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CONTENTS

Chairman: Mr. V. OUTRATA (Czechoslovakia)

Report of the International Law Commission on the work of its second session (A/1316) (*continued*)

[Item 52]*

1. The CHAIRMAN called upon the Committee to continue the discussion of part III of the report of the International Law Commission.

2. Mr. BALLARD (Australia) thought that in view of the fact that the Sixth Committee had before it several proposals for different measures to be taken by the General Assembly with regard to the formulation of the Nürnberg principles, it would be advisable to refer to the basic document, resolution 177 (II) of the General Assembly, for precise directives. That resolution entrusted the International Law Commission with the double task of formulating the Nürnberg principles and preparing a draft code of offences against the peace and security of mankind. It had already been pointed out that the two tasks were closely connected, and the General Assembly's intention was certainly to consider the results of that work as a whole, and not each part separately. The fact that the International Law Commission had completed the first part of its task and had postponed performance of the second part was accidental and was due to the manner in which the Commission had organized its work. That fact should not lead the Sixth Committee to anticipate the study which it would have to carry out when the International Law Commission had completed its task. It appeared from paragraph 150 of the International Law Commission's report that the Commission had not completed its study of the Nürnberg principles, since it would reconsider them when deciding upon the place to be accorded to them in the draft code. The Australian delegation agreed with the International Law Commission on that matter and hoped that the Commission would obtain useful information from the debates that were being held in the Sixth Committee.

3. The International Law Commission had fulfilled its task and its interpretation of resolution 177 (II) had been correct. It had been argued that the Commission had formulated rules of law instead of principles and that it should have formulated the general princples of international law on which the Nürnberg Charter and judgment were based. The wording of resolution 177 (II) perhaps contained a latent ambiguity, and subsequent discussion showed that the word "principles" was used in a loose sense in the resolution. Since a code should contain rules of law rather than principles, it could not be said that the Commission's interpretation was wrong.

4. The best solution would be to take note of the formulation and to regard it as the initial stage of the work which had to be carried out; the Australian delegation would therefore vote for the United Kingdom draft resolution (A/C.6/L.142).

5. Mr. CHAUMONT (France) wished to reply to remarks that had been made by the representatives of the United Kingdom, of Greece and of the Soviet Union.

6. The United Kingdom representative had levelled specific criticisms at certain passages of the French representative's statement at the second meeting which the Sixth Committee had devoted to the consideration of the formulation of the Nürnberg principles (A/C.6/SR.232). Mr. Fitzmaurice had expressed doubts as to the validity of the French theory that the charter and judgment of Nürnberg had created no new international law, but had merely embodied already accepted principles, or principles already implicit in the conduct of States. He had stated (A/C.6/SR.233) that the examination of principles antecedent to Nürnberg might produce some unpleasant surprises and would in any case be purely academic.

7. With regard to the first part of that statement, it was impossible to ignore the important part played by the United Kingdom in the procedure which had resulted in the preparation of the charter and the passing of the judgment of Nürnberg. The United Kingdom had shown great anxiety during the Second World War that the Nazi rulers should be punished for the crimes of which they were guilty. The theory that the charter and judgment of Nürnberg had created no new law, but had applied existing law, was not a purely French thesis: the charter and the judgment re-stated

* Indicates the item number on the General Assembly agenda.

the general concept held during the war by all the Allied Powers, including the United Kingdom.

8. Furthermore, the criticism that the proposed examination would be purely academic was unfounded. If it was considered that a new law had been created to apply to the enemy, it might also be considered that such a law was arbitrary and merely represented the law of the conqueror. If it was considered on the contrary that existing law had been applied to the enemy, no criticism was possible, since it would be a question of applying existing rules to special circumstances. The question was not academic, therefore, but one of vital importance.

9. The procedure followed at Nürnberg was not derogatory to the principles of law which existed at the time. The offences listed by the Tribunal were based on already existing principles of international law; they were principles "recognized" by the Nürnberg Charter, as was stated in the General Assembly resolution, and not principles "laid down" by that charter.

10. The list of war crimes in article 6 (*b*) of the Charter of Nürnberg was based on the definitions of traditional international law contained in the Hague Conventions of 1907, the Treaty of Versailles of 1919 and the Geneva Conventions of 1929. Thus, the concept of war crimes as it was recognized in the Charter of Nürnberg had already existed in 1939.

11. With regard to offences against peace, many texts could be quoted to prove that a war of aggression had for a long time been regarded as an international crime. The expression "publicly arraign" used in respect of Emperor William II in article 227 of the Treaty of Versailles, implied the concept of penal action. There were also the Geneva Protocol of 1924 and the Briand-Kellogg Pact, where the following expression of penal law is found: "*Renunciation* of war as an instrument of national policy"; there was also the solemn declaration of the League of Nations of 24 September 1927, concerning wars and aggression, which stated that "all wars of aggression are, and shall always be, prohibited". There were also various Pan-American instruments which denounced wars of aggression as an international crime, and were mentioned in Mr. Ricardo Alfaro's report to the International Law Commission on the question of international criminal jurisdiction (A/CN.4/15). Thus, the concept adopted at Nürnberg had not been a new one; it was merely a new and more effective application of that concept.

12. As regards crimes against humanity, there was no denying that they were regarded by all civilized nations as common crimes. If they were committed by responsible government officials, their punishment must be effected on the international plane and could not be left to the national law of the country.

