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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. Mr. ROLING (Netherlands) said that the formulation of the principles of Nürnberg and the question of aggression were controversial questions. Public opinion increasingly demanded that no war should be fought without just cause and therefore, in the future, Governments would tend to call the war waged by their enemy aggression. After the war, victors would be inclined to prove their claims by the trial of the vanquished, and, should the victor himself be the aggressor, such trials could be used to distort history. It was true that a regular international criminal court could avoid many of the pitfalls which an *ad hoc* tribunal would find it difficult to escape. On the other hand, it should be borne in mind that it was an almost superhuman task to judge the act of aggression soon after the end of a war.

2. The problem had several doubtful aspects. On 23 April 1945, the British Government had stated in an *aide mémoire* that "unprovoked attacks . . . are not war crimes in the ordinary sense, nor is it at all clear that they can properly be described as crimes under international law".[1] The French Government had also held that aggression was not a crime and that only persons who committed cruelties and atrocities during the illegal war should be brought to trial. The attitude of the Soviet Union at the International Conference on Military Trials at London in 1945 had also been ambiguous, although it had been Marshal Stalin who, on 6 November 1943, had originated the concept of the crime of aggression.[2] The London Conference of 1945 had nevertheless succeeded in drafting the Charter of Nürnberg due to the strongly maintained and ably defended position of the United States Government.

3. Heretofore, all attempts to define the concept of aggression had failed, and, as self-defence was allowed, it was therefore left to the State concerned to determine whether aggression had taken place and whether it was compelled to resort to armed force in self-defence. Until a world legal order, maintained by a world police force, was established, and until sovereign States were no longer allowed to pursue their own interests unhampered by law, that difficulty would remain. For, in fact, aggression was a legal concept borrowed from a future phase of international relations.

4. The Soviet Foreign Minister, speaking at the 380th meeting of the First Committee on 28 October 1950, had made a distinction between just and unjust wars, and not between aggressive and defensive wars. A just war, he had said, was a liberating war designed to defend a people from foreign attack or an attempt to enslave it, or to liberate it from capitalist and imperialist domination.

5. If that were the attitude of the Government of the Soviet Union, there would be two fundamentally different concepts of aggression. On the one hand, the charter forbade a change in the *status quo* brought about by armed force. On the other hand, there was the view that wars could be fought to achieve an ideological purpose. As long as that divergence of opinion existed, no code of offences against the peace and security of mankind could be drafted which did not include a definition of aggression.

6. Although the concept of aggression was controversial, there was no doubt that the development of international law on the matter would be of great importance. It might not deter statesmen from aggressive wars, which were started with the conviction that the war would be won, and therefore without giving thought to any idea of criminal responsibility. Future wars would be still more cruel because of the desire to win and thereby to avoid trial for the crime of aggression as the price of defeat. The prospect of being tried would delay capitulation and thus prolong a war. Therefore the measures taken to prevent and punish aggressive war could not achieve immediate results. The usefulness of such measures lay in emphasizing that the concept of crime against peace was the culmination of the increasingly accepted opinion that changes in international relations should not be achieved by armed

* Indicates the item number on the General Assembly agenda.

[1] *Report of Robert H. Jackson to the International Conference on Military Tribunals*, London, 1945, p. 19, para. 5.

[2] Stalin, Joseph, *The Great Patriotic War of the Soviet Union*, New York, 1945, pp. 90 *ff.*

force and that war should be abolished. The slowly growing belief of mankind that aggressive war was an illegal means to effect such changes justified the concept of the crime of aggression.

7. There was therefore no need for an indiscriminate application of punishment for that crime against peace. It was a special type of crime, which required special rules with regard to complicity. If the ordinary rules were applied, the entire population, at least in a democracy, would have to be regarded as criminal, or, at least, the entire army. That view was not only impractical but it would also make it impossible to distinguish between armies which waged war in accordance with the laws and customs of war and armies which behaved as criminals. That should be avoided at all costs. The Nürnberg judgment held the military men responsible, not because they had fought in an illegal war, but because they had meddled in politics and exceeded their specific tasks as military men.

8. The crime against peace was political and opinions about it differed from one country and one period to another. It could only be committed on the policy-making level. In the case of Fritsche, for example, the Tribunal of Nürnberg had recognized that he was too small a man for such a big responsibility.

