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Summary record of the 48th meeting

Topic:
Formulation of the Nürnberg Principles

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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.

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Chairman: Mr. Georges SCELLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. Roberto CORDOVA, 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".

3. The CHAIRMAN also thought the word "conception" should be used, or perhaps "initiative" or "projet" which was the most appropriate word. The nouns should be replaced by verbs—"projeter, préparer, déclencher, poursuivre".

4. Mr. ALFARO observed that the word "planning" had a wider meaning than "projet". It meant the drawing up of overall plans.

5. Mr. FRANÇOIS asked why the Commission should depart from the official French text of the Charter, which had used the word "direction".

6. The CHAIRMAN replied that the word was a poor translation, and that the most suitable term was "projeter".

7. Mr. KERNO (Assistant Secretary-General) noted that the so-called official translation was in fact so bad that the Commission would have to improve on it; this would have to be mentioned in the report.

8. The CHAIRMAN agreed.

9. Mr. HUDSON asked where the French version had been issued.

10. Mr. LIANG (Secretary to the Commission) said that it was a reproduction of the official version of the Tribunal's Charter drawn up in London. The London Charter had been drafted not only in English, but in French and Russian. If the Commission wished to alter the French text, this must be indicated in a note. The version given in the report was the official French text.

It was decided to adopt the text with the alterations suggested by the Chairman.

11. The CHAIRMAN read paragraph a (ii).

12. Mr. HUDSON said that in the French version the word "participer" ought to be used instead of "participation" to make the wording of the text correspond to that of sub-paragraph (i).

13. The CHAIRMAN read the second paragraph. He felt that the wording "treaties, agreements and undertakings" should be used there also.

The text was adopted with these alterations.

The CHAIRMAN read the third paragraph.

14. Mr. HUDSON quoted the following passage from the judgment: "War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression and such a war is therefore outlawed by the Pact" (*Trial of the Major War Criminals before the International Military Tribunal, Nürnberg, 1947, p. 220*). He thought the report should include this sentence with its reference to aggression.

15. Mr. SPIROPOULOS said he would leave it to the Commission to decide.

16. Mr. ALFARO did not see how the Commission could make amendments to the special report by Mr. Spiropoulos, as it had been distributed and could not be altered. No one could do the impossible. The passage quoted could be included in the general report. He suggested that the Commission should take note of it.

17. Mr. HUDSON said that if the Commission ac-

cepted Mr. Alfaro's view, its members were wasting their time. The Commission was discussing the special report, and was at liberty to add or delete anything it thought fit for the purpose of its general report.

18. Mr. CORDOVA considered that in examining the report by Mr. Spiropoulos, the Commission was working on its report for submission to the General Assembly. When it decided to add anything, it was giving a directive to its general rapporteur. Mr. Hudson's proposal was a valuable one, and should be reproduced in the general report.

19. Mr. HUDSON said that his proposal should figure in the report as adopted by the Commission. The Commission was drafting a commentary on the principle and might add anything it thought fit. When it had examined the special report and taken a decision as to what parts of it it wished to keep, delete, or alter, the general rapporteur need not re-draft the text for the Commission to discuss afresh.

20. The CHAIRMAN said that the Commission was not called upon to re-draft Mr. Spiropoulos' report, but it must indicate to its general rapporteur what it wished to retain and what it did not wish to retain in its general report.

21. Mr. KERNO (Assistant Secretary-General) said there was a misunderstanding. All the members of the Commission were fundamentally in agreement. The report by Mr. Spiropoulos would remain as it stood until Domesday, so to speak. The Commission was at present preparing its report to the General Assembly. That would be another document. It did of course take Mr. Spiropoulos' report and the other documents submitted to it as a basis for its discussions. It first of all examined the definition of the principles and of the crimes, and after that the commentaries—which as it had found, were most important. It gave its general rapporteur instructions which in some cases were quite specific and in others allowed him a certain latitude. Of course if the Commission attached great importance to any particular point, any member was at liberty to propose the precise wording he felt to be most suitable. The Commission would decide whether its directives to the general rapporteur were definite instructions or otherwise.

22. The CHAIRMAN agreed with Mr. Kerno's view.

23. Mr. SPIROPOULOS also agreed. At the same time, Mr. Hudson was right in arguing that the Commission could not discuss the report twice over. The work of the Rapporteur consisted of drafting a text and submitting it for the Commission's approval. Of course the Commission might not agree with the Rapporteur. Only where it instructed its general rapporteur that such and such a passage should be included in his report would that passage be included.

