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CONTENTS

	Page
Report of the International Law Commission on the work of its second session (A/1316) (<i>continued</i>)	159

Chairman: Mr. V. OUTRATA (Czechoslovakia).

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

[Item 52]*

1. Mr. TARAZI (Syria) said the establishment of the Nürnberg Tribunal had marked an advance of crucial importance in the history of mankind. In a short account of the emergence of penal proceedings for crimes against peace and crimes against humanity, he noted that not until the end of the Second World War had it been possible to establish an international tribunal for the purpose of punishing the major war criminals.

2. The work achieved by the International Law Commission, and the concise and comprehensive terms in which Mr. Spiropoulos had drafted his report (A/CN.4/22) were commendable. Still, some of the principles contained in the charter and judgment of the Tribunal had been omitted both by the Commission and by its Rapporteur. The delegation of Syria regarded those principles as of great importance, and felt it would have been a step forward in international criminal law if they had been formulated.

3. For example, the International Law Commission had unfortunately not pointed out that the Nürnberg Tribunal had been instructed to try only war criminals whose offences had no particular geographical localization, the Moscow Declaration of 30 November 1943 having made it quite clear that criminals whose offences had been committed in a particular country would be tried by the tribunals of that country. That distinction should have been made, in view of its importance in the future whenever jurisdiction was to be apportioned between national and international tribunals.

4. Nor had the International Law Commission mentioned the principle of group responsibility. Article 9 of the Charter of the Nürnberg Tribunal provided that the Tribunal might declare a group or organization a criminal organization; and article 10 specified the consequences involved in such a declaration. Those consequences might have important effects, since where a

group was declared criminal, its members might be brought to trial.

5. He quoted from a passage in the Nürnberg judgment in which the Tribunal had declared that the sole fact of membership by a person in an organization declared to be criminal was not in itself sufficient evidence to deem that person criminally liable; he must have had knowledge of the criminal purposes or acts of the organization. That definition might with advantage have been incorporated in the International Law Commission's report.

6. Thirdly, the Commission should have mentioned in its report the Tribunal's interpretation of the rule *nullum crimen sine lege, nulla poena sine lege*, and also article 11 of the charter, which laid down that any person convicted by the international Tribunal might also be charged before a national tribunal. It would have been extremely useful for any future international judicial organization if that principle had been thoroughly examined.

7. The Nürnberg principles were of great importance, both as doctrine and as practical guidance. They should therefore be formulated without omissions, and drafted with great care, since in such matters form and substance became almost coterminous.

8. For all those reasons, he reserved his position with regard to the various draft resolutions, with the exception of that submitted by the Byelorussian SSR (A/C.6/L.140), which his delegation considered acceptable. The General Assembly might ask governments, through the Secretary-General, for their comments on the formulation of the Nürnberg principles.

9. Proceeding to deal with the manner in which the International Law Commission had discharged its responsibilities, he said the task of the Commission had been to formulate the principles contained in the charter and judgment of Nürnberg to extract them, so to speak. Its business had been solely to give judgments of facts, not of value. The General Assembly had directed it to assemble the materials to be used later in the building of a juridical edifice.

10. Moreover, the Nürnberg principles could hardly be reconsidered. The Tribunal had given its judgment

* Indicates the item number on the General Assembly agenda.

and thereby proclaimed principles which had the force of law. The development of international penal law would be promoted not by attempting to pass judgment on those principles, but by endeavouring to clarify and emphasize them.

11. Lastly, it ought to be remembered that the Tribunal had been set up to punish the crimes committed in the course of the Second World War. Crimes committed in peace-time had only been considered in so far as they had been calculated to prepare for aggressive war. The International Law Commission could therefore not be reproached for having limited its study to the charter and judgment of the Nürnberg Tribunal.

12. Mr. ABDON (Iran) said precise penalties for war criminals were essential, and hence his delegation had been happy to note that the International Law Commission had successfully accomplished its task under General Assembly resolution 177 (II).

13. He did not agree with the French representative that the International Law Commission ought to have decided to what extent the principles contained in the charter and judgment of Nürnberg were principles of international law. The General Assembly had affirmed and then re-affirmed the Nürnberg principles by its resolutions 95 (I) and 177 (II); and the task of the International Law Commission was therefore not to express opinions on those principles as principles of international law, but simply to formulate them.

14. In any case, it would hardly have been profitable for the International Law Commission, any more than for the General Assembly, to enquire whether the principles contained in the charter and judgment of Nürnberg were part of the law as it existed before 1939 or whether, rather, the Charter of Nürnberg had created new law, for in that respect opinions were sharply divided. The representative of Greece had explained what would have happened if the majority of the members of the International Law Commission had declared that the Nürnberg principles did not exist as law before the Charter of Nürnberg was drafted. Moreover, most of those persons who had been convicted by the Tribunal were still serving their sentences, and the disastrous results of any such decision by the International Law Commission might easily be imagined.

