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Summary record of the 77th meeting

Topic:
Other topics

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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.

CONTENTS

	<i>Page</i>
Commission's draft report covering the work of its second session (<i>continued</i>)	290
Part III: Formulation of the Nürnberg Principles (<i>continued</i>)	290
B. The Crimes (<i>continued</i>)	290

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.

6. Mr. HUDSON, referring to the last paragraph on page 8 (paragraph 115 of the "Report"),² said that "assurances" were not necessarily a "unilateral undertaking" and proposed that the word "meaning" should be replaced by the word "including".

7. Mr. ALFARO explained that the word "unilateral" was designed to convey that the undertakings concerned were undertakings subscribed to by one or more States representing the same interests, and not synallagmatic undertakings.

8. The CHAIRMAN thought the word might prove ambiguous, since "unilateral" generally meant "isolated", whereas parallel undertakings were also included.

9. Mr. BRIERLY also preferred "including" to "meaning" and proposed that the expression "unilateral undertaking" should be used without inverted commas.

10. Mr. ALFARO proposed the substitution of the phrase "as meaning an undertaking made unilaterally by a State or a group of States, etc."

11. Mr. AMADO pointed out that, if the State which received the assurance acted as if it had accepted the latter, the undertaking would cease to be a unilateral undertaking. He proposed that the word "unilateral" should be deleted because it limited the scope of the undertakings referred to, and that was not the Commission's intention.

12. Mr. KERNO (Assistant Secretary-General) recalled that the Commission had discussed this question at length in relation to the three terms "treaties", "agreements" and "assurances", and had found that the distinction between assurances on the one hand and treaties or agreements on the other was that the former were unilateral.

13. Mr. SANDSTRÖM added that the Commission had recalled certain activities of Hitler who had given assurances even when the protected State had not accepted them.

14. The CHAIRMAN remarked that it was a difficult point. In civil law, for example, there was some discussion as to whether a deed of gift was a contract or not.

15. Mr. el-KHOURY observed that a unilateral undertaking was an undertaking given by one party; it ceased to be an obligation if the other party did not accept it. He therefore thought it preferable to delete the word "unilateral".

16. Mr. ALFARO, referring to Mr. Sandström's observation, said it was highly probable that those who drafted the Charter had had in mind the unilateral assurances given by Hitler, which had not required acceptance because the States concerned were anxious to live in peace. Such assurances had been purely unilateral assurances.

17. The CHAIRMAN suggested the word "spontaneous".

18. Mr. CÓRDOVA proposed the phrase "as including spontaneous promises made by a State . . ." since it would provide an explanation while avoiding a definition.

19. Mr. el-KHOURY thought that the meaning suggested by Mr. Alfaro would be preserved by deleting the word "unilateral".

20. Mr. AMADO said he preferred the English to the French text.³

21. The CHAIRMAN and Mr. SANDSTRÖM objected to the word "contractée" which was unsatisfactory as applied to a unilateral undertaking and, in addition, said they preferred "engagement" to "obligation".

22. Mr. BRIERLY proposed the following text: "as including any pledge or guarantee of peace even if given unilaterally".

The above text was adopted.

23. Mr. ALFARO, referring to the second paragraph on page 9 (paragraph 117 of the "Report"), said that he had regarded the discussion in the Commission as a general debate, but it concerned "every man in uniform who fights a war".

24. Mr. HUDSON considered that the war in question must be an aggressive war.

25. Mr. CÓRDOVA proposed the substitution of the words "who fights such a war" for "who fights a war".

26. Mr. ALFARO accepted this amendment.

27. Mr. HUDSON proposed the deletion of the words "The Commission agreed on the understanding that" at the beginning of the last sentence in the paragraph. He recalled that Mr. Spiropoulos had said that it was the Tribunal which had agreed on that understanding.

28. Mr. CÓRDOVA said he believed Mr. Spiropoulos had said that the judgment referred only to high-ranking military personnel and had concluded from the fact that junior officers had not been brought to trial that only high-ranking military personnel could be prosecuted.