24. Mr. SANDSTRÖM asked whether anyone would object to the insertion in the Commission's report of the sentence suggested by Mr. Hudson (para. 14 above). He personally had no objection, since the sentence lent weight to Mr. Spiropoulos' arguments.

25. Mr. SPIROPOULOS said he would merely like remark that he had inserted commentaries in his report provisionally. The choice of passages to be quoted from the judgment was a matter of personal opinion.

26. Mr. ALFARO thought the quotation suggested by Mr. Hudson an excellent one. He too agreed with Mr. Kern, whose statement corresponded to what the Chairman had had in mind in giving his ruling. The Commission was meeting to discuss the conclusions to be inserted in its general report.

27. The CHAIRMAN suggested that the sentence quoted by Mr. Hudson be included in the final report.

It was so decided.

28. The CHAIRMAN read the fourth paragraph of the commentary on Crimes against Peace (A/CN.4/22, para. 44), and observed that the paragraph was complete in itself.

It was decided to insert the paragraph in the general report.

29. The CHAIRMAN read the fifth paragraph (*ibid.*), and footnote 61.

30. Mr. SPIROPOULOS explained that this time the footnote did not give a verbatim quotation, but was a passage which he himself had drafted. He felt that it was important for the Commission to discuss it. If the usual method was followed of not referring to preparatory studies, the footnote would be deleted.

31. Mr. KERNO (Assistant Secretary-General) suggested that as a matter of style the French word "garanties" should be replaced by the word "engagements".

32. Mr. LIANG (Secretary to the Commission) thought that quotations from one of the official texts could not be altered, since all three texts were of equal validity. It would be better to explain in a note that the various authentic texts did not tally.

33. Mr. BRIERLY thought it would be advisable to end the final sentence of the paragraph in question after the words "in further detail", and to delete footnotes 61 and 62.

34. The CHAIRMAN thought that the Commission might keep the French text and explain in a note the interpretation it gave to the text.

35. Mr. SANDSTRÖM felt that the English word "assurances" should be included in the note.

36. The CHAIRMAN suggested that it be left to the general rapporteur to draft the note. Obviously it was awkward to alter the text; on the other hand, unintelligible expressions could not be retained.

37. Mr. CORDOVA agreed that it would be better to explain in a note any alterations the Commission might decide to make in the Nürnberg texts.

38. Mr. el-KHOURY pointed out that the Commission's idea had been to change the French text; this was contrary to what Mr. Liang had stated.

39. The CHAIRMAN replied that the text altered by the Commission was not an official text.

40. Mr. KERNO (Assistant Secretary-General) thought there was an important question involved. The Com-

mission had adopted the wording "According to the charter..."—a semi-quotation—in the sentence introducing the Crimes against Peace. Yet it had decided to alter the wording of the passage. In the present instance the text was a quotation, and the Commission should proceed carefully.

41. Mr. LIANG (Secretary to the Commission) thought that the text of the passage quoted should be retained.

42. Mr. CORDOVA thought an explanation should be given as to why the Commission had altered the text.

43. Mr. BRIERLY suggested deleting the beginning of the first paragraph on page 35: "According to the Charter and the judgment, the following acts constitute crimes under international law".

44. Mr. ALFARO pointed out that these introductory words did not appear in the Appendix to Mr. Spiropoulos' report.

45. The CHAIRMAN said that if the Commission agreed, no alteration would be made to the texts quoted in French; a note would merely be given in the report indicating the meaning attached to them by the Commission. In the case in point, the report would include "According to the Charter..." followed by the text adopted by the Commission; and a note would be given explaining that the official text had been changed.

It was so decided.

The Commission decided in principle to delete footnote 61.

46. The CHAIRMAN read the sixth paragraph (*ibid.*). Here too he thought that in the French text the word "direction" should be replaced by the word "projet".

47. Mr. KERNO (Assistant Secretary-General) remarked that the Commission was again faced with the same difficulty.

47 a. The CHAIRMAN thought it would be sufficient to put the words "direction" and "preparation", in the last line of the paragraph, between inverted commas.

48. Mr. LIANG (Secretary to the Commission) said that the London Charter had been drafted in three copies—French, English and Russian—all authentic. As the Commission had altered the wording of the London Charter, it would have to give an explanation. The difficulty was aggravated when the Commission retained the word "planning" while changing the corresponding word in the French text. He was of the opinion that no change could be made in the passages quoted.