9. The judgments rendered by the Tribunal of Nürnberg, the Tribunal of Tokyo and other tribunals showed that few people had been tried and sentenced for a crime against peace, and that no one had been sentenced to death solely for a crime against peace. The persons who had been hanged had also been found guilty of atrocities and of crimes against humanity. That was especially remarkable since the judgment of Nürnberg had called the crime against peace "the supreme international crime, differing only from other war crimes in that it contains within itself the accumulated evil of the whole".

10. There seemed to be a contradiction between the sentence and the considerations on which it was based. In the considerations of the judgment of Nürnberg, the criminal nature of aggression was based on the Pact of Paris and texts dating from the time of the League of Nations. The judgment cited certain resolutions of the League of Nations and the Pact of Paris of 1928 as evidence that, at the time of the Pact, aggression was, according to international law, a crime. The League of Nations resolutions, however, were not law-making instruments and the Pact of Paris provided that each State should decide for itself whether its claim of self-defence was justified. Nevetheless, it was on that weak basis that the tribunal had called aggression the supreme crime, without drawing the obvious conclusion that the normal consequence of the perpetration of the crime should be a death sentence.

11. Recent history, however, recorded certain developments in the attitude of States towards aggressors. The first of these developments was the elimination by the Powers of Napoleon as a danger to peace and security. That measure had been political, not punitive. Under article 227 of the Treaty of Versailles, the German Emperor would have been tried not for having committed a crime according to international law, but for "a supreme offence against international morality and the sanctity of treaties" and the tribunal was to be guided not by the principles of international justice, but "by the highest motives of international policy". When the Allies had requested the Emperor's extradition, they had emphasized the special character of their demands, which contemplated not a juridical accusation but an act of high international policy. The trial could only have led to the elimination of the Emperor from the political scene.

12. It was clear from the trials held after the Second World War that the same thought had prevailed. Except in so far as they had been condemned to death for their conventional war crimes and their crimes against humanity, a small group of leaders, who were found directly responsible for aggression and who symbolized the idea of aggression and conquest, had been merely got rid of by imprisonment. No one could deny the right of the victor in a just war to eliminate those elements which had been the active forces behind the aggression. That elimination had been achieved by political action in the case of Napoleon. It had been aimed at through a political trial in the case of the German Emperor after the First World War. It had been achieved by judicial action in the case of the German and Japanese leaders after the Second World War.

13. Only from the point of view that a crime against the peace was a political crime, that the perpetrator was an enemy rather than a criminal and the sanction a measure of security rather than of punishment, did the Charter of Nürnberg clearly not create new law, the Powers had not exceeded their competence in formulating the charter, and the judgment of Nürnberg was correct in stating that the charter was merely the codification of existing law. Under that interpretation, the charter created no precedent in that the victor could proclaim the law as he pleased. The only new element was the criminal trial, in which a justified political measure was carried out. That interpretation might furnish a realistic and sound basis for the future development of international law.

14. Those general considerations on the crime against peace showed, first, that the law of the Charter of Nürnberg was not as new as it was sometimes said to be; secondly, that the significance of the sentence and the implications of the statement that the charter did not make new law should be taken into consideration as well as the wording of the judgment; thirdly, that the crime against peace was of a special nature with special consequences in the matter of applying rules of participation and complicity; and, fourthly, that only a small group of leaders had been charged with the crime of aggression. In fact it had been such a small group that the phrases "command of the law" and "an order of a superior" meant something different when applied to that group than they did when applied to ordinary citizens. Accordingly, under the Charter of Nürnberg, official position could not be relied upon as a defence, or even be invoked in mitigation of punishment. In general, it could be said that the provisions of the Charter of Nürnberg were special provisions for major war criminals, which should not be applied on the same basis to ordinary war criminals.

15. Turning to the question of the task entrusted to the International Law Commission, Mr. Roling reviewed its history. After receiving the report of Mr.

Justice Biddle, President Truman had expressed the hope that the United Nations would "reaffirm the principles of the Charter of Nürnberg in the context of a general codification of offences against the peace and security of mankind" (A/CN.4/25, p.7). The United States representative had thereupon submitted a proposal to that effect to the United Nations, and the General Assembly had adopted on 11 December 1946 resolution 95 (I) affirming the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal and directing the Committee on the Codification of International Law to give urgent attention to plans for the formulation of those principles in the context of such a general codification.

