SOME ASPECTS OF THE LAWS OF WAR IN THE LIGHT OF THE WAR CRIMES TRIALS FOLLOWING WORLD WAR II.

Ten years having passed since the end of World War II and with sovereignty restored to Japan and to West Germany it may be timely to recall the trials that followed the war. What did they involve and what has been their impact on international law?

The hopes felt when the Nurnberg trials were in preparation was well expressed by Justice Jackson in his report to President Truman.

> "After we entered the war, and as we expended our men and our wealth to stamp out these wrongs, it was the universal feeling of our people that out of this war should come unmistakable rules and workable machinery from which any who might contemplate another era of brigandage would know that they would be personally punished. Our people have been waiting for these trials in the spirit of Woodrow Wilson, who hoped to 'give to international law the kind of vitality which it can only have if it is a real expression of our moral judgment'".

Such were the goals.

At the outset there were serious and far-reaching problems to be solved, for nothing on this scale had ever been attempted before. Could every wrong be righted? Where should the trials be heard? Could they be held within a reasonable time? Which Nazi should be tried? Each one said, "Not me!" and piously pointed one finger towards a neighbor and another toward Hitler--now dead and safely

beyond worldly retribution. Would it be enough to try only the leaders who had planned the war, the enslavement of conquered peoples, the plunder of their property and the deliberate and diabolical murder of millions? Yet, what about the thousands of "Little Men" in the SS, in the Gestapo, the Nazi Party?

Upon consideration, it was evident that there were four main categories of war crimes to be dealt with: 1). There were the offenses against Allied Military personnel, the "conventional" war crimes, the violations of international conventions, such as mistreatment of prisoners of war, the Malmedy Massacre, and the murder of captured flyers who had bailed out of flaming planes. There were also the offenses in Germany against Allies--the operation of death camps. These cases could be handled by the Armies in the field in military courts. 2) There were the localized atrocities, such as the destruction of Lidice, the mass murders in Poland and Russia, and other conquered countries. The perpetrators of these crimes could be sent back to the scene and tried by the local courts for violation of the laws of the particular country. Murder was murder everywhere. 3) There were the traitors, quislings and collaborators. Obviously, the countries they betrayed could handle them best. 4) Then there were the crimes which, as it was said, had no particular geographical location. These were the offenses of the leaders who planned the war and the atrocities. The trial and punishment of these men was regarded as an international problem and only an international court was considered to be the proper forum.

The United States had proposed to England, France, and Soviet Russia a specific plan for the formation of such an international

tribunal. From this resulted a momentous legal document, the London Agreement of 1945 (a four power agreement which was later ratified by nineteen other nations), containing the Charter of the International Military Tribunal to be established in Germany for the trial of the major war criminals. The International Military Tribunal was to later describe the charter as embodying "the expression of International law existing at the time of its creation." Most notable was the catalogue of offenses therein, never before set down so succinctly:

> (a) Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
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> (b) War crimes: namely, violation of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment of or deportation to slave labour or for any other purpose of civilian population of or in occupation territory, murder or ill-treatment of prisoners of war or 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;
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> (c) Crimes against humanity; namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population' before or during the war, or persecutions on political,

racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated".

With minor changes, this was incorporated into Law 10 of the Allied Control Council for Germany which was the law under which the "subsequent" Nurnberg cases were brought.

There had been a notable precedent for the idea of an international war crimes tribunal, as well as for the trials before military courts of a single nation. The Treaty of Versailles at the end of World War I had provided that an Allied Tribunal might sit in judgment on Kaiser Wilhelm II "for a supreme offense against international morality and the sanctity of treaties" but the trial was never held, for the Kaiser had found sanctuary in Holland and that country refused to extradite him. The treaty also recognized the right of the Allies to try other German war criminals before Allied Military Tribunals, thus affording a basis for the trials of the "little men" as well. Curiously enough, it was this last provision that led, not to Allied trials but to the farcial German exhibition in 1921 known as the Leipzig Trials. The memory of this shameful experience determined the Allies of 1945 to refuse to permit the Germans to try their own war criminals.

In 1921 when the Allies submitted a list of nearly 900 persons, and demanded their surrender for trial pursuant to the treaty, the Germans opposed it and instead suggested a compromise: they would try these war criminals themselves. The Allies agreed; after all, they did not have custody of the men. Thereupon an abridged sample list of 45 was submitted but only 12 could be found! Of these only

6 were convicted, and the others were not made to serve their short sentences. Two were allowed to "escape". The Allies were furious, but as a practical matter could do nothing.