29. The CHAIRMAN pointed out that, if the judgment applied only to high-ranking military personnel, it was because the Tribunal was not competent to try junior officers and soldiers; consequently it could not be known what it would have done if it had had to do so.

30. Mr. CÓRDOVA stated that soldiers were nevertheless responsible even if they had acted on orders from a superior.

31. Mr. SANDSTRÖM read out the following passage from The Charter and judgment of the Nürnberg Tribunal:

"Although the waging of aggressive war may involve activities in different fields, military, administrative and economic, only persons in the highest positions seem to have been, in the opinion of the Court, capable of committing this crime. Thus, the

² It read as follows: "The term 'assurances', is understood by the Commission as meaning any 'unilateral undertaking' made by a State as a pledge or guarantee of peace."

³ The French text read as follows: "Le terme 'garanties' est pris par la Commission comme signifiant toute 'obligation unilatérale' contractée par un Etat en faveur de la paix."

Court did not adopt the extreme theory that every act of warfare committed in the prosecution of a criminal war is an international crime. To be a crime against peace such an act must be such as to qualify it as *waging* war. It may be said that the Court, partly because it was concerned only with the major war criminals, did not make the compass of the notion of "waging" absolutely clear, but there seems to be no doubt about the principle that only acts of warfare constituting a *waging* of criminal war are crimes against peace. If an act committed in the course of or in relation to an aggressive war does not amount to waging such war, it is an international crime only if it can be characterized as a war crime in the strict sense of that term or as a crime against humanity."⁴

32. Mr. BRIERLY said that the passage quoted by Mr. Sandström was an excellent summary of the earlier quotations.

33. Mr. ALFARO said he would incorporate the passage in his report.

34. Mr. BRIERLY proposed that the last sentence of the second paragraph on page 9 should be worded as follows: "The Commission understood the phrase to refer only to high-ranking officers or officials and believed that was also the opinion of the Tribunal."

35. The CHAIRMAN pointed out that the Tribunal had not been concerned with the question, since it had merely to try the major war criminals brought before it.

36. Mr. HUDSON proposed the wording: "The Commission understood the phrase to refer only to such high-ranking military personnel and high State officials as were prosecuted."

37. Mr. BRIERLY said that phrase did not correspond with the facts since some of the persons prosecuted were not accused of war crimes.

38. Mr. HUDSON then suggested the deletion of the words "as were prosecuted".

39. Mr. CORDOVA suggested the substitution of the words "as were found guilty".

40. Mr. BRIERLY thought the views of the Tribunal could be deduced from its findings.

41. Mr. CORDOVA considered that the Tribunal had not tried other persons because it had not been competent to do so. It would be wrong to draw conclusions from the Tribunal's finding. If it had been competent to try soldiers, the latter might have been found guilty.

42. Mr. HUDSON moved that the wording of the phrase be left to the general rapporteur.

It was so agreed.

43. The CHAIRMAN observed that if the phrase "waging of a war" were translated by "conduire" or "mener une guerre" the paragraph would be pointless, because junior officers and soldiers did not "conduct" a war.

44. Mr. BRIERLY said the same applied to the expression "waging of a war".

45. Mr. SANDSTRÖM thought it might be assumed

that the Tribunal's view was that the persons referred to were holders of high rank. Otherwise, its findings would have been different.

46. Mr. HUDSON recalled that the Tribunal had said of Dönitz that he had not been a mere army or divisional commander.

47. Mr. ALFARO thought it was desirable to retain the paragraph, but he would redraft it.

(b) *War crimes*

48. Mr. HSU, referring to the killing of hostages, asked whether a note could not be added in the following terms: "the Commission took note of the fact that the Geneva Conventions of 1949 had outlawed the taking of hostages in addition to the killing of hostages."