16. The Committee on the Progressive Development of International Law and its Codification had studied the question and reported to the second session of the General Assembly (A/CN.4/5, p.18). It suggested that the International Law Commission should be invited to prepare "(*a*) a draft convention incorporating the principles of international law recognized by the Charter of the Nürnberg Tribunal and sanctioned by the judgment of that Tribunal and (*b*) a detailed draft plan of general codification of offences against the peace and security of mankind in such a manner that the plan should clearly indicate the place to be accorded to the principles mentioned in sub-paragraph (*a*)".

17. Here for the first time the original proposal was divided into two parts, and the General Assembly, in its resolution 177 (II) of 21 November 1947, had accepted that division in directing the International Law Commission: (*a*) to formulate the principles of Nürnberg, and (*b*) to prepare a draft code of offences against the peace and security of mankind. The report of the Sixth Committee had shown that it was deemed preferable to hold over the latter task until the trials of war criminals were further advanced.[3]

18. From the outset, therefore, it had been considered possible that there might be a difference between the principles of Nürnberg and the final codification of offences against the peace and security of mankind. That view was supported in the Sixth Committee at the fourth session by the Netherlands and Swedish delegations[4] and in the report of Mr. Spiropoulos to the International Law Commission on the subject of the draft code (A/CN.4/25).

19. The Committee was thus confronted with a very difficult situation. The General Assembly in 1946 had affirmed the principles of Nürnberg and thereafter only instructed the International Law Commission to formulate them. The Commission had therefore indicated that, owing to that previous affirmation, it had not been free to examine the principles of Nürnberg critically, but that it was bound to formulate them as they were found in the charter and in the judgment. It had realized that it might hesitate to adopt some of them in the proposed draft code.

20. The principles must not be appropriate for a general code, first, because the Charter of Nürnberg envisaged only the trial of major war criminals, and laws applicable to leaders were not always suitable for the common man; an "order . . . of a superior", although properly excluded as a defence in article 8 of the Charter of Nürnberg, should not be ruled out for people who did not belong to the small group of leaders to whom the provisions of the charter applied. Secondly, the charter had been drafted in haste and some of its provisions had later proved inadequate. The description of what could be considered a crime against peace in article 6 (*a*) could not be maintained.

21. If the Committee adopted the formulation of the principles contained in the International Law Commission's report, it would be sanctioning some principles which would not find a place in the criminal code to be drafted. He thought the Committee should avoid sanctioning the General Assembly's affirmation of principles it no longer recognized as generally valid rules of international law. It should adopt a procedure whereby the principles of Nürnberg would not contradict the principles adopted later for the general code.

22. The word "principle" had apparently been interpreted by the International Law Commission to mean "rules", whereas usually it referred to the general concept upon which rules were based. If the International Law Commission's task was interpreted to mean that it should formulate "principles" and not "rules", the problem would be simplified. The Sixth Committee could select from the principles contained in the Commission's report certain general concepts of fundamental importance in the charter and the judgment without going into details. The fundamental Nürnberg principles were not questioned and they would be applied in the draft code. The Committee would thus avoid affirming now what it might have to deny later.

23. With regard to the principles as formulated in the International Law Commission's report, Mr. Roling said that principle I was of great importance and could be adopted as it stood.

24. He had certain objections, however, to principle II. It referred to a case where an international duty was imposed with the sanction of punishment, but the national law was silent on — or at least did not impose a penalty for — the act forbidden under international law. As it stood, the principle might imply the direct application of international law without having recourse to the intermediary assistance of national law, which had been the customary procedure in the past. It would express a new concept that international law could not only bind governments, but that it was also directly applicable to individuals. In paragraph 102 of the Commission's report that body stated that principle II expressed the principle of the supremacy of international law. Mr. Roling thought, however, that the case of a crime under international law, whilst the national law imposed no penalties for the act, was rather different from the case where national law obliged the individual to perform the very act which was considered a crime under international law. To that situation referred the sentence of the judgment, quoted at the end of paragraph 102, that, "the very essence of the charter is that individuals have inter-

[3] *Official Records of the General Assembly, Second Session, Sixth Committee, Summary Records of Meetings,* pp. 212 and 213.

[4] *Official Records of the General Assembly, Fourth Session, Sixth Committee, Summary Records of Meetings,* 160th meeting, paras. 23 and 24, 68.

national duties which transcend the national obligations of obedience imposed by the individual State".

