THE CODIFICATION OF THE NURNBERG PRINCIPLES

By David I. Lippert

When, in 1946, Judge Francis Biddle, the American member of the Nurnberg Tribunal recommended in his report to President Truman "that the United Nations as a whole reaffirm the principles of the Nurnberg Charter in the context of a general codification of offenses against the peace and security of mankind," the President replied that "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." Consequently, on November 15, 1946, the United States introduced an appropriate resolution before the General Assembly. (1) This was in recognition of the obligation imposed by the U.N. Charter on the General Assembly to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification. Thus the General Assembly, in 1947, directed the International Law Commission of the United Nations to draft such a code. This body composed of representatives of fifteen nations (Judge Manley O. Hudson for the United States) devoted several years to the effort and in July, 1951, adopted and submitted to the General Assembly a Draft Code of Offenses Against the Peace and Security of Mankind. In conformity to the usual practice it has been referred to the member nations for study. (2) In anticipation of public examination and discussion a preliminary reconnaisance of the field may not be amiss.

Viewed as an attempt to restate the underlying principles of the protests against aggression that the United States and other nations have made in recent years, the Draft Code may provide a

welcome international measuring stick. But as a legal document its value and significance can best be gauged by considering it within its frame of reference and by looking to its sources.

The General Assembly's directive to the International Law Commission did not limit it to the formulation of the Nurnberg principles. More broadly, it was to "prepare a draft code of offenses against the peace and security of mankind." Although it was to clearly indicate the place to be accorded the rules "recognized in the Charter of the Nurnberg Tribunal and in the judgment of the Tribunal," the Commission did not consider itself bound to make this indication nor did it regard itself as precluded from suggesting modification or development of such principles. Nevertheless, for the purpose of these observations the landmark of Nurnberg may properly be taken as a point of reference, and the Draft Code analyzed in terms of the three grand categories of international offenses recognized there, namely, crimes against peace, crimes against humanity and war crimes. (3)

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The Draft Code undertakes to declare that "offenses against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punishable." (Art. 1) Thus at the outset a fundamental principle is enunciated -- that of individual responsibility. This principle qualifies practically every act that is declared to be criminal: it is the act performed by "the authorities of a State," that is, the leaders and officers, that is here proscribed. (4) This is in keeping with the Commission's statement that it decided to deal only with the individual aspect of the problem. In support

of this view it referred to the penetrating and illuminating pronouncement of the Nurnberg Tribunal that: "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." (5) It may well be some day declared, in retrospect, that the most notable advance in international law in our age was this very declaration of personal responsibility. Before Nurnberg it had always been so easy for international criminality to go unpunished by merely pleading "superior orders" or that the act was in fact not an individual act but the "act of the State". The Draft Code thus declares (in Art. 3) that "the fact that a person acted as Head of State or as responsible Government official does not relieve him from responsibility", and (in Art. 4) that the fact that he acted "pursuant to order of his Government or of a superior does not relieve him from responsibility, provided a moral choice was in fact possible to him." These provisions but reflect the Nurnberg Tribunal's charter, as interpreted by the judgment (6) and the many, many similar rulings made by the U.S. military courts that tried over 1600 German war criminals. The principle was likewise upheld by the International Military Tribunal for the Far East which tried the Japanese war criminals. (7)

In describing crimes against peace neither the Nurnberg charter nor the judgment defined "aggressive war" (but the Tribunal had no difficulty in holding the Nazis guilty thereof after reviewing their plans and wars against ten nations). (8) The Tokyo Tribunal also refrained from defining the term but declared that "whatever may be the difficulty of stating a comprehensive definition of a 'war of aggression', attacks made with the above motive [to seize possession

of victim nations7 cannot but be characterized as wars of aggression." (9) This difficulty doubtless deterred the Commission but it did endeavor to define the term "act of aggression" so as to include "employment . . . . of armed force against another state for any purpose other than national or collective self-defense or in pursuance of a decision or recommendation by a competent organ of the United Nations." (Art. 2 (1)). (10)

Not only is the overt act of aggression declared to be a crime but so is the mere "preparation . . . . for the employment of armed force against another State." (Art. 2 (3)). The Nurnberg parallel is the inclusion under crimes against peace the "planning, preparation, initiation . . . . of a war of aggression." (11) The Tribunal's pronouncements on the planning phase are not as clear as on the actual waging of war, the initiation of which it characterized as "the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole." (12) The court seemed to regard culpable planning as something that could take place in several spheres: military (e.g. Goering, Keitel, Reeder, Jodl), diplomatic (e.g. Goering, Von Ribbentrop,