49. Mr. ALFARO pointed out that the note would be inserted in a paragraph which he proposed to add, and which read as follows:

"When the Commission discussed the definition of war crimes some members considered that not only the killing of hostages but also the taking of hostages should be included in the list of such crimes. A proposal to that effect was, however, rejected by 5 votes to 5 with 1 abstention. The Commission intends to reconsider the question in connection with the preparation of a draft Code of offences against the peace and security of mankind."

50. Mr. HUDSON thought that such a paragraph was out of place in the document, because it was absolutely unconnected with the formulation of the Nürnberg Principles, and that its proper place was in a draft code.

51. Mr. ALFARO recalled that the Commission had decided at its 49th meeting to incorporate a passage to that effect.⁵

52. Mr. HSU observed that while the Commission had adopted that decision when the draft Code had been discussed, it had agreed not to include any list. The paragraph proposed by the Rapporteur was therefore no longer appropriate. But he suggested that the text which Mr. Alfaro had just read out had its value, because the reader would find it strange that there was no mention of the Geneva Conventions.

53. Mr. YEPES entirely agreed with Mr. Hsu. It should be mentioned that the Commission had wished to go further than the Nürnberg Principles, since it had proposed to state that the taking of hostages was a war crime.

54. The CHAIRMAN wondered whether the proper place for the note was at that point in the report, or in the section dealing with the draft Code of offences against the peace and security of mankind.

55. Mr. CORDOVA agreed with Mr. Hsu that the Commission should avoid giving the impression that it was unaware that the taking of hostages had been outlawed in 1949, although it was not a crime in 1939. If the note in question was inserted, it would be clear to everyone that the Commission had been restricted by its terms of reference.

⁴ United Nations publication, Sales No. 1949.V.7.

⁵ See 49th meeting, paras. 27 - 30.

56. Mr. el-KHOURY thought that it should also be pointed out that the Government of Pakistan had called attention to the question of the taking of hostages (A/CN.4/19/Add.2). But he agreed with Mr. Hudson that the question should be mentioned in connexion with the draft Code.

57. Mr. ALFARO proposed saying: "The Commission noted this fact during the discussion concerning the Nürnberg Principles."

58. Mr. CORDOVA said that everyone would read this document without referring to the draft Code. Hence, he would repeat that it was preferable to state that the Commission was familiar with the Geneva Conventions.

The Commission decided, by 8 votes to 1 with 2 abstentions, to include the note proposed by Mr. Hsu.

59. Mr. HUDSON thought that if, as had been decided, the Commission incorporated Mr. Hsu's note in the report, it would be logical also to state that the Geneva Conventions of 1949 dealt only with serious violations of the laws and customs of war. He had always had misgivings concerning the looseness of the phrase "violations of the laws and customs of war". Some passage which would restrict the phrase to serious violations should be sought in the judgment of the Nürnberg Tribunal.

60. Mr. ALFARO thought that the sense of this expression from the Charter was brought out in the list of the most serious crimes which was to be found in the same paragraph. The only reason for saying that "such violations shall include, but not be limited to..." was that it was deemed desirable to avoid the possible impression that other serious violations had been ignored.

61. Mr. HUDSON thought that the gravity of the violations listed might be noted in the first paragraph of the commentary in the report.

62. Mr. ALFARO said that he would certainly examine the question.

63. Mr. AMADO observed that the words "destruction sans motif" in the French text did not accurately render the English words "wanton destruction". Members of the Commission proposed that the phrase "sans motif" should be replaced by one of the following expressions: "non justifiée", "abusive", "perverse" or "arbitraire".

The Commission decided to substitute the word "perverse" for the phrase "sans motif".

64. The CHAIRMAN moved that it be stated that the Commission had clearly understood that the destruction of cultural equipment came under its definition of war crimes. The Commission would thereby avoid seeming to have neglected this question to which UNESCO attached much importance. It would be courteous to indicate that the Commission took account of UNESCO's wishes. The note might be included after the words "not justified by military necessity".