49. The CHAIRMAN considered that this did not affect the previous decision.

50. Mr. HUDSON said that Mr. Liang had suggested to him a possible method of altering the definition of Crimes against Peace. He wondered what was gained by keeping the word "direction" (planning), since the word "préparation" surely covered the idea of planning. The Commission was not bound to follow the Charter where it gave a definition of crimes. If

the French word "direction" raised any difficulty, the English word "planning" could be deleted.

51. Mr. SPIROPOULOS said that in his second report (A/CN.4/25) he used only the word "préparation" in this connexion. Like Mr. Hudson, he had felt that "planning" was covered by "préparation". There could be no preparation without planning.

52. Mr. CORDOVA thought there was a difference between the drawing up of plans and preparation. For example, the drafting of constructional plans for a building was not the same thing as the preparation for building.

53. Mr. SANDSTRÖM was of the same opinion. In the Swedish Penal Code, preparation was the beginning of execution, whereas a plan was merely the expression of intention.

54. Mr. el-KHOURY did not regard intention as constituting crime. Crime involved the commission of acts.

55. Mr. SPIROPOULOS considered that a plan was part of preparation.

56. The CHAIRMAN asked whether the Commission wished to delete the words "planning" and "direction", as Mr. Hudson had suggested.

57. Mr. HUDSON withdrew his proposal.

58. Mr. SPIROPOULOS said that for reasons of prudence he would prefer that the words should not be deleted. He agreed with Mr. Hudson, adding that in the draft Code of Offences, he had not used the word "planning".

59. The CHAIRMAN thought it would be better to keep the text as it stood.

The Commission decided to retain the words planning and direction in order to keep as close as possible to the judgment of the Tribunal.

60. The CHAIRMAN read the final paragraph of the commentary.

There were no observations.

WAR CRIMES

61. The CHAIRMAN read paragraph b relating to war crimes and the commentary on it.

62. Mr. BRIERLY pointed out a discrepancy between the English version, which read: "Such violations shall include, *but not be limited to* . . ." and the French text, which had no corresponding phrase.

63. The CHAIRMAN said that the phrase in the English text was translated by the word "notamment".

64. Mr. LIANG (Secretary to the Commission) said that the official text read: ". . . sans y être limitées".

65. The CHAIRMAN thought that this accurate translation should be restored.

It was so decided.

66. Mr. HUDSON said that Articles 46, 50, 52 and 56 did not appear in the Hague Convention, but only in the Regulations annexed to the Convention.

67. The CHAIRMAN agreed that this was the case.

68. Mr. FRANÇOIS said that here again there was a quotation from the judgment of the Tribunal.

69. Mr. HUDSON also pointed out that there had been several Geneva Conventions in 1929.

70. The CHAIRMAN thought it would be better to say which was meant.

71. Mr. LIANG (Secretary to the Commission) thought the best plan would be to insert a note drawing attention to the points lacking precision in the text of the judgment.

The Commission so decided.

72. Mr. el-KHOURY recalled that the Secretary-General of the United Nations had received a note from the Government of Pakistan on the use of the expression "killing of hostages" (A/CN.4/19/Add.2). If only the killing of hostages were regarded as a war crime, it would be an implicit admission that the taking of hostages was legitimate. Pakistan asked the Commission to add the taking of hostages to the list of war crimes, and he supported this request.

73. The CHAIRMAN asked whether the Commission would like this crime to be inserted here or in the Code of Offences.

74. Mr. CORDOVA thought that the part of the sentence implying that the taking of hostages was allowable should be deleted. Pakistan thought that the Charter had made a mistake; and he hoped that the sentence would be amended, which would be to the advantage of international law.

75. Mr. el-KHOURY recalled that a great number of hostages had been taken during the last war, and many had been killed. It was a crime to kill hostages. Was it a crime to take them? He called for a note indicating that the taking of hostages was not allowable.

76. Mr. SANDSTRÖM wondered whether it was necessary to make this enumeration. The Commission might mention under the heading of war crimes violations of the laws and customs of war, leaving it to courts dealing with such cases to interpret the phrase.

