

Document:-
A/CN.4/SR.76

Summary record of the 76th meeting

Topic:
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Extract from the Yearbook of the International Law Commission:-
1950 , vol. I

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formulating the principle relating to persons acting under superior orders.

99. The CHAIRMAN thought the discussion which had just taken place could be summed up by saying that the members of the Commission were unanimous in affirming that the Commission had made modifications in the Nürnberg Principles, and that the fact should be indicated in the report. At the same time, he felt that the Rapporteur had received sufficient guidance to be able to produce in the final draft of his report a formula which would give satisfaction to everybody. He also noted that the Commission was in favour of dividing the paragraph into two distinct parts as proposed by Mr. Yepes.

Paragraph 7 (paragraph 156 of the "Report")

100. Mr. HUDSON proposed deleting the words "under the draft Code" from the last line of the paragraph.

101. Mr. KERNO (Assistant Secretary-General) observed that the French translation of that part of the report required revision. The word "application" should be replaced by the words "mise en oeuvre" in that paragraph.

These proposals were adopted.

Paragraph 8 (paragraph 157 of the "Report")

102. Mr. ALFARO thought that a few words should be added to the paragraph to the effect that Mr. Spiropoulos, in his capacity as special rapporteur, had been requested to continue his work and submit a new report to the Commission at its next session. He suggested the following text:

"The draft was referred by the Commission to the special rapporteur, Mr. Spiropoulos, who was requested to continue work on the subject and to submit a further report to the Commission at its third session."

It was so decided.

The meeting rose at 6.10 p.m.

76th MEETING

Tuesday, 25 July 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 CORDOVA, 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).

Commission's draft report covering the work of its second session (continued)

PART III: FORMULATION OF THE NÜRNBERG PRINCIPLE A/CN.4/R.7/ADD.3)¹

1. Mr. HUDSON wished to know whether what was taking place was the first reading of the draft report, to be followed later by a second reading of the final text which would then be adopted officially. If the members of the Commission wished to have their individual opinions recorded in the report the time to express them would be at the second reading.

2. The CHAIRMAN replied that a second reading would certainly be required but that it would only be a partial one. Members of the Commission who had observations to make would make them at the second reading. In principle, apart from certain recommendations to the general rapporteur, the Commission had adopted what had been read.

3. Mr. HUDSON assumed that the report would be put to the vote at the second reading, in the first place section by section and then as a whole. He repeated that some members of the Commission might wish to express their personal opinions then, for inclusion in the report.

4. Mr. LIANG (Secretary of the Commission) asked whether the Commission contemplated a third reading. As a rule, if a member wished his observations to be included in the report he made them before the second reading.

5. Mr. HUDSON reminded the Commission that the previous year it had approved, during the second reading, memoranda setting out the opinions of certain of its members. He thought that procedure a good one.

6. Mr. LIANG (Secretary of the Commission) seemed to remember that the observations in question had been made at the first reading.

7. The CHAIRMAN thought it better for individual observations to be made at the first meeting.

8. Mr. HUDSON was not in favour of that procedure: he would like to have the revised text to be voted upon in front of him before giving his personal opinions.

9. The CHAIRMAN made the objection that that would involve a third reading, unless it were left to the Rapporteur to incorporate such observations in his report.

¹ Mimeographed document only. Parts of that document that differ from the "Report" are reproduced in footnote to the summary records. For other parts, see the "Report" in vol. II of the present publication.

10. Mr. CÓRDOVA asked whether every member of the Commission would be able to have his opinions included in the report.

11. Mr. HUDSON thought not. It would be a question of explaining why a member had voted as he did.

12. Mr. ALFARO said that explanations of that kind had been included in the case of Mr. Koretsky during the first session.

13. Mr. HUDSON remarked that the same thing applied to Mr. Scelle and himself.

14. The CHAIRMAN stated that the observations in question had been made when the Commission adopted the report as a whole. He thought that it would be possible for the Commission to accept observations made during the second reading, but that either the task of incorporating them in the report must be left to the Rapporteur or the Secretariat, or they must appear in the report in the form in which they were made.

