УДК 342.1
DOI https://doi.org/10.24144/2788-6018.2023.03.75

NUREMBERG TRIBUNAL: PROBLEMS OF LEGITIMACY

Ivzhenko D.A.,
PhD student of the constitutional law department
at Taras Shevchenko national university of Kyiv
https://orcid.org/0000-0003-4023-8809

Івженко Д.А. Нюрнбергський Трибунал: проблеми легітимності.

У статті розкривається концепція та принципи Нюрнберзького трибуналу, створеного після Другої світової війни, а також про три види злочинів, встановлені Хартією. Автор зазначає, що такі злочини за загальним міжнародним правом ґрунтуються на визнанні необхідності кримінально-правового захисту фундаментальних загальнолюдських цінностей незалежно від того, чи відображено склад відповідних злочинів у законодавстві держави, на території якої вони вчинені. Це положення відображено в Статуті Нюрнберзького трибуналу, який розглядає злочини, що підпадають під його юрисдикцію, «незалежно від того, чи становили ці дії порушення внутрішніх прав країни, де вони були вчинені, чи ні» (пункт «с» статті 6).

Також приділено увагу юрисдикції Трибуналу. Таким чином, юрисдикція трибуналу була поширена на дії, які мали місце в минулому, і це вимагало концептуального узгодження з принципом «nullum crimen, nulla poena sine praevia lege poenali».

У статті також розглядається питання індивідуальної міжнародної кримінальної відповідальності як одного із засобів, за допомогою якого міжнародне право намагається протидіяти грубим порушенням прав людини. Нагадаємо, що 8 серпня 1945 року між урядами Союзу Радянських Соціалістичних Республік, Сполучених Штатів Америки, Сполученого Королівства Великої Британії та Північної Ірландії та Тимчасовим урядом Французької Республіки в Лондоні було підписано Угоду. про переслідування та покарання головних військових злочинців європейських країн Осі, до якого був доданий Статут Міжнародного військового трибуналу.

Зазначається, що посилання на зворотну силу кримінального права стали однією з причин доктринального неприйняття Нюрнберзького прецеденту. Питання про те, чи було прийняття Лондонської угоди та Статуту Міжнародного військового трибуналу актом правотворчості, тобто чи містили вони нові правові норми, які були застосовані до подій, що відбулися до їх прийняття, мають ще не знайшли чіткого рішення.

Ключові слова: Нюрнбергзький трибунал, легітимність, Статут, кримінальна відповідальність, міжнародне право.

Ivzhenko D.A. Nuremberg Trial: problems of legitimacy.

The article refers to the the concept and principles of Nuremberg Tribunal established after the World War II, as well to the three types of crimes established by the Charter. The author states that such crimes under general international law are based on the recognition of the need for criminal law protection of fundamental universal human values, regardless of whether the composition is reflected relevant crimes in the laws of the state in whose territory they were committed. This provision is reflected in the Charter of the Nuremberg tribunal dealing with crimes subject to its jurisdiction "whether or not these acts constituted a breach of internal the rights of the country where they were committed, or not" (paragraph "c" of article 6).

The attention is also paid to the jurisdiction of the Tribunal. This, jurisdiction of the tribunal was extended to actions that took place in the past, and this required conceptual alignment with the maxim «nullum crimen, nulla poena sine praevia lege poenali».

The article also deals with the issue of individual international criminal responsibility, as one of the means by which international law seeks to counter gross violations of human rights. It is reminded that, as of August 8, 1945 between the governments of the Union of Soviet Socialist Republics, The United States of America, the United Kingdom of Great Britain and Northern Ireland and the Provisional Government of the French Republic in London signed the Agreement on the Prosecution and Punishment of the Chief War Criminals of the European Axis countries, to which the Charter of the International Military Tribunal was annexed.

It is stated that references to the retroactive application of criminal law have become one of the reasons for the doctrinal rejection of the Nuremberg precedent. Question about whether the adoption of the London Agreement and the Charter of the International Military Tribunal was an act of lawmaking, that is, whether they contained they are new legal rules that have been applied to the events that took place before they were adopted, have not yet found a clear solution.

