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Summary record of the 47th meeting

Topic:
Formulation of the Nürnberg Principles

Extract from the Yearbook of the International Law Commission:-
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Code of Offences against the Peace and Security of Mankind.

132. Mr. BRIERLY did not think that that was the problem. In no country did the law recognize superior orders as a defence when a crime had been committed.

133. Mr. el-KHOURY expained that under the law of his country, which was based on Islamic law, an order given by a superior did not in itself free from responsibility the person to whom the order was given. The order of a chief who had power to enforce the execution of his order might remove that responsibility. He observed that the text of Principle IV, which was based on the text of article 8 of the Charter of the Nürnberg Tribunal, had been established by the Commission the previous year. But as he had not then been able to attend the meetings of the Commission, he could give no opinion on its intentions at that time. He thought, however, that the Commission must now examine the extent to which the Nürnberg Tribunal had utilized and implemented the provisions of article 8 of the Charter. The crimes in question were listed in article 6. He wondered how many subordinates had committed such crimes in Germany. There were certainly millions of them. But how many of such persons had been brought before the Nürnberg Tribunal and sentenced by it ? Perhaps twenty, one hundred, or even a thousand. Since the Nürnberg Tribunal, which was responsible for applying article 8 of the Charter, had failed to do so by limiting itself to a certain number of cases, the Commission should not formulate that principle, which would be binding upon other courts in future.

134. Mr. SPIROPOULOS emphasized that he had not decided any issue in the principle and the comment he had formulated. He had merely confined himself to the task assigned to the Commission by the General Assembly.

135. Mr. KERNO (Assistant Secretary-General) did not consider it absolutely essential for the Commission to take a formal decision at that stage on the exact interpretation it placed upon the words " principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal ", which appeared in General Assembly resolution 177 (II). The Commission had already adopted the text of Principles I to III. Principle V would probably raise no difficulty. It therefore only remained to formulate Principle IV. The Rapporteur's text and Mr. Brierly's amendment might perhaps form the basis for a solution.

136. The CHAIRMAN thought that the Commission should adjourn in order to form a definite opinion on the policy to be followed in respect of the principles it was to state in its report.

137. Mr. SANDSTRÖM reminded the Commission that the principles it was to formulate must be in conformity with the Charter and judgment of the Nürnberg Tribunal. He considered that article 8 of the Charter was drafted in very categorical terms, but the judgment was not so clear.

138. Mr. SPIROPOULOS thought that the Commission must now decide whether or not it wished to adopt the principles that an order given by a superior made the subordinate responsible; that was the first question it would have to decide.

139. The CHAIRMAN again requested the Commission to consider the matter and to form an opinion so that it could adopt a definite position with regard to the decisions it was about to take.

The meeting rose at 1 p.m.

47th MEETING

Thursday, 15 June 1950, at 10 a.m.

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Chairman: Mr. Georges SCELLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris el-KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. Ivan KERNO (Assistant Secretary-General in charge of the Legal Department); Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgmeut of the Tribunal: Report by Mr. Spiropoulos (item 3(a) of the agenda) (A/CN.4/22) *(continued)*

PRINCIPLE IV (*continued*)

1. The CHAIRMAN was convinced that it was useless for the Commission to decide in a purely theoretical way how it was to interpret the task entrusted to it. The drafting of Principle IV was acceptable. There might seem to be some contradiction between Principle IV and what the Commission intended to include in the draft criminal code. But it was only apparently so; there was no real contradiction. The Charter merely spoke of mitigation, and if the Commission wished to include mitigation or even absolute defence in the criminal code, it could do so without contradiction. It could even allow a judge to acquit the accused. The criminal code would enlarge on the Nürnberg principles. The Nürnberg principles referred to " justice "; he personally would prefer to say " equity ", though the idea

was exactly the same. He felt that, provided certain alterations were made in the wording of the French text, Principle IV could be accepted as it stood.

2. Mr. ALFARO agreed. There was every reason to maintain that the Commission had the power to determine what principles recognized in the Charter and judgment constituted principles of international law when the Tribunal was set up and what principles did not. However, it had decided to adopt the principles as enunciated in the Charter. These could be found in its report which had been approved by the Sixth Committee and the General Assembly. If the Commission went back on this, it would amount to an attempt to revoke the General Assembly's decision. If it admitted that it had made a mistake, it would automatically imply that the Assembly had also made a mistake; and possibly the Assembly might maintain that the Commission was wrong in the present instance and not previously. That would utterly destroy the Commission's prestige. He could not see how the Commission could refuse to recognize principles solemnly affirmed by the General Assembly; it would be unwise, therefore, to become involved in a discussion likely to lead to that end, especially as only one of the five principles had given rise to further discussion on the question already settled at the first session. Without prejudice to a thorough discussion of Principle IV, and with due regard to the view that this principle was not a rule of international law at the time when the Tribunal was set up, it would be better to concentrate on deciding whether the principle was acceptable or not, in view of the provisions of Article 8 of the Nürnberg Charter and the decision taken a year ago by the Commission.