77. Mr. SPIROPOULOS said that at the Commission's first session, the Sub-Committee consisting of Mr. Sandström, Mr. François and himself had submitted to the Commission a draft which contained no enumeration of war crimes (A/CN.4/W.6, para. 4)¹ The Commission had felt that it would be better to list the crimes as set out in the Charter of the Nürnberg Tribunal. The proposal to give some explanation in a commentary had been rejected by the Commission. In his report on the draft Code of Offences against the peace and security of mankind he was proposing not to list the crimes again. But in the report now before the Commission, he had felt it would be wise not to depart from the text of the Charter, but to reproduce the list as given there. In any case, he saw no reason why there should be any departure from the Charter in this instance.

¹ See *Yearbook of the International Law Commission, 1949. Summary record of the 25th meeting, footnote 9.*

78. Mr. CORDOVA and Mr. el-KHOURY felt that the words "killing of hostages" should be deleted from the list of war crimes, and a note added giving the reasons why the Commission felt the words should be omitted.

79. Mr. BRIERLY thought the words should not be omitted; on the contrary they were most important and should be kept in the text. The essential point was that there should be no killing of hostages. He personally would like to go further and prohibit the taking of hostages. But the Charter of the Nürnberg Tribunal made no mention of this. Moreover, he was under the impression that at present the taking of hostages was not forbidden by international law.

80. Mr. CORDOVA thought on the contrary that the Commission ought to point out that the Charter was wrong to mention the killing of hostages in its list of crimes, as that this would seem to imply that the taking of hostages was permissible. Incidentally, to prohibit the taking of hostages was one way of preventing hostages from being killed.

81. Mr. el-KHOURY recalled that the Geneva Convention of 1949 relative to the protection of civilian persons in time of war definitely prohibited the taking of hostages, and the Commission would be well advised to include this among the war crimes.

82. Mr. BRIERLY pointed out that the Convention in question had not yet come into force.

83. The CHAIRMAN supported Mr. el-Khoury's proposal. The taking of hostages must be prohibited.

84. Mr. BRIERLY dissented from this proposal, pointing out that the Commission could not make this addition, since the taking of hostages had not yet been recognized as a war crime at the time of the Nürnberg Trial. He had no objection to the Commission drafting a note stating its opinion that the taking of hostages in general should be prohibited.

85. Mr. KERNO (Assistant Secretary-General) thought there was no reason why the term "killing of hostages" should not be retained. Paragraph b as a whole, like Article 6 (b) of the Charter, was governed by the first phrase which read: "War crimes, namely violations of the laws or customs of war". Since it was stated that the list of crimes in the paragraph was not limitative, the taking of hostages would automatically be included if prevailing international law forbade it.

86. Mr. HUDSON asked that the Commission should quote in its report the Geneva Convention of 1949 relative to the protection of civilian persons in time of war, in particular Article 34 which laid down that the taking of hostages was unlawful. Articles 39 and following of the same Convention, dealing among other things with the treatment of hostages, might also be quoted. These articles established an entirely new piece of law. By inserting the text of these two articles in its report, the Commission would greatly reinforce the force of paragraph (b) "War crimes".

87. The CHAIRMAN agreed with Mr. Hudson's proposal and commended it to the Rapporteur's attention.²

² The debate on war crimes was resumed at the 49th meeting.

CRIMES AGAINST HUMANITY

88. The CHAIRMAN read paragraph (c) "Crimes against humanity" (A/CN.4/22, para. 44).

89. Mr. SANDSTRÖM said he would like to put to the Commission a very difficult question: when did a crime against humanity become an international crime? In his report, Mr. Spiropoulos stated that the Nürnberg Tribunal had "applied Article 6 (c) in a very restrictive way"; and in footnote 65 he added that "nothing is said in the findings as to whether the above acts would be considered as international crimes under international law in the event of their not being connected with crimes against peace and war crimes". It was doubtful whether the Charter defined more clearly the relationship between crimes against humanity on the one hand and crimes against peace and war crimes on the other. Article 6 (c) of the Charter said: "... in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated". The position seemed to him quite clear: in Germany terrible atrocities had been committed before the war, and the Tribunal had not considered that such acts were connected with a crime coming within its jurisdiction; hence it had felt it was not competent to declare that such atrocities were crimes against humanity in the sense given in the Charter.

89 a. He asked for explanations for two reasons. Article 7 of the Draft Resolution on Rights and Duties of States read: "every State has the duty to ensure that conditions prevailing in its territory do not menace international peace and order".³ This text meant that it was the duty of States to treat their population in such a way as not to constitute a threat to peace. But possibly ill-treatment of a population itself constituted a threat to peace. He would like to know whether it thereby constituted a crime against humanity in the sense of paragraph (c).