15. Mr. ALFARO read out Part III of the report.

*Paragraphs 1 and 2
(paragraphs 95 and 96 of the "Report")*

16. Mr. HUDSON thought that the first sentence of paragraph 2: "In pursuance of this resolution of the General Assembly, the Commission undertook a preliminary consideration of the subject at its first session in 1949", might be followed by the first two sentences of the last paragraph of Part III,² and the paragraph might end with the words "This conclusion was set forth in the report which was approved by the General Assembly at its session of 1949."

17. Mr. ALFARO had felt that the part of the draft report under consideration ought to end by pointing out to the reader what the formulation of the Nürnberg Principles meant, and saying: "That is what the Tribunal thought, and that is what the Commission did." He had therefore thought it best to place the passage mentioned by Mr. Hudson at the end of Part III.

18. Mr. HUDSON, Mr. SANDSTRÖM and Mr. CÓRDOVA felt that it would be more logical for the explanation of the manner in which the Commission had interpreted its task to be given at the beginning of Part III.

The Commission decided to insert the first two sentences of paragraph 2 on page 13 after the first sentence of the second paragraph on page 2.

The Commission decided to add after those three sentences the words: "This conclusion was set forth in the report which was approved by the General Assembly at its session of 1949."

19. Mr. FRANÇOIS pointed out that the Commission

² These sentences read as follows:

"In the first session of the Commission the question arose as to whether or not the Commission should ascertain to what extent the principles contained in the Charter and judgment constituted principles of international law. The conclusion of the Commission was that since the Nürnberg Principles had been affirmed by the General Assembly the task of the Commission was not to express any appreciation of these principles as principles of international law but merely to formulate them."

had taken a much wider view of its task in connexion with paragraph (b) of resolution 177 (II). In preparing the draft code it had rejected the view that its task "was not to express any appreciation of these principles". It had expressed an appreciation of those principles in Part II of the report. It should be made clear that it was only paragraph (a) of the resolution which applied to Part III. Drafted as it was at present the passage would be rather confusing for the public, which would be surprised to find in Part V of the report that the Commission had expressed an appreciation of the Nürnberg Principles.

20. Mr. KERNO (Assistant Secretary-General) suggested that the second sentence of paragraph 2 on page 13 might be amended to read: "the task entrusted to the Commission by paragraph (a) of resolution 177 (II) was not to express any appreciation...".

It was so decided.

Paragraph 3 (paragraph 97 of the "Report")³

Paragraph 3 was adopted without comment.

A. THE PRINCIPLES

Principle 1

21. Mr. HUDSON proposed that the words "of course" in the second sentence of paragraph 1 (*paragraph 98 of the "Report"*) be deleted.

22. Mr. ALFARO thought that those words meant that the Commission could not enunciate principles applicable only to persons in Axis countries. That was obvious, but needed emphasizing. To say "but Principle I is now enunciated in general terms" would imply that its being so enunciated was something out of the ordinary.

23. Mr. HUDSON asked whether the Rapporteur would accept the word "formulated" instead of "enunciated".

24. Mr. ALFARO saw no objection to the substitution.

25. The CHAIRMAN failed to understand the meaning of the words "in theory" in the second sentence of paragraph 2 (*paragraph 99 of the "Report"*). Did it imply a reservation? He would like the words deleted.

26. Mr. ALFARO said that the same idea had occurred to him and he had thought of saying "This conception involves... ", but had preferred to keep to Mr. Spiropoulos' text. He believed Mr. Spiropoulos had meant: "from a theoretical standpoint".

27. Mr. CÓRDOVA thought that what Mr. Spiropoulos had meant was that for the first time individuals

³ In the "Report" the last sentence of paragraph 3 replaced the three following sentences of the draft report:

"This formulation consists of two sections: The first section contains the general principles laid down in the Charter and in the judgment of the Nürnberg Tribunal. The second section is devoted to definitions of the crimes under the said Charter and judgment. The formulation of the Commission is set out in the following paragraphs."

were recognized as having international personality, since they were declared punishable under international law, and that the doctrine previously applied to them had been abandoned.

28. Mr. HUDSON proposed the deletion of the explanatory sentence in question, which did not show why the Commission had formulated the principle.

29. The CHAIRMAN pointed out that it was a statement made by the Tribunal.

30. Mr. HUDSON felt that in that case the text ought to say so.

31. The CHAIRMAN said that the Commission was going over once again the discussion of the previous year. He had believed it to have taken a final step, but he perceived now that all members of the Commission had not done so. He repeated that he failed to understand the meaning of the words "in theory", since the Nürnberg criminals had been hanged "in practice".