2 a. From a purely legal point of view, he was convinced that the principle that superior order did not free a person from criminal responsibility was a sound one, especially when supplemented by a proviso that superior order could be considered in mitigation of punishment, if justice so required. Man was endowed with free will, and even the most ignorant person in the civilized world could judge whether an act was criminal or not. Moreover, with regard to the crimes referred to in the Charter, obviously if superior order exonerated a person from criminal responsibility, in most cases such crimes could be committed with impunity. This was particularly true where criminals belonged to a totalitarian government. In a totalitarian State, all acts involved superior order. The system was like a pyramid in which the will of the dictator was at the apex, and was handed down from one category of officials to another until it reached the lowest strata of the population. Where the dictator happened to be a monster of the Hitler type, it was obvious what the expression " superior order " meant; and that, with the exception of Hitler himself, everyone could fall back on superior order to exculpate himself.

2 b. It was also true that, even within a totalitarian state, an individual could disobey a criminal superior order when he exercised his power of option. He cited the example of Rommel, the Commander of the Africa Corps during the last war. Rommel had thrown in the fire an order issued by Hitler on 18 October 1942, under paragraph 3 of which any enemy troops on commando operations in Europe or Africa taken prisoner by the Germans, even if soldiers in uniform or demolition squads, and whether armed or unarmed, in action or in flight were to be massacred to the last man. The order added that even if they gave themselves up, such prisoners were not to be spared. Rommel's action was revealed through the cross-examination at Nürnberg on 18 June 1946 of General Siegfried Westphal (see D. Young: *Rommel*, London, 1950, pp. 152 and 153). Thus, even in a totalitarian State choice could be exercised. He would vote for the principle, with the amendment proposed by Mr. Brierly, which brought it more into line with the end in view.

3. Mr. YEPES considered that the Commission was bound to rectify its decisions of the previous year if it felt that a mistake had been made. Hence he could not agree with Mr. Alfaro's argument. By admitting its mistakes, the Commission would increase its prestige with the scientific world. What Mr. Alfaro had said of the totalitarian State merely confirmed his own argument at the previous meeting. The individual was swallowed up by the Leviathan. A soldier could not be made entirely responsible for his acts. The order just quoted showed how far the decisions of heads of States such as Hitler could go. Theoretically, subordinates were free to disregard such orders; humanly they were not. It would be contrary to ethical principles to make minor officials and soldiers shoulder full responsibility when they had acted under orders. He suggested that the second sentence of Principle IV should be worded as follows: " It may, however, be considered in mitigation of punishment, or he may be acquitted, if justice so requires."

4. On a point of order, Mr. SPIROPOULOS said he had drawn attention to the fact that there could be no discussion without method; and the Commission was again falling into the same error. If the Commission stood by the decision of a year previously, it had only to consider whether the text he had proposed was consistent with the Nürnberg Charter and judgment. Only by reversing that decision could the Commission consider whether the principle recognized by the Charter and judgment was in keeping with the principles of international law.

5. Mr. BRIERLY clarified his proposal as being concerned rather with the drafting of the principle. Where there was no moral freedom there could be no guilt. Where the accused had any option, superior order was no defence.

6. Mr. YEPES suggested that, in certain cases, a superior order could be an absolute defence. That was the contention of Mr. Alfaro and himself, with the difference that they had specified the particular case. It was a question of drafting.

7. Mr. FRANÇOIS was prepared to accept the Chairman's proposal. The text drawn up by Mr. Spiropoulos would thus be adopted and Mr. Brierly's amendment rejected as altering the sense of the Charter. If the Commission decided that it had to formulate the prin-

ciples contained in the Charter, it must preserve them as enunciated in the Charter—i.e., superior order was not an absolute defence but merely a mitigating circumstance. Mr. Brierly was endeavouring to camouflage this decision under a formula which did not decide the issue. He could not share Mr. Alfaro's opinion that the Commission was bound by the principles adopted by the General Assembly.