89 b. The other point on which he would be glad of an explanation was the case of genocide. The 1948 Convention made all acts of genocide, even where peace was not threatened, crimes under international law. Would it not be well to define the criteria for deciding whether a crime of this kind should be regarded as genocide or as a crime against humanity.

90. The CHAIRMAN said that article 6 (c) of the Charter of the Nürnberg Tribunal included crimes committed "before or during the war". He thought that the Rapporteur had in fact interpreted this wording in a restrictive sense, and that the Commission had a right to examine this interpretation. He suggested deleting the words "when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime".

91. Mr. SPIROPOULOS opposed this suggestion. The judgment had interpreted the Charter, and the Commission must abide by the judgment.

³ Yearbook of the International Law Commission, 1949. Report to the General Assembly. Part II.

92. The CHAIRMAN asked which rule took precedence, the rule laid down in the judgment, or the provisions of the Charter.

93. Mr. SPIROPOULOS replied that in his opinion the judgment took precedence since the judgment applied the law.

94. Mr. AMADO observed that if crimes of the type listed in paragraph (c) (crimes against humanity) were not connected with crimes against peace or war crimes, they were common crimes; just as the murder of a group of people not committed with the intention of suppressing that particular sector of the population on racial or religious grounds was not genocide, but a common crime. That was why the Tribunal had hesitated to regard itself as competent in the matter of atrocities committed before the war. He favoured the text as it stood in the report.

95. Mr. HUDSON was not satisfied with the commentary on paragraph (c) (crimes against humanity): for example, he was puzzled by footnote 65, which suggested that the Tribunal would have been justified in considering whether, under international law, the acts mentioned in paragraph (c) could be regarded as international crimes, even if they were not connected with crimes against peace or war crimes. With regard to Mr. Sandström's suggestion that murder not connected with crimes against peace or war crimes might still be an international crime, this was going rather far. These crimes could not all be regarded as crimes under international law. The connexion with war must be kept. A good example was slavery, which existed in a great many countries and which was never regarded as a crime under international law. The point raised by Mr. Sandström was pertinent in regard to persecution on political, racial or religious grounds because it could constitute a threat to peace.

96. The CHAIRMAN agreed with the distinction made by Mr. Amado. The difference of opinion which had just arisen among the members of the Commission was connected with the words "committed . . . before or during the war". Personally he saw no reason why the judgment should prevail if it was not in keeping with the Charter. If the judges had made a mistake, that was a miscarriage of justice. A judgment must be in conformity with the law.

97. Mr. HUDSON also felt that where a law and a judgment were in harmony, the judgment was correct; but a judgment was not correct when it modified the law which it ought to apply.

98. The CHAIRMAN said that if the Charter and the judgment were not consistent, it would be for the Commission to discuss the instances where they did not tally. In any case, he was opposed to the theory that the judgment took precedence over the Charter.

99. Mr. CORDOVA supported the Chairman's statement. A tribunal might misapply the law. But the law must be respected and, if it were not respected, the judgment should be quashed or revised. The Tribunal and the Commission had an equal right to interpret the Charter.

100. Mr. HUDSON thought the question might be cleared up by a closer examination of the second paragraph of the commentary which read: "The Court did not consider that the acts relied on before the outbreak of war had been committed in execution of, or in connection with, any crime . . . etc." Actually, the Tribunal had made a similar declaration:

"To constitute Crimes against Humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of the crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime." (*Trial of the Major War Criminals before the International Military Tribunal*, p. 254). The terms used by the Rapporteur went further than the Tribunal's declaration. It was solely for want of satisfactory evidence that the Tribunal had regarded itself as not competent to declare in general terms that acts prior to 1939 constituted crimes against humanity as defined in the Charter of the Nürnberg Tribunal.

101. Mr. AMADO pointed out that Article 6 (c) of the Charter of the Tribunal expressly stated that the acts must have been committed "in execution of or in connection with any crime within the jurisdiction of the Tribunal . . .".

102. Mr. KERNO (Assistant Secretary-General) wished to make the same observation; he did not think there was any contradiction between the Charter and the judgment. Article 6 (c) of the Charter also stipulated that the acts listed there were only crimes against humanity where they were connected with "any crime within the jurisdiction of the Tribunal". There was clearly some difference between the French and the English texts of paragraph (c) in the report. It might be argued that the words "in execution of or in connection with any crime within the jurisdiction of the Tribunal" referred only to persecutions, whereas it was quite clear from the French text that the words referred to all "acts . . . or persecutions".

