Document:-
A/CN.4/SR.17

Summary record of the 17th meeting

Topic:
Formulation of the Nürnberg Principles

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the rights and duties of States. With regard to article 9, he proposed that it should be considered together with the preamble, since it was not concerned with a specific right or duty, but rather with a general statement on the rights and duties of States.

The Chairman's two proposals were adopted unanimously.

Formation of a committee

112. The CHAIRMAN pointed out that, although most of the twenty-four articles submitted to the Commission had been adopted in principle, many questions remained to be solved; the most important were the following:

(1) The preamble, which would have to be worded to take into account Mr. Scelle's draft, article 9 and various ideas arising out of the Panamanian draft;

(2) The question whether the declaration on the rights and duties of States should consist of " articles " or " paragraphs ";

(3) The order of these articles or paragraphs;

(4) The style;

(5) The question of the various sub-titles;

(6) A study of the phraseology, in order to achieve uniform texts in the various languages.

113. All these questions involved the consideration of the draft as a whole. In order to do this, it might be advisable to set up a small committee which would report to the Commission as soon as possible after having studied the draft and drawn up a new text. In accordance with the Committee's report, the Commission would decide whether it could proceed to prepare a final draft during its current session or whether that task should be postponed until the second session.

114. The Chairman decided, in accordance with the usual procedure, that the committee should be composed of the following members: Sir Benegal Rau (Chairman), Mr. Alfaro, Mr. Brierly and Mr. Scelle. He recalled that the Committee's special task was the study of the various questions he had enumerated.

115. Mr. KORETSKY thought it would be well to specify whether the committee was merely to prepare the way for a second reading of the draft declaration or whether it was to draw up a final draft, which would be submitted as such to the General Assembly, He thought the first solution preferable, unless the committee could draw up a text which it would recommend for submission to the Assembly.

116. The CHAIRMAN agreed with Mr. Koretsky and thought that the Commission should give the committee a free hand. He specified that Mr. Hsu's first proposal would be referred to the committee.

The meeting rose at 6.05 p.m.

17th MEETING

Monday, 9 May 1949, at 3 p.m.

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Chairman: Mr. Manley O. HUDSON.

Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. VLADIMIR M. KORETSKY, Sir Benegal N. RAU, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. LIANG, Director of the Division for the Development and Codification of International Law, Secretary to the Commission.

Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal (A/CN.4/5)

GENERAL DISCUSSION

1. The CHAIRMAN invited the Commission to begin the discussion of item 3 on the agenda, which included the following two paragraphs:

(*a*) Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal.

(*b*) Preparation of a draft code of offences against the peace and security of mankind.

2. Those two questions had been included in the agenda in pursuance of resolution 177 (II) of the General Assembly dated 21 November 1947 (See A/CN.4/5, p. 33). Previously, by its resolution 95 (I) of 11 December 1946 (See A/CN.4/5, pp. 14 and 15), the General Assembly had already affirmed " the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal " and had referred the matter to the Committee on the Progressive Development of International Law and its Codification.

3. The report of that Committee (A/AC. 10/52; also A/CN.4/5, pp. 18 and 19) proposed that the General Assembly should request the International Law Commission to prepare a draft Convention incorporating the principles of international law recognized by the Charter of the Nürnberg Tribunal and sanctioned by the judgment of that

Tribunal, and a detailed draft plan of general codification of offences against the peace and security of mankind. The Commission also drew the Assembly's attention to the possible advantages of establishing an international judicial authority with competence to exercise jurisdiction over such crimes. That last recommendation had entirely disappeared from the text of resolution 177 (II), and the first two had undergone modifications. Thus, the resolution was drawn up in more imperative terms than the draft: instead of merely inviting it to prepare drafts, the Assembly " decides to entrust " to the Commission the formulation of the Nürnberg principles and " directs " it at the same time to carry out that task and prepare a draft code of offences against the peace and security of mankind. Of those two tasks only the first should be discussed at the present meeting.

4. The Commission was therefore directed to formulate and not to study critically the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal. The Tribunal had, moreover, introduced only a few changes into the principles of the Charter. Only on two points had there been a slight deviation from them: first, when, by a restrictive interpretation, the Tribunal decided not to take account of the crimes against humanity committed before the beginning of the 1939 war; and secondly, when it refrained from considering as guilty of war crimes those who had committed violations of the Naval Protocol of 1936 concerning submarine warfare.

5. Although it had confirmed them, the General Assembly had not pointed out what were the principles of international law recognized by the Charter and the judgment of the Nürnberg Tribunal. It seemed therefore that the Commission was to some extent free to determine those principles even though its mandate was solely to formulate them.