32. Mr. CORDOVA pointed out that they had been hanged in pursuance of a legal theory.

33. Mr. HUDSON observed that the task of the Commission was to formulate principles, not to state what that formulation involved. It would be for doctrine to do that.

34. The CHAIRMAN reminded the Commission that Mr. Hudson had proposed deletion of the sentence; if it were deleted, however, it might be necessary to delete the remainder of the paragraph.

35. Mr. HUDSON and Mr. ALFARO thought that would not be necessary.

36. The CHAIRMAN failed to understand the objection to acknowledging that rules of international law applied directly to individuals. He wondered what grounds there could be for not accepting the expression "the 'international personality' of individuals". To state that an individual had or had not legal capacity was to state implicitly that he was or was not a person for purposes of international law.

37. Mr. BRIERLY considered that that might be going rather far. There were subjects of law who were obliged to obey and who did not possess international personality in the full sense of the term. International personality had both a passive and an active aspect. The Nürnberg Principles had recognized the individual's passive international personality by making him punishable under international criminal law. But the individual did not possess active international personality; he had not for example the right to plead before an international tribunal.

38. The CHAIRMAN understood that they were dealing with persons for the purposes of international law and the legal capacity they were regarded as having.

39. Mr. AMADO felt that it was not the Commission's task to draw theoretical conclusions from the principles formulated. He saw no purpose in saying "The general rule underlying Principle I is that international law may impose duties on the individuals directly without any interposition of internal law". The principle having been laid down, why give the reader and the General Assembly a lesson about it? And why

mention the consequences of the principle's interpretation? He did not approve of the word "involving". It was very proper, however, to repeat the Tribunal's conclusions.

40. The CHAIRMAN observed that the general rapporteur had a difficult task. He had included the Commission's conclusions in his report, a decision had been taken, and now it was called in question again.

41. Mr. YEPES pointed out that what was stated was not a conclusion but a fact.

42. Mr. el-KHOURY thought that if it accepted the first principle and declared that international law might impose duties on the individuals directly, the Commission would be expected to give reasons for its conception. The conception had become its own, and the reasons for it must be shown if it was to be incorporated in international law.

43. The CHAIRMAN asked the Commission whether it agreed to deletion of the second sentence that read: "This conception, in theory, is considered as involving the 'international personality' of individuals."

The Commission decided, by 6 votes to 4, to delete the second sentence of the paragraph.

44. Mr. KERNO (Assistant Secretary-General) wished to remark that he was sure the vote ought not to be interpreted as a rejection of the content of the sentence, since the members of the Commission had had different reasons for voting against it. Mr. Briery, for example, approved of the sentence in part. The vote meant that some members had thought it better for the question of the individual's international personality not to be mentioned, because it was not the proper place for it.

45. Mr. HUDSON agreed. The Commission was not taking any stand on the matter.

46. Mr. YEPES considered that the passage after the sentence which the Commission had just decided to delete continued the sequence of ideas. The whole paragraph ought therefore to be deleted.

47. Mr. ALFARO held however that the principle, reinforced by the quotation from the judgment, appeared in the first sentence of the paragraph. The reference to the international personality of individuals might be deleted, but he felt that deletion of the remainder of the paragraph would weaken the statement.

*Principle II*⁴

48. Mr. HUDSON had advanced an argument during the discussion which he believed had been accepted by the Commission. No trace of it, however, appeared in document A/CN.4/R.7/Add.3. He had pointed out that it was not acts which were punished, but persons for an act. Principle III spoke of "a person who committed an act . . ."; in Principle II it would be better to say: "The fact that domestic law does not make punishable the act which . . .".

⁴ Principle II read as follows:

"The fact that domestic law does not punish an act which constitutes a crime under international law does not free the person who committed the act from responsibility under international law."