But in 1945 things were different. The Allies had custody of the culprits, and international and zonal machinery was set up in Germany and procedures for extradition between Allies was established. Most important, the Charter had been adopted and the International Military Tribunal had been created.

The trial commenced on November 20, 1945 and continued for nearly a year until August 31, 1946, when the judgment of the IMT was rendered. Adjudging twelve death sentences, three life imprisonment sentences and four sentences varying from ten to 20 years' imprisonment, and three acquittals, it also declared that groups within the following organizations were criminal in character (thus laying the foundation for the trials of their party members): the Leadership Corps of the Nazi Party, the SS (Die Schutzstaffeln Der Nationalsozialistichen Deutchen Arbeiterpartai) and the Gestapo (Die Geheime Staatspolizei); the SA (Die Sturmabteilungen Der N.S.D.A.P.), however, it declined to declare criminal and with the Russian member dissenting, it made a like ruling in favor of the Reich Cabinet, the General Staff and the High Command.

Although a second international trial to involve German industrialists was favored by France and the Soviet Union, a lukewarm attitude was displayed by England. The U.S. had been willing to try them in the first trial but it opposed a second one on an international scale. Instead, the U.S. set up its own tribunals to try the "second rank" of the high Nazis, and during the period from October 1946 to April 1949 twelve lengthy trials were prosecuted in Nurnberg. Accused were 185 persons among whom 24 were sentenced to death, 20 to life

imprisonment, and 98 to prison terms ranging from 1½ to 25 years. Of the remainder, 35 were acquitted, 4 committed suicide, and 4 had proceedings dropped due to illness.

The largest war crimes operation in the U.S. Zone was not in Nurnberg, however, but was to be found in Dachau, a little community near Munich, Germany, proceeding under the supervision of the U.S. Army's Judge Advocate. In administration buildings of the former infamous Dachau concentration camp, the courtrooms were set up. The now cool crematorium ovens, the empty lethal gas chamber, the gallows, the savage dog kennels, the mass graves, the cynical motto, "Arbeit macht frei" in the wrought-iron gate to the horror barracks--all but a few yards from the courtroom--made it impossible for anyone to forget the reason for the trials. The selection of this site for the proceedings was a fitting sequel which gave some small measure of consolation to the French and other Allied pilgrims who yearly journeyed to the mass graves there. For these trials were concerned not with those high Nazis who had sat in their offices and planned the crimes but rather with those men whose hands were actually "imbrued with innocent blood." These were the men who were guilty of carrying out the orders from higher headquarters, and then added their own whit of sadism, identifying themselves completely with the whole evil program. These were the men who were guilty of the mistreatment and murders of Allied soldiers and flyers, of slave laborers, of concentration camp inmates.

The Dachau trials began within a month after VE Day and continued until the end of 1947. Within this period the prodigious number of 489 trials were held, involving 1672 defendants. Of this total, 1347 were finally convicted: 288 death sentences were approved and by the end of 1949 all but 13 had been executed, 229 sentences to life

imprisonment were approved, and 830 were given prison terms varying from nine months to 35 years. The remaining 325 were either acquitted (256) or had their convictions set aside (69) by General Clay for lack of evidence.

More than one-half of the trials were concerned with offenses against American soldiers. To some extent efforts had been made earlier to bring this type of offender to trial before the military courts during combat. However, the plan was largely abandoned because of the fear of retaliation through the execution of captured Allied soldiers by the Germans. The surrender ended this danger and the trials quickly commenced.

When it was foreseen that there would be as many national trials relating to a particular concentration camp as there would be nationalities of the inmates, it seemed more logical to hold one big trial for each camp. The Americans had the evidence and the leaders of the camps liberated by them and therefore agreed to also try these cases at Dachau. The interested nations, however, sent representatives to observe and assist in a liaison capacity.

Thus there were three separate war crimes court systems in the U.S. Zone, one international and two of the U.S.

Both U.S. operations were very large. At peak strength the twelve long "subsequent trials" in Nurnberg required the services of nearly 900 Americans and Allies and about as many more Germans. At Dachau, where nearly 500 shorter trials were held, there were also about 900 Americans and Allies on duty plus about 200 Germans.

