against Poland begun on 1 September 1939".⁶⁶ It further referred to the invasion of Austria as a "premeditated aggressive step in furthering the plan to wage aggressive wars against other countries".⁶⁷ When assessing the guilt of Kaltenbrunner, who had been actively involved in the seizure of Austria, the Court stated: "The Anschluss, although it was an aggressive act, is not charged as an aggressive war, and the evidence against Kaltenbrunner under count one does not, in the opinion of the Tribunal, show his direct participation in any plan to wage such a war".⁶⁸

In discussing the case of Schacht the Court mentioned his participation in the occupation of Austria and the Sudetenland and added in a parenthesis "neither of which are charged as aggressive wars".⁶⁹ In reference to von Papen the Court said: "The evidence leaves no doubt that von Papen's primary purpose as Minister to Austria was to undermine the Schuschnigg regime and strengthen the Austrian Nazis for the purpose of bringing about Anschluss. To carry through this plan he engaged in both intrigue and bullying. But the Charter does not make criminal such offences against political morality, however bad these may be. Under the Charter von Papen can be held guilty only if he was a party to the planning of aggressive war. There is no evidence that he was a party to the plans under which the occupation of Austria was a step in the direction of further aggressive action, or even that he participated in plans to occupy Austria by aggressive war if necessary."⁷⁰

The warlike steps taken by Germany against Poland, Denmark, Norway, Belgium, the Netherlands, Luxembourg, Yugoslavia, Greece, the Soviet Union and the United States were all regarded by the Tribunal as aggressive wars, although it used various expressions

⁶⁵ *Judgment*, p. 46.

⁶⁶ *Judgment*, p. 16.

⁶⁷ *Judgment*, p. 21.

⁶⁸ *Judgment*, p. 119.

⁶⁹ *Judgment*, p. 136.

⁷⁰ *Judgment*, p. 153.

to describe them, such as "invasion", "aggression", "aggressive war" or, in reference to the United States, merely "war".

The Court thus followed the distinction made in the indictment between the aggressive *action* against Austria and Czechoslovakia and the series of aggressive *wars*, starting with the attack on Poland. It consequently interpreted the term "aggressive war" restrictively. Every attack or invasion by armed forces was apparently not considered as a war of aggression. The juxtaposition of aggressive acts or action, on one side, and aggressive wars, on the other, seems to imply that cases, where only the attacker has recourse to armed force while the victim puts up no, or a negligible, armed resistance, do not come within the notion of "aggressive war" as interpreted by the Court. The existence of an aggressive war would presuppose that the armed attack by the aggressor has been countered by armed resistance or a declaration of war on the part of the attacked country and thus resulted in war in the technical sense.

It is possible that the Court, when it decided not to regard the occupation of Austria and Czechoslovakia as aggressive war, was influenced also by the consideration that the Governments of the occupied countries might be said to have given some sort of formal consent and that the occupation was in fact accepted as a *fait accompli* by other Powers.

In any case, the distinction made between the aggressive *acts* against Austria and Czechoslovakia and the aggressive *wars* against the other countries means that a substantial limitation was given by the Court to the notion of "war of aggression".

In connexion with its discussion of the invasion of Norway, the Tribunal made an important statement concerning the plea of self-defence, entered to the charge of aggressive war. It had been argued by the defence that, in accordance with the reservations made by several Powers to the Kellogg-Briand Pact, Germany could itself decide with conclusive effect, whether a preventive action was necessary in the interest of its self-defence. The Court, however, held that "whether action taken under the claim of self-defence was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced".⁷¹

C. WAR IN VIOLATION OF INTERNATIONAL TREATIES, AGREEMENTS OR ASSURANCES

The Court did not dwell on this category of wars. It had already decided that certain of the defendants had planned or waged aggres-

⁷¹ *Judgment*, p. 38.

sive wars, and it did not find it necessary "to consider at any length the extent to which these aggressive wars were also wars in violation of international treaties, agreements or assurances".⁷² It mentioned, however, the most important treaties which had been violated: the Hague Conventions concerning pacific settlement of international disputes and relative to the opening of hostilities, the Versailles Treaty, several treaties of mutual guarantee, arbitration and non-aggression and, finally, the Kellogg-Briand Pact.

The attitude of the Court is easily understandable. All Germany's wars, beginning with the attack on Poland, had been found criminal as aggressive wars. From a practical point of view it therefore seemed superfluous to examine in detail if they were also wars in violation of international treaties. But from the standpoint of general international law an examination by the Court of the relation between the two types of criminal war would have been useful. The principal question that presents itself in this connexion is: Is a war in violation of international treaties, agreements and assurances always a war of aggression? If yes, it seems unnecessary to specify such a war as a separate type of criminal war. On the other hand, if the answer is no, a second question arises: on what grounds can resorting to a war which is not aggressive but in violation of international treaties, agreements or assurances be considered, according to general international law, as not only illegal but also criminal? The decision of the Tribunal, being concerned exclusively with aggressive war, did not touch these questions.

D. THE COMMON PLAN OR CONSPIRACY

As to the distinctive characteristics of the two categories of crimes against peace, namely planning, preparation, initiating or waging of either of the two types of war mentioned above, on one side, and, on the other, participation in a common plan or conspiracy for the accomplishment of "any of the foregoing" little general discussion is to be found in the judgment. Most of the statements made by the Court in this respect concern the common plan or conspiracy. It may therefore be convenient to begin with this crime which, furthermore, was charged under the first count of the indictment.

(1) *Contentions of the prosecution*

The contentions of the prosecution in this connexion were summarized by the Court in the following way: "The 'common plan or conspiracy' charged in the indictment covers 25 years, from the forma-

⁷² Judgment, p. 46.

tion of the Nazi Party in 1919 to the end of the war in 1945. The party is spoken of as 'the instrument of cohesion among the defendants' for carrying out the purposes of the conspiracy—the overthrowing of the Treaty of Versailles, acquiring territory lost by Germany in the last war and 'Lebensraum' in Europe, by the use, if necessary, of armed force, of aggressive war. The 'seizure of power' by the Nazis, the use of terror, the destruction of trade unions, the attack on Christian teaching and on churches, the persecution of the Jews, the regimentation of youth—all these are said to be steps deliberately taken to carry out the common plan. It found expression, so it is alleged, in secret rearmament, the withdrawal by Germany from the Disarmament Conference and the League of Nations, universal military service, and seizure of the Rhineland. Finally, according to the indictment, aggressive action was planned and carried out against Austria and Czechoslovakia in 1936-38, followed by the planning and waging of war against Poland; and, successively, against 10 other countries.

"The prosecution says, in effect, that any significant participation in the affairs of the Nazi Party or government is evidence of a participation in a conspiracy that is in itself criminal."⁷³

(2) *Objections of the defence*

The defence objected to the conspiracy charge on several grounds.⁷⁴ It contended that the conception of conspiracy was confined to the Anglo-American legal system and was, as used by the prosecution, entirely unknown to German law. To introduce this concept into the present trial would be unjust, as it was "utterly alien to the defendants and to the legal trend of thought of their people". Furthermore, the defence denied that conspiracy to wage an illegal war was an international crime. "Can it be honestly stated," it was asked, "that already before 1939 not only the initiating of an illegal war was held to be an act punishable individually, but moreover a 'conspiracy' for initiating such war?" To punish for conspiracy would consequently be a violation of the principle *nullum crimen sine lege*. The defence also argued that the very expression "to conspire" implies that the conspirators participate knowingly and willingly. If somebody imposes his will on another, there is no conspiracy. Therefore, it was submitted, "a conspiracy with a dictator at its head is a contradiction in itself".

(3) *Findings of the Court*

The Court applied the conception of conspiracy, but gave to it

⁷³ *Judgment*, p. 54.

⁷⁴ See *Nazi conspiracy and aggression*, supplement B, pp. 53 ff, 117 and foll.

a restrictive interpretation. "Conspiracy", the judgment says,⁷⁵ "is not defined in the Charter. But in the opinion of the Tribunal the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action. The planning, to be criminal, must not rest merely on the declarations of a party programme, such as are found in the 25 points of the Nazi Party, announced in 1920, or the political affirmations expressed in 'Mein Kampf' in later years. The Tribunal must examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan."

Although the Court held that the existence of a concrete plan to wage war was necessary to constitute conspiracy, it did not require that a single conspiracy be proved. "In the opinion of the Tribunal, the evidence establishes the common planning to prepare and wage war by certain of the defendants. It is immaterial to consider whether a single conspiracy to the extent and over the time set out in the indictment has been conclusively proved. Continued planning, with aggressive war as the objective, has been established beyond doubt."⁷⁶

The contention of the defence that conspiracy with a dictator is a contradiction was rejected by the Court. "The argument that such common planning cannot exist where there is complete dictatorship is unsound. A plan in the execution of which a number of persons participate is still a plan, even though conceived by only one of them; and those who execute the plan do not avoid responsibility by showing that they acted under the direction of the man who conceived it. Hitler could not make aggressive war by himself. He had to have the co-operation of statesmen, military leaders, diplomats, and businessmen. When they, with knowledge of his aims, gave him their co-operation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing. That they were assigned to their tasks by a dictator does not absolve them from responsibility for their acts. The relation of leader and follower does not preclude responsibility here any more than it does in the comparable tyranny of organized domestic crime."⁷⁷

These pronouncements clearly imply that the planning, to constitute a conspiracy, must, firstly, be a common, concrete planning which, secondly, has as its objective the waging of war—presumably either aggressive war or war in violation of international treaties, agreements or assurances.

⁷⁵Judgment, pp. 54-55.

⁷⁶Judgment, p. 55.

⁷⁷Judgment, pp. 54-55.

(a) *Common, concrete planning*

It is obvious that there can be no common plan or conspiracy without common planning. Several persons must in some way or other participate in the planning. But, on the other hand, their contributions to the common plans need not be the same nor equally important. Some of the participants can play a leading role and, in the opinion of the Court, one single man can even completely dominate the initiation and development of the plans without there ceasing to be common planning. As has been seen, the Court rejected the plea of the defence that common planning cannot exist where there is complete dictatorship. If other persons knowingly co-operate with the dictator there can still be common planning. When such persons, with knowledge of his aims, give the dictator their co-operation, they make themselves parties to the plan initiated by him. The collaborators can have different spheres of activity; the Court mentions in this connexion statesmen, military leaders, diplomats, and businessmen.