49. Mr. ALFARO remarked that the word "punishable" ought not to refer to the word "act" if it was persons that were to be punished.
50. Mr. HUDSON proposed that in that case the principle might read: "make a person punishable for an act . . .".
51. Mr. YEPES felt it would be better to say: "does not punish a person for an act".
52. Mr. HUDSON suggested the words: "The fact that domestic law does not make a person punishable for an act does not free that person from responsibility . . .".
53. The CHAIRMAN remarked that it was a matter of English phraseology.
54. Mr. BRIERLY proposed the words: "The fact that domestic law does not impose any penalty for an act which . . .".
55. The CHAIRMAN pointed out that in French the expression would be: "*ne punit pas un acte*" ("does not punish an act").
56. Mr. HUDSON thought Mr. Brierly's the better text.
57. Mr. BRIERLY and Mr. HUDSON would prefer the word "internal" to be substituted for the word "domestic".
58. Mr. HUDSON proposed that in the English text the word "relieve" be substituted for the word "free".
59. Mr. ALFARO pointed out that the Charter used the word "freeing".
60. Mr. CORDOVA replied that the Commission was improving on the text of the Charter.
61. Mr. ALFARO stated that in the second paragraph of the commentary the word "domestic" must be retained in the English text since the passage was a quotation from the judgment.
62. Mr. FRANÇOIS failed to understand the meaning of the phrase "and only as far as the local law is concerned". He thought it redundant.
63. The CHAIRMAN had likewise failed to understand the meaning of that phrase.
64. Mr. ALFARO reminded the Commission that sub-paragraph (c) of article 6 of the Charter of the International Military Tribunal read: "whether or not [committed] in violation of the domestic law of the country where perpetrated", and that no objection had been made to that passage. The phrase in question must therefore be retained. Should the Commission so desire it might substitute the word "internal" for the word "local" in the English text.
65. Mr. FRANÇOIS and Mr. HUDSON were in favour of deleting the phrase.
66. Mr. KERNO (Assistant Secretary-General) felt that it was of little consequence whether the phrase was deleted or retained, but he thought the text more correct in its present form because the Charter only referred to "the domestic law of the country where perpetrated", whereas here the text was referring in a more general manner to the country's legislation.
67. Mr. BRIERLY considered the text highly ambiguous. The "local law" did not unequivocally mean the internal law of the country where the act had been perpetrated. Nothing would be lost if the words were deleted.
68. Mr. HUDSON felt that there was no need to say anything since sub-paragraph (c) of Article 6 of the Charter of the Tribunal was quoted.
69. Mr. ALFARO agreed to the first sentence of paragraph 2 (paragraph 101 of the "Report") ending at the word "humanity".⁵
70. Mr. HUDSON wished to know why there was a footnote giving the source of the particular quotation from the Statute, when similar footnotes did not appear in all other cases. He was in favour of footnote (3) being deleted.
71. Mr. ALFARO remarked that in the present case the quotation had been taken from the text of the judgment.
72. Mr. BRIERLY proposed that footnotes be given only in the case of quotations from the judgment.
73. Mr. ALFARO had no objection to make.
74. Mr. HUDSON proposed the deletion of the last phrase of the paragraph: "in order to remove any doubt concerning the applicability of this principle to all international crimes after the words 'general terms'". That phrase did not come within the Commission's terms of reference: its task was to formulate the Nürnberg Principles.
75. Mr. ALFARO stated that the purpose of the phrase was to explain the difference between the text of Principle II and the corresponding text in the Charter. The words "in order to remove any doubt etc. . . ." might be deleted, but the matter must not be left in doubt; mention must be made of the fact that the Commission was expressing the principle in general terms. The international criminal code would over-ride the law of all countries.
76. Mr. HUDSON asked what doubt could arise.
77. Mr. ALFARO replied that the phrase had been quoted from the Special Rapporteur's report.
78. The CHAIRMAN pointed out that the Commission had already pronounced on the matter, but if the Commission wished to reconsider it it could do so.
79. Mr. CORDOVA thought that the Commission had not pronounced on the matter.
80. The CHAIRMAN stated that the Commission had decided that international law was superior to national law, but some members of the Commission were dissatisfied with the decision.
81. Mr. CORDOVA agreed that the Commission had accepted the principle; it had not however made up its mind whether that was the right place to mention it.
- The Commission decided, by 4 votes to 3 with 4 abstentions, to delete the words: "in order to remove any doubt concerning the applicability of this principle to all international crimes".*

⁵ Thus leaving out the words "and only as far as the local law is concerned".

82. Mr. HUDSON did not like the tone of the last paragraph (paragraph 102 of the "Report") of the commentary on Principle II; he desired to know who considered that international law could be binding. The Commission was reproducing the findings of the Tribunal: it ought to say: "The Tribunal considered . . .".