Key words: Nuremberg tribunal, legitimacy, Charter, criminal responsibility, international law.

Problem statement and its connection with important scientific or practical tasks. Considering the ongoing disputes for establishing Tribunal for vladimir putin and war-politician russian «elite» for unleashing the aggressive war against Ukraine, it's necessary to consider the experience of one of the most influential and historical international tribunals against war criminals - Nuremberg Tribunal.

To analyse all crimes committed by russians against our State is not the aim of this article, we will leave it for further prosecutors and judges of the upcoming International Tribunal. Meanwhile, the aim of this article is to concentrate on the process of establishing and accusation of the war criminals in crimes committed during Word War II.

Analysis of recent research and publications, which initiated the solution of this problem and on which the author relies, highlighting previously unresolved parts of the overall problem to which the article is devoted. The topic of Nuremberg Tribunal has always aroused great interest among scientists, and at different times in leading national and foreign scientists such as Sh. Bassiuni, I. Blishchenko, V. Vereshchetin, M. Hnatovskyi, B. Grefrat, A. Hrynchak, N. Zelinska, V. Morris, A. Nikolaev, J. O'Brien, V. Rosen, V. Sautenet, U. Harris, E. Schwelb and many others. But still the problem of the legitimacy of Nuremberg Tribunal and its international legal analysis remains somewhat insufficient covered in the scientific literature.

We should start with the November 20, 1945 - the day when the trial against the horrific war criminal of the Third Reich has been opened in Nuremberg. The Tribunal consisted of Judges from the four Victory States - United States, France, United Kingdom and Soviet Union, which occupied the territory of Nazi Germany after the victory. The Tribunal was held under the London Charter (Agreement) enacted on 8 August 1945.

It is generally understandable that the provisions of London Charter has raised from the Kellog-Briand Pact as of 27 August 1928. It was a Treaty between the United States and other Powers providing for the renunciation of war as an instrument of national policy. According to the Article 1 of the Treaty, The High Contracting Parties solely declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another [1].

It is worth mentioning that before this Treaty to be enacted, the war was deemed as a legal right of nations, no distinction was made between just or unjust wars. Nevertheless, the Pact did not declare war to be a crime. The Allies condemned two reasons for such actions:

(1) They were the victors along with occupiers of Germany;

(2) The crimes under the Charter were included under the universality principle;

According to the Declaration of Berlin as of 5th June 1945, the Allies proclaimed that The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority. The assumption, for the purposes stated above, of the said authority and powers does not affect the annexation of Germany [2].

The principal Nazi leaders as specified by the Allied Representatives, and all persons from time to time named or designated by rank, office or employment by the Allied Representatives as being suspected of having committed, ordered or abetted war crimes or analogous offences, will be apprehended and surrendered to the Allied Representatives.

Justice Jackson started the opening case for the prosecution with the following words: «We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this trial will commend itself to posterity as fulfilling humanity's aspirations to do justice» [3].

So the Charter established that the Nuremberg Trial will be conducted by the military authorities. Major Williard B. Colles proclaimed that a military tribunal with mixed inter-allied personnel may properly be established by the commanding officer of cooperating cobelligerent forces. Whether national or mixed international military tribunals are used to administer the laws of war is a question of policy only. The use of a national tribunal has the practical advantage that the members of such a tribunal are familiar with and may readily follow the established military law and procedure of their own country; whereas, before an international tribunal may function, during its sessions, and while its sentences are under execution, many novel, difficult, and time-consuming questions will arise and have to be solved as to its appointment, composition, procedure, and powers. Nevertheless, it seems to be rather inter-allier tribunal, but not the international one. Perhaps the better idea could be to wait till till the International Court of Justice would have been established [4, p. 330-331].

It is confirmed in the Article 2 of the Charter, according to which the Tribunal shall consist of four members, each with an alternate. One member and one alternate shall be appointed by each of the Signatories. Despite the fact that 19 nations adopted and sanctioned the Charter, the Allies have been the

so-called «representatives» of the all other nations, as well as the whole international community [5].