In Nurnberg the thirty-two men who sat as Military Government judges (or as alternates) in three-man panels in the "subsequent trials" were all American civilians, drawn from the ranks of prominent

state court judges and attorneys, and had been especially requested to serve on these courts. On the other hand, the Dachau courts were staffed by some fifty Army officers, many of high rank, who happened to be on duty in Germany. They sat in three-man or five-man panels, depending upon the gravity of the offense. (Not mystifying to anyone familiar with Army terminology was the fact that the Nurnberg Military Government civilian-staffed courts were called "military" tribunals, whereas those at Dachau with military members were known as "military government" courts!)

The Nurnberg judges were required to state the reasons for their decisions (which they did in learned and precedent-making opinions) and no review thereof was authorized. Although the Commander-in-Chief retained the power to lessen the sentences, he had no occasion to. But in Dachau, conformably to military practice, no opinions were rendered but complete revision was permissible on review by General Clay assisted by his Judge Advocate staff. Yet when he found what he considered to be error he could not order a new trial because of the Washington pressure to finish up with the program. Overwhelmed with petitions on behalf of the convicted ones (whose imaginations were now unrestrained and who felt that they had nothing to lose by complaining), and anxious that no injustice be charged to the American record, the reviewers became extremely critical. To resolve the doubtful cases without ordering a new trial, the rather unorthodox and makeshift practice grew up of reducing the sentences or commuting death sentences to life imprisonment. In the extremely doubtful cases an order of complete disapproval was entered and the men were freed. In this manner, General Clay altered 326 sentences out of 1416 convictions, including 69 which he cancelled altogether.

Some people have been troubled because the trials were held

by the victors. The charge has been made by many of the defendants and their friends that this has introduced an element of vengeance into the whole program. But unless the war criminals were to be freed outright there was no other way. Moreover, if it be recognized that the individual nations could try, in their own national courts, the German officials who had come out to rule them and had harmed their people contrary to their national laws, then surely these same nations could agree to act in unison on the matter and provide international trials. Granting that, some misgivings were still felt because such international tribunals were not manned by neutrals. But who were neutrals? "The scope of the war, however, left few neutrals," said Justice Jackson, "and formal neutrality of a government did not mean disinterestedness on the part of all its citizens." He continued:

> "There was no escape from selection of the judges by the victorious powers and it seems naive to believe that they would have chosen more dispassionate or just jurists from other lands than from England, France and the United States. Those countries which enjoy the blessings of an independent judicial tradition rely upon the individual integrity, detachment and learning of the judge to shape his decisions rather than upon the source of his commission, his nationality or his class."

As for those men who had remained in Germany to commit their crimes, it was preposterous that Germany should become their sanctuary merely because no German courts could be trusted to hold such trials. Manifestly, those who were not major criminals and not to be tried in an international court would be summoned before the military government courts of each individual occupying power.

It is one of the inherent rights and duties of a military governor to reestablish courts of justice in the occupied country. Although he will ordinarily reopen the local courts, if closed due to war, he will not usually permit them to try cases involving offenses against the occupation itself, such as sabotage, injury to his soldiers, refusal to obey his orders, etc. These he will try in his own military courts. In these he may also try war crimes cases.

Inasmuch as one of the paramount objectives of the occupation of Germany was the restoration of the reign of justice and the removal of Nazi corruptions from German law, it might be supposed that a perfect object lesson could have been provided by a completely American court system. But the problem was not that simple. If court proceedings are conducted according to the rules of the military governor's country the local conquered population may be unfamiliar with them. They may not think they are getting justice according to their lights. What may seem just to him may seem unjust to them. Moreover, their local attorneys will not be equipped to be of any help to them with a strange court procedure to cope with.