15. To say, however, that it was not the concern of the International Law Commission to pass judgment on the principles contained in the Nürnberg judgment did not mean that in formulating those principles the Commission was obliged to repeat the terms of the charter. The International Law Commission had been quite right to declare that it was entitled to make certain modifications in the text of the charter in the light of the great general principles of international penal law. For example, his delegation agreed with the drafting of principle IV, which certain delegations had said did not conform with the wording of article 8 of the charter, on which it was based. The passage of the judgment on which principle IV was based appeared to indicate that the Tribunal had not wished to go any further than the principle of penal law according to which the fact that a person acted pursuant to order of a superior did not free him from responsibility if he had freedom of choice. Article 8 of the charter left open a loophole, and the International Law Commission, in

formulating principle IV, had been quite right to stop up that loophole in conformity with the generally acknowledged principles of penal law.

16. He did not agree with the French representative's view that the International Law Commission ought to have extracted from the charter and judgment a general definition of crimes against humanity. There were no crimes against humanity generally under international law; crimes against humanity existed only under the Charter of Nürnberg, since under article 6 of that charter the acts enumerated therein constituted international crimes only in so far as they were committed in connexion with crimes against the peace, and war crimes. If the French representative's view were accepted, it would have to be concluded that all crimes against humanity were to be considered as crimes under international law.

17. He wished to make one observation regarding paragraph 123 of the International Law Commission's report. The Commission had omitted the phrase "before or during the war" contained in sub-paragraph (c) of article 6 of the charter because it referred to a particular war, the war of 1939. It would have been preferable in formulating the Nürnberg principles to make a general reference to all wars, by replacing the words "the war" by "a war". The total omission of those words might lead to confusion in connexion with the definition of crimes against humanity.

18. He supported the draft resolution submitted by the United Kingdom (A/C.6/L.142).

19. Furthermore, he stated that he was prepared to withdraw his own amendment (A/C.6/L.143) in favour of the Cuban text (A/C.6/L.144), which was identical in substance with his own. Nevertheless, his delegation considered that the Nürnberg principles should not necessarily be adopted *en bloc* in the draft code of offences against the peace and security of mankind. He believed, for the reasons explained by the Netherlands representative, that for the purpose of their inclusion in the code, the International Law Commission would be entitled to suggest modifications in the Nürnberg principles.

20. He regretted that he was unable, for the reasons stated, to support the draft resolution submitted by France (A/C.6/L.141/Rev.1).

21. Referring to the draft resolution submitted by the Byelorussian SSR (A/C.6/L.140), he said his delegation did not consider that the procedure laid down in articles 16 and 21 of the statute of the International Law Commission should apply to a particular task assigned to the Commission by the General Assembly.

22. He wished to pay tribute once again to the International Law Commission, and in this connexion would support the amendment¹ submitted by the representative of Uruguay in which the Sixth Committee expressed its gratitude to the International Law Commission.

23. Mr. HERRERA BAEZ (Dominican Republic) said the International Law Commission had on the whole done remarkable, and scientifically honest, work; his delegation was not, however, prepared to accept the present formulation of all the Nürnberg principles.

¹ Later issued as A/C.6/L.148.

24. Those delegations which, like his own, were participating for the first time in a debate on the charter and judgment of the Nürnberg Tribunal were very eager to study the historical background of the question in order to determine whether the Nürnberg principles, at the time when they were applied, were the expression of existing international law or whether they were new principles established to satisfy a public opinion embittered by the hardships of war. But the time and the place were unsuitable to pass judgment on the Nürnberg trials.

25. Despite his intention not to recall the past, he considered it important to determine whether the Nürnberg principles, then applied only to the war criminals of the Second World War, could be extended.

26. In paragraph 29 of its report on the work of its first session (A/925), the International Law Commission had acknowledged that "the task of formulating the Nürnberg principles appeared to be so closely connected with that of preparing a draft code of offences against the peace and security of mankind that it would be premature for the Commission to give a final formulation to these principles before the work of preparing the draft code was further advanced".

27. In that connexion, paragraph 150 of the report under discussion (A/1316) said that the principles might be modified or developed for the purpose of their incorporation in the draft code. His delegation, together with a number of other delegations, would shortly submit a draft resolution to the Committee on that subject. The proposal would be drafted on the basis of the ideas set forth by the Netherlands representative and would request the International Law Commission to continue its work in the light of the observations made in the Sixth Committee.

28. He then considered the principles as they had been formulated by the International Law Commission, adding that he had been impressed by the United Kingdom representative's remark that principle I should clearly state the acts to which it referred.

29. He felt bound to make some reservations regarding the correlation between principles I and III because such a correlation, or rather, the conclusions to be drawn from it, would be contrary to the express provisions of his country's Constitution.