8. Mr. BRIERLY did not understand Mr. François' criticism. The principle was formulated in accordance with the Charter and judgment. What he had proposed was based on the latter. His only modification was the addition of words to be found in the last sentence of the commentary on Principle IV.

9. Mr. FRANÇOIS was under the impression that Mr. Brierly had wished to make a substitution.

10. Mr. HUDSON explained that Mr. Brierly had suggested the addition of the words: " Provided a moral choice was in fact possible to him " (see A/CN.4/22, part IV). He considered that, under its terms of reference, the Commission could decide that certain principles were principles of international law recognized either in the Charter or in the judgment, or in both. He hoped the Commission would share this view. Mr. Brierly's proposal was based on the judgment, which mitigated the severity of the Charter.

11. The CHAIRMAN read out the amended text: " The fact that a person acted pursuant to order of his Government or of a superior, does not free him from responsibility under international law, provided a moral choice was in fact possible to him. It may, however, be considered in mitigation of punishment if justice so requires."

12. Mr. CÓRDOVA considered that the text implied that obedience to a specific order could constitute an absolute defence. Under its terms of reference, the Commission could not so decide. Neither in the Charter nor in the judgment of the Tribunal could a superior order be regarded as an absolute defence.

13. Mr. SPIROPOULOS urged the Commission not to decide for Mr. Brierly's amendment, as it would be a mistake. It was an important question which he had again studied for the purposes of his second report, on the draft code of offences against the peace and security of mankind (A/CN.4/25). He had also discussed it with several qualified persons. He had been greatly puzzled as to the sense of the passage quoted by Mr. Brierly. For a while he had interpreted the passage as Mr. Brierly interpreted it. But a thorough study of the text of the judgment had brought to light two passages which he had inserted in his report (footnote 54). Those passages were quite categorical. They stated that article 8 of the Charter prohibited the doctrine of superior orders being used as a defence. That meant that Principle IV must not be given a different sense from article 8 of the Charter. Mr. Pella, the author of a book on the subject, with whom he had had a long conversation, had reached the same conclusion. In preparing his second report he had studied the jurisprudence of local English, American and French military tribunals which had had the same problem to deal with. They had applied " Control Council Law No. 10 " containing the same rule as the Charter; and they had likewise decided that the argument of superior order could not be used as an absolute defence (See Brand, *Law Reports of Trials of War Criminals,* Vol. XV, p. 157). He read out the last part of his commentary on Principle IV as showing that what was involved was degree of responsibility and not absolute defence. In paragraph 120 of his second report (A/CN.4/25) he had quoted a passage from the Jackson Report on the London Conference. How, in view of that passage, could it be maintained that superior order constituted an absolute defence ?

14. Mr. el-KHOURY argued that Principle IV recognized and defended by Mr. Spiropoulos was clear, and that superior orders were not an absolute defence. No one denied that, but Mr. Brierly sub-divided the question. There was first of all superior order. Secondly, there was the moral choice open to the person committing the act. If such a person had a choice, superior order could not be argued as an absolute defence. At Nürnberg, article 8 had not been applied correctly, since hundreds of thousands of persons who committed under orders the atrocities set out in article 6 (c) had been let go scot free, which implied that they were implicitly recognized as not guilty. The true criterion of criminal responsibility had nothing to do with orders received, but lay in moral liberty and the possibility of choice on the part of the person committing the act alleged. The judgment could be interpreted in this sense; and he supported Mr. Brierly's proposal.

15. Mr. AMADO said he had listened to the Rapporteur's statement with attention and profit. But Mr. Spiropoulous had not quoted footnote 55 of his report, to the effect that at the London Conference there was agreement that superior orders should not be an *absolute* defence. That passage led him to agree with Mr. Brierly's proposal.

16. Mr. HUDSON said he had read very carefully the passage in the judgment referring to this question; and he could find no justification for the beginning of the first sentence of the final paragraph:

" Finally as regards the criterion for the determination of the degree of responsibility of a person acting pursuant to superior command . . .".

This would be true only if degree of responsibility were understood to mean the possibility of invoking a defence. Mr. Spiropoulos had said that it was a question merely of determining the gravity of the punishment. He personally felt that what was at issue was the extent to which absolute defence could be invoked. The passage quoted in the last part of his commentary on Principle IV was taken from the judgment. He felt that Mr. Spiropoulos was contradicting his own argument in stating that only the degree of responsibility was at stake, ignoring the fact that the last part of his commentary followed the ante-penultimate sentence. He suggested that the two sentences be placed one immediately after the other in the commentary.

