HISTORICAL CONSIDERATION OF THE FORMULATION OF THE NUREMBERG PRINCIPLES

(Principles of International Law Recognized in the Chart of the Nuremberg Tribunal and the Judgment of the Tribunal)

SUBMITTED TO THE SECOND SESSION OF THE UN. INTERNATIONAL LAW COMMISSION

by the

WORLD JEWISH CONGRESS

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Item 3 of the Provisional Agenda for the Second Session of the International Law Commission is concerned with the formulation of the principles of international law recognized in the Charter and judgment of the Nuremberg Tribunal and the preparation of a draft code of offenses against the peace and security of mankind. Prof. Gilliopolis prepared reports on both these topics (A/814/20 and A/814/22), the second dealing also with the integration of the Nuremberg principles in the draft code.

The World Jewish Congress respectfully submits the following observations in connection with the above, based, inter alia, on the wording of the Charter of the International Military Tribunal (IMT), the judgment of that Tribunal, subsequent legislative acts of the Allies and Nuremberg judgments passed thereunder.

1. Incorporation of Crimes against Humanity into the Draft Code

"Crimes against humanity" has been included in the draft code as a crime against humanity as set forth in art. 6(c) of the Charter of IMT. In this connection it has been suggested that "perhaps it would be preferable to incorporate in the draft code only the crime of genocide, since governments might be very reluctant to accept the inclusion in the code of the acts constituting the crime against humanity, as defined by the Nuremberg Charter."

The author of the draft code thus proposes to exclude from the International Criminal Law in progress the offense of the laws of civilized mankind, but human rights as a violation of the compulsory and deportation as well.
This suggestion seems to us to be without merit both from the legal and political point of view. Legally, the crimes enumerated in Art. 6(c) of the Charter of the IMT are as much international crimes as any of the others suggested for incorporation in the draft code since the effect of their perpetration cannot be restricted to the territory of a particular state but must necessarily be extended to countries abroad because of the inherent threat to the peace and security of the world.

A number of important political considerations also suggest the advisability of incorporating these crimes in the code. The Charter of the IMT was signed by a very large number of States who thus affirmed their adherence to the principles of that historic document, and it is by no means evident that they or other States would be reluctant to accept these principles as a permanent addition to the structure of international law, especially in the troubled world of to-day. Furthermore, it should also be remembered that these principles were not regarded by the Tribunal as new rules of international criminal jurisdiction but as an "expression of international law at the time of its creation", while Art. II-4 of Control Law No. 10 specifically states that they were earlier recognized as such.

It should also be mentioned that a number of the Nuremberg defendants were executed for committing such crimes while others were sentenced to imprisonment for many years, some even for life. It is respectfully pointed out that the omission from the catalogue of international crimes of these principles upon which the Tribunal based their judgments would involve an obvious danger to the prestige and integrity of the democratic powers. Such an omission, it is submitted, would lead to the charge that

1) Opinion and Judgment, p. 48
all the Nuremberg Trials constituted a travesty on justice and were undertaken for motives of vengeance.

Moreover, the ICTY laid great stress on the criminality of persecutions, particularly on racial and religious grounds. The omission of such a provision from the catalogue of crimes against humanity might very well be interpreted as a lack of concern by the party of nations in acts directed against religious, racial and ethnic minorities.

II. Connection between Crimes against Humanity and Crimes against Peace

The draft code provisionally includes, under No. VIII (e), crimes against humanity other than those covered by the Genocide Convention, using the wording of Art.6(a) of the Charter of the ICTY with some deviations and omissions. One of the essential provisions of that article which was dropped in the prosecution in the trial of the top war criminals has been included in the code, namely, the provision that crimes against humanity to be punishable must be connected with the waging of aggressive war. During the discussions on the wording of the ICTY Charter, Professor André Gres, assistant to the French representative, proposed that the persecution of minorities be considered a crime even when unconnected with the waging of war. "All countries", he said, "have interfered in affairs of other countries to defend minorities who were being persecuted". Even before the start of the trial of the major war criminals, he foresaw the difficulties involved in establishing a connection between the persecutions and the war.

The view was confirmed when the ICTY did not find it possible to "make a...

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2) Ibid., p. 78
general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter, and ruled that the atrocities and persecutions committed by the defendants anterior to September 1, 1939, did not come within its competence.