103. Mr. ALFARO supported Mr. Kern. If, as the Chairman had suggested, paragraph (c) were to stop after the words "on political, racial or religious grounds", it would amount to no more than a definition of common crimes. The end of the paragraph was necessary to make them crimes under international law. Cases might, however, arise in which a government before a war which it had prepared and as a part of the plans for that war, might decide to exterminate the population of a given region on political, racial or religious grounds. Unquestionably such a crime ought to be classified as a crime against humanity. He thought the Commission would agree to the incorporation of the words "before or during the war" in paragraph (c).

Mr. SCALLE handed over the chairmanship to Mr. SANDSTRÖM, the first Vice-Chairman, and left the meeting.

104. The CHAIRMAN read the first paragraph of the commentary on paragraph (c.)

105. Mr. el-KHOURY asked whether the French term "assassinat" and the English word "murder" had the same meaning.

106. Mr. BRIERLY replied that actually the terms "murder" and "assassination" did not mean the same in English, but he saw no objection to retaining the word "murder".

107. Mr. AMADO said that in French the term "assassinat" meant aggravated murder.

108. Mr. HUDSON pointed out that the commentary was not precise, since the words "before and during the war" did not appear in paragraph (c), whereas they were contained in Article 6 (c) of the Charter.

109. Mr. KERNO (Assistant Secretary-General) agreed that as the commentary began with the words "The above text", it was not correct.

110. Mr. LIANG (Secretary to the Commission) suggested replacing the first two words of the commentary by the words "Article 6 (c) of the Charter". This would bring the commentary into line with the principles laid down by the Charter of the Nürnberg Tribunal.

11. Mr. FRANÇOIS remarked that the words "committed before or during the war" as given in the Charter, had a very definite sense in their context. They referred to the last World War. But in a general statement they could be omitted. Not only was it self-evident that crimes could be committed "before or during the war"; but account should also be taken of the fact that the crimes could be committed in connexion with the preparation of war without a war actually breaking out. Hence, he suggested that the text as drafted by Mr. Spiropoulos be maintained.

112. Mr. ALFARO said he would like to know precisely what was the Commission's opinion. Did it hold that crimes against humanity could be committed before as well as during a war? His own view was that in connexion with a crime against peace they could be committed before a war, but in connexion with a war crime, they could be committed only during a war.

113. Mr. CÓRDOVA thought the solution would be to consider that crimes against humanity committed without any connexion with war were not crimes under international law, but crimes under domestic law. If, however, they were committed during or in connexion with a war they constituted international crimes.

114. Mr. ALFARO put to the Commission the case of a nation planning an invasion. One part of the invasion plan was that prior to the war the authorities of the country to be invaded, and its population, should be exterminated. That was a crime committed before the war; whereas other crimes, such as the killing of hostages or the massacre of prisoners etc., were committed during the war. In his opinion, it would be dangerous to omit the words "before or during the war" from paragraph (c). They should be inserted for the sake of precision and with a view to including in the definition of crimes under international law, the crimes listed in paragraph (c), even if committed before the war.

115. Mr. HUDSON thought that if the words were added they should apply only to crimes against peace, not to war crimes.

116. Mr. el-KHOURY favoured the insertion of the words "before or during the war". In the course of preparing for war, a government might exterminate groups of people opposed to war. Such cases should be covered by paragraph (c).

117. Mr. BRIERLY thought that crimes such as those contemplated in paragraphs (a) and (c) could be committed even where there was no war. A crime against humanity was a crime even in the absence of war. The Charter had rightly inserted the words in question because it was referring to a specific war, but there was no reason to keep them in a definition of general application.

118. Mr. el-KHOURY said that crimes of this kind could be committed not only by an aggressor but by the government attacked; the latter might decide, for example, that certain sectors of its population refusing to take part in defence against aggression should be liquidated.

119. Mr. KERNO replied that under the Charter, the crimes mentioned in Article 6 (a) applied only to aggressive wars, whereas the crimes listed under Article 6 (b) applied to all wars and all parties.

120. Mr. CÓRDOVA thought the Commission was discussing several points at once, and he would like to know what was the precise point at issue at the moment.

121. The CHAIRMAN said the Commission was discussing whether the words "before and during the war" should be inserted in paragraph (c) or not.