16 a. He recalled the very significant proposals of the International Red Cross Committee for the revision of

the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. He read out article 40 (a):

" The fact that the accused acted in obedience to the orders of a superior or in pursuance of a law or regulation shall not constitute a valid defence, if the prosecution can show that in view of the circumstances the accused had reasonable grounds to assume that he was committing a breach of this Convention. In such a case the punishment may nevertheless be mitigated or remitted, if the circumstances justify."

This text, however, was not embodied in the final text of the Convention of 12 August 1949.

17. Mr. SANDSTRÖM said he would willingly have supported Mr. Spiropoulos if the Commission had not already departed from the Charter in formulating Principle III. In Principle IV it was still more justified in doing so. He read out the last part of the Commentary; where there was no moral choice, there should be no responsibility. He supported Mr. Brierly's proposal.

18. Mr. HSU said he could not support Mr. Brierly's amendment. The Commission had already retreated from its former position with regard to one of the principles. It could make a similar decision here, though if the Commission had made a mistake, it need not repeat it. The adoption of Mr. Brierly's amendment would constitute a serious alteration of the principle involved in the Statute, and would weaken it.

19. Mr. SPIROPOULOS said he had the impression that the members of the Commission were travelling along parallel paths. Most of them were anxious to adopt a principle which they could recognize as binding in international law, whereas he wished merely to formulate what was to be found in the Charter and judgment of the Nürnberg Tribunal. In his second report, he went further than them and argued that this Nürnberg principle should be abandoned. He had referred to two passages from the judgment in which it was stated that superior orders could not constitute an absolute defence.

20. The CHAIRMAN repeated that there was no point in adopting a theoretical attitude. The Commission's task was to take a decision on Principle IV.

21. Mr. HUDSON asked for the vote to be taken in sections.

22. Mr. KERNO (Assistant Secretary-General) said that the basic text was the Rapporteur's version; that constituted the proposal before the Commission. To it Mr. Brierly had proposed an amendment to add at the end of the first sentence: " provided a moral choice was in fact possible to him." A vote would have to be taken first on Mr. Brierly's amendment, then on the Rapporteur's text, sentence by sentence.

23. Mr. YEPES recalled that he had proposed an amendment with the following wording: " It may, however, be considered in mitigation of punishment, or he may be acquitted, if justice so requires."

24. The CHAIRMAN said that this amendment was similar to Mr. Brierly's.

25. Mr. BRIERLY also thought that Mr. Yepes' amendment, though more general than his own, amounted to the same thing.

26. Mr. YEPES withdrew his amendment in view of the opinion of the Commission that Mr. Brierly's amendment was equivalent to his own.

The amendment proposed by Mr. Brierly was adopted by 9 votes to 3.

The amended first sentence of Principle IV was adopted by 8 votes to 2, with 2 abstentions.

27. Mr. HUDSON suggested that the words " if justice so requires " at the end of the second sentence be deleted as being meaningless.

The vote on this amendment resulted in a tie, 6 votes for and 6 against. The phrase therefore stood.

The second sentence of Principle IV was adopted by 10 votes in favour, with 2 abstentions.

Principle IV as a whole was adopted by 8 votes to 2, with 2 abstentions.

28. The CHAIRMAN read out the commentary on Principle IV and footnote 54.

29. Mr. HUDSON thought that the wording of the first part of the commentary called for revision. With regard to footnote 54, pp. 148 - 151 of the publication, *Nazi Conspiracy and Aggression: Opinion and Judgment* [1] gave some interesting details on the mitigation of penalties which the Tribunal had had to make; he suggested that these details be taken into account and in part reproduced in the footnote. He emphasized particularly that, in the case of General Jodl, the Tribunal had found nothing to justify a reduction of his penalty in the fact that Jodl had acted, as he himself had stated, on superior orders. He also suggested that in the interests of consistency with the decision previously taken by the Commission, footnote 55 should not be retained in the Commission's report. The Commission was not called upon to deal with preparatory studies.

30. Mr. SPIROPOULOS agreed with Mr. Hudson, provided the Commission did likewise.

31. Mr. HUDSON also suggested that the quotation given at the end of the commentary be placed immediately after the quotation at the end of the first paragraph, on the grounds that they constituted one single passage.

32. Mr. CÓRDOVA suggested that the text of the second sentence of the commentary be altered, to keep closer to the text given in article 8 of the Charter of the Nürnberg Tribunal: " The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility "; whereas, the principle as just adopted admitted absolute defence where the accused had no moral choice.