83. Mr. ALFARO pointed out that the text in question, proposed by the Special Rapporteur, had been adopted by the Commission and incorporated in the final report.⁶

84. Mr. YEPES agreed that the Commission had already given its final consent and the general rapporteur had merely reproduced what had been approved.

85. Mr. AMADO wished to know the meaning of the sentence: "It is considered that international law can bind individuals even if national law does not direct them to observe the rules of international law."

86. Mr. SANDSTRÖM proposed the deletion of the opening words: "It is considered that".

87. Mr. ALFARO remarked that that would make the sentence more categorical.

88. Mr. CORDOVA repeated the objection that the text had been adopted by the Commission. He added that when adopting Mr. Spiropoulos' report the Commission had not thought of the difficulty. It had now to consider its position vis-à-vis the General Assembly. It was necessary to make it clear whether the sentence was a conclusion arrived at by the Commission or whether it was merely a matter of formulating principles contained in the Charter and the judgment.

89. Mr. BRIERLY proposed that the opening words of the sentence read: "The Tribunal considered that . . ."

It was so decided.

Principle III

90. Mr. HUDSON proposed, in the first place, the substitution of the word "relieve" for the word "free" in the English text.

91. Mr. ALFARO accepted the amendment.

92. Mr. BRIERLY thought that the first part of the second sentence of the commentary (paragraph 103 of the "Report"), namely the words "In cases of acts constituting international crimes", should be deleted. It added nothing to the clarity of the text.

Mr. Brierly's proposal was adopted.

93. Mr. HUDSON then asked why, in the second sentence of the commentary on that principle, the Rapporteur had used the words "in an official capacity" instead of repeating the words he had used in the principle itself, namely "acted as Head of State or responsible Government official".

94. Mr. ALFARO replied that Mr. Spiropoulos' reason for not using the same words had been that he wished to give a paraphrase which appeared to him to show the sense in which the expression "responsible Government official" could be understood.

95. Mr. AMADO laid that he did not like paraphrases. He thought them unnecessary, particularly in a case of that kind.

96. Mr. CORDOVA remarked that the expression "acted in an official capacity" could include much wider categories of persons than the expression "acted as Head of State or responsible Government official".

97. The CHAIRMAN thought it would be advisable for Mr. Alfaro to employ the same words as those used in the principle itself.

98. Mr. KERNO (Assistant Secretary-General) thought that the reason Mr. Alfaro had acted as he had was that he had adopted Mr. Spiropoulos' view, which had always been that it was not enough simply to state principles but that they must be accompanied by commentaries. It was his own opinion that a paraphrase was sometimes very helpful. It enabled public opinion, which was not exclusively the opinion of jurists or experts, to form a more correct view of the meaning of certain terms. He pointed out that the Commission had agreed to retain the commentaries on Principles I and II, which were likewise paraphrases, and he saw no reason why the Commission should decide differently in the case of Principle III.

99. Mr. SANDSTRÖM considered that the second sentence of the commentary, containing the words "acted in an official capacity", led up to the following sentence which was a quotation from the judgment of the Nürnberg Tribunal; it was helpful and should be retained.

100. Mr. CORDOVA agreed, provided that the words "acted in an official capacity" were substituted for the words "acted as Head of State or responsible Government official".

101. Mr. FRANÇOIS pointed out that the last sentence of the commentary (paragraph 104 of the "Report") on Principle III conflicted with the last sentence of Principle IV: if the mitigation of punishment was a matter for the competent Court to decide, the same must apply in Principle IV.

102. Mr. ALFARO stated that the last sentence of the commentary on Principle III bore reference to article 7 of the Charter of the Nürnberg Tribunal. He reminded the Commission that the question of mitigating punishment, explicitly referred to in article 7, had been discussed at length by the Commission when considering Principle III appearing in Mr. Spiropoulos' report on formulation of the Nürnberg Principles. He felt he should read out the passage of the Summary Record of the 46th meeting dealing with the matter (paras. 73 - 77). He stated that it was that discussion and the decision taken which had caused him to include the sentence in question in his report.

103. Mr. HUDSON proposed the deletion of the last sentence of the second paragraph of the commentary; if the Commission retained it, it would have to delete the second sentence of Principle IV.

104. Mr. ALFARO observed that the Commission must be consistent. Its views on one day must not conflict with those of the day before.

