

## FOOTNOTES

1. The Charter and Judgment of the Nurnberg Tribunal, United Nations--General Assembly, International Law Commission, New York, 1949, pp. 11-12. Quotations of Nurnberg and Tokyo texts in the present analysis are as set forth in the publication, unless otherwise indicated. Precise references to the official reports are therein given. Citations to this publication will hereinafter be given as "Nurnberg."
2. Nurnberg p. 41
3. Nurnberg p. 42. The Draft Code differs from Nurnberg on the effect of superior orders. The latter provided that their existence might be referred to in mitigation; the Code is silent on this point.
4. Nurnberg p. 83.
5. Nurnberg p. 48.
6. Nurnberg p. 85.
7. Nurnberg pp. 49, 55, 56. No such distinction was observed by the Tokyo Tribunal which characterized all Japanese wars as "aggressive", except the one against Thailand which was held to be unproved as to this aspect. Nurnberg p. 85.
8. Nurnberg p. 47.
9. Nurnberg p. 53.
10. Nurnberg pp. 56-57.
11. In the Farben case, subsequently tried by a US Military Tribunal, the court viewed this great industrial firm's participation as patriotism, not as economic planning for aggression: the majority said "The defendants now before us were neither high public officials in the civil government nor high military officers. Their participation was that of followers and not leaders .....It is, of course, unthinkable that the majority of Germans should be condemned as guilty of committing crimes against peace. This would amount to a determination of collective guilty to which the corollary of mass punishment is the logical result, for which there is no precedent in international law and no justification in human relations, ..... We would not require the citizen, at the risk of becoming a criminal under the rules of international justice, to decide that his country has become an aggressor and that he must lay aside his patriotism, the loyalty to his homeland, and the defense of his own fireside at the risk of being adjudged guilty of crimes against peace on the one hand, or of becoming a traitor to his country on the other hand, if he

makes an erroneous decision based upon facts of which he has but vague knowledge." X Law Reports of Trial of War Criminals, H. M. Stationery Office, London 1949, p. 39.

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The foregoing opinion was not concurred in, however, by Judge Paul M. Hebert, Dean of the Louisiana State University Law School. Said he: "I do not agree with the majority's conclusion that the evidence presented in this case falls so far short of sufficiency as the Tribunal's opinion would seem to indicate. The issues of fact are truly so close as to cause genuine concern as to whether or not justice has actually been done because of the enormous and indispensable role these defendants were shown to have played in the building of the war machine which made Hitler's aggressions possible." International Conciliation No. 450 (1949) p. 317

12. The Nurnberg Tribunal declined to declare that the German General Staff and High Command were "criminal organizations", although it condemned many of their members as "a disgrace to the honorable profession of arms." It ruled that "their planning at staff level, the constant conferences between staff officers and field commanders, their operational technique in the field and at headquarters was much the same as that of the armies, navies and air forces of all other countries . . . . . To derive from this pattern of their activities the existence of an association or group does not in the opinion of the Tribunal, logically follow." Nazi Conspiracy and Aggression, Opinion and Judgment, U.S. Govt. Printing Office, 1947, p. 106
13. This would appear to authorize such activity as participation in the Korean conflict (employment of armed force in pursuance of a decision of the United Nations).
14. Nurnberg p. 49.
15. It might even be argued, with some degree of superficiality, that the Tribunal condoned threats, citing the language used concerning von Papen, who was acquitted. Apropos his conduct in preparing the way for the Austrian Anschluss, the court said: To carry through this plan he engaged in both intrigue and bullying. But the Charter does not make criminal such offenses against political morality, however bad these may be." Nurnberg p. 48.
16. If example is desired it may probably be found in the Chinese version of its participation on the side of the North Koreans. It characterized their soldiers as "mere volunteers."
17. See footnote 7, supra.
18. Nurnberg p. 57. The court qualified this, however, by indicating that rearmament could have been criminal if it had been established that "Schacht carried out this rearmament as part of the Nazi plans to wage aggressive wars." In other words, there had been a failure of proof as to him.

19. As wide as the gap was, the subsequent trial of Krupp by a U. S. Military Tribunal greatly enlarged it. Although it was clearly established that Krupp Senior had plotted to evade the disarmament provisions of the Treaty of Versailles from the very beginning and had confessed as much in 1941, this court recalled that "rearmament in itself is not criminal" and blandly pointed out that Krupp's activities might be fully justified under the doctrine of "business as usual." Said the court: "Considered objectively and in the proper context, it is at least plausible that Gustav Krupp's decision made in 1919 was a calculated business risk. .... He concluded there was a strong possibility that the obstacles then preventing him from engaging in that field of activity would sooner or later be removed by the repudiation of the Versailles Treaty or otherwise, and that the German Government would then be again in the market for armament. ....When, in 1933, his calculation proved to be correct, the Krupp firm was ready to begin the production of arms at once....."
- X Law Reports of Trials of War Criminals, H.M. Stationery Office, 1949, p. 115
20. "Acts by the authorities of a State or by private individuals, committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such, including: (i) killing members of the group; (ii) causing serious bodily or mental harm to members of the group; (iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (iv) imposing measures intended to prevent births within the group; (v) forcibly transferring children of the group to another group." Draft Code (Art. 2 (9)).
21. This is strictly in conformity with the Nurnberg judgment. For example, von Shirach was found guilty of these crimes as a state official, whereas Streicher was adjudged guilty as a private publisher. Nurnberg p. 70.
22. Nurnberg p. 65. Strictly speaking, genocide was not defined in the Charter. The gravamen of this crime is the "intent to destroy." However, it was encompassed in the definition of crimes against humanity insofar as it included "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 connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated." Note that "persecutions" do not necessarily involve the intent to destroy a group.
23. Nurnberg pp. 69-72.
24. See footnote 22, supra. Similar rules are to be found in the new Geneva Convention Relative to the Protection of Civilian

Persons in Time of War of August 12, 1949, Dept. of State Publications 3938, Dept. of the Army Pamphlet No. 20-150. For example Article 32 provides: "The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents."

