Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with commentaries

1950

Text adopted by the International Law Commission at its second session, in 1950, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (at para. 97). The report, which also contains commentaries on the principles, appears in *Yearbook of the International Law Commission, 1950,* vol. II.

94. The Commission recommends that the General Assembly give consideration to the desirability of an international convention concerning the general exchange of official publications relating to international law and international relations.

Part III. FORMULATION OF THE NÜRNBERG PRINCIPLES [3]

95. Under General Assembly resolution 177 (II), paragraph (*a*), the International Law Commission was directed to " formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal ".

96. In pursuance of this resolution of the General Assembly, the Commission undertook a preliminary consideration of the subject at its first session. In the course of this consideration the question arose as to whether or not the Commission should ascertain to what extent the principles contained in the Charter and judgment constituted principles of international law The conclusion was that since the Nürnberg principles had been affirmed by the General Assembly, the task entrusted to the Commission by paragraph (*a*) of resolution 177 (II) was not to express any appreciation of these principles as principles of international law but merely to formulate them. This conclusion was set forth in paragraph 26 of the report of the Commission on its first session, which report was approved by the General Assembly in 1949. Mr. Jean Spiropoulos was appointed special rapporteur to continue the work of the Commission on the subject and to present a report at its second session.

97. At the session under review, Mr. Spiropoulos presented his report (A/CN.4/22) which the Commission considered at its 44th to 49th and 54th meetings. On the basis of this report, the Commission adopted a formulation of the principles of international law which were recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal. The formulation by the Commission, together with comments thereon, is set out below.

Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal

PRINCIPLE I

Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

98. This principle is based on the first paragraph of article 6 of the Charter of the Nürnberg Tribunal which established the competence of the Tribunal 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 crimes defined in sub-paragraphs (*a*), (*b*) and (*c*) of article 6. The text of the Charter declared punishable only persons " acting in the interests of the European Axis countries " but, as a matter of course, Principle I is now formulated in general terms.

99. The general rule underlying Principle I is that international law may impose duties on individuals directly without any interposition of internal law. The findings of the Tribunal were very definite on the question whether rules of international law may apply to individuals. " That international law imposes duties and liabilities upon individuals as well as upon States ", said the judgment of the Tribunal, " has long been recognized ".[4] It added: " Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provision of international law be enforced." [5]

PRINCIPLE II

The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

100. This principle is a corollary to Principle I. Once it is admitted that individuals are responsible for crimes under international law, it is obvious that they are not relieved from their international responsibility by the fact that their acts are not held to be crimes under the law of any particular country.

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[3] Mr. Ricardo J. Alfaro declared that he voted in favour of part III of the report with a reservation as to paragraph 96, because he believed that the reference therein contained regarding the task of formulating the Nürnberg principles should have been inserted in the report together with a quotation of the passage in the judgment of the Nürnberg Tribunal in which the Tribunal asserted that the Charter " is the expression of international law existing at the time of its creation, and to that extent is itself a contribution to international law ".

In abstaining from the vote on this part of the report, Mr. Manley O. Hudson stated that some uncertainty had existed as to the precise nature of the task entrusted to the Commission. In the report of the Commission covering its first session, which was approved by the General Assembly, the view was put forward that " the task of the Commission was not to express any appreciation of these principles [namely the Nürnberg principles] as principles of international law but merely to formulate them ". In his opinion, however, the Commission had not altogether adhered to that view in its later work, with the result that doubt subsisted as to the juridical character of the formulation adopted. Moreover, the formulation had not sufficiently taken into account the special character of the Charter and judgment of the International Military Tribunal and the *ad hoc* purpose which they served.

Mr. Georges Scelle said that he regretted that he could not accept the view taken by the Commission of its task in this part of the report, for the same reasons as those which he had stated the previous year. The report did not enunciate the general principles of law on which the provisions of the Charter and the decisions of the Tribunal were based, but merely summarized some of them, whereas the Tribunal itself had stated that the principles it had adopted were already a part of positive international law at the time when it was established. Moreover, he considered that the final text of the report did not seem to reflect accurately the conclusions reached by the Commission during its preliminary discussions, and restricted their scope.

[4] *Trial of the Major War Criminals before the International Military Tribunal*, vol. I, Nürnberg 1947, page 223.

[5] *Ibid.*

101. The Charter of the Nürnberg Tribunal referred, in express terms, to this relation between international and national responsibility only with respect to crimes against humanity. Sub-paragraph (*c*) of article 6 of the Charter defined as crimes against humanity certain acts "whether or not [committed] in violation of the domestic law of the country where perpetrated". The Commission has formulated Principle II in general terms.

