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A/CN.4/W.11

Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal - Proposal by Professor Georges Scelle - incorporated in document A/CN.4/SR.28, para.88

Topic:

Formulation of the Nürnberg Principles

Extract from the Yearbook of the International Law Commission:-

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he in no way objected to the principle of the protection of the right of self defence, he considered that that right could not be included in the list of principles of Nürnberg.

79. Mr. SPIROPOULOS pointed out that the guarantee of the right of self defence before an international penal tribunal could not have existed as a principle before the establishment of the Nürnberg Charter, since the Nürnberg Tribunal had been the first international jurisdiction of that kind. It could not therefore be said that the principle had been recognized in the Charter or the Judgment.

80. With reference to the argument which Mr. Scelle had drawn from article 38 of the Statute of the International Court of Justice, it should be pointed out that the general principles of law mentioned in that article were principles of municipal law. The meaning of that paragraph was that the Court should, when necessary, apply the general principles of municipal law in the settlement of international disputes. It could not therefore be held that there was a principle of international law in that matter, which, moreover, came under penal procedure.

81. Mr. SCELLE objected that article 38 in no way stipulated that it applied only to principles of municipal law: that adjective did not appear in the text. It could therefore be held that the Statute of the Court referred in that paragraph to the principles of international law as well as to the principles of municipal law. That was perfectly logical, since any principle of international law had its origin in custom, which was actually a repetition by States of acts covered by their municipal law. Before becoming a principle of international law, therefore, any principle was first a general principle of municipal law and at both stages of its development it could be applied by the Court in international matters.

82. With regard to the inclusion of the right of self defence among the rules of procedure, Mr. Scelle could not accept that position at all. In that connexion he recalled that the reason the Dreyfus affair had shocked France to such an extent was that one of the documents presented by the prosecution had not been communicated to the accused. The French people had not been wrong on that point: it had considered that something more than a procedural irregularity was involved; it had seen in that fact a violation of a fundamental principle of justice.

83. Mr. CORDOVA thought that any discussion on the nature of the right of self defence was only of a purely academic interest. Since the right of the defendant to defend himself was written in the Nürnberg Charter, the Commission could also include it among the principles which it was formulating. In that case, it might be asked what could be thought of the provisions of the Nürnberg Charter which restricted the right of self defence, in particular article 3, which ruled out any possibility of objecting to the judges. Was it not necessary to consider them as a limitation by the Charter of a principle of international law which that Charter its lf recognized?

84. Mr. BRIERLY was of the opinion that Mr. Alfaro's proposal was altogether too detailed and contained rules which were not included in the general conception of the right of self defence: cross-examination of witnesses for the prosecution by the defence, for example, took place only in countries of Anglo-Saxon law. It was therefore preferable to adopt a more general formula which would simply ensure that defendants were to have a just trial.

85. Mr. FRANÇOIS shared the opinion of Mr. Brierly and explained that the right of the defendant to question witnesses for the prosecution directly was unknown in the legislation of the Netherlands, for example.

86. Mr. YEPES would vote in favour of the two proposals, because he wanted one or the other of them to be retained; his preference, however, was for Mr. Scelle's text.

87. The CHAIRMAN put the two proposals to the vote.

Mr. Alfaro's proposal was rejected by 4 votes to 1.

The Commission decided, by 6 votes to 2, to retain provisionally the following text proposed by Mr. Scelle: " Every defendant shall have the right to defend himself."

Draft formulation submitted by Mr. Scelle

88. Mr. SCELLE asked the Chairman to submit to the Commission an alternative draft of the formulation of the Nürnberg principles, of which he was the author, and which reads as follows:

" The principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal are as follows:

" 1. The individual is subject to international law, including international penal law.

" 2. The office of head of State, ruler or civil servant, does not confer any immunity in penal matters nor mitigate responsibility.

" 3. This subjective criminal responsibility of heads of States, rulers and agents is distinct from the objective responsibility of the State, which may become a subsidiary issue.