But the planning must not only be common, it must also be concrete, and consist in the establishment of one or more concrete plans to wage war. Participation in the activities of the Nazi Party or government was not considered by the Tribunal to constitute, in itself, a participation in a criminal conspiracy. To be a party to such a conspiracy each planner must, with knowledge of its purpose, have made a significant contribution to the elaboration of a concrete plan to wage war. It appears from the parts of the judgment which deal with the individual responsibility of the defendants, that the Court applied this principle with considerable strictness. Several of the defendants charged with conspiracy on count one were found not guilty, because the evidence failed to establish their knowing participation in a concrete plan to wage war. Frank, although a member of the Reich Government and a "Reichsleiter" of the Nazi Party was not considered sufficiently connected with the common plan to wage aggressive war to be convicted on count one.⁷⁸ Frick had not participated in any of the important conferences at which Hitler outlined his aggressive intentions and was therefore not regarded as a member of the conspiracy.⁷⁹ As to Streicher, there was no evidence to show that he was within Hitler's inner circle of advisers or was closely connected with the formulation of the policies which led to war or had knowledge of them. His connexion with the conspiracy was therefore, in the opinion of the Tribunal, not established.⁸⁰ Funk, whose activity in the economic sphere was under

⁷⁸ *Judgment*, p. 124.

⁷⁹ *Judgment*, p. 127.

⁸⁰ *Judgment*, p. 129.

the supervision of Goering, was not considered as one of the leading figures in originating the Nazi plans for aggressive war. He was found guilty on count two, but not on count one, charging conspiracy.⁸¹ As to Schacht the Court said that it was clear that he was a central figure in Germany's rearmament programme and that he was largely responsible for Nazi Germany's rapid rise as a military power. But, as rearmament could not be considered criminal of itself under the Charter, it had to be shown that Schacht carried out this rearmament as part of the Nazi plans to wage aggressive wars. In that regard, the Court found that Schacht was not one of Hitler's inner circle and that it was not proved beyond a reasonable doubt that Schacht did in fact know of the Nazi aggressive plans.⁸² Doenitz was not considered privy to the conspiracy to wage aggressive war as he at that time was a field officer performing strictly tactical duties and as he was not present at the important conferences, when plans for aggressive war were announced, nor was informed about the decisions reached there.⁸³ Despite his leadership of the "Hitler-Jugend", with its warlike activities, von Schirach was not found to be involved in the development of Hitler's plan for territorial expansion by means of aggressive war.⁸⁴ As the evidence did not show that von Papen was a party to the plans under which the occupation of Austria was a step in the direction of further aggressive action, the Tribunal did not find him guilty of conspiracy.⁸⁵ Speer's activities did not, in the opinion of the Court, amount to conspiring, as all the wars had already begun, when he became the head of the armament industry.⁸⁶ Fritzsche's propaganda activities were not regarded as falling within the definition of conspiracy in view of the fact that his position and influence were not such as to enable him to attend the planning conferences which led to aggressive war or to receive information of the decisions taken at these conferences.⁸⁷ With regard to Bormann, the Court said, that he had not been present at the planning conferences and it could not be inferred from the evidence or from the positions he held before the war that he had knowledge of Hitler's plans for aggression. Accordingly, Bormann was found not guilty on count one.^{87a}

Thus only those defendants who belonged to Hitler's inner circle and who with knowledge of his concrete aggressive plans had intimately collaborated with him were convicted on count one: Goering, "the planner and prime mover in the military and diplo-

⁸¹ *Judgment*, p. 132.

⁸² *Judgment*, pp. 135-137.

⁸³ *Judgment*, pp. 137, 141.

⁸⁴ *Judgment*, pp. 145, 146.

⁸⁵ *Judgment*, p. 153.

⁸⁶ *Judgment*, p. 156.

⁸⁷ *Judgment*, p. 163.

^{87a} *Judgment*, p. 164.

matic preparation for war",⁸⁸ von Neurath and Raeder, both participants in the crucial meeting on 5 November 1937, where Hitler revealed his aggressive intentions, Hess, Ribbentrop, Rosenberg, Keitel and Jodl.

(b) *Objective of conspiracy*

The Court defined conspiracy as "a concrete plan to wage war", obviously criminal war and primarily aggressive war. As has been seen, it further interpreted "aggressive war" in a restrictive way and excluded from that notion "aggressive acts", such as the occupation of Austria and Czechoslovakia. A common concrete planning of "aggressive acts" would thus not constitute a criminal conspiracy. Kaltenbrunner and von Papen, who took part in the planning of the "Anschluss", were therefore found not guilty of conspiracy on count one.

The Court seems to have gone even further and required that the objective of a criminal conspiracy should be aggressive war on a larger scale. Participation in the preparation only of particular wars of aggression were not considered to constitute participation in the conspiracy charged. The Court said of Funk that he did "participate in the economic preparation for certain of the aggressive wars, notably those against Poland and the Soviet Union", but dealt with his guilt under count two of the indictment, not under count one.⁸⁹ When explaining that it was convinced of the existence of a criminal conspiracy in Germany, the Tribunal said that "continued planning, with aggressive war as the objective" had been established beyond doubt. The Court seems, consequently, to have considered the use of aggressive war as a general instrument of policy and not particular wars of aggression, as constituting the distinctive objective of a conspiracy.

E. PLANNING, PREPARATION, INITIATION OR WAGING OF A CRIMINAL
WAR

The Court referred to this category of crimes against peace in saying that "count two of the indictment charges the defendants with committing specific crimes against peace by planning, preparing, initiating, and waging wars of aggression against a number of other States".⁹⁰ A distinctive feature of these crimes as compared with the crime of conspiracy thus is, that they are connected with particular

⁸⁸ *Judgment*, p. 109.

⁸⁹ *Judgment*, p. 132.

⁹⁰ *Judgment*, p. 16.

wars of aggression, or aggressive wars against particular countries, whereas the common plan or conspiracy, as has been seen, has for its objective aggressive war as a general policy. This distinction is made clear in some of the statements of the Court as to the guilt of the individual defendants. With respect to von Schirach the Court said that it did not appear that he "was involved in the development of Hitler's plan for territorial expansion by means of aggressive war, or that he participated in the planning or preparation of any of the wars of aggression".⁹¹ Concerning Sauckel it stated: "The evidence has not satisfied the Tribunal that Sauckel was sufficiently connected with the common plan to wage aggressive war or sufficiently involved in the planning or waging of aggressive wars to allow the Tribunal to convict him on counts one or two".⁹² About Schacht it said that he was not involved "in the planning of any of the specific wars of aggression charged in count two".⁹³ Pertinent in this connexion is also the circumstance, mentioned above, that the Court held Funk guilty on count two because of his participation in the preparation for "certain of the aggressive wars", but not guilty on count one.⁹⁴

It must be remarked that the restrictive interpretation given by the Court to the notion of "aggressive war" (excluding "aggressive acts") applies also to this category of crimes against peace, connected with particular wars of aggression.

All the stages in the bringing about of a criminal war are declared to be crimes, from the planning to the actual waging of the war. In these circumstances it does not seem to be of any great importance to try and lay down abstract definitions of the different stages. The Court itself apparently did not make precise distinctions between planning and preparation. It therefore seems more practical to examine what different kinds of activities the Court found criminal under this category of crimes against peace.

(1) *Planning and preparation*

Military planning and preparation was considered criminal in so far as it was undertaken by persons in influential positions. Such military leaders as Goering, Keitel, Raeder and Jodl were found guilty of this crime. On the other hand, the Court said of Doenitz that, although he built and trained the German U-boat arm, the evidence did not show that he prepared aggressive wars. "He was a line officer performing strictly tactical duties. He was not present at the im-

⁹¹ *Judgment*, p. 145.

⁹² *Judgment*, p. 147.

⁹³ *Judgment*, p. 136.

⁹⁴ *Judgment*, p. 132.

portant conferences when plans for aggressive wars were announced, and there is no evidence he was informed about the decisions reached there."⁹⁵ As a pre-requisite for criminal military planning the Court therefore seems to have required knowledge of the aggressive purpose of the planning. Such knowledge, however, might, apparently, not only be proved directly by showing that the defendant was informed in fact, but also be inferred from the position he held.⁹⁶

In the judgment, Goering was named the prime mover in the diplomatic preparation for war and his part in the diplomatic manoeuvres which led up to the war against Poland was especially recalled. Von Ribbentrop's role in the diplomatic activities preceding the Polish and other aggressive wars was mentioned under the heading of crimes against peace. Under the same heading it was stated that Rosenberg as chief of the Office of Foreign Affairs of the Nazi Party played an important role in the preparation and planning of the attack on Norway. These are examples of criminal planning and preparation in the sphere of *diplomacy and foreign policy*. As the Court was concerned only with the major war criminals it is not possible to ascertain if, in its opinion, persons of lower standing than the above-mentioned defendants could commit this kind of criminal planning. It may be assumed, however, that in the view of the Court, the pre-requisite of actual or inferred knowledge, required as to military planning, would be applicable also in this case.

Funk was found guilty of *economic* planning and preparation for certain of the aggressive wars, notably those against Poland and the Soviet Union. But Schacht, though because of his activities in the economic and financial fields he was considered by the Court as "a central figure in Germany's rearmament programme",⁹⁷ was acquitted. The Court said: "... rearmament of itself is not criminal under the Charter. To be a crime against peace under article 6 of the Charter it must be shown that Schacht carried out this rearmament as part of the Nazi plans to wage aggressive wars".⁹⁸ From the evidence presented, however, it could not, in the opinion of the Court, be inferred that he did in fact know of the Nazi aggressive plan. This conclusion was reached despite the fact that Schacht "with his intimate knowledge of German finance, was in a peculiarly good position to understand the true significance of Hitler's frantic rearmament, and to

⁹⁵ *Judgment*, p. 137.

⁹⁶ *Cfr.* what the Court said about Bormann: "The evidence does not show that Bormann knew of Hitler's plans to prepare, initiate or wage aggressive wars. He attended none of the important conferences when Hitler revealed piece by piece those plans for aggression. Nor can knowledge be conclusively inferred from the positions he held." *Judgment*, p. 164.

⁹⁷ *Judgment*, p. 135.

⁹⁸ *Judgment*, p. 136.

realize that the economic policy adopted was consistent only with war as its object".⁹⁹ Thus in this case, the Court was very cautious in drawing inferences from the official position occupied by the defendant.

(2) *Initiation*

The Tribunal said: "To initiate a war of aggression . . . is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."¹⁰⁰ No one of the defendants was, however, explicitly found guilty of having initiated aggressive wars. The expression nearest to "initiation" used by the Court was that "Goering was the moving force for aggressive war second only to Hitler".¹⁰¹ Presumably Hitler alone was considered as the initiator as his orders set in motion the several aggressive wars. Doenitz, on the other hand, was expressly acquitted of having initiated such wars because he was at the time only a field officer performing strictly tactical duties.

(3) *Waging*

Doenitz was expressly convicted of waging aggressive war. The Court said: "It is true that until his appointment in January 1943 as Commander-in-Chief he was not an 'Oberbefehlshaber'. But this statement under-estimates the importance of Doenitz's position. He was no mere army or division commander. The U-boat arm was the principal part of the German fleet and Doenitz was its leader. . . . That his importance to the German war effort was so regarded is eloquently proved by Raeder's recommendation of Doenitz as his successor and his appointment by Hitler on 30 January 1943, as Commander-in-Chief of the Navy. Hitler, too, knew that submarine warfare was the essential part of Germany's naval warfare. From January 1943, Doenitz was consulted almost continuously by Hitler . . . As late as April 1945, when he admits he knew the struggle was hopeless, Doenitz as its Commander-in-Chief urged the Navy to continue its fight. On 1 May 1945, he became the head of State and as such ordered the Wehrmacht to continue its war in the east, until capitulation on 9 May 1945 . . . In the view of the Tribunal, the evidence shows that Doenitz was active in waging aggressive war".¹⁰²

⁹⁹ *Judgment*, p. 136.