25. With regard to international duties, there were three situations in which an individual might find himself. First, there was the situation in which no contrary national obligation was involved; secondly, there was a situation where the national law obliged the individual to act contrary to an international duty, a case which was not dealt with in the principle as formulated by the International Law Commission; and, thirdly, there was the situation where a national superior order imposed duties contrary to international obligations. The third situation was covered in principle IV. If the phrase "command of the law" were inserted in that principle, principle II would become redundant. Principle II was ambiguous, and, if taken literally, superfluous.

26. Principle III formulated the responsibility of heads of States or government officials, a position which did not relieve them from responsibility under international law. The Charter of Nürnberg went further, however, since it said in article 7 that those positions should not even be grounds for the mitigation of punishment. He could not agree with the Commission's views on principle III, for, while the concrete mitigation of punishment might be a matter for the Court to decide, to forbid mitigation of punishment in certain circumstances was surely a matter for the legislator. As he had mentioned in discussing the significance of the plea of superior order or command of the law, Mr. Roling felt that the provision concerning the official position of a defendant could not be applied in the same way to major and minor war criminals and in practice many doubts had been raised as to the justification of the provision.

27. With regard to principle IV, it should be stressed that a superior order given to a leader did not relieve him from responsibility, whereas a private soldier acting under orders could not be held responsible to the same extent for his act. The draft of principle IV, which was based on the judgment, was not very satisfactory. The judgment said that a superior order did not remove responsibility, but recognized that there might be situations when a superior order amounted to a situation of duress and where consequently, according to the general principles of law, no obligation any longer existed, and responsibility disappeared. Those two situations were not adequately covered by the phrase "provided a moral choice was in fact possible to him". The only question to consider was whether a legal obligation still existed and whether obedience to the international duty contrary to a superior order was still humanly possible. The ambiguous wording of the judgment should not be followed in the principles to be adopted by the United Nations.

28. There was no doubt that one of the principles of the charter and judgment of Nürnberg was that of a fair trial, which was contained in principle V. He wondered, however, whether the phrase "on the facts and law" should be added. Only in doubtful cases did equity demand discussion of the law. Despite the procedure outlined in the International Law Commission's report, the door was open to many arbitrary decisions in view of the sometimes vague wording of that procedure. Whether the trial was fair would depend solely on the spirit in which the principle was applied.

29. Principle VI mentioned the crimes punishable as crimes under international law. Once again it did not contain real principles but merely details of the Charter of Nürnberg, and wrong details at that. To sum up all the stages in which the crime against peace could manifest itself — including even the conspiracy to plan or prepare a war of aggression — was to repeat a formulation criticized by anyone who had been connected with the application of that provision of the charter. The provision should not be repeated as a principle of international law, especially as the judgment had not distinguished between planning and preparation. Nor had the judgment followed the directive of the charter to regard as a crime what, in the opinion of the Tribunal, had been too far removed from the time of decision and action. In the light of the decision of the Tribunal, the wording of the charter was no longer correct, and the Committee should not forget that the General Assembly had requested the formulation of principles recognized both in the charter *and* in the judgment.

30. Sub-paragraph (*b*) of principle VI mentioned war crimes. Once again, he believed that the enumeration of examples as given in the charter was no longer a principle but a detail which should not be included in a formal declaration of the principles of Nürnberg.

31. Sub-paragraph (*c*) mentioned the crimes against humanity. The Commission had enumerated the acts which came under that heading but had omitted to bring out the important feature of those crimes, that they could have been committed even before the war, although that was mentioned in paragraph 123 of the report. There again he believed that such an enumeration of details should not be included in the formulation of the principles of Nürnberg.

32. Principle VII stated that "complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in principle VI is a crime under international law". It was clear from the judgment that together with the provisions of the Charter of Nürnberg, the Tribunal had also applied the general principles of criminal law. That had been the case both with rules about individual guilt in the light of the state of mind of the defendant, and with the rules of complicity.

33. The Commission's commentary on principle VII stated, however, that the only provision in the charter regarding responsibility for complicity was contained in the last paragraph of article 6 which laid down that "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such a plan". That was not a complicity rule, but a rule about the responsibility of conspirators, and a very bad one at that. It tried to establish the responsibility for acts which were unknown to the defendant—a type of responsibility which was decisively rejected, at least in continental law. It was a typical conspiracy rule severely criticized in Anglo-American jurisprudence. It had nothing to do, however, with the general theory of complicity and participation, which was partly covered by the provision of the Charter of

Nürnberg about planning and preparation. Neither charter nor judgment recognized any other form of participation or complicity with regard to crimes against peace. The Tribunal had clearly recognized that the rule applied only to conspiracy. That there was confusion was confirmed by the conclusion in paragraph 126 of the report that the statement contained in the judgment to the effect that the provision had been designed to "establish the responsibility of persons participating in a common plan" to prepare, initiate and wage aggressive war "would seem to imply that the complicity rule did not apply to crimes perpetrated by individual action". The Tribunal had not invoked that rule when acknowledging the criminal character of participation and complicity in war crimes and crimes against humanity committed by individuals.

