

**THE IMPACT OF THE NUREMBERG AND TOKYO INTERNATIONAL
MILITARY TRIBUNALS ON THE ESTABLISHMENT
OF THE PRINCIPLE OF INDIVIDUAL CRIMINAL RESPONSIBILITY
IN THE INTERNATIONAL CRIMINAL LAW**

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A respected and beloved teacher,
Academician Levan Alexidze*

ABSTRACT

Advancement of the international justice system is one of the fundamentally important issues for the development of international criminal law. The rise of the ethnic, religious, or racial conflicts globally, is becoming a root cause of the gravest crimes against mankind, determined by the international community as - International Crimes. Consequently, the issue of the imposition of the individual criminal responsibility upon the perpetrators of international crimes is becoming especially relevant on the national as well as international levels.

Key words: individual criminal responsibility; international criminal law; Nuremberg Tribunal; Tokyo Tribunal

INTRODUCTION

The principle of individual criminal responsibility is raising different approaches in international criminal law and in some cases ascribes the latter to the domain of national criminal law.¹ This position has a legal basis and justification, since international criminal law within the scope of determining criminal responsibility of the individuals for committing international crimes, is based on the general principles of criminal law. Consequently, the issue of the individual criminal responsibility illustrates the close interaction between national and international criminal law.

The fact that States are primary subjects of international law,² does not exclude imposition of international criminal responsibility upon individuals for committing international crimes. Simultaneously, together with the imposition of the criminal responsibility upon individuals, responsibility of the State may also arise.³

]For the above-mentioned objective, this paper analyses the Charters of the Nuremberg and Tokyo International Military Tribunals and other related international legal instruments, which serve as a legal basis of the practice of the imposition of criminal responsibility upon individuals by the Tribunals, as well as a basis of the current model of individual criminal responsibility principle recognized in contemporary international criminal law.

¹ Brown, B., "Depoliticizing International Criminal Law," *Theory and Practice of International Criminal Law: Essays in Honor of M. Cherif Bassiouni* (2008), p. 83.

² Levan Alexidze (2014), *Contemporary International Law*, (Tbilisi, 2014), p. 8.

³ *Ibid.*, 196.

1. ROLE OF THE NUREMBERG INTERNATIONAL MILITARY TRIBUNAL

In the process of the establishment of principle of individual criminal responsibility, the role of the Nuremberg International Military Tribunal (the Nuremberg IMT) is especially important. The decision regarding establishment of the Nuremberg IMT was made before the end of the World War II. The Moscow Declaration of 1943 laid down the rules for the individual prosecution of the members of the National Socialist German Workers' Party (Nazi Party) for the international crimes committed during the WWII.⁴

However, it shall be noted that, the question was how to ensure the proper administration and enforcement of justice, taking into consideration that it was not the first attempt of holding persons individually accountable for committing international crimes. Treaty of Versailles⁵ envisaged the imposition of individual criminal responsibility upon William II of Hohenzollern, formerly German Emperor, for committing a supreme offence against international morality and the sanctity of treaties. This issue is explicitly regulated by the Article 227 of the Treaty.⁶ Article 227 also determined the composition of the tribunal. Namely, under Article 227, the Tribunal should be composed of five judges, one appointed by each of the Allied Powers: the United States of America, Great Britain, France, Italy and Japan. From my point of view, the fact that Tribunal was composed of the judges appointed by the Allied Powers illustrates the readiness of the international community for the establishment of principle of individual criminal responsibility.⁷

Even though the aims and objectives of the Treaty of Versailles had not been enforced,⁸ the latter can be regarded as a first attempt of the establishment of principle of individual criminal responsibility.

As it was mentioned above, considering the experience of the Treaty of Versailles and Leipzig War Crimes Trials,⁹ the idea of the creation of the military tribunal in order to bring the major war criminals of WWII to justice existed before the end of the War. Finally, in 1944, the leaders of the main Allied Powers - Great Britain, France, United States of America and Soviet Union, agreed to establish the Tribunal.¹⁰ As a result, in 1945

⁴ Taylor Telford, *The Anatomy of Nuremberg Trials : A Personal Memoir* (Back Bay Books, 2013), 7 (Telford, 2013).

⁵ Treaty of Versailles, Washington, Govt. print. off, 1919 <https://www.loc.gov/law/help/us-treaties/bevans/must000002-0043.pdf> [accessed 19.07.2020].

⁶ "The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties", *Ibid.*, 227.

⁷ This position is further strengthened by the Article 228 of the Treaty of Versailles, according to which: the German Government had obligation to hand over to the Allied and Associated Powers all persons accused of having committed acts in violation of the laws and customs of war, in order to try and punish them before military tribunals established on their territory.