This problem the planners tried to meet. The American and British were accustomed to the Anglo-American system of jurisprudence whereas the Germans knew only the Continental system. (An American would probably never believe he was getting a fair trial in Europe because of th different roles played by the judge and attorneys.) To solve the problem as well as to provide a court system that was fair, simple and flexible enough to be administered by army men, a procedure was devised that approximated the Continental system. Having in mind war conditions and possibly a sullen and rebellious population, the army did not propose to let the Germans introduce delaying tactics and fine-spun

legalisms. It was going to be fair but efficient. And if such procedures were good enough for current offenders they were good enough for war criminals also. Such were the rules in Dachau and Nurnberg. The London Charter, setting forth the rules to govern the IMT, approached the matter in much the same way. Commenting on it, Justice Jackson said:

> "It should not shock anyone that a trial before an Allied military tribunal should have some aspects based upon common law traditions and some drawn from the Continental and Slavic systems. For example, the United States and the United Kingdom cannot insist on the full sized application of Anglo-American procedures, the rules of evidence, the privilege against self-incrimination, and similar matters. These are not inherent parts of other systems of legal proceedings and there is no need for leaning over backward to give the Axis leaders the benefit of protective principles not afforded by German law even prior to Axis distortion of German justice. The Hitlerites need only have a fair trial.....the trial in all respects should be conducted justly and impartially."

The IMT was an international court and there were no American defense counsel before it. But in some of the Zonal tribunals there were and, trained as they had been, the use of the loose rules struck them as something approaching the sacrilegious. They had forgotten that similar relaxations were the custom in nearly all of the American administrative tribunals and that even the British and other Allies had adopted similar rules for their war crimes courts. Although they

attempted to have the Supreme Court pass on such matters, none were successful. However, similar procedures used in the trial of General Yamashita, in Tokyo, were under review when the court considered his petition for a writ of habeas corpus. The majority of the court refused to interfere with the conviction but the late Justices Murphy and Rutledge were alarmed at the informal practices disclosed and dissented in vigorous and highly critical terms. They brushed aside the reminder that similar procedures had been already approved by the Supreme Court in 1942 in the case of the German saboteurs.

It can hardly be doubted that the adoption of technical rules of evidence would have resulted in mass acquittals and the Allies would have impressed the Germans less with their justice than with their impotence. Certainly it would have been an anomaly to find Germans returned to France and Poland for trial under continental rules and strictly judged while those tried in Germany would gaily go free. Professor Sheldon Glueck, America's foremost authority on war crimes, anticipated the sticklers for all of the law's technicalities when he wrote in 1944:

> "The administration of justice is not some amiable little game of chess to be played forever according to the old rules though the heavens fall; it is rather a means to a socially and morally desirable end, and it must constantly be modified to achieve that end. In our day and age, one major aim of the administration of justice in international affairs is to demonstrate beyond doubt that lawlessness . . . . . entails prosecution and punishment."

Notwithstanding Supreme Court sanction of its procedures, the Army has since announced that should it be required to again try war criminals it will adhere to traditional American rules. Already in August 1948, too late to affect the war crimes trials, the Continental-type rules were scrapped in the regular military government courts and U.S procedures adopted in their place. This momentarily aroused many German lawyers who threatened to boycott the courts, asserting that they could not properly represent clients under rules they were unfamiliar with! Although the threat was not fulfilled, the outburst is significant only by way of proving that it is the familiar that seems fair.

No discussion of the Nurnberg proceedings can proceed far without the problem of ex post facto being raised. Certainly it was a crucial part of the defense of all the trials. Although in the United States the principle is a part of our basic law, elsewhere it is generally only a maxim, not a rule of law. Stone concludes that there "is clearly no principle of international law embodying the maxim against retroactivity of criminal law. Several years after the judgment Justice Jackson discussed the problem in these terms:

> "If no moral principle is entitled to application as a law until it is first embodied in a text and promulgated as a command by some superior effective authority, then it must be admitted the world was without such a text at the time the acts I have recited took place.....The fallacy of the idea that law is found only in such a source appears from the fact that crimes were punished by courts under our common-law philosophy long before there were legislatures. The modern law of crimes may largely be traced to judicial

> decision of particular cases earlier than it appeared in statute.....Unless international law is to be deprived of this common-law method of birth and growth, and confined wholly to progression by authoritarian command, then the judges at Nuremberg were fully warranted in reaching a judicial judgment of criminal guilt."

One of the retorts that could have been made to the Nazis who pleaded this defense was that since it was no defense under the Nazi law why should they be entitled to it. No one accused in their courts could escape the concentration camp with such a plea. If there were no laws against the acts denounced as war crimes then certainly the Allied Powers would have been under no legal restraint to treat the Germans with humanity or even afford them fair trials. On the other hand Appleman has shown that even under the laws in force under National Socialism the war crimes could properly have been punishable, namely, (1) the authority to punish the commission of an act which was already punishable by law, (2) the rule permitting punishment "according to the principle of criminal law and to the sound feelings of the people," and (3) the first step doctrine under which by German law a person who took the first step which might lead to the commission of an offense, even though such step was not unlawful, might be punished on the theory that he had completed all of the steps.