13. He went on to recall the statement of the United Kingdom representative to the effect that an individual could not be a subject of international law. The contrary theory was not just a fashionable theory, as the United Kingdom representative had alleged, it was an existing principle of law. It was inconceivable that an individual could be criminally liable under international law unless he were himself a subject of international law. The situation as regards legal persons was different: a legal person could not be considered as criminally liable; it could only be made liable indirectly, or rather its liability was only a civil or administrative one. But as regards individuals, it was impossible to deny that they were subjects of international law without denying the possibility of the international punishment of offences under international law.

14. In reply to the Greek representative, he stated in the first place that he had spoken the words criticized by Mr. Spiropoulos, not in his own personal capacity but on behalf of his government. He was surprised, in view of the traditional ties of friendship uniting Greece and France, at the immoderate language used by the Greek representative (A/C.6/SR.234). He recalled that the French Government considered a war of aggression as an international crime; the contrary statements made by Mr. Gros at the London Conference, as recalled by the Greek representative, did not alter the French Government's position. He thought that it was not the moment to give utterance to doubts concerning the concept that aggression was a crime under international law just when the First Committee was trying to demonstrate the importance of that concept in international life.

15. As regards one particular point, the Greek representative had been mistaken with regard to the aims pursued by the French delegation; that delegation was not asking that the International Law Commission should consider the principles of the charter and judgment of Nürnberg to see if they constituted principles of existing international law, because that question had already been decided in the affirmative. His delegation had simply asked that the study and formulation of the principles contained in the charter should be exhaustively pursued. The International Law Commission had considered that the principles "recognized" by the Charter of Nürnberg were the principles "created" by that charter. His delegation thought that the term "recognized" meant "as they had been applied, being already in existence".

16. The Greek representative, whose words had perhaps outrun his thoughts, had stated that there were no crimes against humanity under international law. He had gone further than the judges at Nürnberg who had not denied the international character of crimes against humanity, but had refused to take cognizance of the crimes against humanity committed by the Nazi leaders before 1939 solely because the relation between those crimes and the 1939-1945 war had not been established, and the Tribunal was competent only to take cognizance of crimes against humanity if they had been committed as a result of crimes against peace or war crimes or in conjunction with such crimes.

17. He noted, finally, that although the International Law Commission had adopted a method, it had not remained faithful to it. Many criticisms of detail had already been made. The Greek representative himself had pointed out that, as regards principle IV, the International Law Commission had departed from the text of the Charter of Nürnberg. The International Law Commission should either have repeated faithfully the principles contained in the charter, or if it thought that it could depart from them, it should have followed that method consistently and have sought out the funda-

mental principles of law underlying the charter and the judgment, as the French delegation had requested.

18. In reply to the representative of the Soviet Union who had declared himself unable to vote for the French proposal because there was a danger that it might "destroy Nürnberg", he thought there had been some mistake as to the intentions of the French delegation, which had always adhered to the view that it was necessary to give a permanent value to the precedent established at Nürnberg.

19. He thought that the International Law Commission had not provided a complete formula or one that conformed to the Nürnberg principles. He therefore asked that that Commission should complete its work in the light of the comments made in the Sixth Committee, and, if the Byelorussian draft resolution (A/C.6/L.140) were approved, in the light of comments made by the governments, because it was necessary to re-affirm the Nürnberg principles and give them a permanent value.

20. Mr. SPIROPOULOS (Greece) explained that he had spoken previously, not only as the representative of Greece, but also as a member of the International Law Commission, in defence of the text of the formulation of the Nürnberg principles prepared by that Commission, since he considered that the Rapporteur was in the best position to make such a defence. The report was a legal text; and the criticisms made of it had to be answered by legal arguments. He thought that he had adhered to arguments of that kind and he had not thought that his allusions would offend the French representative. That at least had not been his intention. He recalled the ties of friendship which had for years bound Greece and France and, on a more personal note, the five years of collaboration during which he had conceived the most friendly feelings for Mr. Chaumont. He hoped that the misunderstanding which had arisen was already over.

21. Mr. ROLING (Netherlands) pointed out that the International Law Commission would be requested to reconsider its formulation of the Nürnberg principles in the light of the observations made by the Sixth Committee, according to the draft resolution presented jointly by eleven delegations — Argentina, Denmark, Dominican Republic, Egypt, France, Netherlands, Norway, Pakistan, Peru, Sweden and Syria—which resolution was proposed to replace the draft resolution introduced by France (A/C.6/L.141/Rev.1). This joint draft resolution reads as follows:

"The General Assembly,

"Having considered part III (Formulation of the Nürnberg Principles) of the report of the International Law Commission on the work of its second session;

"Recollecting that the General Assembly, by its resolution 95 (I) of 11 December 1946, affirmed the principles of International Law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal and by its resolution 177 (II) of 21 November 1947 directed the International Law Commission to formulate those principles;

"Considering that the International Law Commission has formulated certain rules contained, according to the Commission, in the Charter and judgment of the Nürnberg Tribunal, and that many delegations have made observations in the present session on this formulation;

"Requests the International Law Commission to reconsider its formulation in the light of those observations."

22. All the authors of the draft resolution desired the International Law Commission to undertake a further review, although their reasons were different.

23. He then clarified the position of his delegation in reply to various statements which had been made. He did not go into the criticisms made by the Soviet representative because he considered that reference to the records of the proceedings—and particularly to the text of his speech which had been distributed to delegations—was sufficient to show that those criticisms were unfounded; he would have an opportunity to return to those criticisms later.