Refusing to acknowledge the existence of a link between these crimes against humanity and the war, the NTT failed to explain whether there must be a chronological or logical connection between the two events in order to make the crimes against humanity actionable. It did not explain why it considered that crimes against peace had commenced on November 5, 1937, while punishable crimes against humanity were not committed before September 1, 1939. Obviously, the NTT was bound by the vague wording of the Charter.

In the Justice Case (No. 3) the Military Tribunal stated that "it can no longer be said that violations of the laws and customs of war are the only offenses recognized by common international law". Developing this view further, the court presented a long list of cases of "Intervention Humanitaire" in time of peace, demonstrating that the perpetration of inhuman acts against its own civilians by a government in time of peace was undeniable under accepted principles of international law.

Control Council Law No. 10 was promulgated before the judgment of the NTT was pronounced. The authors of that law were not aware of all the difficulties which would arise in the interpretation of crimes against humanity, but they did know that the security of mankind could be threatened.

47. Opinion and Judgment, p. 84
even in peace time by the commission of such crimes. With this in mind, the
Law, while repeating almost verbatim the text of Art. 6(c) of the Nuremberg
Charter, omits those words which set forth the necessity of a connection between
crimes against humanity and war. Crimes against humanity of both types —
such as murder and similar acts, and persecution on political, racial, or
religious grounds — are recognized as substantive and not derivative crimes.
In other words, this Law considers these crimes to be independently actionable
on, as General 

Taylor expressed it, "they stand on their own
feet".

It should be pointed out that Control Council Law No. 10 was an
international agreement among the four powers occupying Germany, cast in the
form of a law. It was formulated when it became obvious that the new Inter-
national Tribunals provided for in the Nuremberg Charter would not be established
although there was still the necessity of judging major war criminals whose
crimes — according to the Moscow Declaration of October 30, 1943, — had no
specific geographical location. In order to stress the international nature of the
law, the powers pointed out that its purpose was "to give effect to
the terms of the Moscow Declaration of Oct. 30, 1943, and the London Agree-
ment of August 8, 1945". The tribunals established in Nuremberg under that
Law and Ordinance No. 7 were neither German nor American courts; they con-
sidered themselves as international tribunals administering international
law. In Judgment No. 3 the court declared that "the tribunals are dependent
upon the substantive jurisdictional provisions of Control Council Law No. 10
and are thus based upon international authority and retain international
characteristics." Thus, the provisions of Art. II(c) of Control Council Law

5) Judgment, pp. 1066-10668 (nunc); cf. also Judgment No. 5, p. 10975 (nunc).
No. 10 and the judgments passed on the basis thereof are to be regarded as part of the Nuremberg principles, and the more appropriate formulation contained in Art. II of that law, it is submitted, should be incorporated in the draft code as representing the law of the nations as concern crimes against humanity.

It is relevant to point out in this connection that the Convention on Genocide specifically declared the acts enumerated in Art. II of the Convention as crimes under international law "whether committed in time of peace or in time of war." It would be inexplicable indeed if acts of genocide—"a species of the genus "crimes against humanity"—were recognized as crimes whenever committed while other crimes against humanity were to be regarded as international crimes only if committed with the waging of war.

III. Offences against Property or Crimes against Humanity

There was a lack of unanimity in Nuremberg as to whether acts directed against the property of persons persecuted on racial, religious, or political grounds were to be considered crimes against humanity within the meaning of the Charter of the Nuremberg Tribunal or the United Nations Charter.

The International Military Tribunal did not distinguish between economic and political persecution. Analyzing the activities of the leadership corps, the Tribunal stated that "it was involved in the economic and political persecution against the Jews". Any Minister of Economics, it charged, with participation "in the early Nazi program of economic discrimination against the Jews." Reichsminister of the Interior, Frick, was

3) Opinion and Judgment, p. 88
4) Ibid., p. 132
also found guilty of destroying, seizing, and administering "many laws designed to eliminate Jews from German life and economy". 8)

In the Himmlergruppen Case (case No. 9) the Military Tribunal had no doubt that the systematic deprivation of property was a crime against humanity which did not differ from deprivation of liberty:

"One who participated in the program which began with social disfranchisement and dehumanization and led, step by step, to deprivation of property and liberty...may not plead surprise when he learns that what had been done systematically, namely, murder, now is officially declared policy."