Now let's go deeper into the Nuremberg Trial subject jurisdiction. The Charter established the individual responsibility for three categories of crimes:

(a) Crimes against peace;
(b) War crimes;
(c) Crimes against humanity.

Let's make a short legal overview of the each of them.

Crimes against peace were defined as 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. As it was mentioned above, after the Kellog-Briand Pact was enacted the nations, including Germany bounded themselves for the purpose of eliminating the war. According to the Preamble of the Pact, the nations deeply sensible of their solemn duty to promote the welfare of mankind, persuaded that the time has, come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated.

Moreover, according to the Hague Convention as of 1899 and 1907, which were enacted prior to the Pact, the fact that the war will exist was recognised and the Parties of the Convention agreed to the some sort of rules. So following mentioned above the aggressive war was not deemed as a crime, meanwhile it was recognised that the war could occur [6, 7].

Meanwhile, the Charter makes the planning or waging of a war of aggression or a war in violation of international treaties a crime, and it is therefore not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London Agreement. But in view of the great importance of the questions of law involved, the Tribunal has heard full argument from the Prosecution and the Defence, and will express its view on the matter.

A long way to preventing the aggressive war has been made by the international community. The following international acts contained the provision regarding preventing aggressive war: unratified Geneva Protocol 1924, resolutions of the Assembly of the League of Nations 1927, Pact of Paris for the Renunciation of War as of 1928 as well in series of non-aggression pacts. Unfortunately, all these pacts and provisions did not have any binding effect for the international community. But looking respectively to all events that occurred prior to Work war II, there were numerous case when the officials could be punished for planning and engaging in aggressive war.

Let's remember the completion of Czechoslovakia to consent to pass the Germany the part of its territory under the pressure of France and Great Britain during the Munich conference in 1938. For example, Professor Quiney Wright said that France and Great Britain, instead of aiding to preserve the territorial integrity of Czechoslovakia as they were bound to do under the Covenant…joined with Italy and Germany in demanding that Czechoslovakia give to Germany in less than a fortnight peraticalyy everything the latter asked [8, p.38]. Isn't this an example of appeasing the aggressor? Thus in the situation of Czechoslovakia, all four parties could be condemned as guilty.

Analyzing the post-Munich international situation and groping for a way to mutual understanding with A. Hitler, Y. Stalin must inevitably was to turn his attention to Poland, whose intermediate geographical position between Germany and Russia former Polish president A. Kwasniewski called a "geopolitical curse». Evaluating the international position of the Second Polish-Lithuanian Commonwealth and the level of its contradictions with the Third Reich, Stalin's diplomacy in January 1939 came to the conclusion that the latter's continuous desire to revise the borders determined the zigzagging of Polish foreign policy and that none of the disputed issues between these states could be resolved. resolved peacefully, and, therefore, the clash between Germany and Poland is inevitable.

The secret protocol to the Molotov-Ribbentrop Pact, signed on August 23, 1939 in Moscow, established the division of the countries of Eastern Europe into the spheres of German and Soviet interests in case of "territorial-political restructuring" of these countries [9].

On September 17, 1939 (16 days after the attack of the Wehrmacht on the territory of Poland and after the crossing of the Xiang River by German troops), at two o'clock in the morning, Stalin, in the presence of Molotov and Voroshilov, received the German ambassador Schulenburg and announced that the Red Army was starting hostilities against Poland. At 3:15 a.m., the Polish ambassador in Moscow, V. Gzybowski, was handed a note from the Soviet government, which stated that: «The Polish state and its government actually ceased to exist. Thus, the agreements concluded between the USSR and Poland ceased to operate. Left to itself and left without leadership, Poland turned into a convenient field for all kinds of accidents and surprises that could pose a threat to the USSR. Therefore, being neutral until now, the Soviet government cannot be more neutral about these facts». So whether the dictum of the Nuremberg Tribunal that the aggression against Poland established the international criminal act, it means that Soviet Russia and its officials should have been recognised as the criminals.