⁶ See 46th meeting, paras. 58 - 69.

105. Mr. FRANÇOIS and Mr. BRIERLY said that the decisions taken by the Commission on Principle III and Principle IV must be consistent.

106 - 107. Mr. ALFARO added that the Commission had deleted a large part of article 7 of the Charter where it formulated the Nürnberg Principles. It must provide an explanation of the reasons which had caused it to do so and state explicitly that it had thought the question of mitigating punishment ought to be left to the decision of the Court.

The Commission decided to retain the last sentence of the commentary on Principle III.

Mr. SANDSTRÖM took the chair.

Principle IV

108. Mr. HUDSON proposed that the word "relieve" be substituted for the word "free" in the English text.

109. Mr. ALFARO accepted the amendment.

110. The CHAIRMAN asked whether the Commission agreed that the last sentence of the Principle be deleted, as had been suggested earlier (see para. 103, *supra*).⁷

111. Mr. AMADO stated that he would vote for deletion of the sentence. If it were retained it would make any acquittal impossible since it only provided for mitigation of punishment. Acquittal, however, must be possible, according to the terms of the preceding sentence, in the event of its being morally impossible for the person who committed a crime to have refused to carry it out when ordered to do so.

112. Mr. YEPES was also in favour of deleting the sentence; the Principle would state precisely the same thing without it, whereas retention would weaken the Principle.

113. Mr. FRANÇOIS declared that the sentence should be omitted entirely in order that the decision now being taken by the Commission on Principle IV should tally with the decision it had just taken on Principle III. An addition should, however, be made to the commentary to the effect that the sentence in question, the gist of which occurred in article 7 of the Charter of the Nürnberg Tribunal, had not been retained by the Commission for the same reason as the words "or mitigating punishment" had already been omitted from Principle III.

114. Mr. CÓRDOVA and Mr. el-KHOURY were in favour of deleting the sentence. Mr. el-KHOURY added that, with the sentence deleted, the Court would retain the power to mitigate punishment.

The Commission decided to delete the sentence.

115. In reply to a question by Mr. YEPES, Mr. ALFARO stated that in the commentary on each Principle he had made reference to the corresponding article of the Charter of the Tribunal to show the source of the Principle.

116. Mr. YEPES urged that when the Commission departed from the principles laid down in the Charter,

more special mention should be made of the fact that it had done so.

117. Mr. HUDSON proposed that the following sentence in the commentary (paragraph 105 of the "Report"), forming part of a quotation from the judgment of the Nürnberg Tribunal, be deleted: "though, as the Charter here provides, the order may be urged in mitigation of the punishment". He felt that the first sentence of the commentary was the most important.

118. Mr. ALFARO was not in favour of the sentence quoted being deleted. He wished it to be retained because it formed part of the preamble to the Nürnberg judgment.

119. Mr. CÓRDOVA thought that if the Commission decided to retain the sentence it would be running counter to decisions it had taken previously. According to article 8 of the Charter it was never possible to plead in defence the order of a superior. The Commission, however, had accepted the modification made to that article of the Charter by the Nürnberg Tribunal when it provided that the carrying out of such an order might be pleaded as grounds for acquittal, when the person receiving the order was not morally free to refuse to obey it and had no choice.

120. Mr. BRIERLY felt that it was not correct to say that the Nürnberg Tribunal had modified the provisions of the Charter. The Tribunal had merely extracted from the provisions of the Charter conclusions universally accepted in criminal law. The Nürnberg Tribunal had applied the principle recognized by all systems of criminal law and by all courts that the perpetrator of an act was not responsible for it and should be acquitted if he did not possess moral freedom not to perpetrate it, that was to say, if he had no choice. Many circumstances might deprive a person of moral freedom or choice. The person might be mad, might act under compulsion, or in pursuance of an order which he could not disobey. In many cases the order of a superior completely deprived the person of moral freedom. The Tribunal had merely stated recognized law on that point. It had observed an elementary principle which had not been formulated by the Charter because there had been no need for the Charter to formulate it.

121. The CHAIRMAN felt that an explanation along the lines of Mr. Briery's statement should be added at the end of the commentary.