Moreover, although no individual penalties were attached to the treaties against warfare there is no doubt that the treaties made aggressive warfare illegal. Thus the argument that there was no advance specification of the penalty is hardly persuasive. As to conventional war crimes, the belligerent states could individually

try the culprits wherever they could be found hence all acting together could do likewise. As to crimes against humanity, these offenses were so heinous that no member of civilized society could expect not to be held accountable.

However this argument about the ex post facto character of the trials may be resolved, the United Nations wisely has attempted to set the matter at rest for the future by the preparation of a Draft Code of Offenses against the Peace and Security of Mankind. The Genocide Convention also serves a similar purpose as to some areas of the Nurnberg judgment. Likewise the 1949 Geneva Conventions. Nor should the Universal Declaration of Human Rights be overlooked. This was adopted by the General Assembly of the U.N. in 1948.

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. Based on this, the General Assembly, in 1947, directed the International Law Commission of the United Nations to draft a code. After several years of effort and debate, the Commission, in July, 1951, adopted and submitted to the

General Assembly a Draft Code of Offenses Against the Peace and Security of Mankind.

The General Assembly has not yet acted upon it or adopted it. Despite the fact that the United States favored its preparation it opposes its consideration at this time. The U.S. has acted similarly in respect to the Genocide Convention although it was brought into force by the requisite number of other nations. It has also expressed an adverse position towards the proposed Conventions on Human Rights which have been drafted to implement the 1948 Declaration on Human Rights. This opposition not only stems from the "cold war" but also from some fundamental differences between East and West in respect to the attitudes toward the relation of man to the state.

Nevertheless, the Draft Code provides a ready guide to the principles for which Nurnberg stands and is thus worthy of detailed attention.

The General Assembly's directive to the International Law Commission did not limit it to the formulation of the Nurnberg principles. More broadly, it was to "prepare a draft code of offenses against the peace and security of mankind." Although it was 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 did not consider itself bound to make this indication nor did it regard itself as precluded from suggesting modification or development of such principles. Nevertheless, 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.

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 performed by "the authorities of a State", that is, the leaders and officers, that is here proscribed. 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 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." Before Nurnberg it had been possible 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". The Draft Code then 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 and the many, many similar rulings made by the U.S. military courts. The principle was likewise upheld by the International Military Tribunal for the Far East which tried the Japanese war criminals.

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). 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 fairly be characterized as wars of aggression.

The International Law Commission was not unwilling to try to evolve a definition of "aggression". But its efforts foundered on the twin rocks of definition by general terms (no agreement could be reached) and defintion by enumeration (these would not exhaust the concept and would only invite evasion by acts unforseen by the draftsmen). Earlier, under the League of Nations its Special Committee on the definition of aggression reported that no satisfactory definition could be drawn up and recommended that the determination should be left in each case to the discretion of the League Council, that is to a political decision. Similarly, the United Nations Security Council has the power to determine the existence of a "threat to the peace, breach of the peace, or act of aggression."

Appleman sees no great problem in the lack of judicial definition:

> "We do not find it necessary, in national or municipal law, to define every element of an offense. There is, for example, no detailed definition of an assault and battery--detailing the elements of provocation, initial attack, defense, aggravated defense, undue force, or the like, nor are such things capable of minute refinement."

However, the International Law Commission did endeavor to

include within the term "act of aggression" 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".

Not only is the overt act of aggression declared to be a crime but so is the mere "preparation . . . . for the employment of armed force against another State." (Art. 2 (3)). The Nurnberg parallel is the inclusion undercrimes against peace the "planning, preparation, initiation .... of a war of aggression." The Tribunal's prouncements on the planning phase are not as clear as those 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." 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). 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.

Specifically excluded from condemnatmon, however, was customary military staff planning of the type that goes on in all armies at all times. 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 (3) (16) However, the plea of an aggressor that it 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 foregoing in the Kellogg-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."

The belief of the Commission that it was authorized to develop and enlarge upon the Nurnberg principles probably prompted the inclusion of "any threat . . . . to resort to an act of aggression against another state," as an offense. (Art. 2 (2)).