33. The CHAIRMAN thought the sentence could have remained as it stood, though he had no objection to its being altered.

34. Mr. SPIROPOULOS agreed to the sentence being modified on the lines indicated by Mr. Córdova.

[1] Published by the United States Government Printing Office, Washington, D.C., 1947.

35. Mr. BRIERLY suggested that it be left to the Rapporteur to decide what wording he should use for the commentary in the general report, and whether footnotes should be incorporated. At present it would be difficult for the Commission to decide on the precise wording of the commentaries. What it should concentrate on was the way in which the principles themselves were formulated.

36. The CHAIRMAN agreed with Mr. Brierly; though it might be useful for the members of the Commission to give their views for the benefit of the Rapporteur.

37. Mr. YEPES said that the Commission at the previous meeting had decided that Principle III applied to governments, whereas Principle IV referred to persons of subordinate status who had acted on orders from a superior. But Keitel was a general, and he wondered whether Keitel did not therefore come under Principle III.

38. The CHAIRMAN pointed out that, although he was a general, Keitel was not one of the rulers; hence Principle IV would apply to him. In a totalitarian state, no distinction could be made between a ruler, an official or even a private individual, since all of them acted under orders from the head of the totalitarian government.

39. Mr. CÓRDOVA once again drew attention to the footnotes in the report. In their present form, they no longer gave support to Principle IV as adopted. Hence, he thought that footnote 54, at any rate, should be deleted.

40. Mr. BRIERLY thought that with the addition suggested by Mr. Hudson, footnote 54 did support Principle IV.

41. Mr. CÓRDOVA said that in some cases the Tribunal had expressly declared that it could not reduce the penalty—e.g., in the case of heinous crimes. But Principle IV now admitted the possibility of exoneration from responsibility.

42. Mr. ALFARO said that the principle as adopted established the general rule that the existence of a superior order did not constitute a defence. Mr. Brierly's amendment was the exception to the rule. Hence he saw no reason why the footnotes should be deleted.

43. Mr. SPIROPOULOS agreed that the report should omit anything likely to prove risky or to constitute a contradiction between the theories advocated by the Commission and the principles enunciated in the judgment of the Tribunal.

44. The CHAIRMAN thought that, as the Rapporteur was agreeable, the footnotes should not be inserted in the Commission's report. He then read out the final paragraph of the commentary.

45. Mr. HUDSON said that the wording of the paragraph called for alteration. The text of the judgment of the Tribunal should be quoted in the precise form given in the official proceedings, and not as given in the publication, *Nazi Conspiracy and Aggression: Opinion and Judgment.*[2]

[2] *Ibid.*

46. Mr. BRIERLY said that the French text of the quotation was entirely different from the English, and asked whether there was an authentic French text.

47. The CHAIRMAN added that several modifications to the text were called for, and that actually the English and French versions did not tally. He wondered what could be the meaning of the phrase " en rapport avec l'ordre reçu "; he thought it should be replaced by the phrase " l'existence d'un ordre reçu ".

48. Mr. LIANG (Secretary to the Commission) remarked that the quotations had been taken from the authentic French text of the proceedings of the Nürnberg trial. He would have them checked.

49. Mr. HUDSON said that the preface to the English text of the official proceedings of the Nürnberg Tribunal stated that they would be published in French, English, Russian and German. An official French version must therefore exist, and the wording of that text should be reproduced in the report.

50. Mr. SANDSTRÖM did not understand the meaning of the words " le vrai criterium ", etc., which seemed to him meaningless.

51. The CHAIRMAN said that he too was not clear as to the meaning of the words.

52. Mr. KERNO (Assistant Secretary-General) said that he had often found himself puzzled by texts drafted in two or three languages, all of them authentic. In the preparation of the English text, the official documents had been available. The French translation, which in this particular case differed from the English, had been badly done, but the quotations in it had been taken from a text which could be regarded as official. Hence he stood by the present text, whether correct or not.

53. The CHAIRMAN said that if there was no objection, he would regard Principle IV and the footnotes referring to it, with the amendments, as adopted by the Commission.

It was so decided.

Principle V

The CHAIRMAN next passed on to Principle V, which he read out.

54. Mr. HUDSON asked that the word " quiconque " in the French text be altered.

55. The CHAIRMAN felt that the words " quiconque est accusé " should be replaced by " toute personne accusée ". He thought the English term " fair trial " was not the same thing as a " procès équitable ".