122. Mr. HUDSON thought that there was no need to add anything on the subject since the commentary itself provided the necessary explanation. The meaning of the paragraph became quite clear if one read in its original form the text of the passage out of the judgment of the Nürnberg Tribunal, which the Rapporteur had split up into several sentences:

"The provisions of this article (article 8) are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defence to such acts or brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most

⁷ The last sentence read as follows: "It may, however, be considered in mitigation of punishment, if justice so requires."

nations, is not the existence of the order, but whether moral choice was in fact possible.”

122 a. He proposed that the passage of the judgment which he had read out should be quoted in the commentary as a continuous whole.⁸ He also supported Mr. François' proposal to the effect that a statement be included in the commentary to the effect that the second sentence of Principle IV had not been retained by the Commission for the same reason as a similar provision had been omitted from Principle III.⁹

123. Mr. ALFARO accepted Mr. Hudson's suggestion.

124. Mr. YEPES desired it to be made clear in the commentary that the Commission had departed from the exact terms of article 8 of the Charter of the Nürnberg Tribunal.

125. Mr. BRIERLY proposed, in order to give effect to Mr. Yepes' suggestion, that in the first sentence of the commentary on Principle IV the words “as interpreted in the judgment of the Nürnberg Tribunal” should be added after the words “contained in article 8 of the Charter”.

126. Mr. ALFARO accepted the addition. He added that owing to the amendments which the Commission had made to Principle IV it was necessary also to delete the last phrase of the second sentence of the commentary, namely the words: “but that it might be considered in mitigation of punishment”.

Principle V

127. Mr. HUDSON proposed that sub-paragraphs (a), (b), (c), (d) and (e), of the commentary (paragraph 107 of the “Report”), which were a word-for-word quotation of sub-paragraphs (a), (b), (c), (d) and (e) of article 16 of the Charter of the Nürnberg Tribunal, be deleted in their entirety.

128. Mr. ALFARO was against the proposal. The question of fair trial had been discussed at length by the Commission.¹⁰ At the commencement of the discussion Mr. Hudson had asked what a “fair trial” was, which meant that Mr. Hudson had been in some doubt on the matter. The vast majority of people would certainly wonder what was meant by “fair trial”. The Commission must explain it *expressis verbis*. There was another reason for retaining the sub-paragraphs. The expression “fair trial” was a typically Anglo-Saxon one and was only employed in the legislation of Anglo-Saxon countries. It did not exist in other countries. He felt that retention of the quotation was therefore essential.

129. Mr. YEPES and Mr. el-KHOURY supported Mr. Alfaro.

130. Mr. HUDSON withdrew his proposal.

⁸ It reads as follows in the draft report: “The Tribunal declared the provision of article 8 to be in conformity with the law of all nations. ‘That a soldier’, the Tribunal said, ‘was ordered to kill . . .’”.

⁹ That statement became para. 106 of the “Report”.

¹⁰ 47th meeting, paras. 54 - 67.

131. The CHAIRMAN declared that in that case the quotation would be retained. He wished however to draw attention to a point of detail. The commentary on Principle V referred to “the Charter of Nürnberg”, whereas the correct term was “the Charter of the Nürnberg Tribunal”; he felt it would be desirable to use the official title.

132. Mr. HUDSON asked whether the last paragraph of the commentary meant that an accused person could on all occasions demand the fulfilment of all the conditions laid down in sub-paragraphs (a) to (c).

133. Mr. ALFARO and Mr. BRIERLY thought that it did.

B. THE CRIMES

134. The CHAIRMAN stated that the Commission had finished examining the Principles and invited the Commission to pass on to section B, “The Crimes”.

135. Mr. HUDSON wished to raise a point of detail. On page 2 of the document under consideration the list of principles bore the general title: “A. The Principles”. The second section of the document, with which the Commission was now about to deal, was entitled: “B. The Crimes”. Different phraseology was thus used for A and B. He felt that it ought to be made uniform.

136. Mr. ALFARO stated that the General Assembly had directed the Commission to formulate the principles laid down in the Charter and judgment of the Nürnberg Tribunal, but the Commission had also to define the crimes referred to in the Charter and the judgment. The General Assembly had certainly not intended definition of the crimes not to be included in the formulation of the principles.

137. Mr. HUDSON said that if the Commission agreed with Mr. Alfaro an explanation to that effect ought to be included in the report.

138. Mr. KERNO (Assistant Secretary-General) stated that the matter had already been discussed at length. The gist of the discussion was indicated on page 2 of the report, but he agreed with Mr. Hudson that some additional explanation was desirable.