24. The United Kingdom representative had stated that the concept of the direct responsibility of the individual under international law without the interposition of the national State was "convenient and picturesque" but unscientific. He thought that many persons had been sentenced and hanged after the Second World War on the basis of that picturesque concept. Notwithstanding the fact that the Germans had acted in accordance with their national law, notwithstanding the fact that Germany had not instilled in its citizens respect for human rights in relation to the Jews, German nationals had been tried and sentenced for criminal violation of rules of international law. It was apparent from the judgment of Nürnberg that there were rules of international law which applied directly to individuals, without passing through the intermediary of national law, and that some obligations of international law transcended the obligations imposed by the national administration.

25. In his closing speech at Nürnberg, Sir Hartley Shawcross had stated that he did not minimize the significance for the future of that political and jurisprudential doctrine. The Sixth Committee, too, should not and could not minimize that question because the fact that the vanquished had been condemned on the basis of that concept signified that the concept must remain valid in the future; adherence to that position would justify what had been done a few years ago.

26. He then explained the reasons which had led his delegation to become a co-sponsor of the joint draft resolution. In the first place, the Netherlands delegation felt that the formulation of the Nürnberg principles should be as faultless as was humanly possible, but it had serious misgivings with regard to their formulation in the present form. In a field of such essential importance, hasty action should not be taken. What was the position? In 1946 the General Assembly had affirmed the principles of international law as recognized in the charter and judgment of Nürnberg, and had directed the International Law Commission to formulate those principles. While he recognized that in general the General Assembly did not commit itself by "taking note", in this case he thought that if the Sixth Committee took note of that formulation, it would stand as the formulation approved by the General Assembly.

Therefore that formulation should not be recognized if there were any misgivings about it.

27. Some members of the Sixth Committee had suggested that note should be taken of the formulation of the Nürnberg principles, and that the criticisms expressed in that connexion should relate only to their inclusion in the draft code of offences against the peace and security of mankind. He again stressed that if the Sixth Committee took note of the formulation of the principles in their present form, its action would signify approval, and that formulation would not only enjoy the great authority of the International Law Commission but also that of the General Assembly.

28. It should not be said that the fact that that formulation was imperfect was unimportant on the pretext that the imperfections would be remedied in the draft code of offences against the peace and security of mankind. The fate of that draft code could not be predicted. It might take years for the United Nations to draft and adopt that code, and perhaps additional years might be required before it was signed and ratified by States. In the meantime, the Nürnberg judgment would constitute the only existing precedent in that field, even though some questioned its value as a precedent. The formulation of the Nürnberg principles was therefore extremely important, particularly if the elaboration of the draft code did not materialize, and in any case as long as it did not materialize. Criticisms should therefore be submitted immediately.

29. As he had already stated, the Netherlands delegation considered that some principles were ambiguous and that others were wrong. Mistakes had been made. He did not wish to stress the fact that the International Law Commission had not established any difference between the principles applying to major war criminals and those applying to minor war criminals. He merely wished to make some comments on principles VI and VII in so far as they referred to crimes against peace.

30. Principle VI reproduced the enumeration of crimes against peace contained in the Charter of Nürnberg. That part of the charter which had been severely criticized had not been applied by the Tribunal. Principle VI classified as a crime against peace not only planning, preparation, initiation or waging of a war of aggression but also participation in a conspiracy for the accomplishment of any of the afore-mentioned acts. It was therefore a crime to participate not only in a conspiracy to wage a war of aggression, but also in a conspiracy for the planning or preparation of a war of aggression. The Nürnberg judgment stated that "the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action." It also stated that "The Tribunal must examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan (A/CN.4/5, p. 52)."

31. Thus the Tribunal had not considered it a criminal act to participate in a conspiracy to plan or prepare a war, but only to participate in a concerted plan to wage war, in a concerted plan existing shortly before the war broke out. Consequently the formulation of principle VI of the International Law Commission was not in accordance with the concept of conspiracy as defined in the judgment. He considered that the International Law Commission had been mistaken on that point.

32. An even more serious mistake had been committed in the formulation of principle VII, which recognized that the ordinary rules of complicity were valid with regard to crimes against peace. He did not wish to give a detailed analysis of the records of the discussions in the International Law Commission, but he noted that that principle had been adopted somewhat hastily and that the arguments used to support that formulation were often rather strange (A/C.4/SR.49). That principle was not recognized in the charter or in the judgment of Nürnberg.

33. The judgment took care to limit the scope of crimes against peace. Thus Sauckel and Speer had been acquitted of that count of the indictment. Instead of following that restrictive tendency, the International Law Commission had extended that concept by adding complicity. According to the formulation of principle VII as it stood, not only industrialists, but all workers in munitions factories, not only the chief of staff but also all soldiers in the field from generals to privates, would be considered as criminals. That was a flagrant violation of the rules laid down in the charter and applied by the Tribunal. The charter and the judgment of the Nürnberg Tribunal had not followed the heated suggestions made during the war for the mass punishment of multitudes of people. It had condemned only a small group of political leaders. The Sixth Committee must adhere to that concept.