6. In examining those principles the Commission could take as a basis for discussion either the various headings in the third part of the memorandum submitted by the Secretary-General (A/CN.4/5), or the summary on page 20 of that document of the French memorandum (A/AC.10/34) submitted to the Committee on the Progressive Development of International Law and its Codification, which proposed the definition of five principles drawn from the Charter and the judgment of the Nürnberg Tribunal.

7. That, moreover, had not been the only attempt to formulate those principles. Sir Hartley Shawcross when addressing the American Bar Association in 1946 had defined three of them in the following terms: [1]

" (1) To initiate a war of aggression is an international crime.

" (2) Individuals who lead their countries into such a war are personally responsible.

" (3) Individuals therefort have international duties which transcend the national duty of obedience imposed by particular States when to obey would constitute a crime against the nations."

8. The Chairman requested the Commission to express its opinion on the analysis he had just made of the task before it.

9. Mr. SANDSTRÖM said that on the whole he shared the point of view expressed by the Chairman. He thought, however, that it would be advisable to define the word " formulate ", which might mean either to analyse the principles and criticize them before deciding whether they were in conformity with international law, or merely to transcribe them, accepting them officially as principles of international law. The second interpretation seemed the better of the two, since, the General Assembly having already confirmed the principles of Nürnberg, there could be no question of the Commission reaching contrary conclusions after a critical examination of them.

10. The CHAIRMAN in that connexion drew attention to the difference in wording that could be noticed between the imperative text of resolution 177 (II) and the text of resolution 260 B(III) of 9 December 1948 in which the General Assembly invited the Commission to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide. In the case of the Nürnberg principles, it was not a work of criticism which the Assembly was asking the Commission to carry out, but a simple legal drafting of already recognized principles.

11. Mr. SANDSTROM thought it was not the Commission's task to assess the competence of the Nürnberg Tribunal, either. All the evidence seemed to show that the General Assembly had assumed such competence, and the Commission ought therefore to adopt a similar attitude on the point.

12. Mr. CORDOVA stated that both the Charter and the judgment of the Nürnberg Tribunal seemed to him to represent considerable progress in international law. There was, however, some doubt as to the intentions of the authors of resolution 177(II) when they directed the Commission to formulate the principles of that Charter and judgment.

13. First of all, since the Assembly had not pointed out what those principles were, the Commission would have to find them before formulating them. It could not, as Mr. Sandström had suggested, confine its activities to a mere transcription of them.

[1] Sir Hartley Shawcross, " *International Law: a Statement of the British View of its Role* ". *American Bar Association Journal*, Vol. 33, No. 1 (Jan. 1947), p. 32.

14. Secondly, he did not think, as did Mr. Sandström, that the General Assembly had the power to establish principles of international law. In the political field it could state that a given principle was a principle of international law, and its statement would bind the Members of the United Nations, but that would not amount to making that principle a principle of international law. On that point, divergencies of opinion had been revealed during the discussions in the Committee on the Progressive Development of International Law and its Codification. It was characteristic that the original wording of the report advocating a draft convention " in order to give to those principles a binding force for all " should have subsequently simply been suppressed after the representative of Yugoslavia had requested that it should be narrowed down to the expression " binding force for the signatory States " (A/CN. 4/5, p. 21). It appeared therefore that although they were at that time already confirmed by the General Assembly, the Nürnberg principles did not yet possess the character of principles of international law, as otherwise it would be easy to lay down that they were binding on all. For this reason he thought that the Commission should extract and formulate the provisions of the Charter and judgment to which it attributed the character of international law.

15. Mr. SPIROPOULOS agreed with Mr. Sandström that the Commission should confine itself to determining the principles proclaimed in the Charter and applied in the judgment. If there was any divergence between the Charter and the judgment—and it was known that the Tribunal's interpretation had occasionally narrowed the field of application of the principles of the Charter—he thought that only the principle as applied by the Tribunal should by retained. On the other hand, they could not ignore Mr. Córdova's remark to the effect that the Commission did not have to define all the Principles of the Charter and the judgment, but only those which were principles of international law. The work of the Commission could thus be reduced to that of formulating only the principles which were recognized by the Charter, the judgment and international law.

16. Mr. ALFARO stated that for him the question was very clear. It was not the Commission's task to find out whether the principles contained in the Charter and the judgment were in conformity with positive international law as it existed before the judgment. Actually, the problem belonged to the field of the progressive development of international law, and it was precisely the Commission's task to formulate principles which would constitute innovations in that law, such as the principle of the international responsibility of the individual for crimes against peace, war crimes and crimes against humanity.