¹⁰⁰ *Judgment*, p. 16.

¹⁰¹ *Judgment*, p. 109.

¹⁰² *Judgment*, pp. 137-138.

The passage quoted gives a good idea of what the Court considered to be waging aggressive war in the *military* sense. Obviously Goering, Keitel, Raeder and Jodl who held positions in the German armed forces comparable to that of Doenitz were also considered guilty of waging aggressive war. Under the heading of "crimes against peace" it was stated in the judgment that Goering commanded the "Luftwaffe" in the attack on Poland and during the aggressive wars which followed, and that Keitel signed orders and issued timetables for several of the military invasions. Jodl was said to be responsible in a large measure for the strategy and conduct of operations. With respect to Raeder the Court stated explicitly that it was clear from the evidence that he participated not only in the planning, but also in the waging of aggressive war.

Waging aggressive war was, however, not understood by the Tribunal in a narrow military sense, because also civilians were seemingly convicted of this crime. Seyss-Inquart was found guilty under count two, apparently because of activities which were described by the Court in the following way: "In September 1939, Seyss-Inquart was appointed chief of civil administration of South Poland. On October 12, 1939, Seyss-Inquart was made Deputy Governor General of the General Government of Poland under Frank.¹⁰³ On May 18, 1940, Seyss-Inquart was appointed Reich Commissioner for occupied Netherlands. In these positions he assumed responsibility for governing territory which had been occupied by aggressive wars and the administration of which was of vital importance in the aggressive war being waged by Germany."¹⁰⁴ Among Rosenberg's crimes against peace was mentioned that he bore "a major responsibility for the formulation and execution of occupation policies in the occupied eastern territories".¹⁰⁵ Frick was convicted on count two. One reason therefor was apparently his activity with respect to occupied territories. He signed the laws incorporating parts of these territories into the Reich, supplied German civil servants for the administrations in all occupied territories and also signed the laws appointing Terboven Reich Commissioner to Norway and Seyss-Inquart to Holland.¹⁰⁶ It would therefore seem that the Court considered at least some *administrative activities* of high officials in territories occupied by aggressive war as waging aggressive war.

But, on the other hand, the Tribunal did not find Sauckel "sufficiently involved in the planning or waging of the aggressive wars" to be convicted on count two, although he was in charge of a pro-

¹⁰³ Frank was not indicted on count two, so the Court did not say if his activity in Poland could be considered as waging aggressive war.

¹⁰⁴ *Judgment*, p. 154.

¹⁰⁵ *Judgment*, p. 122.

¹⁰⁶ *Judgment*, p. 127.

gramme which involved deportation of millions of human beings from occupied territories to Germany for slave labour. This exploitation of occupied territories in the interest of the German war effort was regarded by the Court not as waging aggressive war but as a war crime under article 6 (b) of the Charter.¹⁰⁷

As to *administrative activities within the Reich* in support of the German war effort the Court said in reference to Frick: "Six months after the seizure of Austria, under the provisions of the Reich defence law of September 4, 1938, Frick became General Plenipotentiary for the administration of the Reich. He was made responsible for war administration, except the military and economic, in the event of Hitler's proclaiming a state of defence. The Reich Ministries of Justice, Education, Religion, and the office of spatial planning were made subordinate to him. Performing his allotted duties, Frick devised an administrative organization in accordance with war-time standards. According to his own statement this was actually put into operation after Germany decided to adopt a policy of war."¹⁰⁸ This statement, made by the Court under the heading of "crimes against peace", seems to indicate some inclination on its part to regard top direction of the administrative machinery of the Reich as participation in the waging of the aggressive wars.

With regard to activities in connexion with German *war economy* the Court noted that Goering was "in theory and in practice . . . the economic dictator of the Reich".¹⁰⁹ But about Speer as the head of the armament industry the Tribunal said: "His activities in charge of German armament production were in aid of the war effort in the same way that other productive enterprises aid in the waging of war; but the Tribunal is not prepared to find that such activities involve . . . waging aggressive war as charged under count two."¹¹⁰ Central direction of the total war economy may therefore have been regarded by the Court as waging war but clearly not industrial production as such.

Although the waging of aggressive war may involve activities in different fields, military, administrative and economic, only persons in the highest positions seem to have been, in the opinion of the Court, capable of committing this crime. Thus, the Court did not adopt the extreme theory that every act of warfare committed in the

¹⁰⁷ *Judgment*, pp. 147-148.

¹⁰⁸ *Judgment*, p. 127.

¹⁰⁹ *Judgment*, p. 108.

¹¹⁰ *Judgment*, p. 156.

prosecution of a criminal war is an international crime. To be a crime against peace such an act must be such as to qualify it as *waging* war. It may be said that the Court, partly because it was concerned only with the major war criminals, did not make the compass of the notion of "waging" absolutely clear, but there seems to be no doubt about the principle that only acts of warfare constituting a *waging* of criminal war are crimes against peace. If an act committed in the course of or in relation to an aggressive war does not amount to waging such war, it is an international crime only if it can be characterized as a war crime in the strict sense of that term or as a crime against humanity.

5. WAR CRIMES

A. DEFINITION

Article 6 of the Charter defines war crimes in these words:

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

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

In consonance with its opinion that the Charter was "the law of the case" the Court expressly stated that it was bound by this definition of war crimes. The indictment charged the defendants also with conspiracy to commit war crimes, but, as has been mentioned above, the Court decided to disregard this charge on the ground that the Charter does not define such a conspiracy as a separate crime.

The Tribunal did not, however, content itself with the statement that it was bound by the definition of war crimes given in article 6 (b). It furthermore declared, in explicit words, that this definition was in conformity with existing international law. The Court said: "With respect to war crimes, however, as has already been pointed out, the crimes defined by article 6, section (b), of the Charter were already recognized as war crimes under international law. They were covered by articles 46, 50, 52 and 56 of the Hague Convention of 1907, and articles 2, 3, 4, 46 and 51 of the Geneva

Convention of 1929. That violation of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument."¹¹¹

Although the Court seems to have had in view, in the first place, the particular war crimes enumerated as examples in article 6 (b), the statement is sufficiently broad to include also the general definition of war crimes as violations of the laws or customs of war. The Court thus seems to have also recognized as a principle of existing international law the provision of the Charter that violations of the laws or customs of war are not only illegal acts but international crimes.

B. WAR CRIMES AS VIOLATIONS OF THE LAWS OR CUSTOMS OF WAR

The principle that violations of the laws or customs of war are international crimes has far-reaching implications. In the first place, it means that persons violating, in their individual capacity, these rules are liable to punishment. But, furthermore, it implies that individuals performing acts of State are criminally responsible under international law, when such acts constitute violations of duties incumbent on the State according to the laws or customs of war. It has already been seen that the Court refused to admit, in regard to international crimes, the plea that individuals are not responsible under international law for acts of State.

The international responsibility of the State for violations of the laws or customs of war is thus supplemented by the criminal responsibility under international law of the acting individuals. It is of interest in this connexion that the defence contended that the Hague Convention on land warfare differentiates two kinds of war crimes, those which can be committed by an individual, such as murder and ill-treatment, and those which can only be committed by a belligerent State, such as illegal utilization of man-power.¹¹² The Court obviously disregarded this argument, as it held several of the defendants responsible for their participation in the German slave labour policy.

Another general aspect of the definition of war crimes as violations of the laws or customs of war is that it makes the determination of what acts are war crimes dependent on the development of these laws and customs. Any enumeration or exemplification of particular

¹¹¹ *Judgment*, p. 83.

¹¹² *Nazi Conspiracy and Aggression*, supplement B, p. 710.

war crimes therefore seems to be, at least in principle, of rather limited value for the future. Such a catalogue may be an adequate expression of the present situation but can always be made obsolete by new developments in the laws and customs of war. The general definition remains as an overriding principle making it necessary to ascertain at each time the actual content of these laws and customs. The dynamic character of the law of war was recognized by the Court. This law, it said, "is not static, but by continual adaptation follows the needs of a changing world".¹¹³

In the literature of international law there has been much discussion as to the consequences of the outlawing of aggressive war with respect to the written and unwritten laws of war. It has been argued that the existence of such laws for illegal war would be logically and juridically inexplicable. How can the conduct of an illegal war, it has been asked, be regulated by legal rules conferring both rights and duties on the aggressor?

This line of thought was reflected in some of the arguments presented by the prosecution. One of the prosecutors said: "Any resort to war . . . is a resort to means that are inherently criminal. War inevitably is a course of killings, assaults, deprivations of liberty, and destruction of property. An honestly defensive war is, of course, legal and saves those lawfully conducting it from criminality. But inherently criminal acts cannot be defended by showing that those who committed them were engaged in a war, when war itself is illegal. The very minimum legal consequences of the treaties making aggressive wars illegal is to strip those who incite or wage them of every defence the law ever gave, and to leave war-makers subject to judgment by the usually accepted principles of the law of crimes."¹¹⁴ Another prosecutor stated: "A war perpetrated in violation of international law no longer really possesses the juridical character of a war. It is truly an act of gangsterism, a systematically criminal undertaking."¹¹⁵

This extreme theory on the consequences of the outlawry of aggressive war is obviously not the one on which the Charter was based or which was followed by the Court. The Charter declares waging of aggressive war to be a crime against peace but as interpreted by the Court "waging" does not, as has been seen above, mean every participation in aggressive warfare. Acts of aggressive warfare which do not come under the notion of waging aggressive war are still international crimes if they can be regarded as war crimes. War crimes

¹¹³ *Judgment*, p. 51.

¹¹⁴ Justice Jackson in *The Trial of German Major War Criminals. Opening Speeches of the Chief Prosecutors*. His Majesty's Stationery Office, London 1946 (hereafter cited: *Opening Speeches*), p. 39.

¹¹⁵ De Menthon in *Opening Speeches*, p. 104.

are, however, defined as violations of the laws or customs of war. This implies that these laws and customs are applicable also to aggressive war. The definition was accepted by the Court as an expression of existing international law.

It must be added, however, that even if the laws and customs of war apply to aggressive wars, this does not necessarily mean that aggressors and victims have or always will have the same rights and duties under these laws. That is a question which depends on the actual and future content of the laws and customs of war. In this respect, too, the definition of war crimes in the Charter leaves the door open for further developments.