Rosenberg), and economic (e.g. Funk). (13) Apparently, supervisory and influential activity in these fields by persons high enough in the government to have actual or inferred knowledge of the aggressive purpose and objective of the plans constitutes criminality. (14)

Specifically excluded from condemnation, however, was customary military staff planning of the type that goes on in all armies at all times. (15) The view that some such military planning is perfectly legal also finds support in the permitted activities specified in the Draft Code. "Preparation" and an "act of aggression" do not include the "employment of armed force against another State" for the purpose of "national or collective self-defense or in pursuance of a decision or recommendation by a competent organ of the United Nations." (Arts. 2 (1) and (3)) (16) However, the familiar plea made by every aggressor that he is acting purely in "self-defense" can find no real support here. The Nazis in Nurnberg emphasized the plea of self-defense, referring to a proviso similar to the foregoing in the Kellog-Briand Treaty. The Tribunal, however, held that the efficacy of the plea does not depend solely on the self-serving declaration of the war maker but upon "investigation and adjudication if international law is ever to be enforced." (17)

The belief of the Commission that it was authorized to develop and enlarge upon the Nurnberg principles probably prompted the inclusion of "any threat . . . . to resort to an act of aggression against another state," as an offense. (Art. 2 (2)). Inasmuch as this concept played no appreciable part in the Nurnberg proceedings further elucidation as to the scope of the crime will be needed. (18) On the surface, it is difficult to see how a threat of force can be any less a disturbance to the peace of the world today than force itself. Invariably, saber rattling induces wide-

spread apprehension and may be the spark, or as the phrase is today, the start of the chain reaction, that starts a war.

The prohibition of the "incursion . . . . by armed bands acting for a political purpose" (Art 2 (4)) likewise does not appear to be directly based on Nurnberg. The incursions the tribunal was concerned with all involved the German Wehrmacht which in no case could be characterized as merely an "armed band." Absolute historical precedent is of course not required, for such activities inevitably would be detrimental factors in maintaining the peace of mankind. (19)

At the opposite extreme, there are too many historical examples of "acts . . . . resulting in the annexation, contrary to international law, of territory belonging to another state" (Art. 2 (3)). But the Nurnberg precedents based on the Austrian and Czechoslovakian episodes are not too satisfactory. It was these events that gave rise to the court's distinction between illegal and criminal aggression. (20) Whatever doubts may arise, certainly the Draft Code's requirement that the annexation be "contrary to international law," limits the rule to those fairly clear cases where no consent is present. Here too, further clarification will prove helpful.

Nurnberg likewise furnishes only a meager guide to the precise scope of "the undertaking or encouragement . . . . of terrorist activities" or "activities calculated to foment civil strife" in another State or to the legal significance of "the toleration . . . . of organized activities calculated to foment civil strife" in another State (Arts. 2 (5) and 2 (6)). However, the existence of Nazi organizations in the victim states, fostered by German authorities, would appear to have prompted both the

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Viewed as an attempt to state the underlying principles of the protests against aggression that the United States and other nations have made, in and out of the United Nations in

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It is a good guide

recent years, this document is a welcome international measuring stick. But, new endeavor that it is, a period of examination and debate must now follow in order that its full significance and effectiveness may be gauged. It will be examined here in terms of its context and some avenues for further exploration suggested.

The General Assembly's directive to the International Law Commission did not limit it to the formulation of the Nurnberg principles. More broadly, it was to "prepare a draft code of offenses against the peace and security of mankind". Although it was to clearly indicate the place to be accorded the rules "recognized in the Charter of the Nurnberg Tribunal and in the judgment of the Tribunal," the Commission did not consider itself bound to make this indication nor did it regard itself as precluded from suggesting modification or development of such principles. Nevertheless, for the purpose of these observations the landmark of Nurnberg may properly be taken as a point of reference, and the Draft Code analyzed in terms of the three grand categories of international offenses recognized there, namely, crimes against peace, crimes against humanity and war crimes. (5)

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dual responsibility. This principle qualifies practically every act that is declared to be criminal: it is the act performed by "the authorities of a State , that is, the leaders and officers, that is here proscribed. (4) This is in keeping with the Commission's statement that it decided to deal only with the individual aspect of the problem. In support of this view it referred to the (penetrating and illuminating) pronouncement of the Nuremberg Tribunal that: "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." (5) It may well be some day declared, in retrospect, that the most notable advance in international law of our age was this very declaration of personal responsibility. Before Nuremberg Until then, it had always been possible for international criminality to go unpunished by merely pleading "superior orders" or that the act was in fact not an individual act but the "act of the State". Consistently, the Draft Code declares (in Art. 3) that "the fact that a person acted as Head of State or as responsible Government official does not relieve him from responsibility", and (in Art. 4) that the fact that he acted "pursuant to order of his Government or of a superior does not relieve him from responsibility, provided a moral choice was in fact possible to him." These provisions but reflect the Nurnberg Tribunal's charter, as interpreted by the judgment (6) and the many, many similar rulings made by the U.S. military courts, that tried over 1800 German war criminals. The principle was likewise upheld by the International Military Tribunal for the Far East which tried the Japanese war criminals. (7)