30. Finally, he could not accept the idea that international law prevailed over domestic law.

31. Mr. VAN GLABBEKE (Belgium) said that his country, which had known two terrible wars of aggression, attached great importance to the Nürnberg principles and the related question of the preparation of a draft code of crimes against the peace and security of mankind. The proof was that Belgium was one of the first countries to accede to the London Agreement of 8 August 1945 which, together with the Moscow Declaration of 1943, constituted the basis of the Charter of the Nürnberg Tribunal. It was true, as the Soviet Union representative had said, that the Nürnberg trial had satisfied the desires of millions of people who still hoped that United Nations activities in the field would soon achieve concrete and practical results which would strengthen the system of international criminal law. In that connexion, the Belgian delegation urged that

nothing should be done which might weaken resolutions 95 (I) and 177 (II) of the General Assembly.

32. The Belgian delegation joined in congratulating the International Law Commission, and more particularly its Rapporteur, for the work it had accomplished. But his delegation felt that it should be ascertained whether the formulation proposed by the International Law Commission was or was not likely to be satisfactory, either as a definitive document or simply as a preliminary study. Accordingly, he would inquire first what was the exact scope of the task conferred by the General Assembly upon the International Law Commission and would consider whether the method of work adopted by the latter had been satisfactory. He would then review the principles formulated and make a few general remarks stating the position of his delegation regarding the draft resolutions and amendments before the Sixth Committee.

33. The International Law Commission had been instructed by the General Assembly to formulate principles—and nothing but principles—of international law. It might therefore have been asked whether all the principles contained in the Charter of the Nürnberg Tribunal, which the latter had applied, were in fact principles of international law either because they were part of international law before the Nürnberg trial or because they could be described as new international law.

34. In the light of the preparatory work and the documents produced between the London Agreement of 1945 and the General Assembly resolution of 1947 (177 (II)), it was conceivable that there were principles in the Charter of Nürnberg which the Tribunal had not applied and they would presumably be excluded from the scope of the task conferred upon the International Law Commission. It might also be possible that the Tribunal had applied principles of international law which were not mentioned in the charter, in which case they should also be considered as outside the narrow scope of the General Assembly resolution. In support of that interpretation, he referred to a passage from the Secretary-General's memorandum of 3 March 1949 in which it was said that "In the interest of peace, and in order to protect mankind against future wars, it will be of decisive significance to have the principles which were implied in the Nürnberg trials, and according to which the German war criminals were sentenced, made a permanent part of the body of international law as quickly as possible."²

35. If the text of the General Assembly resolution really meant that the only principles of international law to be formulated were those contained in the charter which the Tribunal had applied, that fact should be emphasized because, as was well known, the Nürnberg Tribunal had on occasion considerably enlarged the scope of the charter.

36. Furthermore, the General Assembly resolution related only to the first judgment of the Nürnberg Tribunal, in the case against Goering and his accomplices. That might, of course, be regretted because it would have been interesting to uncover in all the judgments of the Nürnberg Tribunal, and even in those of the Tokyo

² *The Charter and Judgment of the Nürnberg Tribunal; History and Analysis*, A/CN.4/5, p. 11.

Tribunal, the principles of international law which they had applied and which were linked to one of the provisions of the charter of those Tribunals. In that connexion, it should be noted that the footnote on page 11 of the report of the International Law Commission (A/1316) mentioning Professor Scelle's objection referred not only to the first judgment, but also to the other decisions of the Nürnberg Tribunal. Accordingly, the text of the General Assembly resolution revealed a gap which would have to be filled when the draft code of crimes against the peace and security of mankind was considered.

37. When the principles as formulated by the International Law Commission were being considered, it was fitting to inquire if some principles had been omitted. That was undoubtedly the reason for the observations of some representatives, including those of France and Yugoslavia, who had referred to principles which were not mentioned in the report of the International Law Commission. It was equally regrettable that the members of that Commission had concluded that they were not expected to deal with the provisions concerning procedure, which were in the charter and which the Tribunal had applied.

38. The Nürnberg trial had established the principle that a war criminal could be tried *in absentia* and that from the sentence, which might call for the death penalty, there was no appeal. That meant that an accused who could not appear before the court would have no means of challenging the decision once it had been given. Another important point, mentioned by the representative of France, was that the international community was authorized to lay down the procedure for inflicting punishment that was applicable internationally. It would be very dangerous to relinquish that procedural principle and to allow a State to institute such proceedings when in its discretion it saw fit to do so.

39. He proceeded to comment on the actual formulation of the principles. Principle I implied that international law could impose duties on individuals directly without any interposition of internal law. That principle was justified by common sense, for crimes were committed by human beings and therefore it must be possible to punish human beings. But it was nonetheless true that international law remained above all a branch of law which created rights and obligations towards States. The first principle formulated by the International Law Commission should not lead to the disregard of the habitual machinery for the performance of treaties. International conventions imposed obligations on the individual only after they had come into effect and had thus become an integral part of national law. International conventions *per se* did not bind individuals; rather it was the national law enacted to enforce respect for treaties on the territory of a particular country.