56. Mr. HUDSON asked what was meant by " fair trial ". So far as he knew, the term had no value as an international definition. He personally could not say precisely what it meant.

57. Mr. SPIROPOULOS said that the term was not his own, and was to be found in the Charter of the Nürnberg Tribunal.

58. Mr. HUDSON's opinion was that the expression " fair trial " did not constitute a principle recognized

in international law. Hence, he would prefer to see it replaced by another expression.

59. Mr. CÓRDOVA maintained that the term should be kept. It stated precisely what was required. It constituted a safeguard for the accused person against unfair practices, and the same principle had been inserted into article 10 of the Universal Declaration of Human Rights.

60. Mr. ALFARO thought that a very important principle was involved; these terms were used in the Nürnberg Charter, where article 16 defined precisely what was to be understood by " fair trial ". Moreover, the same expression was to be found in the United States Constitution, and it was also used in the Universal Declaration of Human Rights adopted by the General Assembly. It meant that any person must have the right to establish proof of his innocence. In several instances, governments had been obliged to pay compensation to individuals because they had not granted them a fair trial. The expression should be retained in Principle V.

61. Mr. BRIERLY agreed with Mr. Alfaro. The various paragraphs of article 16 of the Nürnberg Charter were quite explicit. Incidentally, they were reproduced in the commentary on Principle V.

62. The CHAIRMAN also felt that the expression should be retained, in both the English and French texts, though the latter was not very precise.

63. Mr. KERNO (Assistant Secretary-General) read out article 10 of the Universal Declaration of Human Rights:

" Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

64. The CHAIRMAN said that all these texts were in harmony, and the term " fair trial " in the report should therefore be maintained. He then read out paragraph (1) of the commentary.

65. Mr. HUDSON suggested that the paragraph be deleted as referring to the preparatory work which was not the Commission's concern. It was not called upon to review what had taken place in London. In any case, the paragraph added nothing to the essence of the report.

66. Mr. ALFARO thought that references to preliminary work could possibly be omitted. But understanding of the text was often simplified if the historical background was known. It was important to bring out the fact that the principle in question had been recognized ever since the London Conference.

67. The CHAIRMAN thought that Mr. Hudson's scruples went rather too far; and he suggested that the Rapporteur be left to decide whether to insert the paragraph or not. He then read out paragraph (2) not including sub-paragraphs (a), (b), (c), (d) and (e)) and paragraph (3).

Principle V and the commentary on it were adopted by the Commission.

CRIMES AGAINST PEACE

68. The CHAIRMAN suggested that the Commission pass on to examine section B of part IV of the report: " The Crimes ". He read out the first sentence of this section.

69. Mr. ALFARO said that this sentence seemed to him particularly important as a link with the previous sections of the report, since it referred expressly to the terms of the Charter and judgment of the Nürnberg Tribunal.

70. Mr. HUDSON agreed with Mr. Alfaro, but suggested that the sentence be worded in terms similar to those used in the first sentence of section A of Chapter IV of the report.

71. The CHAIRMAN said that the French text was perfectly satisfactory as it stood. Possibly the English text called for modification.

72. Mr. ALFARO wanted the present wording retained.

73. The CHAIRMAN next read out heading (a), " Crimes against peace ", with the sub-headings (i) and (ii).

74. Mr. HUDSON remarked that the quotation was taken textually from article 6 (a) of the Nürnberg Charter. Nevertheless, he wondered whether " waging of a war " should be included among the crimes against peace. Reading the judgment of the Nürnberg Tribunal, he had noticed that it was mainly concerned with the planning, preparation and initiation of war. Indeed, the expression " waging of a war " would apply to any individual in uniform—which would certainly not be justified from the legal point of view. In a conversation with high officials of the Naval College of New Jersey, he had found them most concerned about the inclusion of the word " waging " of a war, and had wondered how far this could be applied to officers, non-commissioned officers and private soldiers fighting in a war.

75. The CHAIRMAN asked Mr. Hudson whether he did not feel that the spirit in which the judgment was pronounced left no doubt that in the eyes of the Tribunal, private soldiers, non-commissioned officers or officers fighting in a war were not committing a crime.

76. Mr. HUDSON said that if that were the case it would be better to say so. With regard to the initiation and waging of war, the Nürnberg Tribunal had granted acquittal in cases where it had found that the accused person had had nothing to do with the preparation of a war. General Keitel had been sentenced for committing crimes against peace and for planning and preparing war, but not for waging war. Franck had not been sentenced for waging war ; Streicher, who had been sentenced for crimes against peace and mankind, had been acquitted of the charge of waging war, as he had had nothing to do with the waging of war. Hence they could not talk of waging war but of planning, preparing and initiating war. A young officer or a private soldier fought in a war. Was the Commission going to maintain that such officers, non-commissioned officers and soldiers were guilty on that account ?