102. The principle that a person who has committed an international crime is responsible therefor and liable to punishment under international law, independently of the provisions of internal law, implies what is commonly called the "supremacy" of international law over national law. The Tribunal considered that international law can bind individuals even if national law does not direct them to observe the rules of international law, as shown by the following statement of the judgment: "... the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State".[6]

PRINCIPLE III

The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

103. This principle is based on article 7 of the Charter of the Nürnberg Tribunal. According to the Charter and the judgment, the fact that an individual acted as Head of State or responsible government official did not relieve him from international responsibility. "The principle of international law which, under certain circumstances, protects the representatives of a State", said the Tribunal, "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 ...."[7] The same idea was also expressed in the following passage of the findings: "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."[8]

104. The last phrase of article 7 of the Charter, "or mitigating punishment", has not been retained in the formulation of Principle III. The Commission considers that the question of mitigating punishment is a matter for the competent Court to decide.

PRINCIPLE IV

The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

105. This text is based on the principle contained in article 8 of the Charter of the Nürnberg Tribunal as interpreted in the judgment. The idea expressed in Principle IV is that superior orders are not a defence provided a moral choice was possible to the accused. In conformity with this conception, the Tribunal rejected the argument of the defence that there could not be any responsibility since most of the defendants acted under the orders of Hitler. The Tribunal declared: "The provisions of this article [article 8] are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible."[9]

106. The last phrase of article 8 of the Charter "but may be considered in mitigation of punishment, if the Tribunal determines that justice so requires", has not been retained for the reason stated under Principle III, in paragraph 104 above.

PRINCIPLE V

Any person charged with a crime under international law has the right to a fair trial on the facts and law.

107. The principle that a defendant charged with a crime under international law must have the right to a fair trial was expressly recognized and carefully developed by the Charter of the Nürnberg Tribunal. The Charter contained a chapter entitled: "Fair Trial for Defendants", which for the purpose of ensuring such fair trial provided the following procedure:

"*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."

[6] *Trial of the Major War Criminals before the International Military Tribunal*, vol. I, Nürnberg 1947, page 223.

[7] *Ibid.*

[8] *Ibid.*

[9] *Ibid.*, page 224.

108. The right to a fair trial was also referred to in the judgment itself. The Tribunal said in this respect: "With regard to the constitution of the Court all that the defendants are entitled to ask is to receive a fair trial on the facts and law." [10]

109. In the view of the Commission, the expression "fair trial" should be understood in the light of the above-quoted provisions of the Charter of the Nürnberg Tribunal.

PRINCIPLE VI

The crimes hereinafter set out are punishable as crimes under international law:

a. *Crimes against peace:*

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

(ii) *Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under* (i).

110. Both categories of crimes are characterized by the fact that they are connected with "war of aggression or war in violation of international treaties, agreements or assurances".

111. The Tribunal made a general statement to the effect that its Charter was "the expression of international law existing at the time of its creation".[11] It, in particular, refuted the argnment of the defence that aggressive war was not an international crime. For this refutation the Tribunal relied primarily on the General Treaty for the Renunciation of War of 27 August 1928 (Kellogg-Briand Pact) which in 1939 was in force between sixty-three States. "The nations who signed the Pact or adhered to it unconditionally", said the Tribunal, "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 planned and waged 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".[12]

112. In support of its interpretation of the Kellogg-Briand Pact, the Tribunal cited some other international instruments which condemned war of aggression as an international crime. The draft of a Treaty of Mutual Assistance sponsored by the League of Nations in 1923 declared, in its article 1, "that aggressive war is an international crime". The Preamble to the League of Nations Protocol for the Pacific Settlement of International disputes (Geneva Protocol), of 1924, "recognizing the solidarity of the members of the International Community", stated that "a war of aggression constitutes a violation of this solidarity, and is an international crime", and that the contracting parties were "desirous of facilitating the complete application of the system provided in the Covenant of the League of Nations for the pacific settlement of disputes between the States and of ensuring the repression of international crimes". The declaration concerning wars of aggression adopted on 24 September 1927 by the Assembly of the League of Nations declared, in its preamble, that war was an "international crime". The resolution unanimously adopted on 18 February 1928 by twenty-one American Republics at the Sixth (Havana) International Conference of American States, provided that "war of aggression constitutes an international crime against the human species". [13]

113. The Charter of the Nürnberg Tribunal did not contain any definition of "war of aggression", nor was there any such definition in the judgment of the Tribunal. It was by reviewing the historical events before and during the war that it found that certain of the defendants planned and waged aggressive wars against twelve nations and were therefore guilty of a series of crimes.

