MEMORANDUM CONCERNING THE FORMULATION OF THE NUREMBERG PRINCIPLES

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

SUBMITTED TO THE SECOND SESSION OF THE
U.N. INTERNATIONAL LAW COMMISSION

by the
WORLD JEWISH CONGRESS

2834 Broadway
New York, N.Y.
June 2, 1950
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. Spiespoulos prepared reports on both these topics (A/C.4/22 and A/C.4/23), 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 Allied and Nuremberg Judges, and hereinafter.

1. Incorporation of Crimes against Humanity into the Draft Code

"Crime No. VII" of the draft code summarizes the criminal acts enumerated in Art. II of the Genocide Convention and crimes against humanity as set forth in Art. 6(e) 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 now in process of formulation not only acts of persecution based on racial, religious and ethnic grounds which were included in the Charter of IMT and which constituted an important step in the development of the law of civilized mankind; but such inhuman acts as enslavement 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 ICTT 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 ICTT 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. 24-4 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 rendered 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

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1) Opinion and Judgment, p. 49
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 persecution, 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 society 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 (8), 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 deletions and additions. One of the essential provisions of that article which has been omitted is 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 Marie, 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, "should intervene in affairs of other countries to defend minorities the were being persecuted". Even before the start of the trial of the major war criminals, he forewarned 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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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 khởiing September 1, 1939, did not occur within its competence.

Refusing to acknowledge the existence of a link between these crimes against humanity and the war, the IMT 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 IMT 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 humanitarian" in time of peace, demonstrating that the perpetuation of inhuman acts against its own civilians by a government in time of peace was punishable under accepted principles of International law.

Control Council Law No. 10 was promulgated before the judgment of the IMT 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.
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 N.Y. 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 Telford 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 international tribunals provided for in the N.Y. 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 Agreement of August 8, 1945". The tribunals established in Nuremberg under that Law and Ordinance No. 7 were neither German nor American courts; they considered 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. 11(c) of Control Council Law

Judgment, pp. 10512, 10618 (nieso), cf. also Judgment No. 5, p. 10975 (nieso).
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 concerns 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 I.C.Y. and Control Council Law No. 10.

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 discrimination against the Jews." 6) Bank, Minister of Economics, was charged with participation "in the early Nazi program of economic discrimination against the Jews." 7) Reichskanzler of the Interior, Frick, was

6) Opinion and Judgment, p. 96
7) Ibid., p. 132
also found guilty of drafted, signing, and administering "many laws designed to eliminate Jews from German life and economy."

In the Siemensgruppe 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 racial disenfranchisement 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 sporadically, namely, murder, now is officially declared policy."

In case No. 11 (Ministry 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."

However, the Military Tribunal in Case No. 5 held that offenses 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 "atrocities and offenses 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 "slavish service," 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. 216 (misc).
only such as affect the life and liberty of the oppressed people. Compulsory
taking of industrial property, however reprehensible, is not in that
category. The interpretation of the doctrine siudum praesidin is no doubt
correct. 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 may 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,
if 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 govern-
ment program. In fact, when such measures are undertaken against a consid-
erable 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 includes 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 Namibian Principles" (Doc. A/3.1/22,
para. 60) Principle 111 provides that heads of States and public officials may be

10) Judgment in Case No. 5, p. 13013 (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. cit., Art. 1, p. 66). 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 NMT 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 NMT 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/83.4/25 p. 17) on the ground that there "must 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 Nuremberg 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 Hilgermann, 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 insane in order to secure the ethnic well-being of the German race.

The Military Tribunal held that the extermination of German nationals by Germany 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 not prevail over domestic law, it would be useful to include the wording of Principle II in the draft code.

VI. The Significance of "Normal Order"

In principle IV it is stated that "normal order" does not free the defendant from responsibility under International law. This rule coincides, not only with art. 8 of the NNT charter but also with the judgment of the NNT Tribunal in Case No. 8, p. 2398 (note 11).

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11) Judgment in Case No. 8, p. 2398 (note).
which declared it to be in conformity with the law of all nations.

Nevertheless, Prof. Spirovolas, 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" (II/98 4.25, p.50).

In the Panel of Discussion No. 5, 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 in 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 law 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 into consideration the obedience to military orders "not obviously unlawful". The ILC 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 Superieur civil ou militaire ne puisse justifier l'acte accompli ou ne prenne de droit, il ne faut pas se demander, je fait reste ce qu'il est en lui-meme, c'est-a-dire un acte bien qu'il soit ordonné par l'autorité legitimate. L'Ordre d'un superieur quelconque n'est donc la hierarchie, ne modifie pas le caractère delitoce de l'acte imposé - "PROCEEDINGS" by P. Grauven, 1st edition, Paris 1974, p. 328.

13) Decision and Judgment, p. 63
Control Council Law No. 10 explicitly states that a "superior order" does not free one from responsibility for the commission of a crime (Art. 71-72). 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. 71-72 of Control Council Law No. 10 be included in the draft code in order to establish them as permanent rules of international law.

VII. Defense of Duress

The draft code enunciates 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 free 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 force 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".

14) Barton's Criminal Law, Vol.1, par. 34, p.545-546.