The prohibition of the "incursion . . . . by armed bands acting for a political purpose" (Art. 2 (4)) likewise does not appear to be based on Nurnberg. The incursions the tribunal 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 invariably would be detrimental factors in maintaining the peace of mankind.

At the opposite extreme there are too many historical examples examples of "acts . . . . resulting in the annexation, contrary to international law, of territory belonging to another state" (Art. 2 (8)). But the Nurnberg precedents based on the Austrian and Czechoslovakian episodes are not too satisfactory. It was these events that gave rise to

the court's distinction between illegal and criminal aggression. 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.

Nurnberg likewise furnishes only a meager guide to the practical 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" could be deemed provocative, or U.S. encouragement to "governments in exile", might be construed to come within the prohibitions.

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 training, 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." Thus, the present Draft Code may be regarded as an effort to fill the gap left open.

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. Although it was set forth no direct prohibitions against private manufacturers of armaments, viewed realistically such activities would necessarily involve some governmental connivance. Thus the guilty officials could be held amenable under the Draft Code and the manufacturers likewise, as accomplices. The problem may turn out to be one of proof rather than the adequacy of the Code.

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. To further dovetail the two codifications the Draft Code enlarges the scope of offenders beyond "State authorities" to include "private individuals." It is most understandable that no formulation of the Nurnberg principles could omit these crimes. 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, can hardly be too often condemned and proscribed.

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

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." Ironically, although such legislative interference is viewed as abhorrent, compunctions against intervention by force of arms has not always been regarded as equally reprehensible. The Chief Prosecutor for the British at Nurnberg stated the anomaly 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?"

At Nurnberg, the conflict between the 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" - - 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 domestic persecution and murder prior to 1939. 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 perceive 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. These same definitions of genocidal acts also appear in the Draft Code, with the Nurnberg limitations omitted. Thus, it may be said that although here the Commission has gone beyond Nurnberg, it has not exceeded the United Nations' program, for the Genocide Convention is now in force as a U.N. treaty.

A third grand category of offenses tried at Nurnberg was that of war crimes, that is, violations of the laws or customs of war. 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. 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.) Perhaps this lack of precise 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 adaption follows the needs of a changing world." Perhaps one of the customs of 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.

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 list 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 <u>any</u> 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 climate for the excesses, and the latter is designed to cover the participation of accomplices. The International Law Commission made the following observation on this point: ".....it is not intended to stipulate that all those contributing, in the normal exercise of their duties, to the perpetration of offences against the peace and security of mankind, could, on that ground alone, be considered as accomplices in such crimes. There can be no question of punishing as accomplices in such an offence all members of the armed forces of a State or the workers in war industries."

The prohibition of incitement has been seen by some as inviting a limitation on the right of free speech. 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 theprohibition. A partial answer is that it is only "direct" incitement that is proscribed.

Dispute as to means of 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." The

draft merely provides that "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) The Nurnberg Tribunal referred to the value of international agreements concerning war crimes, even though they establish no tribunals, by pointing out that the Hague Convention of 1907 "nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention." The U.N. Committee on International Criminal Jurisdiction completed a draft statute for an International Criminal Court on Aug. 31, 1951.

It may have been evident that the tone of the Draft Code is quite general. The International Law Commission did not undertake to make specific or detailed regulations. Nevertheless, such have been made, quite obviously spurred by the revelations at Nurnberg but under quite different auspices. The International Red Cross proposed revisions of the Geneva Convention of 1907 , the Hague Convention of 1907, and the Geneva Convention of 1929. Subsequently 61 nations sent representatives to Geneva in 1949 (including the US and the USSR) and the monumental 1949 Conventions were signed. In addition to the three revisions a completely new one was also approved. Thus far the US has not ratified any of the four although it stated that it would observe the 1949 Prisoner of War Convention in the Korean conflict. These four are known as the 1949 Geneva Conventions--

1. For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.
2. For the Amelioration of the Condition of

Wounded, Sick and Shipwrecked Members of
Armed Forces at Sea.

3. Relative to the Treatment of Prisoners of War.

4. Relative to the Protection of Civilian Persons in time of War.

The first three are not too much different in spirit than their predecessors but the regulations are spelled out in considerably more detail. With such things as the Bataan death march in mind detailed prohibitions are set forth. The influence of Nurnberg is seen in such things as the prohibition of medical experiment on prisoners of war and detailed investigation procedures in case of death of a prisoner.