34. He again stressed the importance of the question because he considered that the Nürnberg principles, as now formulated, might in the future pave the way for unlimited vengeance and provide a legal basis for mass slaughter. Moreover, the fear of relentless punishment of all those who had had any share in the hostilities would make war more cruel and capitulation more difficult. Thus the decision taken by the International Law Commission might produce disastrous results. He urged the members of the Sixth Committee not to approve the formulation of principles which were wrong. He asked those who had already expressed their opinion to reconsider it and to give the International Law Commission an opportunity to revise the formulation of the Nürnberg principles in the light of what had been said in the Sixth Committee. Far from presenting any drawbacks, that procedure was full of advantages.

35. In conclusion, he apologozed for having stated his criticisms so frankly, but they were based on his personal experience during the trial of the major war criminals in which he had participated, and which had revealed the consequences of hastily improvised provisions.

36. Mr. LOBO (Pakistan) said that the Sixth Committee now had before it a number of proposals and amendments; the question was what solution it should recommend to the Assembly. Should the principles formulated in part III of the International Law Commission's report be referred back to the Commission, so that they might then be submitted to the governments of the Member States of the United Nations for their observations, or should the General Assembly confine itself to taking note of them; or, again, should it, in

noting them, ask the International Law Commission to continue its study in order to give a lasting value to those principles "and especially to the notion of crimes against humanity as distinct from the notion of crimes against peace and the notion of war crimes"; or, lastly, should the Assembly ask the International Law Commission, as the Netherlands representative had urged, to reconsider its formulation in the light of the observations made in the course of the current discussions?

37. The delegation of Pakistan considered the last solution the best and the most conducive to the codification and progressive development of international law.

38. The Nürnberg principles, involving as they did the grave problems of war and peace, were of great importance and deep significance to international law. They proclaimed that those who disturbed the peace by planning, preparing, initiating or waging a war of aggression or a war in violation of international treaties, and those who violated the laws on customs of war or committed inhuman acts against civilian populations thereby rendered themselves guilty of international crimes and liable to judgment and punishment. Any measures, therefore, which had the effect of strengthening the notion of crimes against peace, war crimes and crimes against humanity, as embodied in the Nürnberg principles, helped to consolidate international peace and security, which were the essential purposes of the United Nations Charter.

39. Pakistan, convinced that the most solid guarantee of the independence, prosperity and progress of all the nations of the world was peace, considered it essential to maintain international peace by outlawing war and inaugurating the reign of law in international relations. The scientific and rigorous formulation of the principles of international law which could be found in the provisions of the charter and judgment of Nürnberg would do much to promote that objective. On behalf of his country, he would therefore support the draft resolution submitted jointly by eleven delegations (A/C.6/L.146) requesting the International Law Commission to reconsider its formulation of the Nürnberg principles in the light of the observations made in the Sixth Committee.

40. In its resolution 177 (II) of 21 November 1947, the General Assembly had requested the International Law Commission not only to formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, but also to prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the said principles. As Mr. Spiropoulos had quite rightly said in his report (A/CN.4/25, p. 18), that could not be done mechanically, and the incorporation of the Nürnberg principles in the draft code by the International Law Commission entailed the "appreciation" of them. He had added that "if the International Law Commission is convinced that one or more of the Nürnberg principles, for whatever reasons, should not be incorporated in the draft code, or, at least, not without some modifications, the Commission should not hesitate to act accordingly."

41. One possible criterion for deciding on the inclusion of a particular principle in the code or on its exclusion would be the extent to which international law prohibited or authorized the act it was proposed to condemn. Reprisals, which Mr. Spiropoulos had mentioned in his report (pp. 52-53), were a case in point. As long as the right of reprisals existed in international relations, an act carried out in the exercise of that right could not be considered as involving international responsibility; that confirmed the fact that in formulating the rules of the draft code, the International Law Commission must, without fail, determine the extent to which they were compatible with the principles of international law.

42. It might therefore be impossible to incorporate all the Nürnberg principles formulated in the International Law Commission's report in the draft code, since their present formulation might be rejected or partly amended before their incorporation was deemed possible. In that case, there would be two formulations of the Nürnberg principles, differing not only as regards their content but also as regards their value under international law. The resultant confusion would do serious, if not fatal, harm to the work of codifying international law entrusted to the General Assembly by virtue of the United Nations Charter.

43. Even if it was decided only to take note of part III of the International Law Commission's report, that contingency might arise, since the General Assembly would thereby be giving its approval to the Nürnberg principles as formulated in the report.

44. The principles formulated in the report did not include all those proclaimed in the charter and judgment of the Nürnberg Tribunal. They did not even express the essence of those principles, since the maxim *nullum crimen sine lege, nulla poena sine lege,* which the Tribunal had not applied in the Nürnberg trial, had been implicitly recognized by the Commission. Consequently, neither the principle of *ex post facto* punishment recognized in the charter and judgment of the Nürnberg Tribunal nor the principle of the criminal responsibility of groups and organizations defined in articles 9, 10 and 11 of the Nürnberg Charter appeared in the formulation.

45. As indicated by the remarks of Mr. Yepes, member of the Commission, at its 54th meeting (A/CN.4/SR.54), the International Law Commission had justified its decision to omit from its formulation the significant principles of *ex post facto* punishment and the criminal responsibility of groups, which had been accepted at Nürnberg, by reference to the principles of criminal law.

46. In addition, the principle stated in article 7 of the Charter of Nürnberg, which dealt with the responsibility of heads of States and responsible officials, had been considerably watered down in the formulation contained in the report. The principle that the official position of defendants would not be considered as mitigating punishment had been omitted by the International Law Commission, which, as the discussion at its 46th meeting—and particularly Mr. Amado's speech (A/CN.4/SR.46)—had shown, had decided that on that point the Charter of Nürnberg had rejected a fundamental principle of law.

