A PRELIMINARY EXAMINATION OF THE DRAFT CODE OF OFFENSES AGAINST THE PEACE AND SECURITY OF MANKIND

A Draft Code of Offenses against the Peace and Security of Mankind was adopted in July, 1951, by the International Law Commission of the United Nations and it will be submitted to the next General Assembly for consideration.

The U. S. representative on the Commission, which is composed of representatives of sixteen nations, is Judge Manley O. Hudson, and United States participation in this endeavor has been most active from the beginning. 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." Conforming to this expression, on November 15, 1946, the United States introduced an appropriate resolution, before the General Assembly, in recognition of the obligation in the U.N. Charter imposed on the General Assembly to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification. (1) Based on this, the directive under which this Draft Code was prepared was issued by the General Assembly in 1947.

Viewed as an attempt to precisely formulate the principles implicit in the protests against aggression that the United States and other nations have made, in and out of the United Nations in recent years, this document is a welcome international measuring stick. But, new endeavor that it is, a certain period of examination and debate must now follow in order that its full significance and effectiveness may be gauged.

The General Assembly's directive to the International Law Commission did not limit it to the formulation of the Nurnberg principles. Rather it was to "prepare a draft code of offenses against the peace and security of mankind", a broader area than was covered at Nurnberg. It was, moreover, 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, however, did not consider itself bound to make this indication nor did it regard itself as precluded from suggesting modification or development of such principles. However, for the purpose of this preliminary evaluation 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.

I

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 as performed by "the authorities of a State" that is/prescribed/ here for the rights and duties of States are the subject of separate U. N. studies. 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." (2) 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. Until then, 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". 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 (3) 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. (4)

II

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). (5) 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 nations] cannot but be characterised as wars of aggression." (6) This difficulty doubtless deterred the Commission but it did define the term "act of aggression" so as to include "the 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)).. A distinction has been thought to exist between the Nurnberg Tribunal's treatment of the concept of "aggressive war" (e.g. the German attack on Poland) and the concept of an "aggressive act or actions." (e.g. Germany's dealings with Austria); an "act" being regarded as something less than a "war." (7) If this is so, the terminology used in the Draft Code may need some clarification, although normal usage would certainly indicate that "aggressive act" is broad enough to encompass such a full-blown example of activity as is involved in waging war.

Not only is the overt act of aggression declared to be a crime but so is the more "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." (8) 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." (9) The court seemed to regard culpable planning as something that could take place in several spheres: military (e.g. Goering, Keitel, Raeder, Jodl), diplomatic (e.g. Goering, Von Ribbentrop, Rosenberg), and economic (e.g. Funk). (10) 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. (11)

Specifically excluded from condemnation, however, was customary military staff planning of the type that goes on in all armies at all times. (12) 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 2 (3)) (13) 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 above 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." (14)

The belief of the Commission that it was authorized to develop the Nurnberg principles probably prompted the inclusion of "any threat . . . . to resort to an act of aggression against another state." (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. (15) 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 widespread 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 it 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. (16)

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 Czecho-Slovakian episodes are not too satisfactory. It was these events that gave rise to the court's distinction between illegal and criminal aggression. (17) 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 explanation 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 prohibition of terrorist activities and the prescription of encouragement of civil strife. These definitions might also be regarded as fitting some aspects of the activities sponsored by the Soviet leadership today. On the other hand, it is conceivable that even broadcasts on the "Voice of America" deemed provocative, or U. S. encouragement to "governments in exile", might be construed to come within the prohibitions. Unquestionably, considerable clarification is needed here.

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 trainings 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." (18) Thus, the present Draft Code may be regarded as an effort to fill the gap left open.(19)

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. Notwithstanding the absence of direct prohibitions against private manufacturers of armaments, viewed realistically, such activities would necessarily involve some governmental connivance and the guilty officials could be held amenable under the Draft Code and the manufacturers as accomplices. The problem may turn out to be one of proof rather than the adequacy of the Code.

Yet inadequacy may exist in another quarter. Suppose a lesser-armed party to a disarmament treaty has real or simulated fears of attack. Unless the treaties in question themselves contain provisos concerning self-defense, perhaps consideration ought to be given to incorporating such into this portion of the Draft Code. This could follow the example of those parts dealing with "aggression" and "employment of armed force."

III

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. (20) To further dovetail the two codifications the Draft Code enlarges the scope of offenders beyond "State authorities" to include "private individuals." (21) It is apparent that no formulation of the

Nurnberg principles could omit these crimes. (22) In these, the nadir of human (more correctly, sub-human) depravity was reached and their repetition, in view of the Nazi view as to their "legality" under domestic law (23) can hardly be too often warned against and forestalled.