40. Therefore he agreed with the representative of the United Kingdom that the chief function of the law of nations was to regulate the rights and obligations of States. The Belgian delegation accordingly accepted principle I as formulated, because in the final analysis the important point was not so much whether the individual should be a direct subject of international law or whether the old idea, implying State intervention, should prevail, but rather to create a definite power

to punish suitably any individual who might in future endanger peace by acts of aggression and by crimes against international order and peace.

41. He next considered principle II, which was the principle of the "supremacy" of international law over national law. In the completely general form in which the International Law Commission had stated it, he feared that that principle might lead to very serious practical difficulties. It might be asked whether such an extension and generalization of the principle of the "supremacy" of international law over national law was not a mistake.

42. Turning to principle III, he said that there was still some confusion regarding the exact meaning of the words "responsible Government official". Opinions differed: some said "responsible Government official" referred solely to a member of a government, others said it included a former member of a government or even any person occupying an important post in the three important branches of government, the legislative, the executive or the judicial. Some documents referred to highly placed officials and the meaning of that expression was no clearer than the words "responsible Government official". It was most important, in the cases of proceedings which might involve the death penalty, that the meaning and the exact scope of each idea in the texts should be quite clear.

43. In connexion with principle III formulated by the International Law Commission the Belgian delegation wished to make one reservation: the Commission had omitted the last phrase of article 7 of the Charter of the Tribunal which said that the fact that an individual acted as head of State or responsible government official not only could not prevent prosecution or relieve him of responsibility but also could not even be taken into consideration as a reason for mitigating punishment. He suggested the Commission had been wrong in changing the text of the charter in that particular. Moreover, in that respect the Commission had not adhered to the procedure which, according to Mr. Spiropoulos, it had adopted for the formulation of the Nürnberg principles. It was, of course, arguable that the Charter of Nürnberg had expressly limited the Tribunal's discretion in that respect. But he was not convinced by the International Law Commission's argument that it had been for the Tribunal to decide the question of mitigating punishments, for the charter had not only barred any plea in exoneration but had even barred any plea of attenuating circumstances.

44. Therefore the formulation adopted by the International Law Commission undoubtedly led to a weakening of the principle contained in the Charter of the Tribunal. Subject to that reservation, the Belgian delegation nevertheless supported principle III, which was based on a supremely just idea that the person who was the head of State should be the first to bear the responsibility and to suffer the penalty to which he was liable under international law in order to ensure that war criminals would receive their just punishment. It seemed that the Nürnberg Tribunal had been justified in deciding in its judgment that the principle of international courtesy which in certain circumstances protected the representative of a State could not be invoked and was not applicable in the case of criminal acts under international law.

45. In connexion with principle IV, he noted that the Charter of the Nürnberg Tribunal went further than the International Law Commission in stating that an individual who violated international law could not be relieved from responsibility even if the fact with which he was charged was obligatory under the national law of his country. Nevertheless, the Tribunal recognized that, if the accused had had no possibility of moral choice, that fact could be urged in mitigation of punishment. The International Law Commission had not retained that part of the Charter of the Tribunal and in so doing it had departed from the method of work it had adopted.

46. The problem of moral choice was particularly delicate; the United Kingdom representative had referred to it, but Mr. van Glabbeke did not concur in the views which he had expressed in that connexion. He thought that it was not the responsibility of the International Law Commission to examine all the possibilities, and he considered that, while the United Kingdom representative had clearly indicated one of the extremes (threat of immediate death in case of disobedience of an order) he had not stated the other extreme. Mr. van Glabbeke cited as an example the case of a head of a family who was threatened with imprisonment. He therefore thought that on this point the judges should be relied on to make a humane application of the principle of freedom of choice, and it was with that reservation that he accepted principle IV.

47. In connexion with principle V, he noted that it conformed to the sacred principle of the right to defence. He regretted, however, that the International Law Commission, in stating that any person had the right to a fair trial, had proposed the addition of the words "on the facts and law". On this point, he was prepared to support the Netherlands representative, who for the sake of simplicity had proposed the deletion of those words. It was preferable to adhere rigorously to the statement of the principle, because if "on the facts and law" were specified, the procedure seemed to be neglected.

48. Some trials which appeared to be fair were based on a fraudulent preliminary investigation. That phase of the preparation of the case was one of the most important because it served as a basis for the public part of the trial. The Charter of Nürnberg provided indeed for communication within a reasonable time of the indictment and of all documents lodged therewith in a language understood by the accused, and also provided that the accused was entitled to explanations at all stages of the procedure. When the draft code of offences against the peace and security of mankind came to be examined, consideration might be given to the principle of a preliminary investigation in which both sides would be heard, and the right of the accused to the assistance of counsel at all stages of the proceedings. With those reservations, he considered principle V as satisfactory either in the form proposed by the International Law Commission or in the form suggested by the Netherlands representative.