As sources of the laws and customs of war the Court mentioned, in the first place, the Hague Convention of 1907 on land warfare and the Geneva Convention of 1929 regarding the treatment of prisoners of war. Another international agreement relied on by the Court was the Naval Protocol of 1936 concerning submarine warfare, although, in the actual circumstances, it did not find the defendants concerned guilty of war crimes arising from violations of this protocol. It was argued on the part of the defence that the Hague Convention did not apply in the present case, because all the belligerents were not parties to it, as required by the "general participation" clause contained in its article 2. The Court dealt with this argument as follows: "In the opinion of the Tribunal it is not necessary to decide this question. The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But the Convention expressly stated that it was an attempt 'to revise the general laws and customs of war', which it thus recognized to be then existing, but by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war which are referred to in article 6 (b) of the Charter."¹¹⁶

Treaty-making is thus, in the opinion of the Court, only one element in the development of the laws and customs of war. Other factors are mentioned in the following statement made in another connexion: "The law of war is to be found not only in treaties, but in the customs and practices of States which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts . . . Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing."¹¹⁷

¹¹⁶ *Judgment*, p. 83.

¹¹⁷ *Judgment*, p. 51.

In view of what has been said above no attempt will be made here to establish, on the basis of the judgment, a catalogue of war crimes. On the whole it may be said that the Court followed the enumeration which appears in article 6 (b).

6. CRIMES AGAINST HUMANITY

A. DEFINITION

The third group of international crimes set forth in article 6 of the Charter are defined as follows:

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

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

Originally, there was in the English text of the Charter a semi-colon between the phrase "the war" and the phrase "or persecutions", instead of the comma now appearing in that place. However, in a protocol¹¹⁸ signed in Berlin on 6 October 1945 the four Governments who had concluded the London Agreement of 8 August 1945 stated that a discrepancy had been found to exist between the Russian text of article 6, section (c), on the one hand, and the English and French texts of the same section, on the other.

The discrepancy was this: in the English and French texts, article 6, section (c) was divided into two parts by a semi-colon between "the war" and "or persecutions", while the Russian text had a comma in the corresponding place. The protocol declared that the meaning and intention of the Agreement and Charter required that the semi-colon in the British and French texts should be changed into a comma and some additional alterations be made in the French text. The correction made by the Berlin Protocol has as a consequence that the phrase "in execution of or in connexion with any crime within the jurisdiction of the Tribunal" now refers to the whole preceding text of article 6 (c). The change in meaning may be made particularly

¹¹⁸ *Trial of the Major War Criminals*, published at Nürnberg, 1947, vol. I, p. 17.

clear by comparing the two French texts. Originally the French text read as follows:

"(c) Les crimes contre l'humanité; c'est-à-dire l'assassinat, l'extermination, la réduction en esclavage, la déportation, et tout autre acte inhumain commis contre toutes populations civiles, avant ou pendant la guerre; ou bien les persécutions pour des motifs politiques, raciaux ou religieux, commises à la suite de tout crime rentrant dans la compétence du Tribunal international ou s'y rattachant, que ces persécutions aient constitué ou non une violation du droit interne du pays où elles ont été perpétrées."

After the changes made by the Berlin Protocol the text has the following wording:

"(c) Les crimes contre l'humanité: c'est-à-dire l'assassinat, l'extermination, la réduction en esclavage, la déportation, et tout autre acte inhumain commis contre toutes populations civiles, avant ou pendant la guerre, ou bien les persécutions pour des motifs politiques, raciaux ou religieux, lorsque ces actes ou persécutions, qu'ils aient constitué ou non une violation du droit interne du pays où ils ont été perpétrés, ont été commis à la suite de tout crime rentrant dans la compétence du Tribunal, ou en liaison avec ce crime."

The Court explicitly declared itself bound by the definition of crimes against humanity laid down in the Charter. The conspiracy charge in the indictment was rejected with respect to crimes against humanity in the same way as it was disallowed in regard to war crimes.

B. GENERAL DECLARATION OF THE COURT AS TO CRIMES AGAINST HUMANITY

The Court expressed its general opinion on the notion of crimes against humanity in the following way:

"With regard to crimes against humanity, there is no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty. The policy of terror was certainly carried out on a vast scale, and in many cases was organized and systematic. The policy of persecution, repression, and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out. The per-

secution of Jews during the same period is established beyond all doubt. To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connexion with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connexion with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter, but from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity; and in so far as the inhumane acts charged in the indictment, and committed after the beginning of the war, did not constitute war crimes, they were all committed in execution of, or in connexion with, the aggressive war, and therefore constituted crimes against humanity."¹¹⁹

C. CATEGORIES OF CRIMES AGAINST HUMANITY

Article 6 (c) refers to two types of crimes against humanity. The first category is defined as comprehending murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population. The phrase "and other inhumane acts" indicates that the list of explicitly named activities is not exhaustive. It could be asked, for instance, whether deprivation of means of sustenance might not be considered as an "inhumane act". The reprobated activities are described as directed against any civilian population. Presumably this does not mean that the entire population must be affected. It seems to imply, however, that a larger body of victims are involved. The word "any" indicates that crimes against humanity can be committed both against the perpetrator's own compatriots and against populations of other nationalities, for instance, populations in countries under belligerent occupation. In the last case crimes against humanity can evidently be war crimes at the same time. That the Court was aware of such overlapping appears from the statement quoted above.

It might perhaps be argued that the phrase "on political, racial or religious grounds" refers not only to persecutions but also to the first type of crimes against humanity. The British Chief Prosecutor possibly held that opinion as he spoke of "murder, extermination, enslavement, persecution on political, racial or economic grounds".¹²⁰ This interpretation, however, seems hardly to be warranted by the

¹¹⁹ *Judgment*, p. 84.

¹²⁰ *Concluding speeches concerning individual defendants*, p. 63.

English wording and still less by the French text quoted above. Moreover, in its statement with regard to von Schirach's guilt the Court designated the crimes against humanity as "murder, extermination, enslavement, deportation, and other inhumane acts" and "persecutions on political, racial, or religious grounds".¹²¹

The qualification "on political, racial or religious grounds" thus applies only to the second type of crimes against humanity: persecutions. What the authors of the Charter had in mind in formulating this part of article 6 (c) was obviously above all the persecutions of the Jews. This category of crimes against humanity is apparently closely related to the crime of genocide. A detailed discussion of these relations does not, however, come within the scope of this paper.

D. REQUIREMENT THAT CRIMES AGAINST HUMANITY BE CONNECTED WITH CRIMES AGAINST PEACE OR WAR CRIMES

In the light of the changes in the English and French texts of article 6 (c) effected by the Berlin Protocol, it is quite clear that both types of crimes against humanity are qualified by the requirement that they be committed "in execution of or in connexion with any crime within the jurisdiction of the Tribunal". This was also the interpretation accepted by the Court, as appears from its general statement quoted above. As defined in the Charter and the judgment, crimes against humanity are, consequently, a category of crimes accessory to crimes against peace and war crimes. The notion is intended to cover inhumane acts, in connexion with the planning or waging of aggressive war, which are not covered by the laws and customs of war. The acts may have been committed, as is said in article 6 (c), "before or during the war", but, obviously, their connexion with crimes against peace or with war crimes will be more difficult to prove if the acts have taken place before the war. The Court declared in its general statement that all the inhumane acts charged in the indictment, and committed after the beginning of the war, were either war crimes or committed in execution of, or in connexion with, the aggressive wars and, consequently, crimes against humanity. But it refused to make a corresponding declaration as to acts committed before the war. This does not mean, however, that no inhumane act perpetrated before the outbreak of the war could be considered a crime against humanity. Von Schirach was found guilty of crimes against humanity at least partly committed before the war. The Court said: "Von Schirach is not charged with the commission of war crimes in Vienna, only with the commission of crimes against humanity. As has already been seen, Austria was occupied pursuant to a common plan

¹²¹ *Judgment*, p. 145.

of aggression. Its occupation is, therefore, a 'crime within the jurisdiction of the Tribunal' as that term is used in article 6 (c) of the Charter. As a result, 'murder, extermination, enslavement, deportation, and other inhumane acts' and 'persecutions on political, racial, or religious grounds' in connexion with this occupation constitute a crime against humanity under that article."¹²² In the case of Streicher, the Court referred to his anti-Jewish activities both before and during the war, but seems finally to have based his conviction only on his acts during the war. The Court said: "Streicher's incitement to murder and extermination at the time when Jews in the east were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connexion with war crimes, as defined by the Charter, and constitutes a crime against humanity".¹²³ It is not, however, altogether excluded that the Court took into consideration also Streicher's persecution of the Jews in peace-time Germany.

Von Schirach's and Streicher's cases show, furthermore, that although an inhumane act, to constitute a crime against humanity, must be connected with a crime against peace or with a war crime, the required connexion can exist even when the crime against peace or the war crime was committed by another person. Both von Schirach and Streicher were indicted under counts one and four but neither of them was found guilty on count one. They were, consequently, convicted only of crimes against humanity, not of any other crime within the jurisdiction of the Court. A material connexion between their acts and a crime against peace or a war crime was considered to be sufficient.

E. SUPERIORITY OF ARTICLE 6. (c) OVER INTERNAL LAW

The last sentence of article 6 (c) provides that the reprobated acts are crimes against humanity whether or not they are committed in violation of the domestic law of the country where perpetrated. In most instances a crime against humanity is also a crime under municipal law, but even when this is not the case article 6 (c) prevails. A person otherwise guilty of a crime against humanity cannot effectively plead that his act was legal under the domestic law obtaining in the territory where the act was committed. That the article expressly mentions only "the domestic law of the country where perpetrated" obviously does not mean that a perpetrator of acts coming within the notion of crimes against humanity could shelter himself behind a domestic law other than that of the territory where

¹²² *Judgment*, p. 145.

¹²³ *Judgment*, p. 131.

he committed his acts. The reason why the authors of the Charter explicitly named the law of the territory apparently is that, in their opinion, this law would, on the level of internal law, have authority in the matter.

F. PERSONS CAPABLE OF COMMITTING CRIMES AGAINST HUMANITY

Crimes against humanity can be committed both by persons acting as organs of the State and by individuals in their private capacity, as illustrated by the cases of von Schirach and Streicher. Von Schirach was found guilty of such crimes because of his activities as "Gauleiter" and Reichs Governor in Vienna. Streicher's crime, on the other hand, was incitement to murder and extermination of the Jews and was committed by him as publisher of a weekly newspaper.

G. CRIMES AGAINST HUMANITY AND EXISTING INTERNATIONAL LAW

While the Court explicitly affirmed that war crimes as well as planning and waging of an aggressive war already were international crimes under existing international law, it made no corresponding statement in regard to crimes against humanity. On the other hand, the Court, as has been mentioned before, quite generally declared that the Charter "is the expression of international law existing at the time of its creation".¹²⁴ This statement would seem to cover also the provisions concerning crimes against humanity.