But in Nurnberg the definition of "crimes against humanity" also included other offenses against civilian populations. (24) 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. (25)

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." Strangely enough, although such legislative interference is abhorred, compunctions against intervention by force of arms has not always been regarded as equally abhorrent. The Chief Prosecutor for the British at Nurnberg dramatically posed the problem 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?" (26)

At Nurnberg, the conflict between the two 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" (27) - - 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 persecution and murder prior to 1939. (28) Conforming to this qualification, the International Law Commission has likewise condemned "inhuman acts" only "when such acts are committed in execution of or in connection 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 see no legality in the Nazi horrors prior to 1939. 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. (29) These same definitions of genocidal acts also appear in the Draft Code, but the Nurnberg qualifications are omitted. Their absence would lead to the conclusion that the Commission regards genocidal acts per se as acts that affect the peace of mankind, whereas "inhuman acts" are not so regarded unless connected with other aggressive acts. Thus, it may be said that although here the Commission has gone beyond Nurnberg,

it has not exceeded the United Nations' program since 1946, for the Genocide Convention is now in force as a U.N. treaty. (30)

IV.

A third grand category of offenses tried at Nurnberg was that of war crimes, that is violations of the laws or customs of war. (31) Likewise the Draft Code includes "acts in violation of the laws or customs of war", (Art. 2 (11)) and although these are not further defined their scope can be partially ascertained from the Nurnberg charter, which enumerated some of them, for example, murder, ill-treatment of the civilian population of occupied territory, killing of hostages. (32) These crimes, the Tribunal declared, "were already recognized as war crimes under international law", citing the Hague Convention of 1907 (rules of land warfare) and the Geneva Convention of 1929 (treatment of prisoners of war.) (33) Perhaps this lack of definition in the Draft Code is due to the view that it is impossible to catalogue these offenses. As the Nurnberg Tribunal said, the law of war "is not static, but by continual adaptation follows the needs of a changing world." (34) Perhaps one of the customs surrounding the customs of war is the tacit understanding that they cannot be catalogued in an all-inclusive manner. So regarded, the Draft Code's vagueness here is no departure from the accepted tradition. (35) Nevertheless its function as a code would be enhanced by a more detailed definition. (36)

It can readily be realized that crimes of the sort covered by the Draft Code are not likely to be perpetrated only by the man with the gun. Nurnberg again offers a good example, for the guilty ones there were largely the planners who sat in offices

far removed from the brutalities they were charged with. For such a code to be realistic, therefore, it must necessarily be made applicable to such planners. Consequently there are included among the catalogue of offenses acts which constitute conspiracy, direct incitement, attempts, and complicity. Not being limited to the "authorities of a state" these criminal acts can evidently be committed by any persons. Conspiracy and attempts are well known concepts in America but direct incitement and complicity are not. The former is quite obviously aimed at men who, like Streicher, helped create the moral (or rather immoral) climate for the excesses, and the latter is designed to cover the participation of accomplices. (37) The prohibition of incitement has been seen by some as inviting a limitation on the right of free speech. But the extension of this to authorize rabble-rousing calls to murder is hardly worthy of that noble concept. (38) It is conceivable that the press may oppose the incitement rule, fearing that opinions expressed on such matters as the need for war preparedness may be construed as coming within the prohibition. A partial answer is that it is only "direct" incitement that is proscribed. Nevertheless, such possibilities point up the need for full debate and clarification to insure understanding in America.

V

In studying the Draft Code in order to evaluate it for the American Bar, the Committee on Military, Naval and Air Law of the International and Comparative Law Section would seem to have a primary interest in that part of it dealing with conventional war crimes. However, the whole document so closely concerns the

activities and responsibilities of military commanders that detailed attention will undoubtedly have to be given to all of it. But in so doing, it may be helpful to avoid, for present purposes, several interesting fields of public controversy and accept, for the time being, the basic assumptions upon which the Draft Code appears to rest. Therefore, controversy on the value or lack of value of the United Nations as an international instrument or the dangers or advantages arising from our membership in it should be excluded. Likewise, Debate on the validity of the Nurnberg Tribunal's charter and judgment should likewise be by-passed. For present purposes both must necessarily be regarded as legal and correct and as representing the highwater mark in the development of international law.(34) Moreover, dispute as to meansof enforcement of the Code is premature, for the International Law Commission has specifically left the matter open with the comment that "pending the establishment of a competent international criminal court, a transitional measure might be adopted providing for the application of the Code by national courts." (40) The draft merely provides that the "The penalty for any offense defined in this Code shall be determined by the Tribunal exercising jurisdiction over the individual accused, taking into account the gravity of the offense." (Art. 5) Nor, considering the time required for the initial effort, should disappointment be felt that the whole range of international criminality is not encompassed within the definitions. Here too the Commission's mission was limited and it further limited itself by regarding offenses against the peace and security of mankind as referring only to "offenses which contain a political element and which endanger or disturb the maintenance of international peace

and security," thus avoiding involvement in such international crimes as piracy, white slavery, and traffic in drugs.

It is believed that by thus clearing the way for a careful legal analysis of the Draft Code the Military, Naval and Air Law Committee will be enabled to make the kind of study that will be most helpful to the Bar in understanding and appreciating the difficult law-making problems involved in reaching for the elusive goal of universal peace. The Bar's informed participation in the great endeavor to assure a reign of law, not of armed force, can be the most meaningful of all of its activities in this historic time when warnings of possible annihilation reach us daily.

Respectfully submitted,

DAVID I. LIPPERT