" 4. International law, including international penal law, has precedence over municipal law. It follows that rulers and agents of State are directly responsible for their international crimes and offences whether or not these are offences under the domestic penal law of their

countries. Consequently, any person who commits a crime against international law, either of commission or of omission, is responsible therefor and liable to punishment.

" 5. Superior orders do not constitute a complete defence, but only a mitigating circumstance when justice so requires.

" 6. A court of international jurisdiction appears particularly suitable to try international crimes and offences, especially those committed by heads of State, rulers or high civil servants.

" 7. In the present state of international law such a court is not necessarily bound by the principle that offences and penalties are not retroactive; this presupposes the preparation and drafting of an international penal code.

" 8. In conformity with the Nürnberg Charter and Judgment the following are already now international crimes:

" Crimes against peace;

" War crimes;

" Crimes against humanity.

" 9. Crimes against peace are: ".

89. In his opinion, the work accomplished so far comprised nothing but an analysis of the Nürnberg Charter and Judgment and, in addition, of the principal international crimes. The Commission had not yet defined any of the fundamental principles of international law which had existed at the time of the drafting of the Nürnberg Charter and Judgment, and which had been recognized by the Charter and applied by the Tribunal. The terms of reference of the Commission were precisely that.

90. The first of those fundamental principles, invoked by the Public Prosecutor and recognized in the Judgment, stated that the individual was subject to international law, including international penal law. It was in accordance with that principle that individuals could be punished: it should therefore appear at the head of the list.

91. The next step was to establish the fact that the old theory according to which any act performed on behalf of the State exempted rulers or officials from individual responsibility has been discarded. It was recognized that the office of head of the State, ruler or civil servant did not confer any immunity in penal matters nor mitigate responsibility. The Commission had admittedly drawn certain deductions from that principle, but it had not expressed it as did his draft.

92. Apart from that subjective responsibility of rulers, there was an objective responsibility of the State, which might become a subsidiary issue. It would certainly be necessary to specify later the nature of that responsibility, but whether it was penal, civil or pecuniary, its existence could not be denied. It therefore constituted a principle of international law which was contradicted by neither the Charter nor the Judgment of the Nürnberg Tribunal, which had not had to deal with it.

93. The fourth principle was that of the precedence of international law over municipal law. It was an obvious principle that the Commission had expressed in the draft Declaration on the Rights and Duties of States and which was the basis of the Charter and Judgment of the Nürnberg Tribunal. From that principle the Commission had drawn the conclusion that the individual was responsible for his crimes under international law, whether those crimes were or were not punishable under municipal law; it had not, however, formulated the principle itself.

94. The Commission had formulated none of the essential principles which were the subject of the first four paragraphs of his draft; it had merely drawn conclusions from some of them. It was imperative that those principles should be defined, the more so since the Commission was to be asked to prepare a code of crimes against international peace and security, of which those principles should constitute the preamble.

95. If the Commission intended to limit itself to the mere task of analysis which it had so far performed, Mr. Scelle could not take part in work which in no way answered the true purpose which the Commission was to fulfil. He had therefore presented his draft formulation, which could be put into final form by the sub-committee whose duty it would be to prepare the final draft.

96. The CHAIRMAN thought that, in view of the importance of the question raised by Mr. Scelle, the Commission should express its opinion of the new draft before referring it to a sub-committee.

97. Mr. FRANÇOIS disagreed entirely with Mr. Scelle's views on the scope of the Commission's terms of reference: its task consisted only in formulating the principles contained in the Nürnberg Charter and Judgment. It was indeed regrettable that the task was so restricted and the Commission might indicate, when it submitted to the General Assembly the result of the work which had been assigned to it, that the principles thus formulated did not represent its own conception of the principles of existing international law; it was, however, the prerogative of the General Assembly to request, if it deemed fit, that the Commission should not formulate the Nürnberg principles once again, but those of positive international law, as the Commission understood them.

98. Mr. YEPES thought that Mr. Scelle's draft, a great part of which he approved, deserved a very thorough study in the Commission, which should certainly not confine itself merely to transcribing the Nürnberg texts.

99. Mr. SPIROPOULOS noted that the various paragraphs of Mr. Scelle's draft set forth or less