It is a fact, however, that the Court applied article 6 (c) only restrictively, especially with respect to inhumane acts committed before the war. A similar tendency to limit the scope of crimes against humanity appears on the part of the authors of the Charter when they qualified these crimes by the requirement that the reprobated acts be committed "in execution of or in connexion with any crime within the jurisdiction of the Tribunal". The reason for this attitude and its connexion with existing international law is made clear by the following statement made during the proceedings by the British Chief Prosecutor:

"So the crime against the Jews, in so far as it is a crime against humanity and not a war crime, is one which we indict because of its association with the crime against the peace. That is, of course, a very important qualification, and is not always appreciated by those who have questioned the exercise of this jurisdiction. But, subject to that

¹²⁴ *Judgment*, p. 48.

qualification, we have thought it right to deal with matters which the criminal law of all countries would normally stigmatize as crimes. Murder, extermination, enslavement, persecution on political, racial or economic grounds. These things done against belligerent nationals, or for that matter, done against German nationals in belligerent occupied territory, would be ordinary war crimes, the prosecution of which would form no novelty. Done against others they would be crimes against municipal law except in so far as German law, departing from all the canons of civilized procedure, may have authorized them to be done by the State or by persons acting on behalf of the State . . . The nations adhering to the Charter of this Tribunal have felt it proper and necessary in the interest of civilization to say that those things, even if done in accordance with the laws of the German State . . . were, when committed with the intention of affecting the international community—that is in connexion with the other crimes charged—not mere matters of domestic concern but crimes against the law of nations. I do not minimize the significance for the future of the political and jurisprudential doctrine which is here implied. Normally international law concedes that it is for the State to decide how it shall treat its own nationals; it is a matter of domestic jurisdiction. And . . . the Covenant of the League of Nations and the Charter of the United Nations Organization does recognize that general position. Yet international law has in the past made some claim that there is a limit to the omnipotence of the State and that the individual human being, the ultimate unit of all law, is not disentitled to the protection of mankind when the State tramples upon its rights in a manner which outrages the conscience of mankind. Grotius, the founder of international law, had some notion of that principle . . . the same idea was expressed by John Westlake. . . . The same view was acted upon by the European Powers which in time past intervened in order to protect Christian subjects of Turkey against cruel persecution. The fact is that the right of humanitarian intervention by war is not a novelty in international law—can intervention by judicial process then be illegal?"¹²⁵

In the light of this statement the notion of crimes against humanity, as defined in article 6 and applied by the Court, appears as the result of a compromise between two ideas. One is the principle of traditional international law that the treatment of nationals is a matter of domestic jurisdiction. The competing idea is the view that inhumane treatment of human beings is a wrong even if it is tolerated, encouraged or even practised by their own State, and that this wrong ought to be penalized on the international level, if necessary. This latter view has found expression in the part of article 6 (c) which describes crimes against humanity as inhumane acts against any

¹²⁵ *Concluding speeches concerning individual defendants*, pp. 63-64.

civilian population, before or during the war, or persecutions on political, racial or religious grounds, whether or not such activities are in violation of domestic law. If such a definition of crimes against humanity had been accepted without qualifications, it would certainly have meant an innovation of a far-reaching and revolutionary nature. It would have set up a minimum standard for the treatment of human beings, in peace and in war, and threatened violators of this standard, whether private individuals or organs of the State, with international penal sanctions.

This effort to guarantee a minimum measure of fundamental rights to all human beings was, however, counteracted by the traditional and conservative principle "that it is for the State to decide how it shall treat its own nationals". The force of this principle made itself felt when the definition of crimes against humanity was qualified by the provision that the inhumane acts and persecutions, to constitute such crimes, must be committed "in execution of or in connexion with any crime within the jurisdiction of the Tribunal". It is thereby required, as has been seen, that the reprobated activities be connected with crimes against peace or with war crimes, that is, with crimes clearly affecting the rights of other States. The aim of this requirement, therefore, is to make sure that acts coming within the notion of crimes against humanity always affect, at least indirectly, such rights. These acts may then be said to be of international concern and a justification is given for taking them out of the exclusive jurisdiction of the State without abandoning the principle that treatment of nationals is normally a matter of domestic jurisdiction.

7. RESPONSIBILITY OF LEADERS, ORGANIZERS, INSTIGATORS AND ACCOMPLICES

The last paragraph of article 6 of the Charter provides:

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

The Court commented on this provision in the following way:

"In the opinion of the Tribunal, these words do not add a new and separate crime to those already listed. The words are designed to establish the responsibility of persons participating in a common plan."¹²⁶

¹²⁶ Judgment, p. 56.

As has been seen above, the Court held that the evidence established the existence of a common plan or conspiracy by certain of the defendants to prepare and wage aggressive war. On the other hand, it refused to consider the charges of conspiracy to commit war crimes and crimes against humanity, on the ground that the Charter does not define as a separate crime any conspiracy except the one to prepare and wage aggressive war.

At first sight, the consequence would seem to be that the concluding paragraph of article 6 should be applicable to the participants in the common plan or conspiracy to prepare and wage aggressive war and to them alone. The defendants guilty of such conspiracy would then be responsible "for all acts performed by any persons in execution of such plan". They would therefore be responsible also for war crimes and crimes against humanity committed by such persons. However, Hess was found guilty of conspiracy to prepare and wage aggressive war, but not of any war crimes or crimes against humanity.

The conclusion seems to be that the Court interpreted the words "common plan or conspiracy" in the concluding paragraph of article 6 and the same words in section (a) of article 6 in different ways. Presumably, the Tribunal saw in the concluding paragraph not a provision laying down the extent of the responsibility resting on persons guilty of conspiracy as a separate crime, but a rule establishing the responsibility of instigators and accomplices in any of the crimes defined in article 6. Participation in "the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes", would then, as interpreted by the Court, mean not participation in a conspiracy in a technical sense but merely complicity because of participation in the planning or execution of any of the crimes listed in article 6.

This view of the position taken by the Court seems to be corroborated by several statements made by it in assessing the guilt of various defendants. Under the heading of "war crimes and crimes against humanity", the Tribunal said about Goering that the record was filled with admissions of his complicity in the use of slave labour, that he signed a directive concerning the treatment of Polish workers in Germany and that he was the active authority in the spoliation of conquered territory. He was also, *inter alia*, said to have been active in the preparing and executing of the aggressions against Yugoslavia and Greece.¹²⁷ Hess was an "active supporter of preparations for war" and "an informed and willing participant in German aggression against Austria, Czechoslovakia and Poland".¹²⁸ Rosenberg

¹²⁷ *Judgment*, p. 109.

¹²⁸ *Judgment*, p. 111.

"helped to formulate the policies of Germanization, exploitation, forced labour, extermination of Jews and opponents of Nazi rule, and he set up the administration which carried them out".¹²⁹

Similar statements were made with respect to other defendants found guilty of crimes under article 6. As a matter of fact, their guilt was to a large extent founded on complicity. The major war criminals did not themselves, in a physical sense, murder or maltreat war prisoners and civilians, kill hostages, destroy and devastate cities, but they were held responsible for these crimes as leaders, organizers, instigators and accomplices. To invest them with this responsibility was apparently the aim of the concluding paragraph of article 6, as interpreted by the Court.

8. CRIMINAL ORGANIZATIONS

A. PROVISIONS OF THE CHARTER

Articles 9 and 10 of the Charter provide as follows:

"Article 9

"At the trial of any individual member of any group or organization the Tribunal may declare (in connexion 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.

"After receipt of the indictment the Tribunal shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration and any member of the organization will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organization. The Tribunal shall have power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard.

"Article 10

"In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned."

¹²⁹ *Judgment*, p. 123.

In the indictment the Court was asked to declare the following groups or organizations to be criminal within the meaning of the charter: *Die Reichsregierung* (Reich Cabinet), *Das Korps der politischen Leiter der Nationalsozialistischen Deutschen Arbeiterpartei* (Leadership Corps of the Nazi Party), *Die Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei* (commonly known as the SS) including *Die Sicherheitsdienst* (commonly known as the SD), *Die Geheime Staatspolizei* (Secret State Police, commonly known as the Gestapo), *Die Sturmabteilungen der Nationalsozialistischen Deutschen Arbeiterpartei* (commonly known as the SA), and the General Staff and High Command of the German Armed Forces.

The purpose of indicting the organizations was explained by counsel for the United States in the following way:

"The purpose of accusing organizations and groups as criminal was to reach, through subsequent and more expeditious trials before Military Government or military courts, a large number of persons. . . . It has been the great purpose of the United States from the beginning to bring into this one trial all that is necessary by way of defendants and evidence to reach a large number of persons responsible for the crimes charged without going over the entire evidence again."¹³⁰

The provisions in articles 9 and 10 thus seem to have arisen chiefly out of practical considerations. At least as presented by the American Chief Prosecutor they were thought of as a means of making subsequent trials of minor war criminals shorter and more expeditious.

The justification for accusing the organizations was, according to the prosecution, that they had "been instruments of cohesion in planning and executing" the crimes defined in article 6.¹³¹ "Without the existence of these organizations, without the spirit which animated them, one could not understand how so many atrocities could have been perpetrated. The systematic war crimes could not have been carried out by Nazi Germany without these organizations, without the men who composed them. It is they who not only executed but willed this body of crimes on behalf of Germany."¹³²

The prosecution pointed out, however, that the organizations

¹³⁰ *Trial of the Major War Criminals*, published at Nürnberg, 1947, vol. I, p. 144.

¹³¹ American Chief Prosecutor, *Opening Speeches*, p. 43.

¹³² French Chief Prosecutor, *Opening Speeches*, p. 130.

were not on trial in the conventional sense of that term. The Tribunal was empowered to declare them to be criminal, but it could not impose any sentence upon them as entities. The Court was not authorized to levy a fine upon them or to convict any person because of membership.¹³³

C. OBJECTIONS OF THE DEFENCE

On the part of the defence the provisions in articles 9 and 10 were attacked on the ground, *inter alia*, that they would result in punishment without guilt. "Article 9 of the Charter is . . . in contradiction with the common legal conviction of all members of the international legal community. There exists neither a legal statute in international law nor a legal statute in any national law which declares the membership in an organization as criminal without it being examined in each individual case, whether the person concerned has made himself personally guilty by his own actions or omissions. Contrary to the general principles of criminal law . . . the Charter provides in article 9 for a criminal responsibility and a collective liability of all members of certain organizations and institutions, and this without any consideration as to whether the individual members have incurred any guilt."¹³⁴ It was also pointed out, as a contradiction, that the indictment which wiped out the State as a super-person in order to arrive at the individual responsibility of the defendants for breaches of the peace, now presented new super-persons in the form of organizations and groups.¹³⁵

D. FINDINGS OF THE COURT

The Court seems to have applied the provisions in articles 9 and 10 with a certain reluctance. It stressed that, according to article 10, the declaration of criminality against an accused organization is final and cannot be challenged in any subsequent criminal proceeding against a member of that organization. In order to illustrate the effect of the declaration, the Court thereafter cited part of Law 10 of the Control Council of Germany, providing that membership in categories of a criminal group or organization declared criminal by the Tribunal is recognized as a crime which may be punished by death, imprisonment or a fine. The Court continued: "In effect, therefore, a member of an organization which the Tribunal has declared to be criminal

¹³³ American Chief Prosecutor, *Trial of the Major War Criminals*, published at Nürnberg, 1947, vol. VIII, pp. 358-359.