34. If the Sixth Committee were to formulate the general principles of criminal law as applied *praeter chartam* by the Tribunal, it should certainly mention other general principles as well, and not only the principle concerning participation and complicity.

35. Turning to the attitude which the Sixth Committee should adopt with regard to part III of the International Law Commission's report, he said that there were three possible courses of action.

36. The first course would be to take note of the report of the Commission as it stood. The Committee should realize, however, that the principles of Nürnberg had already been affirmed by the General Assembly. By taking note of the Commission's report, the Committee would give the sanction of that affirmation to the principles as they were formulated now. While admiring the Commission's work, he was convinced that it had not given the right interpretation to the General Assembly's request to formulate "principles of international law" and he therefore felt that the Committee should not take note of the Commission's report as it stood.

37. The second course open to the Committee was to try to amend the principles as formulated by the Commission, deleting some and amending others. He believed, however, that the Committee should neither amend nor alter the work done by the Commission, because codifying work was not a task for the General Assembly. The Committee should indicate its wishes and opinions, and request the International Law Commission to reconsider its work in the light of those wishes and opinions.

38. Without in any way attempting to submit a new formulation of the principles to be adopted now, he wished to suggest a tentative formulation of four principles of international law as recognized in the charter and judgment of Nürnberg just to illustrate his delegation's approach to the problem.

39. The first principle would read: "I. The principle of individual criminal responsibility under international law (including the criminal responsibilty of heads of State and State officals)". That was the general principle that individuals, including heads of State and Government officials, were criminally responsible under international law. It corresponded to principles I and III of the Commission's report.

40. The second principle would read: "II. The principle of the supremacy of international law (indicating that there are international duties which transcend the 'intra-national' obligation of obedience imposed by the individual State)". That principle would embody the new concept of international duties and would condemn the past attitude of "right or wrong, my country". It would stress that loyalty to mankind prevailed over purely national loyalty. There was no need to mention the detailed consequences of that principle, for they would be involved in the general task of drafting the code of offences against the peace and security of mankind. The extremely complicated nature of situations which had both a national and an international aspect could be considered in connexion with that code.

41. The third principle would read: "III. The principle of a threefold individual responsibility: for crimes against peace, war crimes and crimes against humanity." There was no need to discuss conventional war crimes under that principle, for its importance lay in the crimes against peace and the crimes against humanity which had been clearly recognized during the Second World War. Before that war, the essential feature of the State had been its unlimited sovereignty: internally with regard to its own subjects and externally with regard to the international community.

42. The Second World War had brought an essential change into that concept of State sovereignty. First of all, the whole of mankind now felt its existence threatened if the different groups of which it was composed were threatened in their particular ways of existence. Thus, the whole of mankind was affected by threats to the existence of any one of those groups. The new idea expressed in the concept of the crime against humanity was that the international community felt entitled to act as a guardian of the groups composing mankind and that there existed a responsibility to the community of nations in respect of behaviour towards those groups. In the recognition of the international criminal responsibility for the extermination of the Jews, the new element was not that murdering Jews was a crime but that, notwithstanding State sovereignty, there was international responsibility. Secondly the concept of the crime against peace entailed the limitation of external sovereignty in connexion with war and the use of armed force; consequently it recognized the limitation of sovereignty in the field of relations between different States.

43. The fourth principle would read: "IV. The principle of fair trial". That principle needed no further explanation.

44. He had tried to give a tentative formulation of the principles of Nürnberg as a suggestion. Those principles, which had been adopted and reaffirmed by the General Assembly, would stand out as a landmark in history and in law. They would give the essence of the charter and judgment of Nürnberg, the detailed consequences of which would find their place in the future code of offences against the peace and security of mankind. They would indicate a turning point in history, when mankind had become so clearly conscious of the law of peace that punishment under that law became inevitable and when the law of security brought forth the acknowledgment of the limitation of sovereignty, including the recognition of criminal responsibility, even in internal affairs.