In case No. 11 (Ministries Case) the Military Tribunal deals with the participation of the Germans in the execution of the governmental program of persecution and extermination of Jews, stressing that they "were alive to the possibilities of increasing their own fortunes and enhancing their positions by taking advantage of these horrible persecutions...and sought to enrich themselves from the misfortunes of its victims." 9)

However, the Military Tribunal in Case No. 5 held that offences against property, particularly forced expropriation, were not crimes against humanity. The court based its view on the fact that Art. 6(c) of Control Council Law No. 10 speaks only of "torture and offences including but not limited to murder, extermination...committed against any civilian population" and does not include among the crimes not which violate property rights.

"Under the doctrine of ejusdem generis", declared the Military Tribunal, "the catch-all words 'other persecutions' must be deemed to include

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8) Ibid., p. 127
9) Judgment in Case No. 11, p. 218 (missed).
only such as affect the life and liberty of the oppressed people. Compulsory seizure of industrial property, however reprehensible, is not in that category. The interpretation of the doctrine "crimes against humanity" is so blunt in these cases. However, the Court did not quote the exact wording of Art. 4(c). The law in connection with atrocities does not mention "other persecutions" but "other inhuman acts" To be sure, such acts must be directed against the life and liberty of the civilian population. But the law further mentions "persecutions on political, racial or religious grounds." Such criminal acts, it is submitted, are not limited to offences against life and liberty; for, as we endeavored to show above, the ICT and other of the Military Tribunals recognized offences against property as crimes against humanity, if they were not isolated acts but were committed in fulfillment of a systematic government program. In fact, when such measures are undertaken against a considerable part of the population, deprivation of property or organization seems to be merely an "economic" measure. An act which deprives a segment of the population of the possibility of its existence, is no less serious than an act against life or liberty.

Accordingly, we suggest that in defining "crimes against humanity" it be explicitly stated that these not only include acts directed against life and liberty but also against the economic status of a minority.

17. Responsibility of Heads of States and Members of Government

In the "Proposed text of the Nuremberg Principles" (Doc. A/314/22, P. 42) Principle III provides that heads of States and public officials may be

10) Judgment in Case No. 5, p. 12013 (mimeo).
held responsible if they commit international crimes. The wording proposed in the draft code, however, does not specifically mention heads of States but speaks in general terms about "any person" whether acting in an official capacity or as a private individual" (loc., XII.K./25, p.64). It should be pointed out in this connection that the question of the responsibility of heads of States has never been definitely settled since first raised in the case of William II. In the case before the International Military Tribunal at Nuremberg defense attorneys challenged the right of that body to try the members of the German Government for crimes against their own citizens. In view of the foregoing, it is suggested that after the words "any person" in the draft code the phrase "including heads of States and members of governments" be added in order to avoid any misunderstanding as to the code's intent.

This suggestion is also motivated by the fact that in the above-mentioned Principles we find two principles (I and III) which concern almost identical matters. In spite of the fact that Principle I refers in general to "any person" the rapporteur found it necessary to stress specifically under Principle III the responsibility of heads of States. If only the general wording ("any person") would remain in the draft code, the omission of "heads of States" might conceivably be interpreted as a renunciation of the provision of Art. 7 of the Nuremberg Charter.

V. International law and Domestic law

It is stated in the Principles that domestic law does not prevail over international law (Principle II). On the other hand, the draft code does not include the words of Art.6(e) of the Nuremberg Charter that the crimes of murder or persecution on political, racial or religious grounds are punishable "whether or not in violation of the domestic law of the country where
perpetrated). This phrase was excluded from the definition of crimes against humanity (under crime No. VIII (2)–Doc. A/85, A/55 p. 27) on the ground that there "can be no doubt that command of municipal law does not affect the criminal character of an act which is a crime under international law" and therefore it is "hardly necessary to introduce into the Code a rule to this effect". Unfortunately, the experience of the Liberian trials shows that this opinion was not shared by all the Tribunals. In the judgment in Case No. 8 we find a clear deviation from the principle that crimes against humanity include criminal acts committed by the representative of a government against its own citizens whether or not in violation of the domestic law of the country where perpetrated. The defendant Richard Glücksberg, former Obergruppenführer in the SS and General of Police, was charged with special responsibility for, and participation in, the extermination of thousands of German nationals pursuant to the so-called euthanasia program of the Third Reich during the war. This program, approved by Hitler in a special decree (which was not promulgated) provided for the extermination of the aged and the incurable in order to secure the ethnic well-being of the Aryan race. The Military Tribunal held that the extermination of German nationals by Germans on the ground of this domestic legislation did not constitute a crime against humanity. As this judgment could be cited in support of the view that international law does prevail over domestic law, it would be useful to include the wording of Principle II in the draft Code.