¹³⁴ Defence counsel for Hess, *Nazi Conspiracy and Aggression*, supplement B, p. 124.

¹³⁵ Dr. Jellinek, *Ibid.*, p. 26.

may be subsequently convicted of the crime of membership and be punished for that crime by death. This is not to assume that international or military courts which will try these individuals will not exercise appropriate standards of justice. This is a far-reaching and novel procedure. Its application, unless properly safeguarded, may produce great injustice."¹³⁶

The Court stressed that in virtue of article 9, it was vested with discretion as to whether it would declare any organization criminal. But the Court 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 subsequent tribunals. On the other hand, the Tribunal should make such a declaration of criminality so far as possible in a manner to insure that innocent persons will not be punished."¹³⁷

The characteristics of a criminal organization were thereafter explained by the Court in the following way: "A criminal organization is analagous 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 connexion 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."¹³⁸

On the basis of these tests the Court made declarations of criminality affecting the Leadership Corps of the Nazi Party, the Gestapo, the SD and the SS. But in none of these cases was the whole organization declared criminal. With regard to the Leadership Corps, the Gestapo and the SD, the Tribunal declared to be criminal the group composed of those members holding certain enumerated positions "who became or remained members of the organization with know-

¹³⁶ *Judgment*, p. 85.

¹³⁷ *Judgment*, pp. 85-86.

¹³⁸ *Judgment*, p. 86.

ledge that it was being used for the commission of acts declared criminal by article 6 of the Charter, or who were personally implicated as members of the organization in the commission of such crimes".¹³⁹ In the case of the SS the wording of the declaration of the Court was different in certain respects. The Tribunal declared criminal the group composed of those persons "who had been officially accepted as members of the SS", and affiliated organizations as enumerated, and "who became or remained members of the organization with knowledge that it was being used for the commission of acts declared criminal by article 6 of the Charter, or who were personally implicated as members of the organization in the commission of such crimes, excluding, however, those who were drafted into membership by the State in such a way as to give them no choice in the matter, and who had committed no such crimes".¹⁴⁰ The reason why the phrase excluding drafted members does not occur in the declarations concerning the Leadership Corps, the Gestapo and the SD is that these organizations were considered by the Court to be wholly voluntary.

In all the four cases the Court further limited the scope of the declaration of criminality by stating that, as this declaration was based on the participation of the organization in war crimes and crimes against humanity connected with the war, the group declared criminal could not include persons who had ceased to hold the enumerated positions or to belong to the organizations prior to 1 September 1939.

The Reich Cabinet was not declared criminal for two reasons. Firstly, because after 1937 it did not really act as a group or organization. It "did not constitute a governing body, but was merely an aggregation of administrative officers subject to the absolute control of Hitler".¹⁴¹ The second reason was that the number of persons here involved was so small that the Court considered that they could be conveniently tried individually without resort to a declaration of criminality. For similar reasons the General Staff and High Command was not declared a criminal group or organization.

As to the SA the Court said, *inter alia*, that after the purge in 1934 this organization was reduced to the status of a group of unimportant Nazi hangers-on. Although units of the SA were sometimes used for the commission of war crimes and crimes against humanity, it could not be said "that its members generally participated in or even knew of the criminal acts".¹⁴² The Tribunal did, therefore, not declare the SA to be a criminal organization.

¹³⁹ *Judgment*, pp. 91, 97.

¹⁴⁰ *Judgment*, p. 102.

¹⁴¹ *Judgment*, p. 104.

¹⁴² *Judgment*, p. 104.

It appears from the foregoing that the Court applied the provisions of article 9 in a very restrictive way. None of the indicted organizations was declared criminal as a whole, only groups within them composed of persons who either directly participated in the commission of crimes referred to in article 6 of the Charter or, although aware of the fact that the organization was being used for the commission of such crimes, solidarised themselves with these criminal activities by becoming or remaining members of the organizations.

In other words, the Court did not impose a collective responsibility, based solely on membership, on the members of any organization. To hold a member responsible for the criminal activities of his organization the Tribunal, in fact, required some conduct on the part of the member which established his complicity in the activity.

9. JURISDICTION

In conclusion, attention may be drawn once more to what the Tribunal said about the foundation of its jurisdiction in international law. The Court seems to have perceived two different grounds of jurisdiction.

"The making of the Charter", it said, "was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world."¹⁴³ In this statement the Court refers to the particular legal situation arising out of the unconditional surrender of Germany in May 1945, and the declaration issued in Berlin on 5 June 1945, by the four Allied States, signatories of the London Agreement. By this declaration the said countries assumed supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any State, municipal or local government or authority. The Court apparently held that in virtue of these acts the sovereignty of Germany had passed into the hands of the four States and that these countries thereby were authorized under international law to establish the Tribunal and invest it with the power to try and punish the major German war criminals.

The Court, however, also indicated another basis for its jurisdiction, a basis of more general scope. "The signatory Powers", it said, "created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the trial. In doing so, they have

¹⁴³ *Judgment*, p. 48.

done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law.”¹⁴⁴ The statement is far from clear, but, with some hesitation, the following alternative interpretations may be offered. It is possible that the Court meant that the several signatory Powers had jurisdiction over the crimes defined in the Charter because these crimes threatened the security of each of them. The Court may, in other words, have intended to assimilate the said crimes, in regard to jurisdiction, to such offences as the counterfeiting of currency. On the other hand, it is also possible and perhaps more probable, that the Court considered the crimes under the Charter to be, as international crimes, subject to the jurisdiction of every State. The case of piracy would then be the appropriate parallel. This interpretation seems to be supported by the fact that the Court affirmed that the signatory Powers in creating the Tribunal had made use of a right belonging to any nation. But it must be conceded, at the same time, that the phrase “right thus to set up special courts to administer law” is too vague to admit of definite conclusions.

¹⁴⁴ *Judgment*, p. 48.

ADDENDUM

The trial of major Japanese war criminals¹

By way of an addendum to this paper, the following points of similarity and dissimilarity between the Nürnberg and the Tokyo war crimes trials are noted:

1. *The Charter*

There are few material differences between the constituent instruments of the two Tribunals. The Charter of the International Military Tribunal for the Far East² contemplates the same three categories of crimes against the peace, conventional war crimes, and crimes against humanity³ as does the Charter of the Nürnberg Tribunal. The first category, crimes against the peace, is indeed slightly differently defined in the former document in that it includes "planning, preparation, initiation or waging of a *declared or undeclared* war of aggression, etc.". The italicised words do not appear in the Charter of the Nürnberg Tribunal⁴ and their insertion in that of the Tokyo Tribunal is clearly due to the circumstance that hostilities began and continued for a long time in the Far East without any declaration of war on either side.

The category of war crimes is not illustrated by examples in the Charter of the Tokyo Tribunal as it is in that of the Nürnberg Tribunal. In view of the circumstance that the list of examples in the latter document⁵ is specifically declared not to be exhaustive, this difference would appear to be without significance.

The declaration that "leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit" any justiciable crime are responsible for all acts performed by any person in the execution of such plan is not, in the Charter of the Tokyo Tribunal, contained in a distinct

¹ The judgment of the Tokyo Tribunal became available only after the paper was written and it was not, therefore, possible to deal with it fully in the main text.

² Text in *Department of State Bulletin* (USA), vol. xiv (1946), No. 349, pp. 361 *f.*; subsequently amended, see No. 360, p. 890.

³ Article 5.

⁴ Article 6; see above pp. 45-46, 60, 64.

⁵ Article 6 (*b*); see above p. 60.

paragraph, as in that of the Nürnberg Tribunal, and, instead, forms part of the last of the sub-paragraphs dealing with the categories of justiciable crimes.⁶

The Charter of the Tokyo Tribunal confers no jurisdiction in respect of organizations.⁷

The Charter of the Nürnberg Tribunal, whilst contemplating the review of sentences imposed, specifically excludes the possibility of any proceedings in the nature of appeal from the Tribunal's findings of guilt or innocence.⁸ No such prohibition is contained in the Charter of the Tokyo Tribunal. In the case of some of the accused convicted by the latter, proceedings in error were attempted to be taken in the United States Supreme Court which, however, declined jurisdiction.⁹

2. *The Indictment*

The principal difference between the indictment of the Japanese major war criminals and that preferred before the Nürnberg Tribunal, apart from the circumstance that the former, of course, included no charges against organizations, was that in the former alone was there a charge of conspiracy to kill and murder members of the Allied armed forces and Allied civilians through the initiation of hostilities which were unlawful by reason of the breach, *inter alia*, of the Hague Convention relative to the Opening of Hostilities.¹⁰

A further difference is that, in the Tokyo indictment, there were no counts of crimes against humanity as such. A possible explanation of this is that, whereas in the Nürnberg trial one of the principal crimes against humanity sought to be punished was the Nazi persecution of the Jews, no analogous count was entered against the Japanese war leaders although its Charter permitted the Tokyo Tribunal to entertain charges of "persecution on political and racial grounds".¹¹ On the other hand, in the Tokyo trial, unlike that at Nürnberg, specific charges of murder and unlawful killing in consequence of the waging of unlawful wars were made.

Another point which is perhaps of some interest is that the counts of conspiracy against the Japanese war leaders charged their combination for illegal and criminal purposes not only with each other but

⁶ Compare article 5 of the Charter of the Tokyo Tribunal and article 6 of the Charter of the Nürnberg Tribunal and see above pp. 70-73.

⁷ See above pp. 73-78.

⁸ Article 2d.

⁹ *American Journal of International Law*, (1949), vol. 42, p. 170.

¹⁰ See *Records of Proceedings of the Tribunal for the Far East*, vol. 1, pp. 27-71.

¹¹ Article 5 (c).

with the "rulers of other aggressive countries, namely Nazi Germany and Fascist Italy". Conspiracy with rulers of other States was not charged against the German leaders.

3. *The Defence*

The point in the several defences of the Japanese accused which is of principal interest because nothing exactly parallel to it is to be found in the case made out for the German accused is the argument that, the Japanese Instrument of Surrender¹² having provided that the Declaration of Potsdam¹³ should be given effect to in connexion with the prosecution of war criminals, only crimes which were recognized to be such in international law at the date of that Declaration could be charged.¹⁴

4. *The Judgment*

In general the judgment of the Tokyo Tribunal is consistent with, and corroborative of, that of the Nürnberg Tribunal. Thus, the former Tribunal, like the latter, rejected all pleas to its jurisdiction on the grounds both that the law of its Charter was binding upon it and that the terms thereof were not inconsistent with international law.