45. The third course open to the Committee would be to suggest to the General Assembly a resolution requesting the International Law Commission to reconsider the formulation of the principles of Nürnberg in the light of the opinions expressed during the fifth session of the General Assembly. That was the course advocated by his delegation.

46. Lastly, Mr. Roling observed that he could not support the Byelorussian draft resolution (A/C.6/L.140). There was no reason for referring the draft formulation of the Nürnberg principles to Member States for their comments. Article 16 of the Commission's statute, invoked in the Byelorussian draft, dealt with proposals for the progressive development of international law, and was therefore not relevant to the formulation of the Nürnberg principles, which had been applied by tribunals and affirmed by the General Assembly. Article 22, also invoked in the draft resolution, referred to the codification of international law, a task with which the General Assembly was not concerned at present, as the draft code of offences against the peace and security of mankind was to be considered only at a later session. The formulation of the principles recognized in the charter and judgment of the Nürnberg Tribunal was a special undertaking, and not subject to the above provisions in the Commission's statute.

47. Mr. KHOMUSKO (Byelorussian Soviet Socialist Republic) said that he wished to deal only with the procedures to be followed with regard to the Nürnberg principles formulated by the Commission, reserving his position on the substance of the question.

48. The Sixth Committee did not have the necessary material at its disposal for adopting the draft principles which the International Law Commission had formulated without consulting Member States, although required to do so under article 16 (*c*) and (*h*) and article 21 (2) of its statute. Reference to Member States facilitated the subsequent task of the General Assembly when reviewing the Commission's work. Needless to say, that procedure was particularly important in the case of the formulation of the Nürnberg principles.

49. He therefore did not think that the Commission's draft should be considered at the present session and proposed a draft resolution (A/C.6/L.140) inviting the Commission to refer the draft back to it for presentation to Member States with a view to receiving their comments. This draft resolution read as follows:

"The General Assembly,

"Considering that articles 16 and 21 of the statute of the International Law Commission require the draft formulation of the Nürnberg principles submitted by the Commission to be presented to the Member States of the United Nations for their comments, in order that those comments, as provided by articles 16 and 22 of the statute, may be taken into consideration by the International Law Commission in preparing a final draft,

"Decides to refer back to the International Law Commission the draft submitted by it, for presentation to the Member States of the United Nations for their comments."

50. Mr. GARCIA AMADOR (Cuba) recalled his statement at the beginning of the discussion of the Commission's report (A/C.6/SR.225), in which he had noted the peculiar history of the Nürnberg principles in the General Assembly. These principles had been affirmed before they had been formulated. That, however, was a matter of the past, and the Committee should now avoid any decision which would place it in the same position with respect to the code of offences against the peace and security of mankind as that in which it had found itself in the case of the Nürnberg principles. The Commission had stated in paragraph 150 of its report—and he agreed with that view—that it did not regard the terms of resolution 177 (II) as precluding it from suggesting modification or development of the Nürnberg principles for the purpose of their incorporation in the draft code. However, by adopting or reaffirming those principles, as now formulated by the Commission, the General Assembly would deprive both the Commission and itself of the necessary freedom of action with regard to their inclusion, in amended form, in the code. He agreed, in that regard, with the Netherlands representative.

51. The General Assembly should, therefore, as he had proposed at the beginning of the debate, merely note the principles formulated by the Commission. By "noting" he did not mean "approving", as the French representative appeared to think, but merely taking cognizance of the Commission's work. It was the same formula which the General Assembly had used the preceding year (resolution 375 (IV)) with regard to the draft declaration on the rights and duties of States, which no one had interpreted as being in the nature of an approval. In so doing, the General Assembly would leave itself and the Commission the necessary freedom of action.

52. With regard to the Byelorussian draft resolution (A/C.6/L.140) he did not think that the Commission had violated its statute. With regard to the Nürnberg principles, it had been working under special instructions from the General Assembly and consequently did not have to follow the procedure laid down in the articles of the Statute mentioned in that draft.

53. In conclusion, he stated that he agreed with the observations made by the Brazilian representative at the 231st meeting concerning the future development of international penal law and the place of the individual in it.

54. Mr. CHAUMONT (France), in reply to the Cuban representative's remarks, said that he had objected to the expression *"prendre acte"*, which was stronger than the English word "noting". He was prepared to accept "noting".