65. Mr. HUDSON observed that the Nürnberg judgment had not dealt with this question, and that it would be preferable to include the note in the draft Code.

66. The CHAIRMAN replied that the Commission

had decided, when discussing the draft Code, to disregard this question. It would clearly be preferable, from a logical point of view, to include it in the draft Code.

67. Mr. LIANG (Secretary to the Commission) explained that it was impossible to include a note in the draft Code because the latter contained no list, and the text which had been provisionally adopted would not be annexed to the report.

68. The CHAIRMAN trusted that there would be a statement in the part of the report devoted to the draft Code to the effect that the question had been considered.

69. Mr. YEPES thought that the question of monuments, etc. should be mentioned in the general report.

70. The CHAIRMAN moved that it be left to the general rapporteur to decide at what point this note should appear.

(c) *Crimes against humanity*

71. Mr. HUDSON said he would prefer the phrase "only when committed" to the phrase "only inasmuch as they have been committed" in the first paragraph of the commentary (paragraph 120 of the "Report"). The value of the following phrase—namely, "in execution of or in connexion with any crimes within the jurisdiction of the Tribunal"—was reduced by its being taken out of its context. It was far from clear, because crimes against humanity also fell within the jurisdiction of the Tribunal. He proposed that the sentence at line 8 of the first paragraph should begin with the words: "Crimes referred to as falling within the jurisdiction..."

72. Mr. ALFARO supported this amendment.

73. Mr. HUDSON suggested that the quotation marks at the end of the second paragraph should begin before the word "declared" and that the words "to the effect" in the English text should be deleted.⁶ He asked why the phrase "the 1939 war" was not used instead of the phrase "the Second World War" in the fourth paragraph of the commentary.

74. Mr. BRIERLY thought that the words "in a general definition of crimes against humanity" at the end of the second sentence in the fourth paragraph (paragraph 123 of the "Report") should be replaced by the words "in this formulation of crimes against humanity".⁷

75. The CHAIRMAN asked the Commission whether it was afraid of compromising itself by establishing a relationship between crimes against humanity and wars.

76. Mr. BRIERLY recalled that the Commission had omitted the expression "before or during the war", which was contained in article 6 (c) of the Charter of the Nürnberg Tribunal, because it considered that these

⁶ The sentence read as follows: "For this reason the Tribunal declared itself unable to make a general declaration to the effect that acts before 1939 were crimes against humanity within the meaning of the Charter."

⁷ The sentence read as follows: "This phrase refers to a particular war, the Second World War, and, in the view of the Commission, should not be included in a general definition of crimes against humanity."

words should not be included in the general principle in the form in which the Commission had had to formulate it, in the light of the rules which had been applied to criminals in a particular war. It was for the Commission to extract the substance of the principles from the Charter.

77. The CHAIRMAN said that the crimes listed in article 6 (c) were crimes against humanity, even if committed by rulers against the population of their own country.

78. Mr. HUDSON said that the first two sentences of the fourth paragraph of the commentary should be combined to read as follows:

“In its definition of crimes against humanity the Commission has omitted the phrase ‘before or during the war’ contained in article 6 (c) of the Charter of the Nürnberg Tribunal, since it refers to a particular war, the World War of 1939.”

79. Mr. ALFARO accepted this proposal.

80. Referring to the last paragraph of the commentary (paragraph 124 of the “Report”), Mr. HUDSON noted that Mr. Alfaro used the words “against ‘any’ civilian population”, whereas, in the definition of crimes against humanity, he used the phrase “done against a civilian population”. This distinction was also made in the Charter, where article 6 (b) (“War Crimes”) referred to civilian populations in occupied territories, whereas article 6 (c) (“Crimes against Humanity”), referred to acts committed against any civilian population. The Charter had thereby distinguished between war crimes and crimes against humanity in relation to the populations concerned in each case. In his view, the definition of crimes against humanity contained in the report should also use the phrase “any civilian populations” instead of “a civilian population”.