17. Mr. AMADO was of the opinion that the preliminary difficulties arising in connexion with the formulation of the Nürnberg principles could be disposed of during the present session, but that the work of drafting should be delegated to a committee and deferred. The Charter of the Tribunal included on the one hand substantive provisions some of which were of a general nature (last paragraph of article 6, and articles 7 and 8) and others of a particular nature defining the various modalities of the crime, and on the other hand, provisions relating to procedure and judicial organization. All those principles had been interpreted and defined in the judgment of the Tribunal: it was therefore possible to formulate them clearly and systematically. It would, however, be advisable in the first place to decide to exclude from the formulation everything relating to procedure and judicial organization: such material could be studied at the same time as the second part of item 3 on the agenda.

18. Once that restriction was made, the Commission would have to decide whether the formulation should take the form of a convention or a resolution. The Nürnberg Tribunal had considered that the Charter did no more than embody the principles of existing international law, and the General Assembly had subsequently confirmed those principles: it could therefore be said that they formed part of general international law.

19. Nevertheless, in view of the extended field of application given to those principles by the Tribunal, it would be more appropriate to consider them from the view of the development of international law. He was therefore of the opinion that the principles should be formulated in a convention clearly defining the modalities of the various categories of crimes described in article 6 of the Charter, together with their extenuating, aggravating or justificatory circumstances. Such a convention as an instrument of progress and penal justice would be more sure than a simple statement in the form of a resolution.

20. That work having been accomplished, it would remain for the Commission to carry out a more lengthy task: that of preparing a draft code of offences against the peace and security of mankind. In that code, to a very large extent, a new law would have to be established. It would certainly confirm some conventions, such as the Convention on Genocide and the convention confirming the Nürnberg principles, but it would also have to contain a general section and, according to the suggestions of some Governments, new criminal modalities. On the other hand, it would exclude all international crimes not directly aimed against the peace and security of mankind, such as the traffic in narcotic drugs, or the white slave traffic, for the repression of which international conventions already existed. Such, he said, was his general idea of the Commission's work in that field.

21. The CHAIRMAN agreed that the Committee on the Progressive Development of International Law and its Codification had envisaged in its report a draft convention on the Nürnberg principles. The General Assembly had not, however, taken action on that suggestion. The only part of the Committee's proposal which survived in resolution 177 (II) was the second part, which dealt with the draft code of offences against peace and security of mankind. But it was not a question of a convention there either.

22. The Commission was therefore faced with one alternative only: should it formulate those parts of the Charter and judgment of Nürnberg which in its opinion constituted principles of international law, or should it attempt to formulate what the Charter and the judgment recognized as principles of international law? It was the second course which without doubt was the real task of the Commission: the text of the Assembly resolution was sufficiently explicit on that point. The Chairman also pointed out that the Charter and judgment of the Tokyo Tribunal would also have to be taken into consideration.

23. Mr. SCELLE was of the opinion that although the Commission was not called upon to criticize the principles recognized in the Charter and judgment of Nürnberg, it had nevertheless the right to make reservations. Unless that were so, it would be difficult to understand why the General Assembly had directed a commission of jurists to formulate the principles.

24. Mr. SPIROPOULOS was of the opinion that it was not part of the Commission's task to determine which of the Nürnberg principles were principles of positive international law, but to confine itself to formulating the principles proclaimed in the Charter and applied by the Tribunal. He even thought it would be dangerous at the present time to deviate from those principles or to criticize them.

25. He was, moreover, of the opinion that it would not be advisable to take into consideration the judgment of the Tokyo Tribunal, which was not mentioned in the General Assembly resolution. The Commission should confine itself to formulating without more ado the principles which had emerged at Nürnberg, and at Nürnberg alone.

26. Mr. SANDSTROM did not share the opinion that the Commission should formulate all that was in the Charter and judgment of Nürnberg. As a matter of fact, certain parts of the Charter, such as Articles 9 and 10, did not, properly speaking, enunciate principles of international law, and need not hold the Commission's attention. In his opinion, articles 6, 7 and 8 of the Charter were the only ones which contained principles that should be formulated.

27. Mr. SCELLE pointed out he had not advocated a critical exposition of the Charter or the judgment. He remarked that if the Commission accepted without reservation all the principles contained in the Charter, it would be exposing itself to the necessity which might arise, of contradicting those principles, if, later, when drafting a code of offences against the peace and security of mankind, it enunciated different ones. In order to retain its freedom of action therefore, the Commission should expressly state that the formulation on which it was engaged was purely a piece of research work and the Commission did not necessarily accept all the principles it found proclaimed.