55. The French delegation considered that the formulation of the Nürnberg principles should be discussed in substance by the Sixth Committee. The matter was too important to be dealt with on exclusively procedural grounds, and he therefore could not support the Byelorussian draft resolution, although he did not dispute the considerations on which it was based. Besides, governments and foreign offices, when approached for their comments, were frequently reluctant to submit them in writing, and the best way to ascertain their views was therefore through a general discussion in the Sixth Committee, in which all Member States were represented.

56. Moreover, if a more thorough study of that important question by the International Law Commission was considered necessary, discussion of it by the Sixth Committee would only facilitate the Commission's task.

57. The French Government, as was well known, attached great importance to the precedents established by the charter and judgment of the Nürnberg Tribunal, in accordance with the teachings of the most eminent French publicists regarding the development of international penal law as a new branch of international public law.

58. It should be kept in mind that the problem of the formulation of the Nürnberg principles was closely related to the larger problem of the codification of offences against the peace and security of mankind. The Cuban representative had confirmed that in his statement.

59. Three members of the Commission—Mr. Alfaro, Mr. Hudson and Mr. Scelle—had made reservations (A/1316, p. 11, footnote) as to the Commission's conception of its task. The reservations showed that there had been two general problems which the Commission had failed to solve.

60. The first was the juridical character of the formulation adopted by the Commission. Paragraph 96 of the Commission's report recalled the conclusion reached by the Commission at its first session, and approved at the fourth session of the General Assembly, that the task of the Commission was not to express any appreciation of the Nürnberg principles as principles of international law, but merely to formulate them. Yet, as Professor Hudson had noted in his reservation, the Commission had not altogether adhered to that view in its later work, with the result that there had been some doubt as to the juridical character of the formulation. The Nürnberg judgment itself recognized that it constituted part of positive international law. That was also confirmed by General Assembly resolution 177 (II), which indicated that the principles to be formulated by the Commission should eventually find a place in the code of offences against the peace and security of mankind. Codification, in international law, meant not the adoption of new law, but the establishment and classification of certain elements of existing customary law or conventional law. The Commission's failure to define the juridical character of the formulation adopted would have placed the General Assembly in a difficult position if the Assembly had wished to come to a decision at the present session. The principles of international law, as defined in Article 38 of the Statute of the International Court of Justice, were those recognized by civilized nations or embodied in international custom. It was therefore the Commission's duty to determine the juridical character of the Nürnberg principles, in preparation for their subsequent codification, as existing principles of positive international law.

61. The second problem was the method followed by the Commission. The Commission, as the Brazilian representative had confirmed, had confined itself to classifying the juridical provisions and rulings contained in the charter and judgment of Nürnberg and, in the course of that process, had even weakened some of the principles. He agreed, in that connexion, with the Netherlands representative. The Rapporteur, in applying that method in his report, had been bound by the terms of reference he had received from the Commission at its first session. A proposal made at the time to the effect that the Commission should formulate, not only the principles recognized in the charter and judgment, but also those underlying the charter and judgment, had been rejected by the Commission (A/AC.4/22, page 23), although General Assembly resolution 95 (I) clearly called for the formulation of both. If the Commission's interpretation were adopted, it would mean that the two sub-paragraphs of that resolution said one and the same thing, which was obviously not the case. The task entrusted to the Commission, therefore, had not been to provide historical commentaries on the charter and judgment, or to throw some light on separate points contained therein, but to establish the underlying principles with a view to assisting the future development of international penal law. If it had been merely a matter of copying certain principles, it would not have been entrusted to such eminent jurists.

62. The French delegation therefore thought that the method used by the Commission in part III was not conducive to the progressive development of international penal law.

63. That general idea could best be illustrated by the example of the way in which the Commission had dealt with the question of crimes against humanity (paragraphs 120 to 124 of the report). In principle VI, the Commission had retained the idea embodied in the Charter of Nürnberg that crimes against humanity were linked with crimes against peace, and war crimes. Furthermore it was clear from the report by Mr. Spiropoulos on the draft code of offences against the peace and security of mankind (A/CN.4/25, p. 28) that he had been reluctant to include in the draft code crimes against humanity as they had been defined in the Charter of Nürnberg and thought it might be preferable to include genocide only.