114. According to the Tribunal, this made it unnecessary to discuss the subject in further detail, or to consider at any length the extent to which these aggressive wars were also "wars in violation of international treaties, agreements, or assurances".[14]

115. The term "assurances" is understood by the Commission as including any pledge or guarantee of peace given by a State, even unilaterally.

116. The terms "planning" and "preparation" of a war of aggression were considered by the Tribunal as comprising all the stages in the bringing about of a war of aggression from the planning to the actual initiation of the war. In view of that, the Tribunal did not make any clear distinction between planning and preparation. As stated in the judgment, "planning and preparation are essential to the making of war".[15]

117. The meaning of the expression "waging of a war of aggression" was discussed in the Commission during the consideration of the definition of "crimes against peace". Some members of the Commission feared that everyone in uniform who fought in a war of aggression might be charged with the "waging" of such a war. The Commission understands the expression to refer only to high-ranking military personnel and high State officials, and believes that this was also the view of the Tribunal.

118. A legal notion of the Charter to which the defence objected was the one concerning "conspiracy".

[10] *Trial of the Major War Criminals before the International Military Tribunal*, vol. I, Nürnberg 1947.

[11] *Ibid.*

[12] *Ibid.*, page 220.

[13] *Ibid.*, pages 221-222.

[14] *Ibid.*, page 216.

[15] *Ibid.*, page 224.

The Tribunal recognized that "conspiracy is not defined in the Charter".[16] However, it stated the meaning of the term, though only in a restricted way. "But in the opinion of the Tribunal", it was said in the judgment, "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 twenty-five 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".[17]

b. *War crimes:*

Violations of the laws or customs of war which include, but are not 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, of 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.

119. The Tribunal emphasized that before the last war the crimes defined by article 6 (*b*) of its Charter were already recognized as crimes under international law. The Tribunal stated that such crimes were covered by specific provisions of the Regnlations annexed to The Hagne Convention of 1907 respecting the Laws and Customs of War on Land and of the Geneva Convention of 1929 on the Treatment of Prisoners of War. After enumerating the said provisions, the Tribunal stated: "That violation of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit or argnment." [18, 19]

c. *Crimes against humanity:*

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime.

120. Article 6 (*c*) of the Charter of the Nürnberg Tribunal distinguished two categories of punishable acts, to wit: first, murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population, before or during the war, and second, persecution on political, racial or religious grounds. Acts within these categories, according to the Charter, constituted international crimes only when committed "in execution of or in connexion with any crimes within the jurisdiction of the Tribunal". The crimes referred to as falling within the jurisdiction of the Tribunal were crimes against peace and war crimes.

121. Though it found 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", that "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", and that "the persecution of Jews during the same period is established beyond all doubt", the Tribunal considered that it had not been satisfactorily proved that before the outbreak of war these acts had been committed in execution of, or in connexion with, any crime within the jurisdiction of the Tribunal. For this reason the Tribunal declared itself unable to "make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter".[20]

122. The Tribunal did not, however, thereby exclude the possibility that crimes against humanity might be committed also before a war.

123. In its definition of crimes against humanitv the Commission has omitted the phrase "before or during the war" contained in article 6 (*c*) of the Charter of the Nürnberg Tribunal because this phrase referred to a particular war, the war of 1939. The omission of the phrase does not mean that the Commission considers that crimes against humanity can be committed only during a war. On the contrary, the Commission is of the opinion that such crimes may take place also before a war in connexion with crimes against peace.

124. In accordance with article 6 (*c*) of the Charter, the above formulation characterizes as crimes against humanity murder, extermination, enslavement, etc., committed against "any" civilian population. This means that these acts mav be crimes against humanity even if they are committed by the perpetrator against his own population.

PRINCIPLE VII

Complicity in the commission of a crime against peace, a war crime, or a crime against humanitv as set forth in Principle VI is a crime under international law.

125. The only provision in the Charter of the Nürnberg Tribunal regarding responsibility for complicitv was that of the last paragraph of article 6 which reads as follows: "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracv to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such a plan."

126. The Tribunal, commenting on this provision in

[16] *Ibid.*, page 225.

[17] *Trial of the Major War Criminals before the International Military Tribunal*, vol. I, Nürnberg 1947, page 225.

[18] *Ibid.*, page 253.

[19] During its discussion on the crime of killing hostages, the Commission took note of the fact that the Geneva Conventions of 12 August 1949, and more specifically article 34 of the Convention relative to the protection of civilian persons in time of war, prohibit the *taking* of hostages.