⁸ Wilhelm II was granted political asylum in the Netherlands, therefore he was not extradited to Germany. Moreover, the International Criminal Tribunal on the territory of Germany was not established.

⁹ The Leipzig War Crimes Trials were a series of trials held in 1921 to try alleged German war criminals of the First World War before the German Reichsgericht (Supreme Court) in Leipzig, on the basis of the law adopted by the German Parliament (Reichstag). Considering that, even though Allies submitted 900 names of alleged war criminals to the German government, only six individuals were convicted, it can be concluded that Leipzig War Crimes Trials did not have significant impact on the establishment of individual criminal responsibility principle. However, the experience of the Leipzig War Crimes Trials indeed affected on the establishment of the international tribunals for the punishment of the major war criminals of WWII.

¹⁰ Telford, 2013: 5.

The Nuremberg Military Tribunal was created on the basis of London Declaration. Allied Powers have also adopted Charter of the Tribunal.¹¹

Article 1 of the Charter of the Nuremberg IMT stipulates¹² that the aim of the Tribunal was the just and prompt trial and punishment of the accused in the planning, preparation, or waging of WWII. Article 6 of the Charter directly states that Tribunal shall have the power for holding above mentioned persons individually responsible. According to the Article 6 of the Charter: “*the following acts, or any of them, were crimes coming within the jurisdiction of the Tribunal*”: (a) Crimes against peace; (b) War crimes; (c) Crimes against humanity.¹³

It should also be noted that, Article 6 of the Charter does not specify the forms of liability for imposing individual criminal responsibility. The Article creates “*wider framework*” and stipulates the following: “*The tribunal shall have power to try and punish persons, who, whether as individuals or as members of organizations, committed any of the crimes coming within the jurisdiction of the Tribunal*”.¹⁴ It indicates that the Nuremberg IMT did not separate principals from accessories and applied so-called unified perpetrator model.

Further, Article 6 of the Charter enshrined provision for the responsibility of leaders, organisers, instigators and accomplices for all acts performed by any persons in execution of common plan to commit crimes.¹⁵ Such provision highlighted the possibility to hold leaders, organisers, instigators and persons ordering the commission of a crime responsible and making them liable for a punishment; however, this did not affect the responsibility of a principal. Note should be given to the fact that a membership in a criminal organisation was not a precondition for criminal responsibility – for these ends, in accordance with the Charter, active participation in the criminal acts of the given organisation was necessary.

In furtherance of holding perpetrators – the members of a criminal organisation – responsible, the Charter envisaged the possibility for the Tribunal to determine the nature of an organisation – i.e. whether the organisation of which the individual was a member, was a criminal organisation. Considering this, the Tribunal named the following organisation to be of a criminal nature: the SS;¹⁶ the SD;¹⁷ Gestapo;¹⁸ the General Staff and High Command of the German Armed Forces; and the SA.¹⁹ The legal basis for such a decision is provided for in Article 10 of the Charter.

¹¹ United Nations, Agreement for the prosecution and punishment of the major war criminals of the European Axis (“London Agreement”), 8 August 1945, 82 U.N.T.C. 280 <https://www.refworld.org/docid/47fdfb34d.html> [accessed 19.07.2020].

¹² Ibid., 1.

¹³ Ibid., 6.

¹⁴ “Whether as individuals or as members of organizations, committed any of the following crimes”.

¹⁵ “Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan”.

¹⁶ Schutzstaffel - SS (Formed: 4 April 1925; Dissolved: 8 May 1945; Type: Paramilitary).

¹⁷ Sicherheitsdienst – SD (Formed: March 1931; Dissolved: 8 May 1945; Type: Intelligence agency).

¹⁸ Geheime Staatspolizei – Secret State Police, abbreviated Gestapo (Formed: 26 April 1933; Dissolved: 8 May 1945; Type: Secret police).

¹⁹ Sturmabteilungen (Formed: 5 October 1921; Dissolved: 8 May 1945; Type: Paramilitary).

Accordingly, the Nuremberg IMT is the very first international instrument for imposing individual criminal responsibility - the Tribunal has tried and managed to hold individuals criminally responsible for their acts.²⁰

2. THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (THE TOKYO IMT)

The establishment of the International Military Tribunal for the Far East (the Tokyo IMT) was virtually inspired by the very objective of the Potsdam Declaration²¹ to mete out stern justice to all war criminals. This document was preceded by the Cairo Declaration,²² authorising the United States, China, and the Great Britain to prevent Japanese aggression.

As it has been noted, the primary objective of the Potsdam Declaration was to mete out justice to all war criminals and, for these ends, to impose individual criminal responsibility.