49. He noted in connexion with principle VI that, instead of merely stating that crimes against peace, war crimes and crimes against humanity were crimes under international law, the International Law Commission had felt impelled to go further and to reproduce textu-

ally the enumeration which appeared in the Charter of the Nürnberg Tribunal. An enumeration always ran the risk of being incomplete. Among the crimes against peace, the International Law Commission had cited wars of aggression but not acts of aggression. That could be explained in the case of the Nürnberg Tribunal, which did not want to take into consideration acts committed in Austria or Czechoslovakia. The Belgian delegation considered, however, that the question of acts of aggression should be reviewed when offences against the peace and the security of mankind were codified. The idea embodied in the expression "waging of a war of aggression" was not defined. It had been said that it did not refer to each man who wore a uniform but merely to superior officers and high officials; but at what precise point was an officer considered a superior, and an official a high official? Those terms should be defined, and definition was particularly important in a field where capital punishment might be involved.

50. The report referred to "killing of hostages" among war crimes. Without going as far as the representative of Syria who wished the taking of hostages to be considered as a crime, and in support of this view had cited the text of the Red Cross Convention, Mr. van Glabbeke thought that the case of ill-treatment of hostages should have been considered. He therefore made full reservations regarding that enumeration, which should be completed at the time of the drafting of the code of offences against the peace and security of mankind.

51. In principle VII, the International Law Commission had retained only the word "complicity". He accepted that wording only if the idea of complicity included co-authors, instigators and provocateurs, although that constituted an extension of the idea of complicity which it was not for the International Law Commission to decide. He approved the idea of making accomplices in the three categories of crimes enumerated in principle VI responsible, although he thought that, in thus extending the idea, the International Law Commission had not remained strictly within the limits of its task.

52. He concluded his examination of the principles by considering whether certain principles had not been forgotten. He had already indicated some omissions and there might be others, for example the principle of the criminal responsibility of organizations, a principle which would make it possible to prosecute individuals because of their affiliation to a group which had been declared criminal by a judicial decision.

53. In conclusion, he reviewed the various draft resolutions. He would not vote for the draft resolution of the Byelorussian Soviet Socialist Republic (A/C.6/L.140) not because he opposed the application of articles 16 and 21 of the statute of the International Law Commission but because, the contrary thesis being also defensible, he preferred, in a realistic spirit, to choose the one which was likely to promote a solution of the problem. Moreover, he thought that the number of replies from governments would be extremely small, so that it would be a waste of time to consult them.

54. He approved the first part of the French draft resolution (A/C.6/L.141/Rev.1), but reserved his final position until the end of the debate. The same was true

in connexion with the United Kingdom draft resolution (A/C.6/L.142). He pointed out that the French text of that draft resolution contained the expression "*prendre acte*" which was not an exact translation of the expression "take note"; the expression "*prendre note*" should be used because "*prendre acte*" indicated unreserved approval, which was not the case.

55. He regretted his inability to approve the Cuban amendment (A/C.6/L.144) which was similar to the amendment of Iran that had just been withdrawn (A/C.6/L.143). The reference to paragraph (b) of resolution 177 (II) would add nothing to the draft resolution but might hamper delegations in suggesting changes in the principles formulated by the International Law Commission when the time came to draft the code of offences against the peace and security of mankind.

56. In conclusion, the Belgian delegation reserved its final position regarding the drafts which had been referred to and all other drafts which might be submitted. In view of the course the debate had so far taken, the Sixth Committee could already take note of the report. If it was possible to improve and perhaps to complete the text of the principles formulated by the International Law Commission by adding the principles accepted by the majority of the Sixth Committee, the Belgian delegation would be prepared to consider the new text with interest.

57. Mr. HSU (China) paid tribute to Mr. Spiropoulos, who had shown himself to be an extremely competent Rapporteur and whose excellent report had served as a basis for part III of the report of the International Law Commission.

58. He agreed with Mr. Spiropoulos concerning principle IV, and regretted that the phrase "providing a moral choice was in fact possible to him" had been inserted instead of the phrase "but may be considered in mitigation of punishment". He recalled that he had been one of the small minority on the International Law Commission who had voted against that amendment.

59. Mr. Georges Scelle had asked the International Law Commission to formulate the principles upon which the Charter of Nürnberg was based, instead of confining themselves to summarizing certain of them. The decision taken by the International Law Commission to reject that proposal was justified, but he thought that the Commission would not have been wrongly interpreting its terms of reference if it had accepted Mr. Scelle's proposal. It was a matter of two different methods, both equally legitimate. He would have preferred the method suggested by Mr. Scelle, and he thought that the International Law Commission had let slip an opportunity to take advantage of a new situation with a view of the development of international law. It had been said that the principles Mr. Scelle desired to have formulated were included in the formulation of the Nürnberg principles by the International Law Commission; but an incidental or implicit reference to a principle was something very different from a mention of it as a principle.