139. Mr. HUDSON proposed that section A be entitled “General Principles” and section B “Definition of Individual Crimes”.

140. The CHAIRMAN thought it would be better to make reference to the introductory paragraphs of the present part of the report (paragraphs 95 - 97 of the “Report”).

141. Mr. LIANG (Secretary of the Commission) felt that Mr. Hudson's proposal was a good one, but it ought to be made clear that the two sections of the Commission's report concerned the formulation of principles. Otherwise the objection might be raised that section B was not concerned with principles. He therefore proposed that section A be entitled “General Principles” and section B “Principles for the Defining

of Crimes". He thought that the defining of certain acts as crimes against peace etc. was a principle.

142. Mr. YEPES proposed that the terminology used on page 2 be employed: A. General Principles; B. Definitions of the Crimes.¹¹

143. Mr. AMADO observed that a distinction was made in Mr. Spiropoulos' report between principles "*Stricto Sensu*" and the principles in the broad sense of the word. Both categories of principles, however, were actually principles. He thought it would be desirable therefore to leave I to V as they stood and from that point to continue the same numbering, thus: Principle VI: Crimes against Peace, Principle VII: War Crimes, etc., instead changing to B. The Crimes (a) Crimes against peace, etc.

144. The CHAIRMAN stated that in his view crimes were also principles. However, the Commission ought to use simple headings, and therefore he supported Mr. Yepes' proposal.

145. Mr. HUDSON also disliked the change of numbering from Principles I, II, III, IV, V to Crimes (a), (b), (c) etc. He accepted Mr. Amado's proposal to continue the series: Principle VI: Crimes against Peace, etc. For the general title to section B he proposed: "Principles stating crimes", or "Principles regarding categories of crimes".

146. Mr. ALFARO reminded the Commission that it had decided to divide the subject into two sections: 1. The Principles, and 2. The Crimes.¹² To amend its decision it could state in the introduction to its report that crimes against peace, war crimes, crimes against humanity etc. were also principles. He was willing to ponder the matter and would take into consideration the views just expressed.

147. Mr. CORDOVA thought it desirable to add a paragraph to the introduction mentioning the difficulties the Commission had had over that point owing to the drafting of General Assembly resolution 177 (II).

148. Mr. el-KHOURY felt that both sections of the report, section A dealing with principles and section B dealing with crimes, concerned principles. The simplest solution would be to call crimes "principles" likewise.

149. Mr. KERNO (Assistant Secretary-General) thought that the Rapporteur would be able to draw the appropriate conclusions from the discussion that had just taken place, which showed the Commission to be agreed that the titles needed to be made uniform and that the two sections should be numbered in a single sequence throughout.

The meeting rose at 6 p.m.

77th MEETING

Wednesday, 26 July 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. 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).

Commission's draft report covering the work of its second session (*continued*)

PART III: FORMULATION OF THE NÜRNBERG PRINCIPLES (A/CN.4/R.7/ADD.3)¹ (*continued*)

B. THE CRIMES (*continued*)

1. Mr. ALFARO suggested that the choice of titles for the two parts of the formulation of the Nürnberg Principles should be deferred to a later date.

(a) *Crimes against peace*

2. Mr. HUDSON pointed out that the exact title of the Briand-Kellogg Pact, mentioned on page 7 (paragraph 111 of the "Report"), was "General Treaty for Renunciation of War". So far as the Pan-American Conference, mentioned on page 8 (paragraph 112 of the "Report"), was concerned it would also be preferable to give it its official title of "International Conference of American States".

3. Mr. KERNO (Assistant Secretary-General) observed that the Pact was known to the public as the "Briand-Kellogg Pact" and suggested that the official title of the Treaty should be given with "Briand-Kellogg Pact" in brackets.

4. Mr. YEPES moved that the same procedure be adopted with regard to the International Conference of American States, which was known to the public as the "Pan-American Conference".

5. The CHAIRMAN suggested that the introduction of these changes should be left to the Rapporteur.

¹ Mimeographed document only. Parts of that document that differ from the "Report" are reproduced in footnote to the summary records. For other parts, see the "Report" in vol. II of the present publication.

¹¹ See footnote 3, *supra*.

¹² See 45th meeting, paras. 9-36.