[20] *Trial of the Major War Criminals before the International Military Tribunal*, vol. I, Nürnberg 1947.

connexion with its discussion of count one of the indictment, which charged certain defendants with conspiracy to commit aggressive war, war crimes and crimes against humanity, said that, in its opinion, the provision did not "add a new and separate crime to those already listed". In the view of the Tribunal, the provision was designed to "establish the responsibility of persons participating in a common plan" [21] to prepare, initiate and wage aggressive war. Interpreted literally, this statement would seem to imply that the complicity rule did not apply to crimes perpetrated by individual action.

127. On the other hand, the Tribunal convicted several of the defendants of war crimes and crimes against humanity because they gave orders resulting in atrocious and criminal acts which they did not commit themselves. In practice, therefore, the Tribunal seems to have applied general principles of criminal law regarding complicity. This view is corroborated by expressions used by the Tribunal in assessing the gnilt of particular defendants.[22]

Part IV. THE QUESTION OF INTERNATIONAL CRIMINAL JURISDICTION

128. The General Assembly, by resolution 260 B (III), invited the International Law Commission "to study the desirability and possibility of establishing an international judicial organ for the trial of persons, charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions", and requested it, in carrying out that task, "to pay attention to the possibility of establishing a Criminal Chamber of the International Court of Justice".

129. At its first session, the Commission appointed as special rapporteurs to deal with this question Messrs. Ricardo J. Alfaro and A. E. F. Sandström who were requested to submit to the Commission, at its second session, one or more working papers on the subject.

130. At the second session, each of the special rapporteurs presented a report. These reports were discussed by the Commission during its 41st to 44th meetings.

131. In presenting his report (A/CN.4/20), Mr. Sandström first raised the question whether the judicial organ mentioned in the resolution was to be created as an organ of the United Nations and stated that, in that case, an amendment of the Charter of the United Nations would be necessary.

132. Several members of the Commission held the view that an international criminal court could be created by means of a convention open to signature by States, Members and non-members of the United Nations; that such a court was not necessarily envisaged as an organ of the United Nations; that Article 7 of the Charter contained a mere enumeration of the principal organs of the United Nations; that the said article did not preclude the possibility of creating new subsidiary organs; and that, therefore, the creation of an international judicial organ as contemplated by the resolution would not require an amendment of the Charter. It was pointed out, furthermore, that the essential question before the Commission was whether it was desirable and possible to create an international criminal jurisdiction, and that the problem with which the General Assembly was concerned would be the same, whether a judicial organ were set up within the framework of the United Nations or outside the organization.

133. On the question of desirability and possibility of establishing an international criminal court, Mr. Sandström stated that he could only consider the problem in a concrete manner; and that it was impossible under such conditions to consider separately desirability and possibility.

134. Mr. Sandström expressed the view that an international judicial organ such as envisaged in the resolution of the General Assembly would be desirable only if effective. Whether established within or without the framework of the United Nations, such an international judicial organ would have the defects which he had pointed out in his report and would be ineffective, especially in respect of grave international crimes. He therefore concluded that its establishment was not desirable.

135. The Commission next considered the report presented by Mr. Alfaro (A/CN.4/15, A/CN.4/15/Corr.1). With regard to the question of desirability, Mr. Alfaro stated that if "desirable" meant useful and necessary, the creation of an international criminal jurisdiction vested with power to try and punish persons who disturbed international public order was desirable as an effective contribution to the peace and security of the world. In the community of States, as in national communities, there were aggressors and disturbers of the peace, and mankind had a right to protect itself against international crimes by means of an adequate system of international repression. The rule of law in the community of States could only be ensured by the establishment of such a system. Public opinion had been in favour of an international criminal jurisdiction since the end of the First World War, when the Treaty of Versailles provided for the arraignment of William of Hohenzollern for "a supreme offence against international morality and the sanctity of treaties". Such public opinion had found expression also in the official and unofficial action, plans and views emanating from Governments, international bodies, law associations, statesmen and jurists, as stated in Part II of Mr. Alfaro's report. Mr. Alfaro also expressed his conviction that the creation of an international organ of criminal justice would have a deterring effect on potential aggressors and that even if its establishment were not feasible, it would always be desirable.

136. As to the possibility of establishing the judicial organ envisaged, Mr. Alfaro stated that he could not see any legal reason which made it impossible for States to set up by convention a judicial organ for the

[21] *Ibid.*, page 226.

[22] *Ibid.*, pages 281, 287, 295, 298, 306, 314, 319, 320, 321, 330.