81. The CHAIRMAN thought the Commission had no objection to the amendments proposed by Mr. Hudson.

It was so agreed.

82. Mr. BRIERLY raised once more the question of the last paragraph of the commentary on “Crimes against Humanity”, and asked that the words “are crimes” contained in the second sentence of the said paragraph be replaced by the words “may be crimes”.

83. Mr. CÓRDOVA observed that, in the words of the report, such crimes might be “committed by the aggressor against his own population”. He considered this use of the expression “aggressor” incorrect.

84. Mr. ALFARO accepted the amendment proposed by Mr. Brierly and, replying to Mr. Córdova’s observation, suggested that the word “aggressor” might be replaced by the words “their perpetrator”.

It was so agreed.

(d) *Complicity in the commission of a crime against peace, a war crime, or a crime against humanity, as set forth in (a), (b) and (c)*

85. Mr. HUDSON proposed that the first paragraph⁸ of the commentary be deleted on the ground that it was

superfluous, since it merely repeated in different words the provisions under Crime (d). The statement in the paragraph that accomplices were “liable to punishment” was redundant, which was one more reason for deleting it. The complicity referred to in this section was a crime. It was therefore unnecessary to state that persons who committed the crime were liable to punishment. It was tantamount to stating that accomplices were accomplices in complicity.

86. Messrs. BRIERLY and SANDSTRÖM also regarded this paragraph as supererogatory.

87. Mr. ALFARO, supporting the retention of the paragraph, said that the Commission was doing no harm in stating that it regarded accomplices as being liable to punishment.

88. The CHAIRMAN observed that in certain legal codes complicity was not set down as a special crime. Murder was a crime and anyone participating in it, directly or indirectly, should be punished. Once the Commission had decided that complicity in the crimes here referred to was a special crime, the paragraph under discussion was no longer necessary. At the same time, he disagreed with complicity being treated as a special crime.

89. Mr. AMADO was surprised that the crime of complicity should again be specified here. He would have preferred the practice adopted in national penal codes of including complicity in the general section. The Commission, having enumerated principles and crimes and having included complicity among the latter, it was now proposed that a further specific reference to complicity should be included. In his view, that was really quite superfluous.

90. The CHAIRMAN said that the Commission seemed to be agreed on the deletion of the first paragraph of the commentary, which was also acceptable to Mr. Alfaro.

It was agreed to delete the first paragraph.

91. Mr. HUDSON thought that the second paragraph of the commentary (paragraph 125 of the “Report”) was somewhat unsatisfactory. He did not share the Rapporteur’s view that the rule concerning Crime (b) went further than the Charter. Where there was complicity, there was conspiracy. The text should be reworded in the light of the fact that the Charter had clearly referred to complicity. Mr. Spiropoulos had stated the contrary in his report, but had agreed to the deletion of the passage concerned.

92. The CHAIRMAN pointed out that there was no distinction in French law between complicity and conspiracy.

93. Mr. SANDSTRÖM said that in Swedish law conspiracy was a serious form of complicity.

94. Mr. ALFARO recalled that the Commission had approved Crime (a), paragraph (ii) of which referred to

⁸ It read as follows: “The foregoing paragraph declares liable to punishment the accomplices in the commission of the crimes mentioned therein.”

participation in a common plan or conspiracy. In his view, the participants in a common plan or conspiracy were co-authors. On the other hand, complicity presupposed a certain gradation between the main perpetrator and the accomplices. The Commission had already made a distinction between "participation" in a crime and "complicity".

95. The CHAIRMAN was not very clear as to the distinction Mr. Alfaro wished to make. In his view, when a group of persons committed a crime, whether by active participation in it or as mere accomplices, they were always liable to punishment. For instance, a burglary might be committed by several persons. Two of them entered the house and burgled it, while a third kept watch. Under the laws of some countries the first two persons were the criminals while the one who watched and had taken no active part in the crime was an accomplice. If the mistress of one of the burglars diverted the owner's attention during the burglary, she also was an accomplice. However, in his view and under French law, these four persons had all participated in the crime and were therefore the perpetrators of the crime.