122. Mr. CÓRDOVA thought that the omission of the words would make the text of the Commission's report clearer.

123. Mr. HUDSON said that what the Commission was actually discussing was the commentary on paragraph (c). It had already been suggested that the first two words of the commentary should be replaced by the words "Article 6 (c) of the Charter". There would thus be no necessity to delete the words "before or during the war" since they appeared in the Charter.

Replying to Mr. el-Khoury, he pointed out that the final sentence of the commentary stressed the fact that crimes against humanity could be committed by an aggressor against his own populations.

124. Mr. ALFARO agreed with Mr. Hudson. If the first paragraph of the commentary began with the words "Article 6 (c) of the Charter", there would be no need to insert the words in question in the definition of the crimes. However, he felt that the Commission had strayed rather far from the terminology of the Charter, and he feared that if the words were not inserted under paragraph (c) the impression might be given that the Commission was thinking merely in terms of crimes committed during wartime. He was not opposed to the omission of the words provided it were understood that such crimes could be committed before a war and even without a war breaking out.

125. Mr. HUDSON thought that if the Commission departed from the text of the Charter, it should add a commentary in its report explaining the reason why.

126. The CHAIRMAN thought the time had come to take a decision, and he asked the Commission whether it wished to keep the text of paragraph (c) as it stood in the report.

It was decided to keep the text.

127. The CHAIRMAN consulted the Commission regarding the first paragraph of the commentary, the words "The above text" at the beginning of the paragraph being replaced by the words "Article 6 (c) of the Charter".

The Commission adopted the first paragraph of the commentary with this amendment.

128. The CHAIRMAN asked the Rapporteur, when drawing up the Commission's general report, to explain the reasons why the Commission had not thought it necessary to insert the words "before or during the war" in the definition of the crimes.

129. The CHAIRMAN read the second paragraph of the commentary, along with footnote 65.

130. Mr. HUDSON pointed out that the first sentence of the paragraph was incorrect and would be better omitted. It was not true to say that the Court applied the article in question in a very restrictive way. With regard to the second sentence, as he had already proposed,⁴ it would be advisable to alter it so as to bring it into line with the wording of the judgment of the Tribunal. He therefore proposed that the words "the Court did not consider . . . etc." be replaced by the words "the Court considered that it had not been satisfactorily proved that before the outbreak of war . . .".

131. Mr. SPIROPOULOS signified his agreement with this alteration.

132. Mr. CORDOVA and Mr. HUDSON proposed that footnote 65 be deleted.

133. The CHAIRMAN consulted the Commission on the two alterations suggested by Mr. Hudson.

Mr. Hudson's proposals were adopted.

The Commission likewise decided to omit footnote 66.

134. Mr. SPIROPOULOS remarked that he had inserted footnote 67 for the benefit of the Commission, but he was quite willing that it should be deleted.

The Commission decided to delete footnote 67.

135. Mr. CORDOVA thought that if the Commission pronounced on the possibility of crimes committed either by an aggressor State or by a non-aggressor State, it would not be keeping within the framework of the Charter and the judgment of the Nürnberg Tribunal. But he thought it would be well if at least the Commission's report referred to the fact that it had also considered the case of crimes committed by a non-

aggressor State, and that the decisions it had taken in this connexion would be found in the draft Code of offences against the peace and security of mankind.

136. Mr. HUDSON said that paragraph (b) referred to war crimes in general, and not only to crimes committed during a war of aggression. Paragraphs (a) and (c) were confined to crimes committed in connexion with an aggressive war. The point raised by Mr. Córdova was very important. If the Commission examined principles that went beyond those laid down in the Charter and judgment of the Nürnberg Tribunal, it would be advisable to follow Mr. Córdova's suggestion. Personally, he considered that the Commission was going beyond those principles in regard to paragraph (b).

137. Mr. BRIERLY thought that the point mentioned by Mr. Córdova did not arise. Some of the crimes in question could only be committed by the aggressor; other crimes could equally well be committed by the party attacked. However, he had no objection to the report giving an explanation on the subject.

138. The CHAIRMAN thought the Commission might discuss the point when the report on the draft Code of offences against the peace and security of mankind (A/CN.4/25) came up for examination.

139. Mr. CORDOVA agreed to this suggestion; but he thought it would be useful for the Commission to refer also in its present report to the statements it would be making in its second report, since it had also been asked to indicate what place the Nürnberg Principles should have in the code of international crimes.