V. The Significance of "Regular Order"

In principle IV it is stated that "regular order" does not free the defendant from responsibility under International law. This rule coincides, not only with art. 8 of the Nuremberg Charter but also with the judgment of the Nuremberg.

11) Judgment in Case No. 8, p. 5398 (ninth).
which declared it to be in conformity with the law of all nations.

Nevertheless, Prof. Spirouvelus, stating that no accord exists as to whether Superior Order might be a defence or not, suggests "a solution which would not exclude Superior Order as a defence" (54/58 4.24, p.50). In the Radio of Discussion No. 3, he proposes the following wording: "The fact that a person acted under command of a law or pursuant to superior order may be taken into consideration either as a defence or in mitigation of punishment if justice so requires."

The fact that "superior order" is a defence in the domestic law of some countries is not relevant in considering its validity in international law. As the rapporteur himself has stated, the norms of domestic law do not prevail upon international law and do not influence it. Furthermore, it is a common rule in domestic laws of all civilized nations that such an order cannot free a subordinate of responsibility for the commission of a crime.

Following this rule the British Manual of April, 1944, states that the court must take in consideration the obedience to military orders "not obviously unlawful." The IIIC made this principle its own, declaring that the fact that "a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defence in such acts of brutality."

12) Que l'ordre de supérieur civil ou militaire ne puisse justifier l'acte accompli ou repoussé du droit, il se fait avec par se demander. Ce fait reste ce qu'il est en lui-même, c'est-à-dire un acte bien qu'il soit commis par l'autorité légitime. L'ordre d'un supérieur qualifié même qu'il soit dans la hiérarchie, ne modifie pas la caractère délictueux de l'acte imposé - "Rapport de Droit Fondamental" by R. Gervais, One edition. Paris 1974, p. 308.

13) Decision and Judgment, p. 53
Control Council Law No. 10 explicitly states that a "superior order" does not free one from responsibility for the commission of a crime (Art. II-48). An exception is made where the order of the superior is not obviously unlawful, but this exception applies only in strictly military matters and not in the carrying out of orders in connection with such crimes as the gassing of inmates in concentration camps. When the subordinate must reasonably assume that the order of the superior is directed against someone's life, liberty or property and that he is an instrument for the commission of a crime, no claim of "superior order" can free him of personal responsibility. It is submitted, therefore, that Art. II-48 of Control Council Law No. 10 be included in the draft code in order to establish these as permanent rules of international law.

VII. Defense of Duesse

The draft code enumerates certain principles governing criminal acts committed under duress. It is suggested that the principles set forth in the Nuremberg trials also be taken into consideration in codifying this subject. In a dissenting opinion in Case No. 6 in which he attacked the acquittal of certain defendants, Judge Robert declared that "compulsion to the degree of depriving the defendants of moral choice did not in fact operate as the conclusive cause of the defendants' actions because their will coincided with the governmental solution of the situation."

A reign of terror cannot per se be considered as a circumstance which would permit the defense of duress. The Judgment in Case No. 5 gave a very liberal interpretation of fear as bearing on such a defense. However, it is an accepted concept in the law that fear is available as a defense
must be well founded and immediate and actual. **Danger of death or great bodily harm** must be present and the compulsions must be of such a character as to leave no opportunity to the accused to escape.** It is obvious, therefore, that fear of loss of property or material damage, imprisonment or even slight bodily harm does not permit the accused to offer the defence of duress.

In view of the foregoing, it is submitted that the enumeration of principles on page 54 of the draft code be supplemented with the statement that the defence of necessity cannot be available when the defendant commits a crime for fear of losing his property or suffering material damage in another way. The judgment in the Krupp case (Case No.6) stated this clearly by declaring that "the fear of the loss of property will not make the defence of duress available".  

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