25. Nurnberg p. 67.
26. Nurnberg p. 71. He cited the instance of the European Powers "which in time past intervened in order to protect Christian subjects of Turkey against cruel persecution." Dean Rusk, Deputy Under Secretary of State, in his testimony in favor of the Genocide Convention gave another instance: "Finally it should be recalled that the United States intervened in Cuba in 1898, in the cause of humanity and to put an end, to quote the joint resolution of April 20, 1898, to--'the abhorrent conditions which have existed for more than three years in the island of Cuba,\*\*\*\*have shocked the moral sense of the people of the United States, have been a disgrace to Christian civilization\*\*\*\*\*' "Subcommittee Hearings, below cited (see footnote 30), p. 20.
27. Nurnberg p. 65.
28. Nurnberg p. 67. That is to say, such outrages if connected with acts of international aggression are punishable. By their impingement on the international scene they become matters of international concern and thereby international crimes. It should be noted that this is not equivalent to holding that crimes against humanity could not be perpetrated before a war. The Nurnberg Charter specifically provided that the acts could have been committed "before or during the war." But if committed before a war, they must be in connection with war plans, for example. So, the persecution of the Jews prior to 1939 was not regarded as a crime, whereas von Shirach's pre-1939 involvement in occupied Austria was regarded as exhibiting sufficient connection with acts of aggression to warrant a finding of guilt. Nurnberg p. 69.
29. "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish." Article I, Genocide Convention, 45 Am. J. Int. Law No. 1. Supp. 7.
30. The Genocide Convention has been ratified by the requisite number of nations and since January 12, 1951, has been in force. 45 Am. J. Int. Law No. 1. Supp. n. 7. It has not

yet been approved by the U. S. Senate although the President favors it. Representatives of the American Bar Association testified against it, pursuant to action taken at the 1949 Annual Meeting on the recommendation of the Special Committee on Peace and Law through United Nations. 74 Annual Report of the ABA 316; Hearings Before a Subcommittee of the Committee on Foreign Relations, US Senate, on Executive O. The International Convention on the Prevention and Punishment of the Crime of Genocide, January 23 et seq., 1950, p. 154. However, representatives of organizations with a combined membership of over one hundred million people testified in favor of ratification. Legislative History of Committee on Foreign Relations, US Senate, 81st Congress, 2d Session, Document 247, p. 28. Included among those testifying in favor of ratification were Charles W. Tillott, Chairman, Section of International and Comparative Law of the ABA, and Edgar Turlington, Treasurer, American Society of International Law. Subcommittee Hearings, above cited, pp. 230, 250. Perhaps the most lucid and scholarly exposition of the viewpoint advocated by the International and Comparative Law Section is to be found in the article The Genocide Convention and the Constitution by Myres S. McDougal and Richard Arens, 3 Vanderbilt Law Review, p. 683, et seq.

31. Nurnberg p. 61.
32. Nurnberg p. 61.
33. Nurnberg p. 61.
34. Nurnberg p. 63.
35. For example, the Manual for Courts-Martial, U.S. 1951, mentions the law of war but is devoid of any definition: "International law includes the law of war." (Par. 1) Judicial notice may be taken of "the law of nations, including the law of war." (Par. 147a) General courts-martial "have power to try any person who by the law of war is subject to trial by military tribunal for any crime or offense against the law of war." (Par. 14a)
36. A reexamination of the laws of war has been called for by Josef L. Kunz of the Board of Editors of the American Journal of International Law in The Chaotic Status of the Laws of War and the Urgent Necessity for Their Revision, 45 Am. J. Int. Law p. 37 (Jan. 1951)
37. The meaning is expounded in proposed U.S. reservation No. 4 to the Genocide Convention: "that the United States Government understands and construes the words 'complicity in genocide' . . . . to mean participation before and after the fact and aiding and abetting in the commission of the crime of genocide." Legislative History, above cited, (see footnote 30) p. 28. The Nurnberg Tribunal disregarded the charges of conspiracy to commit war crimes and crimes against humanity on technical grounds. As to conspiracy to wage aggressive war, it required knowing participation in a concrete plan to wage war (not just aggressive acts). Nurnberg pp. 47, 53, 55.

38. Similar fears concerning the Genocide Convention have been discounted as unfounded. See McDougal and Arens (above cited in footnote 30) at p. 708
39. The Draft Code can perhaps best be appraised in the context of the "Formulation of the Nurnberg Principles" prepared by the International Law Commission under the same General Assembly directive calling for the Draft Code. These are seven in number and cover 1) personal responsibility 2) the supremacy of international law over domestic law in the field of international crimes, 3) the invalidity of the defense of "act of state," 4) the invalidity of the defense of "superior orders" 5) the right to a fair trial, 6) Crimes against peace, war crimes and crimes against humanity are punishable, and 7) complicity in the foregoing is a crime. Report of the International Law Commission covering its Second Session 5 June - 29 July 1950, General Assembly, Official Records: Fifth Session, Supplement No. 12 (A/1316), Lake Success, N. Y., 1950, pp. 11-14. Reviewed in Notes on Legal Questions Concerning the United Nations, by Yuen -LI LIANG, 45 Am. J. Int. Law, No. 3, pp. 515-524 (July 1951).
40. The Nurnberg Tribunal referred to the value of international agreements concerning war crimes, even though they include no sanctions, by pointing out that the Hague Convention of 1907 "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." Nurnberg p. 45.