28. Mr. YEPES shared the opinion of those who considered that the Commission's sole task was to formulate the principles recognized both by the Charter and the judgment of Nürnberg. That, in his opinion, was the meaning of the word " and " in section (*a*) of resolution 177 (II). He was of the opinion that the principles should be formulated as a declaration rather than a convention, for which it would be more difficult to secure acceptance.

29. The CHAIRMAN pointed out that the Commission was not empowered to draft either a declaration or a convention.

30. Mr. FRANÇOIS also thought that the terms of reference of the Commission were very simply and solely to proclaim the principles recognized at Nürnberg. He emphasized the harmful effect on world opinion that would be produced by the doubt the Commission had cast on the very principles on which the judgment had been based and by virtue of which a certain number of the accused had been condemned to death or imprisonment. He stated that the General Assembly had not invested the Commission with the right to review that judgment.

31. Mr. BRIERLY admitted that section (*a*) of resolution 177 (II) was drawn up in ambiguous terms and lent itself to differing interpretations. In his opinion, the only consideration that should be borne in mind was that by its resolution 95 (I) the General Assembly had confirmed as principles of international law the principles enunciated in the Charter and judgment of the Nürnberg Tribunal. The Commission's task was not therefore to decide whether a principle enunciated in the Charter or the judgment was really a principle of international law; it must proceed from the assumption that it was such a principle.

32. Mr. CORDOVA found it difficult to admit that the Commission had no other task than that of registering simply and solely, the principles enunciated in the Charter or the judgment of Nürnberg. As a matter of fact, the Commission had a double mandate: to codify the principles sanctioned by positive international law and to formulate new principles arising from the progressive development of international law.

33. Mr. SANDSTROM recalled that the formu-

lation of the principles enunciated at Nürnberg was only a preliminary stage in the process in the drawing up of the draft code of offences against the peace and security of mankind, which was the Commission's main task. The limited character of the Commission's terms of reference as regarded the formulation of the Nürnberg principles should not therefore give rise to astonishment

34. Mr. SPIROPOULOS thought it better to avoid asking whether a given principle existed in positive international law, since the Tribunal had proclaimed that all the principles recognized by the Charter were based on existing conventional or customary international law.

35. The CHAIRMAN proposed that it should be noted in the report that " the conclusion of the Commission is that it is not asked to express any appreciation of the principles applied in the Charter and the Tribunal of Nürnberg as principles of international law. It is asked merely to give formulation to those principles without any indication of their authority."

36. Mr. SCELLE supported that proposal while maintaining the reservation he had previously made.

The Chairman's proposal was adopted.

37. The CHAIRMAN noted that the Commission had agreed to confine itself to the principles enunciated in articles 6, 7 and 8 of the Charter. He also emphasized that neither the Charter of the Tribunal nor the Charter of the United Nations defined a war of aggression, and he wondered whether it would not be advisable to include a definition of a war of agression in the formulation of the Nürnberg principles. He also wondered whether the principle of judgment in the absence of the accused enunciated in article 12 of the Charter should not be included in the formulation.

38. Lastly, the question arose as to whether it would be advisable to examine the provisions of the Charter relating to procedure. He recalled in that connexion that article 6 of the Charter confined the powers of the Tribunal to crimes committed in the interests of the European Axis Powers. The Commission should therefore decide whether the principles enunciated by the Tribunal were or were not of general application. He pointed out that that question had been discussed at length at the London Conference which had drawn up the Charter of the Tribunal, and thought it would be useful for the Commission to take account of the records of that Conference which were the preparatory documents of the Charter.

39. Mr. SANDSTROM stated that the Commission should not concern itself with questions relating to procedure, just as it should avoid questions relating to the Tribunal's powers. He pointed out that the Tribunal had considered the principles enunciated in Article 6 as of general application.

40. Mr. SPIROPOULOS was of the opinion that the Commission should refrain from entering into details of procedure. Questions of procedure could be more usefully discussed when the Commission commenced its discussions on the establishment of an international penal court.

41. Mr. SCELLE remarked that the question of the rights of defence was not a question of procedure.

42. The CHAIRMAN wondered whether it could be inferred from the judgment that the Tribunal had admitted an exception to the principle: *nullum crimen sine lege.*

43. Mr. ALFARO stated that the Commission should confine itself to formulating principles and not concern itself with questions of procedure which would be studied when the establishment of an international jurisdiction was being considered. The principles it had to formulate were four or five in number: the principle of individual responsibility for the crimes of an international character enumerated in Article 6 of the Charter; the principles arising out of Articles 7 and 8 of the Charter; the principle of the guilt of persons who have been members of criminal organizations (articles 9 and 10). He thought that to those principles might perhaps be added the principle of guaranteeing the accused a fair trial.