60. There had also been discussions in the Sixth Committee as to whether the International Law Commission should have expressed any appreciation of the

Nürnberg principles as principles of law. He took the view of the majority of the International Law Commission, which had not considered that to be its task. But he did not quite like the way in which that decision had been taken; the wording of paragraph 96 of the report (A/1316) and the details given on the discussion of the subject in the International Law Commission might imply that the Commission had doubts as to the legality of the principles formulated. But that impression would be wrong. Certain international jurists doubtless thought that the Nürnberg principles went further than the law already existing in 1946; but most of them thought that the principles, although not formulated in writing, were generally admitted by world opinion, and it was undeniable that the crimes against humanity committed during the Second World War had to be punished in order to maintain peace and security, and that the Nürnberg principles were in conformity with the highest conceptions of justice.

61. His delegation found the formulation of the principles satisfactory. It was ready to vote for their proclamation as Mr. Amado had suggested.

62. In the absence of a formal proposal from the Brazilian representative, the Chinese delegation would vote for the United Kingdom draft resolution (A/C.6/L.142) with the amendments proposed by Cuba (A/C.6/L.144) and Uruguay.

63. Mr. CABANA (Venezuela) said that the discussion which had just taken place on the question of the formulation of the Nürnberg principles showed the capital importance attached by all delegations to the incorporation into international law of the essential and universal elements of those principles. His delegation had studied the question with great care and would like to make some comments in order to clarify its views on the subject.

64. The Byelorussian delegation had submitted a draft resolution (A/C.6/L.140) to the effect that the draft formulation of the Nürnberg principles should be referred back to the International Law Commission for transmittal, for comments, to the States Members of the United Nations, as provided by articles 16 and 21 of the statute of the International Law Commission. Most speakers had disagreed with that interpretation of those articles, and had maintained that they referred only to proposals concerning the progressive development of international law and its codification. In view of the fact that in the present case the International Law Commission had completed a task expressly entrusted to it by the General Assembly, it was not, in their opinion, necessary to invite governments to submit comments on the first results of the Commission's work.

65. His delegation was no longer as sure as it had been of the correctness of that point of view, since reading article 15 of the statute of the International Law Commission, the last sentence of which read as follows: "Similarly, the expression 'codification of international law' is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine."

66. His delegation could not, however, approve the Byelorussian draft resolution, because it considered that

the formulation of the principles recognized by the charter and judgment of the Nürnberg Tribunal, constituted a stage in the preparation of a draft code of offences against the peace and security of mankind, referred to in General Assembly resolution 177 (II), paragraph (b). If the International Law Commission invited governments to submit their comments on the proposed formulation, the latter would have to proceed to a study of the juridical value of the principles contained therein, which they would be unable to do unless they examined at the same time the principles which would eventually be included in the code of offences against the peace and security of mankind, or, to quote resolution 177 (II), unless they knew the place to be accorded to the Nürnberg principles in the future code.

67. He went on to speak of the doubts which had been expressed as to whether the International Law Commission had been right to limit itself to formulating the Nürnberg principles without appreciating their value. Most of those doubts had been dispelled by the brilliant statement of the Greek representative. In his delegation's opinion, such an appreciation was not required under the General Assembly resolution and would have served no purpose. The Commission deserved praise for the work which it had done; as to the juridical value of the principles formulated by it, that was a question which could be examined at the time of preparation of the future code.

68. His delegation thought that the formulation of the Nürnberg principles was only a stage in the process of the codification of international law. Certain representatives, amongst them the representative of Yugoslavia, had maintained the contrary opinion, and had alleged that resolution 95 (I) of the General Assembly had affirmed that the principles recognized by the charter and judgment of the Nürnberg Tribunal were principles of international law. The Assembly had not stated that all the principles appearing in those two instruments were principles of international law. It would therefore be well to analyse those documents with a view to deciding which were the principles included which might be considered as principles of international law and accepted as such.

69. The Egyptian representative had pointed out that no legal organ of the United Nations had hitherto given an opinion on the juridical value of the Nürnberg principles. In his delegation's opinion, that was because the stage of codification in that field had not yet been reached, since those principles had as yet no fixed value. The International Law Commission had recognized the impermanent character of those principles when it had stated in paragraph 150 of its report that the phrase "indicating clearly the place to be accorded to" the Nürnberg principles, appearing in resolution 177 (II) should not be interpreted as meaning that the Nürnberg principles would have to be inserted in their entirety in the draft code, and that the phrase did not preclude it from suggesting modification or development of those principles for the purpose of their incorporation in the draft code. The substance of the Nürnberg principles should be examined when the time came to draft the code.