77. Mr. BRIERLY referred to page 60 *et seq.* of *The*

Charter and Judgment of the Nürnberg Tribunal,[3] where it was clearly stated what waging war was intended to mean. A private soldier had no moral choice.

78. Mr. HUDSON emphasized that the judgment of the Tribunal as a whole did not dwell on the notion of waging war.

79. Mr. SPIROPOULOS recalled that in the first part of his report he mentioned several proposals made at the London Conference, in particular a proposal by the Soviet Union delegation regarding the definition of crimes, and a proposal by the United States delegation stating that " the maintenance ... of the words ' participating in the waging of the war ' would make the entire soldiery, conscript and volunteer, and numerous civilians guilty by definition " (A/CN.4/22, para. 21). There was no doubt that only high-ranking military personnel were by definition guilty of waging war. On the other hand, if, for example, a general had not taken part in the preparation of a war or in the operations of a war, but had been called upon in 1943 to take part in the war against Russia, he would not be guilty of the crime of preparing war. There was no doubt, too, that a private soldier could not be prosecuted. This surely was clear from his report; and the Charter of the Nürnberg Tribunal contained nothing to contradict this.

80. Mr. CÓRDOVA asked whether in Mr. Spiropoulos' opinion guilt on the grounds of waging war must be confined exclusively to high-ranking soldiers and officials. What was the position of an officer or official who prepared plans for a war without knowing at all whether a war would actually take place? In his opinion the terms of article 6 of the Charter applied exclusively to high state officials.

81. Mr. SPIROPOULOS replied that the Tribunal had decided that private soldiers, non-commissioned officers and officers were excluded. Incidentally, it was not for the Commission to go into the details of this question, since its task was to formulate principles which could be regarded as principles of international law.

82. The CHAIRMAN asked whether it was not the task of a judge to decide whether or not there had been participation in the preparation and planning of war.

83. Mr. BRIERLY thought that pages 60 *et seq.* of *The Charter and Judgment of the Nürnberg Tribunal* gave most valuable data on the notion of waging wars. The Rapporteur would find material most useful for his report.

84. Mr. HUDSON said that, in the light of the discussion which had just taken place, he felt that the Commission should be logical and omit the words " waging of a war ". If the term were kept in the principles and commentaries, every soldier would fear the consequences of having worn uniform and fought in a war. Mr. Spiropoulos seemed to maintain the same opinion, and his impression was confirmed by point (ii) in paragraph 21 of the report. If the expression were kept, he would find it impossible to reassure his military friends.

85. Mr. SPIROPOULOS thought the term might be kept, on the understanding that it would refer only to high military personnel and officials.

86. Mr. CÓRDOVA recalled that the Commission's task was to formulate principles. The formulas laid down by the London Conference had in fact exonerated subordinate military personnel. The Nürnberg Tribunal had also, in fact, never tried private soldiers. The Commission must make it clear that the act of waging war was not punishable unless committed by high military personnel and officials.

87. Mr. SPIROPOULOS thought that the Commission might be satisfied if an explicit commentary on what the London Conference had decided were inserted into the report.

88. Mr. AMADO remarked that the final paragraph on pp. 60 - 61 of *The Charter and Judgment of the Nürnberg Tribunal* indicated that the Tribunal only appeared to have considered persons occupying high positions as guilty of the crime of waging aggressive war; while mere participation in an aggressive war did not constitute participation in the waging of aggressive war, and therefore was not a crime against peace.

89. Mr. SANDSTRÖM thought that when the Commission examined the report on the draft code of offences against the peace and security of mankind, it could take up the discussion with more profit.

90. Mr. HUDSON said that the passage quoted by Mr. Amado seemed to make a distinction between " act of warfare " and "waging war ". He could not follow the distinction intended. His military friends thought that a person committed an " act of warfare " the moment he " waged war ". This very subtle distinction seemed to indicate that there had been an attempt to choose the wording carefully, and he would be glad to hear explanations which might clarify the matter.

91. Mr. LIANG (Secretary to the Commission) said that the distinction was from an authoritative source. In fact it was taken from the actual terms of the judgment of the Nürnberg Tribunal. The private soldier and the man in the street could not follow the distinction, and as was frequently the case, they must be helped by a jurist in order to understand them.