64. The whole difficulty had arisen because the International Law Commission had misinterpreted its terms of reference and had retained the actual wording of the Charter of Nürnberg instead of formulating the wider principles of international law underlying that charter. Indeed, in paragraph 123 of its report, the Commission recognized the fact that crimes against humanity need not necessarily be committed in time of war, but that conclusion did not tally with the wording it had adopted in paragraph (*c*) of principle VI. The Commission had failed to recognize that its terms of reference were broader than those of the Nürnberg Tribunal which had been set up solely to try and to punish the major war criminals of the European Axis countries. In his report on the formulation of the Nürnberg principles (A/C.N.4/22, p. 38, footnote), Mr. Spiropoulos had noted that nothing was said in the findings of the Tribunal as to whether the acts committed prior to 1939 would be considered as international crimes under international law in the event of their not being connected with crimes against peace, and war crimes.

65. That was perfectly true, but it should be interpreted in the light of the Tribunal's restricted terms of reference. Unlike the International Law Commission, the Tribunal had not been asked to codify the principles of crimes against humanity; it had simply applied the

notion of such crimes to one particular set of circumstances, at the same time recognizing that they were not indissolubly linked with those particular circumstances.

66. At the 231st meeting, Mr. Amado had argued that if crimes against humanity were not necessarily connected with war, they would then become simply offences under the ordinary law. The French delegation was convinced however that such crimes had certain definite characteristics which distinguished them from crimes under the ordinary law.

67. In the first place, the whole point of establishing the nature of international crimes was that they could only be punished at the international level. The peculiar characteristic of crimes against humanity was that they were in general committed by governments, or with the complicity or tolerance of governments, so that the only possible form of punishment was on the international level.

68. Secondly, the concept of the crime against humanity had been incorporated in the Convention on Genocide which had now come into force and was thus a concrete part of international law. It was clear from article I of that Convention that genocide, an act which all representatives would surely recognize as coming within the general concept of crimes against humanity, was considered a crime under international law, whether it was committed in time of peace or in time of war.

69. It was therefore contrary to existing international law to lay down as a principle that crimes against humanity were inseparably linked with crimes against peace, or war crimes.

70. Having made those general comments on part III of the report, Mr. Chaumont said that, like the representative of the Netherlands, he too had prepared a tentative list of principles which the International Law Commission could use as a basis for future study.

71. The first principle would be the recognition of the responsibility of the individual under international criminal law; his delegation did not consider it sufficient to establish only the administrative responsibility of the State.

72. Arising out of that first principle, the second would be the recognition that to belong to certain criminal State organizations was an offence for which individuals could be indicted.

73. The third principle was the recognition that certain crimes could be classified as international crimes and were thus punishable by the immediate and direct action of the international community.

74. As a corollary, the fourth principle would be the recognition that the international community was competent to establish procedure for imposing punishment at the international level. That principle was closely connected with the question of international criminal jurisdiction which the Committee would discuss under part IV of the report.

75. The fifth principle was that the elements of international criminal law were principles in accordance with the provisions of Article 38 of the Statute of the International Court of Justice. In other words, they would form part of positive international law.

76. The sixth and most important principle would be that henceforward the protection of the lives of individuals or groups constituted a fundamental norm of international law (hence the notion of crime against humanity). That would come under the general measures to protect human rights, irrespective of the existence of a state of war or of peace.

77. He emphasized that he did not wish in any way to belittle the work accomplished by the International Law Commission, for he regarded it as an essential preliminary. The Commission should, however, continue its work, going deeper into the question, so that finally it would be able to formulate, not only the actual rules of the Charter of Nürnberg but the nature, scope and justification of the principles underlying that charter.

78. He therefore announced his intention of submitting a draft resolution requesting the International Law Commission to continue the thorough study of the Nürnberg principles and drawing the attention of the Commission and of governments to the need to give a permanent validity to those principles, and especially to the notion of crimes against humanity, a notion independent of that of crimes against peace, and war crimes (A/C.6/L.141/Rev.1). This proposed resolution reads as follows:

"The General Assembly,

"Considering part III of the report of the International Law Commission (A/1316);

"Noting that the Commission, in this part, has drawn up certain formulas taken from the text of the charter and judgment of Nürnberg;

"Emphasizing once again the reality and importance of the principles of international law on which that charter and that judgment are based;

"Requests the International Law Commission to continue the thorough study of those principles;

"Draws the attention of the Commission and of governments to the need, in particular, to give, within the framework of the aforementioned study, permanent validity to those principles and especially to notion of crimes against humanity as a ntion independent of that of crimes against peace, and war crimes."

The meeting rose at 5.35 p.m.

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