70. Finally, he pointed out that one of the principles clearly brought out at Nürnberg was that of the direct

responsibility of the individual under international law. In the formulation proposed by the International Law Commission, the classic theory of the responsibility of the State had been replaced by a new theory founded on the direct international responsibility of the individual. The United Kingdom representative had already expressed doubts with regard to the practical consequences of that new theory. The Venezuelan delegation would like to know if, in the event of the admission of the concept of individual responsibility, the concept of the responsibility of the State would be eliminated. His delegation wondered if it would be better to ensure the punishment of the guilty or material reparation for damage caused. If that theory were strictly interpreted, a rather unpractical conclusion would be reached, namely, that the responsibility of the State would be admitted on an equal footing with that of the individual.

71. He wondered whether it would not be preferable to adopt the United Kingdom representative's suggestion to the effect that the direct responsibility of the individual should be transformed into an obligation on the part of the State either itself to punish the guilty or to allow an international court to sentence them.

72. In conclusion, he said that his delegation would vote for the United Kingdom draft resolution, as amended by Cuba. In order, however, to bring the text of the draft more closely into line with resolution 95 (I) of the General Assembly, he suggested that the second paragraph should be amended as follows:³

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

73. The Venezuelan delegation reserved the right to make comments if the principles formulated by the International Law Commission were discussed separately or studied from the point of view of their intrinsic juridical value.

74. Mr. BUNGE (Argentina) said that statements of the previous speakers showed the full importance of the formulation of the Nürnberg principles, both for the present and for the future. To come to a decision on that problem, it must be viewed in its proper historical perspective. He quoted paragraphs (a) and (b) of the operative part of General Assembly resolution 177 (II) and pointed out that the International Law Commission had decided to deal separately with the formulation of the Nürnberg principles and the preparation of a draft code of crimes against the peace and security of mankind. A problem of interpretation had arisen at the very beginning of the Commission's work.

75. As stated in paragraph 96 of their report, it had been necessary to decide whether the Commission should ascertain to what extent the principles contained in the Charter of Nürnberg constituted principles of

³ Later issued as A/C.6/L.147.

international law. The conclusion had been that, since the Nürnberg principles had been affirmed by the General Assembly, the Commission's task was not to express any appreciation of those principles as principles of international law, but merely to formulate them.

76. As the Brazilian representative had stated at the 231st meeting, three conflicting theories had been stated in the International Law Commission. Some representatives had considered that it was necessary to pass qualitative judgment on the principles to be formulated, others had maintained that the charter and judgment of Nürnberg were based on principles of international law which had existed before the establishment of the Nürnberg Tribunal and that the Commission therefore had to enumerate the principles of international law on which those documents were based, and the third opinion had been that expressed in paragraph 96 of the report.

77. The Argentine delegation considered that the decision taken by the International Law Commission on the subject was unfounded and that the Commission should have adopted the first of the above-mentioned viewpoints. The basic idea was that all the principles recognized by the Nürnberg Charter and Tribunal were principles of international law, in view of resolution 95 (I) of the General Assembly. It was, however, inadmissible to consider that the General Assembly had regarded as rules of international law principles which had not even yet been formulated, especially in view of the fact that it had adopted a second resolution instructing the International Law Commission to assume that task. It was clearly implied in the operative part of resolution 95 (I) that the Assembly had merely confirmed the principles of international law recognized in the charter and judgment of Nürnberg.

78. A detailed consideration of the text of that resolution showed that the International Law Commission was called upon to formulate principles which had to be (a) principles of international law, and (b) recognized by the Nürnberg Charter and Tribunal. That means that the General Assembly had not confirmed all the principles acknowledged at Nürnberg and that, as a result, it had not considered as principles of international law all the principles, without exception, on which the charter is based, or which have been accepted by the Tribunal. There were, of course, several interpretations of the word "acknowledge". The Argentine delegation believes that that term applied to something of the past or of the present which had been accepted and noted. Obviously, for an interpretation to be valid, the spirit in which the provision concerned had been conceived should be known. The question was not merely one of acknowledging and confirming something that had already been acknowledged and confirmed, but of crystallizing norms that had not yet been sanctioned by international law.

79. In that connexion, the report submitted by Judge Biddle to President Truman on the former's return from Nürnberg, and the President's reply, might be considered as a starting point. Both documents reaffirmed the principles of the Charter of Nürnberg within the framework of the general codification of crimes against the peace and security of mankind. That was why General Assembly resolution 95 (I) began

by acknowledging the obligation incumbent upon the Assembly under Article 13, paragraph 1 a of the United Nations Charter to initiate studies and to make recommendations for the purpose of encouraging the progressive development of international law and its codification. The purpose of resolutions 95 (I) and 177 (II) of the General Assembly was to crystallize the principles laid down at Nürnberg and thus to promote the progressive development of international law.

80. Those resolutions therefore represented a stage in the evolution of concepts of responsibility for crimes against peace and mankind and mark, at the same time, the beginning of a procedure tending to the juridical confirmation of ideas which had hitherto had purely political antecedents, ideas which were perfectly justified in the eyes of world public opinion and were in conformity with the elementary principles of justice. The analysis he had just made was intended to prove that the contention in paragraph 96 of the report of the International Law Commission was unfounded.