140. Mr. el-KHOURY considered the point raised by Mr. Córdova to be one of great importance. He cited the following example: supposing that Greece attacked Bulgaria, Greece would unquestionably be the aggressor. As a result of this aggression, Bulgaria might exterminate the Greeks living on her territory. Would it be admissible for her to use aggression as a pretext for doing so?

141. The CHAIRMAN suggested closing the meeting and terminating the discussion of the first report by Mr. Spiropoulos at the beginning of Monday afternoon's meeting, and then going on to Mr. Brierly's report on Treaties.

142. Mr. AMADO was in favour of the adjournment of Item 3 (b) of the Agenda. He thought it would be useful to take up the discussion of Mr. Spiropoulos' reports again at a later date, in order that they might have a brief respite.

143. Mr. KERNO (Assistant Secretary-General) supported this proposal.

144. Mr. SPIROPOULOS disagreed. He thought that his report on the draft Code of offences against the peace and security of mankind should have priority. The General Assembly had asked the Commission to examine it as quickly as possible. He was quite willing that other reports should be discussed before his own, however, on the understanding that his second report would in any case be examined during the present session.

⁴ See para. 100, above.

145. The CHAIRMAN ruled that Mr. Brierly's report (A/CN.4/23) should be examined at the next meeting, as soon as the Commission had completed its examination of Mr. Spiropoulos' report on the formulation of the Nürnberg principles.

The meeting rose at 1.10 p.m.

49th MEETING

Monday, 19 June 1950, at 3 p.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. 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)

WAR CRIMES (continued)

1. The CHAIRMAN asked the Commission to excuse Mr. Spiropoulos, who was ill. As Mr. Spiropoulos had agreed, the study of his report might be completed before the Commission took up the examination of Mr. Brierly's report on the Law of Treaties (A/CN.4/23).

2. Mr. el-KHOURY said he had already asked that part IV, section B, paragraph (b), "War Crimes"¹ should include the phrase "the taking and killing of hostages".² He proposed that the report should mention that this addition had been made at the request of several members of the Commission. He also suggested

that in addition to crimes committed by an aggressor, crimes committed by other States should constitute crimes under international law.

3. Mr. KERNO (Assistant Secretary-General) pointed out that the list in paragraph (b) was not restrictive. Hence, if the taking of hostages was in fact a crime under prevailing international law, it was unnecessary to state this specifically.

4. Mr. el-KHOURY admitted that there were war crimes other than those mentioned in the list; but he felt that if the Commission mentioned the killing of hostages, it should also mention the taking of hostages so as to make it quite clear that this was condemned also. If the Commission did not agree to the interpolation he suggested, he asked that the point should at least be mentioned in the Commission's report.

5. Mr. HUDSON thought it would not be correct to state that the Nürnberg Charter and Tribunal recognized the taking of hostages as a crime. The Commission was not attempting to recast the Charter.

6. Mr. FRANÇOIS agreed that the Nürnberg Charter and Tribunal had not recognized the taking of hostages as unlawful. On the other hand, the Diplomatic Conference of the Red Cross held in 1949 at Geneva had gone further and had admitted the principle that the taking of hostages was prohibited. The Nürnberg Tribunal had merely decided that it was unlawful to kill hostages. He would prefer the text to be kept as it stood, since the Commission's task was to formulate the principles of international law recognized at Nürnberg.

7. The CHAIRMAN recalled that the Commission seemed disposed to agree to the insertion of a note indicating that some members felt it would be desirable to lay down the principle that the taking of hostages was unlawful.

8. Mr. SANDSTRÖM asked whether the Commission would not have an opportunity of discussing the point again when the draft Code of offences referred to in item 3 (b) of the agenda came up for examination.

9. The CHAIRMAN said there would be such an opportunity; but he thought a note in the report would prevent readers from gaining the impression that the Nürnberg principles and the Code were at variance.

10. Mr. CÓRDOVA said that to include the taking of hostages among war crimes would be contrary to the Nürnberg principles; but the principles should be altered so as to enable them to be included in the Code.

11. Mr. SANDSTRÖM considered that the best plan would be to give an account of the present discussion in the general report, indicating the evolution that had taken place since Nürnberg; and to revert to the point when dealing with the Code of offences against the peace and security of mankind.

12. Mr. HUDSON thought that, on other issues also, the Commission might go further than the Nürnberg principles when drafting the Code.

13. The CHAIRMAN felt that the Commission had accepted the view that it should retain such of the Nürnberg principles as it regarded as principles of

¹ A/CN.4/22, p. 37.

² See Summary record of the 48th meeting, para. 75.