The Tokyo Tribunal further expressly approved and adopted the words of the Nürnberg Tribunal¹⁵ concerning the effect of the Pact of Paris in rendering illegal the use of war as an instrument of national policy and making individuals planning and waging war in this manner criminally responsible, and concerning the ineffectiveness of the pleas of superior orders or act of State as disclaimers of responsibility.¹⁶

The Tokyo Tribunal proceeded to a slightly more elaborate discussion of the meaning of "conspiracy" than took place at Nürnberg,¹⁷ holding in especial: "A conspiracy to wage aggressive or unlawful war arises when two or more persons enter into an agreement to commit that crime. Thereafter, in furtherance of the conspiracy, follows planning and preparing for such war. Those who participate at this stage may be either original conspirators or later adherents. If the latter adopt the purpose of the conspiracy and plans and prepare for its

¹² Text in *Department of State Bulletin* (USA), vol. xiii (1945), No. 324, p. 364.

¹³ *Ibid.*, No. 318, p. 137.

¹⁴ *Records of Proceedings of the Tribunal for the Far East*, vol. 146, p. 48, 436. 436.

¹⁵ See above pp. 41-43.

¹⁶ *Records of Proceedings of the Tribunal for the Far East*, vol. 146, p. 48, 448.

¹⁷ See above pp. 50-55, 72-74.

fulfilment they become conspirators.”¹⁸ But, consistently with the decision of the Nürnberg Tribunal, the Tokyo Tribunal held that the context of the provision of its Charter declaring leaders, organizers, instigators and accomplices “participating in the formulation or execution of a common plan or conspiracy to commit [any justiciable crime]” to be responsible for all acts performed by any person in the execution of such plan related it “exclusively to sub-paragraph (a) [of article 5], crimes against peace, as that is the only category in which a ‘common plan or conspiracy’ is stated to be a crime. It has no application to conventional war crimes and crimes against humanity as conspiracies to commit such crimes are not made criminal by the Charter of the Tribunal”.¹⁹

In connexion with international crimes in general, it is to be noted that the Tokyo Tribunal declared that “aggressive war was a crime of international law long prior to the Declaration of Potsdam” and that, therefore, the contention that, in virtue of the Instrument of Surrender, only crimes recognized at the date of that Declaration could be charged, was irrelevant.²⁰ The contention that those of the accused who had been members of the Japanese armed forces and prisoners of war were triable only by tribunals constituted in accordance with the Geneva Convention of 1929 was likewise rejected; the view of the United States Supreme Court in the *Yamashita Case*²¹ that the relevant stipulations of the Convention “apply only to judicial proceedings directed against a prisoner of war, for offences committed while a prisoner of war” and not to a prosecution “for a violation of the law of war committed while a combatant” being expressly adopted.²²

So far as concerns the category of crimes against the peace, the Tokyo Tribunal took the phrase “initiating aggressive war”, as used in the indictment to mean the actual commencement of hostilities but, in view of the fact that such initiation constituted as well the waging of aggressive war, did not proceed with the counts “of initiating as well as of waging aggressive war”.²³ This way of dealing with the question stands in some contrast to that adopted by the Nürnberg Tribunal, which singled out the initiation of a war of aggression as “the supreme international crime” but held “planning and preparation [to be] essential to the waging of war” and accordingly specifically examined the case of each accused individual in order to determine if he was guilty of one or more of the charges of initiating, planning, preparing or waging wars of aggression.²⁴ Neither Tribunal, how-

¹⁸ *Records of Proceedings of the Tribunal for the Far East*, vol. 146, p. 48, 448.

¹⁹ *Ibid.*, p. 48, 449.

²⁰ *Ibid.*, p. 48, 440.

²¹ *In re Yamashita*, *American Journal of International Law*, vol. 40 (1946), pp. 432, 444.

²² *Records of Proceedings of the Tribunal for the Far East*, vol. 146, p. 48, 441.

²³ *Ibid.*, p. 48, 448.

²⁴ See above, pp. 47-49.

ever, defined "wars of aggression" though, after a detailed examination of the treaty relations of Japan which involved, incidentally, a consideration of the effect of the "general participation clause" in the various Hague Conventions and the extent to which the latter were evidence of customary international law, the Tokyo Tribunal held that there had been a criminal conspiracy to wage wars of aggression and that such wars had been waged against all prosecuting countries except Thailand. No evidence had been offered that Thailand "had complained of Japan's actions as being acts of aggression" so that "in these circumstances [the Tribunal was] left without reasonable certainty that the Japanese advance into Thailand was contrary to the wishes of the Government of Thailand and the charges that the defendants initiated and waged a war of aggression against [that country remained] unproved". But, for the rest, "they were unprovoked attacks, prompted by the desire to seize the possessions of these nations. Whatever may be the difficulty of stating a comprehensive definition of 'a war of aggression', attacks made with the above motive cannot but be characterized as wars of aggression".²⁵ But, unlike the Nürnberg Tribunal, which differentiated the German "acts of aggression" against Austria and Czechoslovakia from "wars of aggression", holding the former to be merely unlawful and not, as the latter, criminal,²⁶ the Tokyo Tribunal characterized all the hostilities undertaken by Japan, with the exception only of those against Thailand, as "wars of aggression".²⁷ And, the existence of a criminal conspiracy to wage such wars having been found proved and being "already criminal in the highest degree,"²⁸ no pronouncement was made on the charges of conspiracy to wage wars in violation of treaties.

As regards war crimes and crimes against humanity, as has been said already, the Tokyo Tribunal regarded the entertainment of the charges of conspiracy to commit murder by waging aggressive war and war in violation of treaties, and of conspiracy to commit conventional war crimes, as not being within its jurisdiction. The charges of murder—as distinct from the charges of conspiracy to commit murder—alleged killings arising from the waging of wars which were unlawful either for lack of a prior declaration of war or because they were begun in violation of treaties. But whether the alleged unlawfulness of these killings was founded upon the initial unlawfulness of the wars during which they occurred or upon subsequent breaches of the laws of war, or upon both, was not made clear in the indictment. The Tribunal said that, if the first was intended, then "no good purpose is to be served . . . in dealing with these parts of the offences by way of counts

²⁵ *Records of Proceedings of the Tribunal for the Far East*, vol. 148, p. 49, 589, 769-771.

²⁶ See above, pp. 47-49.

²⁷ *Records of Proceedings of the Tribunal for the Far East*, vol. 148, p. 49, 586.

²⁸ *Ibid.*, pp. 49, 769 to 49, 772

for murder when the whole offence of waging those wars unlawfully is put in issue upon the count charging the waging of such wars . . . If breaches of the laws of war *are founded upon*, then that is cumulative with the charges [in the counts charging specific breaches of the laws of war]”.²⁹ Therefore the charges concerned were not proceeded with. It may be noted that, in the indictment presented to the Nürnberg Tribunal, no separate charges of killing as a consequence of waging unlawful war were made, unlawful killings being charged and treated by the Tribunal, either as war crimes or as crimes against humanity.³⁰ In general, unlike the Nürnberg Tribunal,³¹ the Tokyo Tribunal, did not distinguish between “war crimes” and “crimes against humanity”.

No dissenting opinions were delivered by members of the Nürnberg Tribunal bearing on the question of its jurisdiction and on the principles of law applied by it. The opinion of the Russian judge expressed dissent from the majority only in connexion with the acquittal of certain of the accused and the penalty imposed upon Hess.³² The French, Dutch and Indian judges, however, dissented from the judgment of the Tokyo Tribunal on all material points. M. Henri Bernard (France) differed from the majority on the grounds that “the Charter of the Tribunal itself was not based on any law in existence when the offences took place” and that “so many principles of justice were violated during the trial that the Court’s judgment certainly would be nullified on legal grounds in most civilized countries”.³³ The first of these grounds was also adduced by the Dutch and Indian judges as a reason for their respective dissents. M. Rolling (Netherlands) also declared that “military planning for a probable conflict is not necessarily plotting for aggression” and further expressed the opinion that the Tribunal ought not to have passed upon offences alleged to have been committed before the outbreak of the Second World War.³⁴ Mr. Justice Pal (India) also expressed the view that, in the absence of an internationally agreed definition of aggression, “any trial such as that just conducted by the International Military Tribunal for the Far East is merely the judgment of the victor upon the vanquished”.³⁵

²⁹ *Records of Proceedings of the Tribunal for the Far East*, vol. 148, p. 48, 452.

³⁰ See above, p. 60.

³¹ See above, pp. 67-68.

³² *Judgment of the Nürnberg Tribunal*, p. 166.

³³ *New York Herald Tribune*, 14 Nov. 1948, p. 27.

³⁴ *Ibid.*

³⁵ *Ibid.*, 13 Nov. 1948, p. 3.

APPENDIX I

Moscow Declaration on German Atrocities of 30 October 1943

The United Kingdom, the United States and the Soviet Union have received from many quarters evidence of atrocities, massacres and cold-blooded mass executions which are being perpetrated by the Hitlerite forces in the many countries they have overrun and from which they are now being steadily expelled. The brutalities of Hitlerite domination are no new thing and all the peoples or territories in their grip have suffered from the worst form of government by terror. What is new is that many of these territories are now being redeemed by the advancing armies of the liberating Powers and that in their desperation the recoiling Hitlerite Huns are redoubling their ruthless cruelties. This is now evidenced with particular clearness by monstrous crimes of the Hitlerites on the territory of the Soviet Union which is being liberated from the Hitlerites, and on French and Italian territory.

Accordingly, the aforesaid three Allied Powers, speaking in the interests of the thirty-two (thirty-three) United Nations, hereby solemnly declare and give full warning of their declaration as follows:

At the time of the granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for, or have taken a consenting part in the above atrocities, massacres and executions, will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be created therein. Lists will be compiled in all possible detail from all these countries, having regard especially to the invaded parts of the Soviet Union, to Poland and Czechoslovakia, to Yugoslavia and Greece, including Crete and other islands, to Norway, Denmark, the Netherlands, Belgium, Luxembourg, France and Italy.

Thus, the Germans who take part in wholesale shootings of Italian officers or in the execution of French, Dutch, Belgian or Norwegian hostages or of Cretan peasants, or who have shared in the slaughters inflicted on the people of Poland or in territories of the Soviet Union which are now being swept clear of the enemy, will know that they

will be brought back to the scene of their crimes and judged on the spot by the peoples whom they have outraged. Let those who have hitherto not imbrued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three Allied Powers will pursue them to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done.

The above declaration is without prejudice to the case of the major criminals, whose offences have no particular geographical localization and who will be punished by the joint decision of the Governments of the Allies.

ROOSEVELT
CHURCHILL
STALIN

APPENDIX II

Agreement for the establishment of an international military tribunal

Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialistic Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis

Whereas the United Nations have from time to time made declarations of their intention that war criminals shall be brought to justice;

And whereas the Moscow Declaration of the 30th October 1943 on German atrocities in occupied Europe stated that those German officers and men and members of the Nazi Party who have been responsible for or have taken a consenting part in atrocities and crimes will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments that will be created therein;

And whereas this Declaration was stated to be without prejudice to the case of major criminals whose offences have no particular geographical location and who will be punished by the joint decision of the Governments of the Allies;

Now therefore the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics (hereinafter called "the signatories") acting in the interests of all the United Nations and by their representatives duly authorized thereto have concluded this agreement.