44. Mr. SPIROPOULOS stated that while the defence had maintained that, in virtue of the principle *nullum crimen sine lege,* the acts imputed to the accused were not punishable, the Nürnberg Tribunal had decided that they were guilty on the grounds that those acts were punishable in virtue of positive law; the Tribunal had therefore maintained the principle in question. The Commission could not consider the exception to the maxim *nullum crimen sine lege* as a principle proclaimed at Nürnberg, because the only principles it had to formulate were those appearing in both the Charter and the judgment.

45. The CHAIRMAN considered that the word " and " in section (*a*) of resolution 177 (II) meant " and/or ", and therefore the Commission would always be able to formulate a principle recognized in the judgment even if it was not included in the Charter, or conversely.

46. Mr. SCELLE did not share that point of view.

47. Mr. CÓRDOVA stated that since the purpose of the formulation was to prevent international crimes, it was advisable to enunciate the greatest possible number of principles, whether they were drawn from the Charter or from the judgment.

48. Mr. BRIERLY stated that the Tribunal had emphasized that the principle *nullum crimen sine lege* was not an absolute rule, but that even if it had been, yet that principle had not been violated.

METHOD OF WORK AND ESTABLISHMENT OF A COMMITTEE

49. The CHAIRMAN requested the Commission to decide on the method of work it desired to adopt. The question to be decided was whether or not it would be necessary to re-word articles 6, 7 and 8 of the Charter of the Nürnberg Tribunal in order to emphasize the principles of international law which they enunciated. For his part he refused to admit that the task of the Commission was merely to extract from the Charter the provisions containing principles of international law and simply and solely recopy them.

50. Mr. AMADO said that it would first be necessary to determine the meaning of the word " formulation ". Some of the principles enunciated in the Charter and the judgment of the Nürnberg Tribunal had considerably modified existing international law. In formulating them, the Commission would sanction those modifications. Its task was therefore extremely important and could not be a mere reproduction of certain provisions of the Charter and judgment of the Nürnberg Tribunal.

51. Mr. SANDSTROM was of the opinion that the Commission should not confine itself to repeating principles enunciated in the Charter and judgment of the Nürnberg Tribunal: it should proceed to make a systematic analysis of those two documents.

52. Mr. CORDOVA shared the views of the Chairman. The Commission should not only register the principles proclaimed in the Charter and judgment of the Nürnberg Tribunal. It should also, to mention only one example, study the question of aggressive operations, which in the Tribunal's opinion did not constitute wars of aggression (A/CN.4/5, p. 59).

53. Mr. FRANÇOIS wondered whether in formulating the principles of Nürnberg the Commission might not be guided by the French proposal (A/AC.10/34) a summary of which appeared on page 20 of the Secretary-General's memorandum (A/CN.4/5). In that case the Commission might take the proposal as a basis for discussion.

54. The CHAIRMAN remarked that the French proposal was drawn up in terms which were too general to serve as a point of departure for the discussion.

55. Mr. AMADO had no objection to taking the French proposal as a basis, but he thought the Commission should first discuss and agree as to what principles emerged from the Charter and the judgment of the Nürnberg Tribunal.

56. Mr. ALFARO recalled that the Commission had agreed to recognize that the principles to be formulated were enunciated in Articles 6, 7 and 8 of the Charter. He thought the Commission might arrange for the formulation of those principles to be preceded by a general statement in the sense of paragraphs (*a*) and (*b*) of the French proposal. Emphasizing the need for a working document to serve as a basis for discussion, he proposed the establishment of a committee composed of two or three members whose task would be to draw up such a document.

57. The CHAIRMAN pointed out that before preparing the document the Committee should study the Charter and judgment of the Nürnberg Tribunal, taking into account the preparatory work on the Charter and the other judgments given by the Tribunal, as well as the Charter and judgment of the Tokyo Tribunal. The question therefore arose as to whether the Committee should draw up the working document during the present session or in the interval between the Commission's first and second sessions.

58. After a brief discussion in which Mr. SPIROPOULOS, Mr. ALFARO and Mr. CORDOVA took part, the Commission decided to set up a committee composed of Mr. François, Mr. Spiropoulos and Mr. Sandström, whose task it would be to draw up during the present session a working document containing a formulation of the Nürnberg principles.[2]

The meeting rose at 5.40 p.m.

[2] The discussion was resumed at the 25th meeting. See A/CN.4/SR.25.

18th MEETING

Wednesday, 11 May 1949, at 3 p.m.

This meeting was held in private and no Summary Record was issued.

19th MEETING

Thursday, 12 May 1949, at 3 p.m.

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