47. Those examples showed that the International Law Commission had supported certain of the Nürnberg principles and excluded others, and in so doing had been obliged to accept the rules of national criminal law, which, in so far as they constituted "general principles of law" within the meaning of Article 38 of the Statute of the International Court of Justice, applied automatically to the prosecution of crimes under international law. As the General Assembly had affirmed the Nürnberg principles by its resolution 95 (I), the task assigned to the International Law Commission under the terms of paragraph (*a*) of resolution 177 (II) was not to state an opinion on these principles as principles of international law, but purely and simply to formulate them.

48. Thus the Commission had been faced with the dilemma of either confining itself to the mere formulation of the Nürnberg principles—in which case it would have been obliged to lay down a number of principles the juridical value of which might have been disputed—or of formulating only principles the juridical value of which it believed to be firmly established —in which case it might have appeared to be criticizing the General Assembly's first resolution and challenging the Assembly's competence to state whether the Nürnberg principles constituted principles of international law. The members of the International Law Commission, as was abundantly shown by the summary records of the Commission's 44th to 49th meetings, had been sharply divided on that point, and in fact the differences had never been bridged.

49. That being the case, what was the juridical standing of the formulation of the Nürnberg principles adopted by the International Law Commission? What must be decided was whether the Tribunal had been entitled to affirm the validity of the charter not only as the *lex in casu*—i.e., as the law applicable to the case which it had been set up to judge—but also as the authoritative expression of general international law, thereby offering its interpretation of the Charter of Nürnberg, and its application of that charter, as the interpretation and application, not simply of a *lex in casu* but also of a principle of general international law. But while the Tribunal had definitely stated that war crimes and crimes against the peace were already crimes under existing international law, it had made no such declaration with regard to crimes against humanity. Moreover, the Tribunal had expressly declared that its charter was "the expression of international law existing at the time of its creation" (A/CN.4/22, p. 35).

50. While he was willing to accept the Tribunal's statement that violations of the laws and customs of war constituted crimes under international law at the time of the creation of the Tribunal, he doubted whether the same could be said in 1939 of crimes against humanity. Though it could be admitted that crimes against humanity perpetrated against the populations of other countries constituted violations of existing international law, the question whether crimes against humanity committed against nationals came exclusively under national jurisdiction or international law was one over which the claims of national and international jurisdiction conflicted.

51. As the memorandum submitted by the Secretary-General (A/CN.4/5) showed, the Charter of the Tribunal brought within the scope of international law crimes committed against nationals by linking them with crimes against peace and war crimes, i.e., crimes which were within its competence. In its judgment, the Tribunal had stated, moreover, that, although it could not make a general statement that the acts committed before 1939 constituted crimes against humanity within the meaning of the Charter of Nürnberg, acts had none the less been committed on a vast scale, since the outbreak of hostilities, that were both war crimes and crimes against humanity, and that other acts, likewise committed after the outbreak of the war and referred to in the indictment, were not, properly speaking, war crimes. As they had been perpetrated as a result of or in connection with a war of aggression, however, they could be considered as crimes against humanity. The memorandum added, however, that that in no way signified that an inhuman act perpetrated before the outbreak of hostilities could not be considered as a crime against humanity.

52. His delegation shared the doubts of the International Law Commission on the subject of the Tribunal's statement to the effect that the Charter of Nürnberg was the expression of international law at the time of the creation of the Tribunal. The judgment of the Tribunal had considerably extended the scope of the Charter of Nürnberg and its findings, and there was a consequent doubt as to the juridical nature of the formulation adopted.

53. Contrary to the opinion expressed by certain speakers, he thought that the affirmation of the principles of the Charter of Nürnberg and of the judgment of the Nürnberg Tribunal by the General Assembly could not result in the incorporation of those principles in international law. Moreover, the debates in the Sixth Committee, as well as those in the plenary meetings of the General Assembly at the second part of its first session of 1946, showed clearly that neither the Committee nor the Assembly had decided what principles of the charter and judgment of the Nürnberg Tribunal should be formulated. As, in addition, the juridical nature of some of the Nürnberg principles did not appear to be clearly established, it might prove advisable for the International Law Commission to exclude those the validity of which was questionable in international law. It would therefore be expedient to invite the International Law Commission to resume consideration of the formulation of those principles in the light of the observations made by the various delegations in the Sixth Committee.

54. In conclusion, Mr. Lobo associated himself with the tribute paid by the other members of the Sixth Committee to the excellent work accomplished by the International Law Commission.

55. Mr. ROBINSON (Israel) recalled that in 1945 two milestones had been reached in the development of international law, i.e., the adoption of the Charter of San Francisco and the signature of the London Agreement. The principles contained in the Nürnberg judgment and reaffirmed by the General Assembly on 11 December 1946 (resolution 95 (I)) had become a constituent part not only of universal international law, but also of the law of the United Nations. However, unlike the San Francisco Charter, the jurisprudence of

which was in a process of permanent evolution, the development of the London Agreement had been halted on 1 October 1946, the date of the judgment of the Nürnberg Tribunal, according to the disturbingly narrow interpretation of the International Law Commission, which disregarded later jurisprudence.