With the signing of the Instrument of Surrender, Japan subjected itself to the terms of the Declaration. The instrument was also signed by the representatives of the United States, the USSR, the Great Britain, China, France, Canada, Australia, New Zealand, and the Netherlands; this fact provided for a solid legal basis for individual criminal responsibility and recognition of the associated principles in international law.²³

The Charter of the International Military Tribunal for the Far East,²⁴ much like the Nuremberg Charter, established jurisdiction of the Tribunal to try and punish the major war criminals in the Far East; the Tribunal had the power to hold persons criminally responsible as individuals or as members of organisations charged with offences including the respective crimes - crimes against peace, conventional war crimes, and crimes against humanity came within the jurisdiction of the Tribunal.²⁵

Consequently, the Tokyo IMT applied the principle of individual criminal responsibility with regard to every defendant and the requisite provisions of the Charter were adequately enforced.²⁶

The Tokyo Trial was a step forward in the direction of strengthening the principle of individual criminal responsibility. These significant international instruments and

²⁰ Within the course of the Nuremberg Trials, 12 trials were held against 177 individuals, including physicians, judges, industrialists, etc. Of the 177 defendants, 24 were sentenced to death.

²¹ Potsdam Declaration - Proclamation Defining Terms for Japanese Surrender Issued, at Potsdam, July 26, 1945 [https://avalon.law.yale.edu/20th_century/decade17.asp] [accessed 19.07.2020].

²² "The Cairo Declaration," November 26, 1943, History and Public Policy Program Digital Archive, Foreign Relations of the United States, Diplomatic Papers, The Conferences at Cairo and Tehran, 1943 (Washington, DC: United States Government Printing Office, 1961), 448-449 <https://digitalarchive.wilsoncenter.org/document/122101> [accessed 19.07.2020].

²³ This has been further strengthened with the creation of International Criminal Tribunal for Rwanda (ICTR), International Criminal Tribunal for the former Yugoslavia (ICTY), and International Criminal Court (ICC).

²⁴ International Military Tribunal For The Far East - Special proclamation by the Supreme Commander tor the Allied Powers at Tokyo January 19, 1946; charter dated January 19, 1946; amended charter dated April 26, 1946, Tribunal established January 19, 1946 https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.3_1946%20Tokyo%20Charter.pdf [accessed 19.07.2020].

²⁵ "The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offences which include Crimes against Peace".

²⁶ Within the course of the Tokyo Trials, 16 defendants were sentenced to life imprisonment, whereas 7 were sentenced to death.

trials facilitated the establishment of elements for individual criminal responsibility - participation in a common plan or conspiracy;²⁷ and a membership in a criminal organisation and active participation in the commission of crimes on a voluntary basis.²⁸ Further, in the post-Nuremberg era, under the Law N10,²⁹ before the United States tribunal and, also, within the trials in French occupation zone (Rastatt), the United Kingdom's occupation zone (Luneburg), and the USSR occupation zones, more than 3000 persons were tried. This fact emphasises that not only the Tokyo IMT and the Nuremberg IMT, but also Allied Powers, in their respective occupation zones, applied the principle of individual criminal responsibility.³⁰

CONCLUSION

The present paper explores several international instruments that have led to the establishment of the individual criminal responsibility principle within the framework of international law. In particular, the Nuremberg and Tokyo IMTs jurisdictional issues are discussed, along with the international treaties laying the legal foundations for these tribunals. In fact, these instruments have brought about the inception of the individual criminal responsibility principle in international criminal law. Even though, these instruments introduce individual criminal responsibility principle, detailed modes of liability for a commander, instigator, co-perpetrator or member of a criminal organisation is not provided for; these issues have been clarified by the ICTR in its requisite practice. Moreover, the definition of a perpetrator, along with the requisite types, have been provided for in the Rome Statute. On the other hand, the ICTY clarified the meaning of common purpose and indirect participation in the commission of a crime.

The paper has explored the early days of international criminal law and the development of two significant processes – inception of individual criminal responsibility principle, along with the debut of holding persons individually responsible for crimes against peace, crimes against humanity, and war crimes; and laying foundation for further development of the individual criminal responsibility principle by ICTR, ICTY and ICC.

²⁷ Provided that a common purpose is established, the existence of a common desire, as a requisite for responsibility for a criminal act, can be discussed in terms of conspiracy too.

²⁸ From Nuremberg to Hague, *The future of International Criminal Justice* (2002), Philippe Sands edition, p. 21.

²⁹ Nuremberg Trials Final Report Appendix D: Control Council Law N10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace And Against Humanity <https://avalon.law.yale.edu/imt/imt10.asp> [accessed 19.07.2020].

³⁰ Law N10 envisaged the possibility to hold perpetrators, organisers, instigators, members of criminal organisations, and political or military leader responsible for criminal acts.