One of the most troublesome problems arose in Korea during the repatriation proceedings. In 1949 the draftsmen were aware of the pretexts under which prisoners of war were being kept long after the war was over. Hence they inserted carefully drawn provisions designed to avoid such delays in the future. But they had not foreseen the situation that arose in 1951-1952 when thousands of North Koreans and Chinese prisoners were unwilling to be repatriated, promptly or otherwise. The U.N. authorities were faced with real legal problems because the 1949 Convention, also as a protective measure, provided that a prisoner could not renounce any of the rights afforded them under the Convention. Also, although a sick prisoner could not be repatriated against his will during hostilities no such prohibition was applicable at their termination. The problem was resolved therefore not according to law but as a policy decision on humanitarian grounds.

With the violent cruelties of the Nazis fresh in their minds the draftsmen also imposed a duty on the belligerent to suppress and punish such offenses among its troops. But for the "grave breaches"

they are not only to enact legislation to provide effective penal sanctions but agree to bring the offenders to trial before its courts or to hand them over to another power for trial. These grave breaches were defined to include wilful killing, torture, inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury, compelling the prisoner to serve in the forces of the hostile power, and wilfully depriving a prisoner of his rights to a fair trial.

In one instance at least there was a specific response to the admonition of the one of the "subsequent" Nurnberg tribunals. In the "Hostage Case" the principal charges related to offenses committed in one of the Norwegian campaigns and during the occupation of Yugoslavia, Albania and Greece. The court was appalled at the evidence:

> "The evidence in this case recites a record of killing and destruction seldom exceeded in modern history ..... Mass shootings of the innocent population, deportations of public and private property, not only in Yugoslavia and Greece but in many other countries as well, lend credit to the assertion that terrorism and intimidation was the accepted solution to any and all opposition to the German will.....The guilt of the German occupation forces is not only proven beyond a reasonable doubt but it casts a pall of shame upon a once highly respected nation and its people."

Yet the court felt forced to hold that:

> "It cannot be denied that the shooting of hostages or reprisal prisoners may under certain circumstances be justified as a last resort in procuring peace and tranquility in occupied territory and has the effect

of strengthening the position of law abiding occupants. The fact that the practice has been tortured beyond recognition by illegal and inhuman application cannot justify its prohibition by judicial fiat."

The court recommended strongly that international law be revised. Thus in the 1949 Convention for the Protection of Civilians the Occupying Power may "at the most, subject them to assigned residence or to internment" (Art. 78), "them" referring to the troublesome local population. In explaining this the US Army instructions now state that "One may not legally take hostages, enforce mass penalties, other than internment or assigned residence, nor execute reprisals against a mass population, even when individuals commit crimes against the Armed Forces."

If the local population is interned then the Occupant must assure suitable food, clothing, medical attention, freedom of religion and schools. Nor may they be forced to work (except in camp maintenance) and if they do work they must be paid. The disciplinary regime must be humane and shall in no circumstances include regulations imposing on internees any physical exertion dangerous to their health or moral victimization. Identification by tattooing is prohibited. Prolonged standing and roll-calls, punishment drill, military drill and maneuvers or the reduction of food rations, are prohibited. In case of death they shall be honorably buried and their graves respected, maintained and marked. If death is caused by another or from an unknown cause there shall be an immediate inquiry and report to the Protecting Power (e.g. a neutral or the International Red Cross).

As to those not interned, the Convention prohibits individual

or mass forcible transfers and deportations except for immediate security reasons. Nor may the Occupant move its own population into the occupied areas. They may not be compelled to work except on projects necessary for the occupying army, for public utility services, or the feeding, sheltering, clothing, transportation, or health of the occupied country. If they work they must be paid a fair wage and their general labor laws and workmen's compensation laws shall remain applicable.

There are elaborate provisions for fair trials and the prohibition against the execution of the death sentence until six months after the Protecting Power receives notification thereof or that request for pardon or reprieve has been denied.

(Appleman refers to his "Military Tribunals and International Crimes." Stone refers to his "Legal Controls of International Conflict."

The material relating to the Draft Code of Offenses is based upon an article by David I. Lippert appearing in the Los Angeles Bar Association Journal for February, 1953.)