81. Paragraph 2 of the United Kingdom draft resolution was illogical, since it was impossible to affirm principles before they had been formulated. It could not be claimed that necessarily each and every principle recognized by the charter and judgment of Nürnberg had been regarded by the General Assembly as principles of international law and that all that remained to be done was to formulate them systematically within the framework of an international penal code.

82. Mr. Bunge then paid tribute to the International Law Commission for the draft formulation it had prepared and to the representatives of Brazil (231st meeting) and of Greece (234th meeting) for the brilliant statements they had made.

83. The first remark which sprang to mind was that the International Law Commission had not formulated all the principles of international law acknowledged in the charter and judgment of Nürnberg. For instance, it had not formulated the principle of the non-retroactivity of penal laws, which had been acknowledged by the Nürnberg Tribunal. In that connexion, he quoted a passage from the report of the special Rapporteur, Mr. Spiropoulos (A/CN.4/22, p.35), to the effect that the Tribunal had declared that its charter was the expression of the international law in force at the time of its establishment.

84. The Tribunal had also put forward certain arguments to refute the contention of the defence that, under international law, a war of aggression did not constitute a crime against international law. To refute those arguments, the Tribunal had based itself mainly on the Briand-Kellogg Pact, under which the contracting parties unconditionally renounced war as an instrument of policy in the future. The Tribunal held the view that the solemn renunciation of war as an instrument of national policy implied that war constituted a violation of international law. The persons who prepared or directed such a war and were thus responsible for its actual and terrible consequences, committed a crime. That meant that the Tribunal had recognized the existence of a principle of international law which rendered a person responsible for the crimes of which that person was accused. It could be argued that that was a principle of penal law, not of international law, but the matter

was not merely one of international law, but of international penal law.

85. A principle of penal law, the sacred right of defence, had been incorporated in the formulation submitted by the International Law Commission. In view of the fact that the principle of the non-retroactivity of penal laws had not been incorporated in the formulation, it was not surprising that the Commission had failed to take into account similar principles, or other consequences of the principle *nulla poena sine lege* or *non bis in idem* or *in dubio pro reo*, and so forth. It followed that the study of the whole question should be continued.

86. Principle I contained the controversial contention that not only the State, but the individual too, was subject to international law. That principle was derived from article 6, paragraph 1, of the Charter of the Nürnberg Tribunal. The Argentine delegation considered, however, that according to classical international law, the individual was not subject to international law. That did not, of course, prevent an individual, like a State, from being subject to international legal provisions. In that case, the State acted as intermediary between the individual and international law.

87. The contrary principle, that is, that an individual could be subject to international law, has, as a corollary, the principle of the supremacy of international law. In that connexion, the Argentine delegation shared the United Kingdom representative's view that the suppression of crimes against peace and mankind could be organized perfectly well without necessarily subscribing to the theory of the responsibility of the individual under international law. Conventions which laid down direct relations between the individual and international law had always constituted exceptions. It was quite unnecessary to modify a classical rule in order to punish individuals who were guilty of such crimes. He considered that the word "person" in principle I should be replaced by the word "author". The word "person" was held to mean moral persons, as well as individuals, in the juridical terminology of many countries. That distinction was rather important in referring to the criminal organizations dealt with in article 9 of the Charter of Nürnberg. In view of the fact that the charter undoubtedly did not wish to make moral persons subjects of international law, a suitable termi-

nology should be used to make clear that the reference applied only to physical persons.

88. Principle II asserted the supremacy of international law over internal law. That principle had not yet been recognized as a principle of positive international law. The Argentine Republic did not accept it, and its Constitution explicitly authorized the contrary principle. Its provisions, like the provisions of other constitutions perhaps, were not compatible with modern monist doctrine. There was no need to provoke a conflict between international law and national laws. The domestic legislation of various countries could very well endorse the principles recognized by international law. The Argentine delegation felt that world legal opinion was not yet prepared to accept such principles.

89. The Argentine representative had nothing to add, regarding the other principles, to the criticisms of form and substance already made.

90. From those remarks, it appeared that (a) all the principles of international law recognized by the charter and judgment of the Nürnberg Tribunal had not been formulated; (b) those two instruments contained provisions which were rules and not principles; (c) some principles had not been well formulated.

91. In the circumstances, the International Law Commission should be invited to re-examine the question of the formulation of the Nürnberg principles.

92. Such principles could be introduced into positive international law only gradually. No hasty action should therefore be taken and international law should be allowed to evolve naturally. In that way the supreme ideal would be achieved: the elimination of war as an instrument of international policy.

93. The Argentine delegation had already expressed its views regarding the United Kingdom draft resolution. It could not accept the premises of the French draft resolution. With regard to the draft resolution of the Byelorussian SSR, it felt that governments should be consulted when revision on the basis of the formulation of the Nürnberg principles had reached a more advanced stage. It would be premature to consult them at the present time.

The meeting rose at 6 p.m.