56. The timidity of the International Law Commission was most clearly demonstrated by its refusal to recognize the independent character of crimes against humanity and its insistence that those crimes could only be committed as a result of, or in connection with, crimes against peace and war crimes. The exclusive concentration on Nürnberg as a precedent was all the more surprising as it had been pointed out, at the first session of the International Law Commission, that the Commission might take into account other judgments than those passed by the International Military Tribunal of Nürnberg (A/CN.4/SR.17, p. 13, A/CN.4/SR.27, p. 2). Unless the Commission decided to take up the jurisprudence of the military tribunals of the occupying Powers in its work on the draft code of offences against the peace and security of mankind, the science of international law would have to step in where the International Law Commission had stopped.

57. He shared the views of the French representative with regard to the work of the International Law Commission within the limited area of its research. The International Law Commission had been instructed by General Assembly resolutions 95 (I) and 177 (II) to formulate the principles enacted by the London Charter and applied in the judgment of Nürnberg and recognized in both the charter and the judgment. It seemed obvious that the recognition of principles logically implied that they had existed previously.

58. The General Assembly had adopted the view expressed by the International Military Tribunal that its charter was the expression of international law existing at the time of its creation, and he regretted that the International Law Commission had not gone more deeply into the question. The attitude adopted by the majority of the Commission at its first and second sessions was shown by paragraphs 26 and 27 of the report of the first session (A/925), and paragraph 96 of the report of the second session (A/1316), and, in particular, by footnote 3 of the latter report.

59. Any evaluation of the work of the International Law Commission must necessarily depend on the interpretation given to the words "principles" and "formulation". The Commission had abstracted the principles of Nürnberg from the specific provisions of the Charter of the Tribunal dealing with the judgment of the "major war criminals" of the European Axis Powers and Mr. Robinson considered that, subject to some minor imperfections, the concept of "principles" adopted by the International Law Commission was correct.

60. The International Military Tribunal had more than once given its charter a restrictive interpretation, for instance in connexion with the conspiracy count and the criminality of organizations; the International Law Commission had merely accentuated that tendency. Its formulation of the Nürnberg principles reasonably restricted the meaning of the expression "waging a war of aggression" by applying it only to high-ranking military personnel or high State officials (paragraph 117). There did not, however, appear to be any justification for asserting that the fact of having acted under orders might lessen the responsibility of the defendant, instead of considering that factor as having a bearing only on the punishment, or in omitting any reference in principle IV to the authority of the Court to mitigate the punishment.

61. Similarly, there was no justification for omitting the phrase "before or during a war" in principle VI (*c*), particularly in view of the comment in paragraph 123. It was unfortunate that principle VI (*c*) did not emphasize the fact that certain acts might be crimes against humanity even if they were committed against fellow-nationals, although that idea was stressed in the comment in paragraph 124 of the report. That inconsistency between the actual text and the accompanying comments would probably be removed if the United Kingdom draft resolution were adopted because, by implication, it attached the same value to the principles and to the comments thereon. In that respect, the United Kingdom resolution was more practical than the suggestion of the Brazilian representative that the principles should be incorporated in a resolution which would have the effect of a declaration. The International Law Commission, which had condensed principle V, had nevertheless found it necessary to refer back, in paragraph 109, to the relevant article of the charter.

62. With regard to the right to a fair trial, which his delegation considered to be the most important of all, Mr. Robinson remarked on the absence of a definition of a "fair trial" in the International Law Commission's report, whereas the expression "on the facts and the law" had a definite meaning. The word "law" meant not only substantive law but procedural law, including the principle of equality of the parties in the trial. The interpretation given to the principle by the International Military Tribunal was not without interest; he quoted examples from the Nürnberg trial which clearly demonstrated that the Tribunal had given the defendants a fair trial in the widest sense of the term.

63. With regard to the task of formulation properly so-called, carried out by the International Law Commission, he shared the view of the Netherlands representative in respect of principle II and preferred his formulation to that of the Commission.

64. The International Law Commission had not confined itself strictly to the task of formulation: paragraph 99 mentioned a "general rule underlying principle I . . . that international law may impose duties on individuals directly without any interposition of internal law". Secondly, paragraph 102 implied the supremacy of international law over national law. Mr. Robinson congratulated the International Law Commission on having departed from the actual terms of the charter and on having attacked the fundamental problems of international law. He felt that in so doing the Commission had not acted arbitrarily.

65. He was sorry to be obliged to criticize the order in which the principles had been presented. Logically the principles were divided—as in any penal code—into two parts: first, general principles, that is principles I, II, III and IV (establishing conditions of responsibility of two categories of persons), and prin-

ciple VII (concerned with complicity); secondly, specific principles, that is the catalogue of crimes with which principle VI was concerned, and principle V which dealt with guarantees for defendants. In the light of that classification, he felt that in particular the principle dealing with complicity was not in the proper place and that changes would have to be made so that the principles might be listed in logical order according to their classification.

66. Although the delegation of Israel was fully aware of the implications of paragraph 150 of the report, it did not believe that a broader and more concrete formulation of the Nüruberg principles should be sacrificed to a future code of offences against the peace and security of mankind, the drafting of which would require a number of years.

67. He did not share the scepticism of the representative of the Netherlands with respect to the criminal nature of a war of aggression. He was convinced that the Nürnberg principles, including the concept of crimes against peace, embodied existing law rather than created new law. The representative of the Netherlands had adduced three basic arguments in support of his thesis: first, that there was no definition of aggression; secondly, that there was no legal basis for considering aggressive war as illegal or criminal; lastly, that the Nürnberg Tribunal had been subconsciously aware of those facts and that therefore none of the defendants had been sentenced to death as punishment for a crime against peace only.