92. Mr. BRIERLY asked whether " waging a war " and " poursuite d'une guerre " were equivalent terms.

93. The CHAIRMAN did not see why preparation of war should be regarded as a crime if waging war was not. If it was diabolical to prepare a war, it was equally diabolical to wage it; and he saw no reason why the word " waging " should be deleted. There must of course be a commentary explaining the exact sense to be given to the various terms used in this part of the report.

94. Mr. el-KHOURY thought that the expression " waging of a war " meant " initiating and carrying on a war ". Hence, it covered the two notions at once. A person who was merely engaged in war was therefore not guilty of " waging the war ". He saw no objection to the term being used in the Commission's report; but at the same time it should be explained that a private

[3] United Nations publication, Sales No.: 1949.V.7.

soldier was not referred to by the expression, and the explanation should make it clear to the private soldier what the term did imply.

95. Mr. KERNO (Assistant Secretary-General) said that the explanation of the terms was to be found in current language. One did not speak of a soldier "waging war"; he "was in the war". The terms "waging" and "poursuite" applied to the same idea and included the preparation and planning of a war. As long ago as the London Conference, the terms had been taken in that sense.

96. The CHAIRMAN thought it was time that this long discussion was closed; and he asked the Commission to decide whether the definition of crimes against peace should be retained, with the addition of a commentary in the general report, without explaining the sense in which the term "waging of a war" was to be interpreted.

The proposal to add a commentary was adopted by 9 votes to 2 with 1 abstention.

97. Mr. HUDSON said he would like to raise one further point—namely, the term "assurances" in sub-paragraph (i) of section A. He did not quite see the meaning of the word. He knew, of course, what a treaty or an international agreement was; and he knew that when two States concluded a covenant of perpetual peace—a thing which frequently happened—they gave each other mutual assurances. But what was the significance of the word taken by itself? Had the Nürnberg Tribunal built up the idea of assurances in its judgment? The word might give rise to great difficulties. In a recent speech, President Truman had given his listeners the assurance that the United States would never declare war on any other country. Did such a public statement constitute an "assurance" as contemplated in sub-paragraph (i)?

98. Mr. SPIROPOULOS said that under chapter IV, "Violation of International Treaties", the Nürnberg judgment had decided what were crimes committed in violation of international treaties and agreements, and had listed them. But it did not appear to have examined cases of "assurances" referred to in sub-paragraph (i).

99. Mr. ALFARO thought the word "assurances" was used in the sense of pledge or engagement. A nation could give an assurance or a pledge to another nation—e.g., it could undertake to keep its troops at a distance of five miles from a frontier, etc. International treaties or agreements were texts solemnly concluded between two or more States. Assurances, on the other hand, were unilateral undertakings. A war waged in violation of an assurance of this kind would equally constitute a crime against peace.

100. Mr. BRIERLY recalled that Hitler had repeatedly given assurances of this kind without observing them; so that he thought the term should be kept.

101. The CHAIRMAN agreed that the term should be kept with some explanation in the report to make its meaning clear.

102. Mr. KERNO (Assistant Secretary-General) was sure there was no doubt as to the meaning of the words "treaties" and "agreements". An "assurance" could be defined as a unilateral undertaking which in some cases might entail obligations. One Power gave an undertaking to another; that constituted an assurance. If the other nation confidently relied on this assurance, it might, for example, disarm. Hence, the violation of such an assurance was a crime in accordance with the term "assurance" quoted in the report. A typical assurance was that given by Hitler, to the effect that when the Sudeten Germans were returned to the Reich he would never again make claims on Czechoslovakia.

The meeting rose at 1 p.m.

48th MEETING

Friday, 16 June 1950, at 10 a.m.

CONTENTS

Chairman: Mr. Georges SCELLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris el-KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. Ivan KERNO (Assistant Secretary-General in charge of the Legal Department); Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal: Report by Mr. Spiropoulos (item 3(a) of the agenda) (A/CN.4/22) (continued)

CRIMES AGAINST PEACE (*continued*)

1. The CHAIRMAN read paragraph a (i) (A/CN.4/22, para. 44); he preferred the word "undertakings" or "declarations" to "assurances". One might say "treaties, agreements and undertakings", the first two being bilateral or multilateral, whereas undertakings could be unilateral. This would correspond to the order in the English text.

2. Mr. HUDSON remarked that the French word "direction" was not the equivalent of the English word "planning".