96. Mr. el-KHOURY asked whether an instigator who provided money or equipment for the carrying out of a conspiracy was an accomplice or not.

97. Mr. BRIERLY reiterated his view that the principle of Crime (d) did not go further than the Charter. It was based on article 6 of the Charter which the Tribunal had interpreted restrictively. In addition, he considered that the subtle distinction which had just been discussed was no concern of the Commission.

98. The CHAIRMAN thought that it would be sufficient merely to quote article 6 of the Charter and delete the rest of the paragraph.

99. Mr. BRIERLY said that there was no point in the last two sentences of the paragraph either.⁹

100. Mr. ALFARO considered that the paragraph was justified on the ground that the Charter had not referred to complicity as a special crime.

101. Mr. HUDSON thought that it was necessary to refer to the terms of the Nürnberg Judgment in order to see how the misunderstanding had arisen which had resulted in the drafting of the second and third paragraphs of the commentary. After quoting the terms of article 6 of the Charter, the judgment stated that:

"In the opinion of the Tribunal, these words do not add a new and separate crime to those already listed. The words are designed to establish the responsibility of persons participating in a common plan. The Tribunal will therefore disregard the charges in Count one that the defendants conspired to commit War Crimes and Crimes against Humanity, and will consider only the common plan to prepare, initiate and wage aggressive war."¹⁰

⁹ The last two sentences read as follows: "In fact, as worded, this paragraph does not concern all cases of complicity but is limited to the participation in a common plan or conspiracy. Complicity in individual crimes is not mentioned."

¹⁰ "The Charter and Judgment of the Nürnberg Tribunal", United Nations publication, Sales No. 1949.V.7, pp. 72-73.

The Tribunal had been wrong in making this statement. It should be stated that Crime (d) was based on the Charter, but that the Tribunal had applied the Charter in a restrictive manner. The whole of this paragraph of the report should be redrafted. It would be expedient to refer it back to the general rapporteur to enable him to find a clearer justification for the principle he had formulated concerning Crime (d). In his view, the Tribunal had not acted in accordance with its own findings.

102. Mr. CORDOVA urged that the Commission's report should contain an explicit reference to the divergence which it had noted between the Charter and the judgment.

103. Mr. BRIERLY disagreed, stating that the contradiction existed, not between the Charter and what the Tribunal had done, but between the Charter and what the Tribunal had stated in the judgment.

104. Mr. SANDSTRÖM said he agreed with Mr. Alfaro, since a careful reading of article 6 showed that it bore no reference to complicity.

105. Mr. KERNO (Assistant Secretary-General) thought that the second and third paragraphs of the commentary (paragraphs 125 and 126 of the "Report") as a whole should be redrafted. He also pointed out firstly, that it was true that the Charter did not refer to complicity and secondly, that in any case the last two sentences of the second paragraph of the commentary should be deleted, since they did not exactly correspond with the facts.

106. Mr. ALFARO asked the Chairman to put the first sentence of the second paragraph of his commentary to the vote. If the Commission decided to retain it, he would ask Mr. Hudson to assist him in redrafting it.

107. The CHAIRMAN put to the vote the question of the deletion of the first sentence of the second paragraph of the commentary, namely "*Prima facie* this rule seems to go further than the Charter."

The proposed deletion was rejected by 7 votes to 2.

108. Mr. BRIERLY proposed that the redrafting of the second and third paragraphs of the commentary as a whole should be left to the Rapporteur and Mr. Hudson.

It was so agreed.

111. Mr. ALFARO, referring to the last three paragraphs¹¹ of his report, observed that his intention had been to point out what the judgment of the Tribunal had to say with regard to the Charter and the principles which it contained and to state briefly the current significance of the Nürnberg Principles. Next, he had

¹¹ Paragraph 127 of the "Report" and the following two paragraphs read:

Referring to 'the law of the Charter', the Tribunal said in its judgment:

"The Charter is not an arbitrary exercise of power on the part of the victorious nations but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law."