68. Mr. Robinson conceded that there was no definition of aggression; but it was none the less true that the Security Council was striving to take measures to prevent and repress wars of aggression. Moreover, the judges at Nürnberg had had no doubts with respect to the aggressive nature of the hitlerian wars. With regard to the second argument, the war of 1939-1945 had upset the legal niceties of the traditional concept of the sovereign's *jus belli ac pacis* and the universal condemnation of aggression had been strikingly expressed in the United Nations Charter.

69. With regard to the Netherlands representative's third argument, Mr. Robinson pointed out that the only one of the defendants who had been prosecuted solely for having committed the crime of aggression and who, although considered guilty, had not been sentenced to death, was Rudolf Hess, and it was almost certain that in his case the judges' decision had not been based on their beliefs concerning the criminal nature of aggressive war, but on the mental state of the defendant.

70. He proceeded to discuss the various draft resolutions before the Committee. The delegation of Israel preferred the United Kingdom draft resolution (A/C.6/L.142) as it stood, to the joint draft resolution (A/C.6/L.146), which referred the question to the International Law Commission.

71. The reasons in support of that choice were the following: first, it seemed that the time had come to take a decision; the question of the formulation of the Nürnberg principles had been under study virtually since 1946 and had already gone through eleven stages.

72. Secondly, he could not accept the argument that if the International Law Commission re-examined the question it might find it possible to achieve a compromise between the various doctrines put forward by the delegations. Whether the International Law Commission remained faithful to the doctrine that it had followed so far, or adopted one diametrically opposed —which was hardly likely—it would never be able to find a solution which would satisfy everyone. Moreover, there was no guarantee, as had been maintained, that by re-examining the question of the formulation of the Nürnberg principles, the Commission would achieve a more satisfactory formulation; it was often best "to let well enough alone".

73. All things considered, it would be wiser to take note of the principles as they stood at present rather than to risk a repetition of the same debate the following year.

74. Lastly, Mr. Robinson pointed out that the Sixth Committee had recently adopted a draft resolution designed to avoid increasing needlessly the work of the International Law Commission. It would seem illogical and inconsistent, therefore, to burden that Commission with a special task which would not only go contrary to that resolution, but would hinder its work in connexion with the codification and development of international law.

75. Mr. KERNO (Assistant Secretary-General in charge of the Legal Department) stated, in order to give the members of the Sixth Committee an idea of the International Law Commission's programme of work, that the First Committee had just adopted a draft resolution submitted by Bolivia and Syria (A/C.1/615) referring to the Commission a proposal of the Soviet Union in connexion with the definition of aggression (A/C.1/608).

76. Mr. CHAUMONT (France) pointed out that the Statute of the International Law Commission could not be taken into consideration in assigning work to that body; on the contrary, the Statute should be adapted to the programme of work. Thus, the statement just made by the Assistant Secretary-General could not be used to support the argument that to refer certain work to the International Law Commission might be contrary to some of the provisions of its Statute.

77. Mr. LACHS (Poland) said that the debates which had taken place in the Sixth Committee had raised a great number of questions including the fundamental problems of war and peace, sovereignty, the relationship between international and municipal law, the responsibility of the individual under international law and the definition of international crimes and criminal responsibility under international law. He did not consider it necessary to undertake a detailed analysis of each of those problems. There were factors of time and place which should not be disregarded, and the representative of Poland was convinced that the members of the Sixth Committee could hardly do more than consider those various questions very generally. Accordingly, he wondered whether it was really advisable to devote so much time to discussions which were more or less theoretical. He considered it appropriate to adopt a more practical attitude in relation to the

question now under study and would explain his point of view in that spirit.

78. In considering the report of the International Law Commission, the Sixth Committee should have restricted itself to a discussion of procedure. The main thing was to determine what steps should be taken in connexion with that report. Yet various representatives who had spoken had made diverse comments sometimes going so far as to raise doubts as to the existence of the Nürnberg principles.

79. One of the problems raised during the discussion had been the problem of the individual being subject to international law. In support of his thesis, the representative of Brazil had even referred to the advisory opinion of the Permanent Court of International Justice regarding the Danzig railway officials. Without going into that question at length, Mr. Lachs cited, in reply to the representative of Brazil, a passage from that opinion which specifically stated that an international agreement imposed no direct rights or duties on individuals; while in the particular case the judges relied on what they thought were the wishes of the parties themselves. There had also been lengthy discussions of the problem of monism and dualism and divergent views had been presented in that connexion. But no matter how strong the temptation to enter into a long discussion of the substance of the question, discussion should be limited to the problem as it now stood before the Sixth Committee, namely, the adoption of a position on the report of the International Law Commission.

80. Nevertheless there was one aspect of the question to which he wished to refer, because of its supreme importance in the eyes of his delegation. Some representatives had expressed doubts regarding the validity and legality of the principles of the charter and the judgment of Nürnberg. If some representatives were not yet convinced on that point, the question was not how the Nürnberg principles should be formulated but rather whether it was really advisable to formulate those principles. Those two problems were completely separate and must not be confused.