Article 1

There shall be established after consultation with the Control Council for Germany an International Military Tribunal for the trial of war criminals whose offences have no particular geographical loca-

tion whether they be accused individually or in their capacity as members of organizations or groups or in both capacities.

Article 2

The constitution, jurisdiction and functions of the International Military Tribunal shall be those set out in the Charter annexed to this agreement, which Charter shall form an integral part of this agreement.

Article 3

Each of the signatories shall take the necessary steps to make available for the investigation of the charges and trial the major war criminals detained by them who are to be tried by the International Military Tribunal. The signatories shall also use their best endeavours to make available for investigation of the charges against and the trial before the International Military Tribunal such of the major war criminals as are not in the territories of any of the signatories.

Article 4

Nothing in this agreement shall prejudice the provisions established by the Moscow Declaration concerning the return of war criminals to the countries where they committed their crimes.

Article 5

Any Government of the United Nations may adhere to this agreement by notice given through the diplomatic channel to the Government of the United Kingdom, who shall inform the other signatory and adhering Governments of each such adherence.

Article 6

Nothing in this agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any Allied territory or in Germany for the trial of war criminals.

Article 7

This agreement shall come into force on the day of signature and shall remain in force for the period of one year and shall continue thereafter, subject to the right of any signatory to give, through the diplomatic channel, one month's notice of intention to terminate it. Such termination shall not prejudice any proceedings already taken or any findings already made in pursuance of this agreement.

IN WITNESS WHEREOF the undersigned have signed the present agreement.

DONE IN QUADRUPLICATE in London this eighth day of August 1945 each in English, French and Russian, and each text to have equal authenticity.

For the Government of the United States of America

ROBERT H. JACKSON

For the Provisional Government of the French Republic

ROBERT FOLCO

*For the Government of the United Kingdom of Great Britain
and Northern Ireland*

JOWITT C.

For the Government of the Union of Soviet Socialist Republics

I. T. NIKITCHENKO
A. N. TRAININ

CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL

I. CONSTITUTION OF THE INTERNATIONAL MILITARY TRIBUNAL

Article 1

In pursuance of the agreement signed on the eighth day of August 1945 by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics, there shall be established an International Military Tribunal (hereinafter called "the Tribunal") for the just and prompt trial and punishment of the major war criminals of the European Axis.

Article 2

The Tribunal shall consist of four members, each with an alternate. One member and one alternate shall be appointed by each of the signatories. The alternates shall, so far as they are able, be present at all sessions of the Tribunal. In case of illness of any member of the Tribunal or his incapacity for some other reason to fulfil his functions, his alternate shall take his place.

Article 3

Neither the Tribunal, its members nor their alternates can be challenged by the prosecution, or by the defendants or their counsel.

Each signatory may replace its member of the Tribunal or his alternate for reasons of health or for other good reasons, except that no replacement may take place during a trial, other than by an alternate.

Article 4

(a) The presence of all four members of the Tribunal or the alternate for any absent member shall be necessary to constitute the quorum.

(b) The members of the Tribunal shall, before any trial begins, agree among themselves upon the selection from their number of a President, and the President shall hold office during that trial, or as may otherwise be agreed by a vote of not less than three members. The principle of rotation of presidency for successive trials is agreed. If, however, a session of the Tribunal takes place on the territory of one of the four signatories, the representative of that signatory on the Tribunal shall preside.

(c) Save as aforesaid the Tribunal shall take decisions by a majority vote and in case the votes are evenly divided, the vote of the President shall be decisive: provided always that convictions and sentences shall only be imposed by affirmative votes of at least three members of the Tribunal.

Article 5

In case of need and depending on the number of the matters to be tried, other tribunals may be set up; and the establishment, functions, and procedure of each tribunal shall be identical, and shall be governed by this Charter.

II. JURISDICTION AND GENERAL PRINCIPLES

Article 6

The Tribunal established by the agreement referred to in article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

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

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

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

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

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

Article 7

The official position of defendants, whether as Heads of State or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Article 8

The fact that 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.

Article 9

At the trial of any individual member of any group or organization the Tribunal may declare (in connexion 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.

After receipt of the indictment the Tribunal shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal

to make such declaration and any member of the organization will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organization. The Tribunal shall have power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard.

Article 10

In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.

Article 11

Any person convicted by the Tribunal may be charged before a national, military or occupation court, referred to in article 10 of this Charter, with a crime other than of membership in a criminal group or organization and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organization.

Article 12

The Tribunal shall have the right to take proceedings against a person charged with crimes set out in article 6 of this Charter in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.

Article 13

The Tribunal shall draw up rules for its procedure. These rules shall not be inconsistent with the provisions of this Charter.

III. COMMITTEE FOR THE INVESTIGATION AND PROSECUTION OF MAJOR WAR CRIMINALS

Article 14

Each signatory shall appoint a chief prosecutor for the investigation of the charges against and the prosecution of major war criminals.

The chief prosecutors shall act as a committee for the following purposes:

(a) To agree upon a plan of the individual work of each of the chief prosecutors and his staff,

(b) To settle the final designation of major war criminals to be tried by the Tribunal,

(c) To approve the indictment and the documents to be submitted therewith,

(d) To lodge the indictment and the accompanying documents with the Tribunal,

(e) To draw up and recommend to the Tribunal for its approval draft rules of procedure, contemplated by article 13 of this Charter. The Tribunal shall have power to accept, with or without amendments, or to reject, the rules so recommended.

The committee shall act in all the above matters by a majority vote and shall appoint a chairman as may be convenient and in accordance with the principle of rotation: provided that if there is an equal division of vote concerning the designation of a defendant to be tried by the Tribunal, or the crimes with which he shall be charged, that proposal will be adopted which was made by the party which proposed that the particular defendant be tried, or the particular charges be preferred against him.

Article 15

The chief prosecutors shall individually, and acting in collaboration with one another, also undertake the following duties:

(a) Investigation, collection and production before or at the trial of all necessary evidence;

(b) The preparation of the indictment for approval by the committee in accordance with paragraph (c) of article 14 hereof;

(c) The preliminary examination of all necessary witnesses and of the defendants;

(d) To act as prosecutor at the trial;

(e) To appoint representatives to carry out such duties as may be assigned to them;

(f) To undertake such other matters as may appear necessary.

to them for the purposes of the preparation for and conduct of the trial.

It is understood that no witness or defendant detained by any signatory shall be taken out of the possession of that signatory without its assent.

IV. FAIR TRIAL FOR DEFENDANTS

Article 16

In order to ensure fair trial for the defendants, the following procedure shall be followed:

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

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

(c) A preliminary examination of a defendant and his trial shall be conducted in, or translated into, a language which the defendant understands.

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

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

V. POWERS OF THE TRIBUNAL AND CONDUCT OF THE TRIAL

Article 17

The Tribunal shall have the power

(a) To summon witnesses to the trial and to require their attendance and testimony and to put questions to them,

(b) To interrogate any defendant,

(c) To require the production of documents and other evidentiary material,

(d) To administer oaths to witnesses,

(e) To appoint officers for the carrying out of any task designated by the Tribunal including the power to have evidence taken on commission.

Article 18

The Tribunal shall

(a) Confine the trial strictly to an expeditious hearing of the issues raised by the charges,

(b) Take strict measures to prevent any action which will cause unreasonable delay, and rule out irrelevant issues and statements of any kind whatsoever,

(c) Deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any defendant or his counsel from some or all further proceedings, but without prejudice to the determination of the charges.

Article 19

The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value.

Article 20

The Tribunal may require to be informed of the nature of any evidence before it is offered so that it may rule upon the relevance thereof.

Article 21

The Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof. It shall also take judicial notice of official governmental documents and reports of the United Nations, including the acts and documents of the committees set up in the various Allied countries for the investigation of war crimes, and the records and findings of military or other tribunals of any of the United Nations.

Article 22

The permanent seat of the Tribunal shall be in Berlin. The first meetings of the members of the Tribunal and of the Chief Prosecutors shall be held at Berlin in a place to be designated by the Control

Council for Germany. The first trial shall be held at Nürnberg, and any subsequent trials shall be held at such places as the Tribunal may decide.

Article 23

One or more of the chief prosecutors may take part in the prosecution at each trial. The function of any chief prosecutor may be discharged by him personally, or by any persons or persons authorized by him.

The function of counsel for a defendant may be discharged at the defendant's request by any counsel professionally qualified to conduct cases before the courts of his own country, or by any other person who may be specially authorized thereto by the Tribunal.

Article 24

The proceedings at the trial shall take the following course:

(a) The indictment shall be read in court.

(b) The Tribunal shall ask each defendant whether he pleads "guilty" or "not guilty".

(c) The prosecution shall make an opening statement.

(d) The Tribunal shall ask the prosecution and the defence what evidence (if any) they wish to submit to the Tribunal, and the Tribunal shall rule upon the admissibility of any such evidence.

(e) The witnesses for the prosecution shall be examined and after that the witnesses for the defence. Thereafter such rebutting evidence as may be held by the Tribunal to be admissible shall be called by either the prosecution or the defence.

(f) The Tribunal may put any question to any witness and to any defendant, at any time.

(g) The prosecution and the defence shall interrogate and may cross-examine any witnesses and any defendant who gives testimony.

(h) The defence shall address the court.

(i) The prosecution shall address the court.

(j) Each defendant may make a statement to the Tribunal.

(k) The Tribunal shall deliver judgment and pronounce sentence.

Article 25

All official documents shall be produced, and all court proceedings conducted, in English, French and Russian, and in the language of the defendant. So much of the record and of the proceedings may also be translated into the language of any country in which the Tribunal is sitting, as the Tribunal considers desirable in the interests of justice and public opinion.

VI. JUDGMENT AND SENTENCE

Article 26

The judgment of the Tribunal as to the guilt or the innocence of any defendant shall give the reasons on which it is based, and shall be final and not subject to review.

Article 27

The Tribunal shall have the right to impose upon a defendant, on conviction, death or such other punishment as shall be determined by it to be just.

Article 28

In addition to any punishment imposed by it, the Tribunal shall have the right to deprive the convicted person of any stolen property and order its delivery to the Control Council for Germany.

Article 29

In case of guilt, sentences shall be carried out in accordance with the orders of the Control Council for Germany, which may at any time reduce or otherwise alter the sentences, but may not increase the severity thereof. If the Control Council for Germany, after any defendant has been convicted and sentenced, discovers fresh evidence which, in its opinion, would found a fresh charge against him, the Council shall report accordingly to the Committee established under article 14 hereof, for such action as they may consider proper, having regard to the interests of justice.

VII. EXPENSES

Article 30

The expenses of the Tribunal and of the trials, shall be charged by the signatories against the funds allotted for maintenance of the Control Council for Germany.