"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

wished to recall the decision adopted by the Commission at its previous session with regard to its programme of work—namely, that it was competent only to formulate, but not to evaluate, principles. In a word, he wished to indicate that the Commission had accomplished its task. Since the Commission had decided to include the second of these three paragraphs among the introductory paragraphs to this part of the report, he asked the Commission whether it intended to retain the reference to the statement of the Tribunal which he had reproduced in the first of these three paragraphs. The statement in question was of considerable value.

112. Mr. AMADO opposed the retention in the last paragraph of the words “the text of its formulation stands before the world”. In his view, the phrase was rather pompous.

113. Mr. HUDSON said that he himself would hesitate to make such a statement. Since the General Assembly might still modify or amend the Principles, it was wrong to state that the texts in question now stood before the world. In addition, he disagreed with the Tribunal’s statement that the Charter was the expression of international law existing at the time of its creation.

114. Mr. CÓRDOVA considered that the inclusion of the quotation from the judgment of the Nürnberg Tribunal was wrong. That judgment was in fact a judgment rendered by conquerors, and it was not for the Commission to concern itself with the justifications which the Tribunal had found for its action. The quotation should not be included. Nor should it be stated that the Commission’s formulation was final. All formulations might be modified by the General Assembly.

115. Mr. KERNO (Assistant Secretary-General) thought it was of value to have a conclusion to the report. Accordingly, the text of the second paragraph could be retained with the addition of the introductory words “As had already been stated at the beginning of this part of the report”, and of the first sentence of the last paragraph. The last sentence of the last paragraph should be remodelled to show that the text submitted was the one which had been drafted by the Commission.

116. The CHAIRMAN supported the retention of the quotations from the judgment, which he regarded as a necessary reminder of the findings of the Tribunal. One phrase in the statement that was true was that the Charter was the expression of international law existing at the time of its creation. From the point of view of general legal ethics, the Tribunal had the power to formulate a new law or a new rule. So soon as ever the Tribunal stated that such a law or rule was customary,

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. This task the Commission has accomplished. The text of its formulation stands before the world as a set of principles affirmed by the United Nations with regard to crimes against peace, war crimes and crimes against humanity, the responsibility of those persons who are guilty of such crimes and the manner in which the responsibility must be determined.”

it actually became so. He would have liked the general impression created by the report to be corrected. He did not consider that the report as drafted truly represented the findings of the Commission and thought that it minimized both the scope of the discussions and of the findings.

116 a. The Commission had now accepted its responsibility; but, as he had already stated, he could not unreservedly accept this report concerning the formulation of the Nürnberg Principles, and wished to make the following reservation:

“Mr. Scelle regretted that he was unable to accept this part of the report on the grounds which he had already stated the previous year—namely, that the report did not enunciate the general legal principles on which the provisions of the Charter and the decisions of the Tribunal were based, and also because the final form of the report appeared not to represent exactly the findings adopted by the Commission during its preliminary discussions and to minimize their scope.”

He requested the Rapporteur to include this reservation in his report.

117. Mr. ALFARO thought that Mr. Scelle’s reservation should be discussed, and proposed that the discussion take place at the following meeting. As for the quotation from the judgment of the Tribunal, he had regretfully to state that, if the Commission decided to delete it, he himself would be obliged to add a reservation to that just made by Mr. Scelle.

The meeting rose at 1.10 p.m.

78th MEETING

Thursday, 27 July 1950, at 10 a.m.

CONTENTS	Page
Commission’s draft report covering the work of its second session (<i>continued</i>)	297
Part III: Formulation of the Nürnberg Principles (<i>concluded</i>)	297
B. The Crimes (<i>concluded</i>)	297
Part VI: Progress of work on topics selected for codification	299
Chapter I: The Law of Treaties	299
Chapter III: Regime of the High Seas	302

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-