Now allow to return to the second type of crimes under the Nuremberg Charter - (2) war crimes. The Charter describes war crimes as «namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied 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».

This situation is kind a different comparably to crimes against peace, as on many occasions in the past, war crimes have been prosecuted. The most known international treaties are the Hague Agreements as of 1899 and 1907, as well as the Geneva Agreement as of 1927. The Tribunal referred to the Kellogg-Briand Pact of 1927 to support the inclusion of "the planning, preparation, initiation or waging of a war of aggression" as a crime against peace. The offence of "crimes against humanity" was based on the general principles of law recognized by civilized nations that formed part of the law of all nations, including Germany.

Hersch Lauterpacht in his book «An International Bill of the Rights of Man» wrote that «The rules of warfare, like any other rules of international law, are binding not only upon impersonal entities, but upon human beings. The rules of law are binding not upon an abstract notion of Germany, but upon members of the German government, upon German individuals exercising governmental functions in occupied territory, upon German officers, upon German soldiers» [10]. Thus, there was little doubt that war crimes were properly indictable under international law.

We are reaching the last category of crimes under the Charter: (c) crimes against humanity - namely, murder extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecution 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. Worth noting that these crimes are related to the war crimes.

The Tribunal held that those crimes committed by Nazi against German Jews, German opponents pre war should not be considered as crimes against humanity. Meanwhile he tribunal ruled that the Germans had committed numerous crimes against humanity during the war.

The civilized usages and customs upon which the definition of crimes against humanity is based are far more ancient than those which gave rise to the concept of crimes against peace. The crimes against humanity are as old as war crimes, even though their substantive content has never been spelled out in meticulous detail. The International Military Tribunal construed this clause as meaning that crimes against humanity do not, so to speak, stand on their own feet, but are crimes under the London Charter only if committed "in execution of or in connection with" crimes against peace or war crimes.

Conclusions. A violation of the principles of «nillum crimen sine lege" and "ex post facto", especially as regards accusations of the crime of aggression: "at least with regard to the responsibility of individuals for crimes against peace, the powers that signed the London Agreement created new rather than applied existing rules of law. Undoubtedly, the arguments of scholars who see in the position of the Tribunal some violation of the principles of "nillum crimen sine lege" and "ex post facto" have serious grounds. At the same time, it is obvious that the egregious atrocities committed during the Second World War could not go unpunished. An alternative to the Nuremberg Tribunal was extrajudicial execution. The extension of its jurisdiction of the Tribunal to events that took place prior to the adoption of its Statute led to an appeal fair retribution in the direction of justice. Brownlee rightly observes that if there is any doubt as to whether they were general international law before 1945, "whatever the state of law in 1945, the provisions of Art. 6 of the Charter of the Nuremberg Tribunal subsequently became an integral part of general international law».

REFERENCES:

1. Kellog-Briand Pact as of 27 August 1928. URL: https://avalon.law.yale.edu/.
2. Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority by Allied Powers as of 5 June1945. URL: https://avalon.law.yale.edu/wwii/ger01.asp.
3. International military Tribunal, Trial of the Major war criminals. URL: https://www.legal-tools.org/doc/45f18e/pdf/.
4. Cowles, Trial of War Crimes by Military Tribunals, 30 A.B.A.J. 330, 331 (1944).
5. Charter of the International Military Tribunal, 1945. URL: https://www.un.org/en/genocideprevention/.
6. Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899. URL: https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-ii-1899.
7. Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907. URL: https://ihl-databases.icrc.org/assets/treaties/195-IHL-19-EN.pdf.

8. Wright, The Law of the Nuremberg Trial, 41 AM. J. INT'L L. 38, 50 (1947).
9. Nichtangriffsvertrag zwischen Deutschland und der Union der Sozialistischen Sowjetrepubliken, 23. August 1939. URL: https://www.1000dokumente.
10. An International Bill of the Rights of Man. By H, Lauterpacht. New York: Columbia University Press; 1945. Pp. x, 230. URL: https://www.jstor.org/stable/2193431.