81. Three fundamental opinions on the validity of the Nürnberg principles had been expressed in the Committee: certain representatives doubted the juridical validity of the principles at the time of their application and at the present time; other representatives recognized the juridical validity of the principles at the present time; finally, a third group considered that it would be inadvisable to question their validity when so many people had already been sentenced in application of those principles. The latter point of view could be dismissed as irrelevant; the consideration of the first and second points of view was tantamount to going back to the origins of the problem which had confronted mankind in recent years.

82. One of the champions of the first point of view, the Netherlands representative, had stated at the 232nd meeting that the concept of aggression as a crime under international law was a "legal concept borrowed from a future phase of international relations". He had even gone as far as to say that "in future governments would tend to call the war waged by their enemy aggression". The examples given by the Netherlands representative in support of that thesis proved that he had failed to take into consideration the historical development of international law. International law was, however, a reality based on historical evolution and on the economic and political development of relations between nations, and the concept of aggression could not be analysed without a prior study of that evolution.

83. The waging of a war of aggression had indeed constituted a crime at the time when Germany had provoked the Second World War. The authors of the Charter of Nürnberg had been convinced of that fact, since they had based their conclusions not only on the Pact of Paris, but on many other documents in which it was clearly stated that a war of aggression constituted a crime under international law. The judgment itself was also explicit in that connexion, for it specified that the principles applied by the Tribunal constituted the expression of the international law in force at the time of their application. Thus, the principle of a war of aggression as a crime under international law had been recognized by sixty-three States, and is a universally recognized principle of international law.

84. Although the Netherlands representative had spoken of a concept "borrowed from a future phase of international relations", he had borrowed his own examples from the past. The case of Napoleon had nothing to do with a modern definition of the crime of agression. The concept of aggression had been re-affirmed at Nürnberg, and the question was not altered by the fact that a distinction between just and unjust wars had been introduced. That distinction could give rise to no confusion unless a deliberate attempt was made to create such confusion. The struggle for liberation from foreign domination could never be defined as aggression. He stressed the danger of assertions such as those made by the Netherlands representative, not only from the juridical point of view, but also from the moral and educational points of view, since there were still groups in the world which continued to foster bellicose intentions. It was therefore the wrong moment to question the validity of the Nürnberg principles, and especially the criminal character of a war of aggression under international law. He was convinced that the Nürnberg trial represented a landmark in the development of international law and that the Nürnberg principles certainly formed part of positive international law, as was confirmed by resolution 95 (I) of the General Assembly.

85. The question of the advisability of formulating the Nürnberg principles having thus been decided, the next question was how those principles should be formulated. Although he would have liked to follow the example of certain representatives and to analyse one by one all the principles as formulated by the International Law Commission, such an analysis could hardly be carried out in the Sixth Committee, for the reasons he had already stated. The Belgian representative's statement served as an illustration of that, since that representative had considered certain aspects of the question in detail, but had dealt with other aspects extremely vaguely.

86. Mr. Lachs, in his turn, might have reservations to make concerning principles I and II, and he would be inclined to support the comments made by the USSR

representative on the subject; in particular, he could comment at length on principle IV, because he was far from being satisfied with the formula on moral choice, as it omitted any mention of the self-imposed duty of self-sacrifice which is necessary when the choice is between the life of one individual and the life of hundreds or thousands of human beings. He could embark on a detailed analysis of all the principles, but for practical reasons he preferred to adhere strictly to procedure.

87. Certain representatives had suggested that the Sixth Committee should take note of the report of the International Law Commission. He was not of that opinion, since while the International Law Commission had done very good work, it was none the less true that the question deserved more thorough study. That did not mean that he supported the proposal to refer the report back to the International Law Commission so that it might continue its work in the light of the comments made by the Sixth Committee. The discussions held in the Sixth Committee had been by their very nature superficial, as was only to be expected in view of the nature of the problem under consideration, and the comments made during those discussions would doubtless be of small assistance to the International Law Commission.

88. A more logical attitude should consequently be taken up, and he did not see why they should not adopt the draft resolution submitted by the Byelorussian Soviet Socialist Republic (A/C.6/L.140), to the effect that governments should be consulted on the question of the formulation of the Nürnberg principles. The representative of Uruguay had objected that that draft resolution was based on an interpretation, which he held to be incorrect, of certain articles of the statute of the Commission. Mr. Lachs did not consider that argument valid. Certain representatives, among them the Belgian representative, had stated that such a method would be a waste of time, but on the other hand it should be remembered that the representatives of Argentina and of the Netherlands had pointed out that great care should be exercised; in that connexion, he had no doubt that as between care and speed, it would be wise to choose care.

89. It had also been pointed out that most governments would fail to reply. He was sure that that was not the case, and that anyhow, if the governments failed to show an interest in the formulation of the Nürnberg principles, it would be necessary to question the advisability of attempting to formulate those principles. His delegation thought that if governments were consulted, it would be possible to obtain opinions which would form an excellent basis for the future work of the Commission and many governments which had been unable to express their opinions in the Sixth Committee would be enabled to put forward their points of view. Those were his reasons for supporting the Byelorussian draft resolution.

90. In conclusion, he emphasized the importance of the Nürnberg trial, of which no one could fail to be aware, and stressed the fact that the validity of the principles contained in the charter and judgment could not be called in doubt, irrespective of their formulation. The Nürnberg trials had not been a manifestation of popular vengeance, but an act of justice which constituted a lesson of the past and a warning for the future.

The meeting rose at 5.50 p.m.

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