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The knotty problems of rearmament are approached by the inclusion of a prohibition of "acts . . . . in violation of . . . . obligations under a treaty which is designed to ensure international peace and security by means of restrictions or limitations on armaments, or on military training, or on fortifications, or other restrictions of the same character." (Art. 2 (7)) In this area practically no illumination is cast by Nurnberg. In fact, in acquitting Schacht, the Tribunal said" . . . . rearmament of itself is not criminal under the Charter." (22) Thus, the present Draft Code may be regarded as an effort to fill the

gap left open.

But no such fine distinctions can hide the fact that disarmament treaties are designed to prevent wars and that a breach of them is a movement in the direction of war. Consequently, the Commission rightly and necessarily concerned itself with the problem. Although it set forth no direct prohibitions against private manufacturers of armaments, viewed realistically such activities would necessarily involve some governmental connivance. Thus the guilty officials could be held amenable under the Draft Code and the manufacturers likewise, as accomplices. The problem may turn out to be one of proof rather than the adequacy of the Code.

It is not likely that this section will bar rearmament in self-defense or in genuine anticipation of attack, for such can hardly be regarded as a "violation" of such treaties. Yet, to satisfy those who may fear that the code gives them no leeway, perhaps consideration ought to be given to incorporating a self-defense proviso into this portion such as is done in those parts dealing with "aggression". There "employment of armed force" in self-defense is permitted. (Art. 2 (1), (3)).

The most well known of the category of crimes against humanity is now called genocide. In describing such acts the identical language of the Genocide Convention is used. To further dovetail the two codifications the Draft Code enlarges the scope of offenders beyond "State authorities" to include "private individuals." It is most understandable that no formulation of the Nurnberg principles could omit these crimes. In these, the nadir of human (more correctly, sub-human) depravity

were reached and their repetition, in view of the Nazi view as to their "legality" under domestic law, can hardly be too often condemned and proscribed.

But in Nurnberg the definition of "crimes against humanity" also included other offenses against civilian populations. Thus, the Draft Code also specifies as crimes "inhuman acts, by the authorities of a State or by private individuals against any civilian population, such as murder, or extermination, or enslavement, or deportation, or persecutions on political, racial, religious or cultural grounds, when such acts are committed in execution of or in connection with other offenses defined in this article." (Art.2 (10)) The Tribunal held that these acts, insofar as they did not constitute war crimes, constituted crimes against humanity.

Critics of the concept of "crimes against humanity" have feared that it involved the unlimited opportunity for one state to interfere in another state's treatment of its own nationals; that is to say, an interference with domestic law and in contravention of the principle that "it is for the State to decide how it shall treat its own nationals." Ironically, although such legislative interference is viewed as abhorrent, compunctions against intervention by force of arms has not always been regarded as equally reprehensible. The Chief Prosecutor for the British at Nurnberg stated the anomaly thus:

> "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?"

At Nurnberg, the conflict between the principles of humanitarian intervention versus domestic law was resolved by specifying that to constitute crimes against humanity the acts must have been committed "in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated" (82) - - in other words, in execution of or connection with crimes against peace or war crimes. Applying this principle, the Tribunal held that it could not punish the Nazis for their acts of domestic persecution and murder prior to 1939. (83) Conforming to this qualification, the International Law Commission has likewise condemned "inhuman acts" only "when such acts are committed in execution of or in connectiin with other offenses defined in this article." (Art. 2 (10)).

Although these Nurnberg distinctions may have partially satisfied those who believed that the principle of non-interference in domestic affairs was to be observed at all costs, it sorely disappointed those who could perceive no legality in the Nazi horrors prior to 1939. (84) Thus the Genocide Convention specifically provides that the acts of murder, etc. with intent to destroy a national or religious, etc., group is a crime, whether committed in time of peace or war. (85) These same definitions of genocidal acts also appear in the Draft Code, with the Nurnberg limitations omitted. (86) Thus, it may be said that although here the Commission has gone beyond Nurnberg, it has not exceeded the United Nations' program, for the Genocide Convention is now in force as a U.N. treaty. (87)

A third grand category of offenses tried at Nurnberg was that of war crimes, that is, violations of the laws or customs of war. (88) Likewise the Draft Code includes "acts in violation of