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SIR DAVID MAXWELL FYFE [presiding]. The drafts of the Soviet Union [XLVIII] and the United States [XLIX] on article 6 have not got together so well. Since we have gone over it in detail, there is really one point of supreme importance in the American draft, obviously important to them, which is the main stumbling block to agreement. That is (e)-the question of the common plan. As I understand the American draft, that is the vital point in it ' which is not included in that form in our draft. I would like the delegations to concentrate on that point first. Is that fair, Mr. Justice Jackson?

MR. JUSTICE JACKSON. Well, that and our (d) -launching a war of aggression, and, of course, the corollary to it, which is limiting wars of aggression, as I have proposed in a short draft [L], so as to rule out economic justification-which I think is quite important.

SIR DAVID MAXWELL FYFE. Could we deal with the common plan or enterprise first? It seems to me the other points will be dealt with by drafting, but I think that is a point on which we ought to see whether there is any difference in principle as to its inclusion before we go on to the other points. If Mr. Justice Jackson would be good enough just to explain the mission of that point.

MR. JUSTICE JACKSON. Well, we think it would be basic to our plan of conducting the case and basic to our interest in the case that the planning, whipping up, and carrying through of this plan of aggression against other nations be proved and judged as criminal. I think we have discussed it until I am quite sure there can be no misunderstanding of its importance to our plan of the case. I don't know that I can add very much more to it.

SIR DAVID MAXWELL FYFE. Mr. Justice Jackson, just to clarify the discussion, could your point be fairly put this way: that you want the entering into the plan to be made a substantive crime?

MR. JUSTICE JACKSON. Yes. The knowing incitement and planning is as criminal as the execution.

SIR DAVID MAXWELL FYFE. I think that, if we dealt with that point to see whether there is any difference between us, it would be helpful.

PROFESSOR GROS. It does quite agree with the views of Mr. Justice Jackson and the language of the other draft covering the question when to say, "to have directed or participated in the preparation We could have said "planning"--that was the intention of the French draft EXXXVI when we said "directed the preparation and conduct of "-so it is only a question of words. If it can be worded differently, we would agree immediately.

GENERAL NIKITCHENKO. I have already had occasion to state, and may repeat again, that in drafting this article 6 we should base our deductions on the Moscow declaration, which points to the necessity of punishment for certain concrete crimes and to punish those who had actually perpetrated those crimes and who had organized them. And from that point of view I should have thought that Sir David's draft of article 6 would answer these points raised by the Moscow declaration. In this draft, participation in the preparation and carrying out of the general plan is provided for, as are certain concrete crimes. It seems to me that we have gone one or two steps back during the last few days, that some time ago we seemed to be nearer agreement than we are now, as regards all the articles except article 6, and even as regards 6, in which there was a certain measure of agreement to take the French proposal as a basis. If we continue to discuss the same things over and over again, the question comes up of whether such discussion would have any profit at all. It might well be that it would be profitable to adjourn, perhaps, for a few days so that during those days the delegations could study the various proposals in detail and try to reconsider the position and perhaps after that we could have a better chance of reaching mutual understanding and coming to agreement.

PROFESSOR GROS. We are open to any suggestion, but we are in a position to accept the Soviet draft with the exception of three words, and it seems to us to be a pity at such a stage not to finish that article today or tomorrow. Each day lost is a day lost for the prosecuting officers, and we had, as the Soviet Delegation pointed out, thought we were near the end of discussion of article 6. May I give just one indication on one point which has been raised by Mr. Justice Jackson! I was impressed by the argument of Mr. Justice Jackson that it does not seem fair in paragraph (a) to speak of acts carried out only by "the European Axis Powers". And I was also convinced, as the Attorney-General put the question, that it was in error to say something like that. I might suggest that in the beginning of the article we could say something like this: "In view of the decisions of the United Nations, the major war criminals of the European Axis powers will be judged by the International Military Tribunal." And after that would come the jurisdiction of the Tribunal, and that would provide for trial of the crimes and atrocities committed by the Axis powers because we have been put in charge of that job only, and are not to set up a general international court. That would give satisfaction to Mr. Justice Jackson. Now, just to show how near we are on other points to the Soviet draft, the modification which I would suggest is only a formal one in the second line-"shall be deemed to be crimes coming within the jurisdiction of the Tribunal". There seems to be a slight difference as it stands-"shall be deemed crimes and shall come within the jurisdiction of the Tribunal". What we are doing is putting all war crimes before the Tribunal. The last change is to satisfy Mr. Justice Jackson, and I hope to do it. I think we could put after the last paragraph some words like "in the planning", or "in the common planning, preparation for", et cetera. I must say that the criticism which was made against the generality of the word "policy" seems to me to apply to the word "common plan". But I don't object to that; in fact, the result would be a decision of the court, and it would be after the decision of the court that the common plan would be established. So it does not matter very much whether we use in that article the words "policy", "design", or "plan" because the real thing is to get a decision of the court which will say "the general plan". The important thing is the conviction against the German leaders.

GENERAL NIKITCHENKO. Actually this is not the Soviet text. It is the English text. We have just a few alterations.

PROFESSOR GROS. I think it is not such a bad one that we could not accept it, considering it is a conclusion of a draft we like. When you read it, and it will be read widely, it is clear that actually the Soviet draft is a very clear draft. Anyone can understand it, and I would like it adopted. I am sure there would be no justifiable comments on the article as it is drafted, because there has been a political declaration by the three powers which says there

must be a judgment by a court of the major war criminals. Well, that does not give a free hand to us to say exactly what we want. We have just to say what crimes will go before the court. This article says that and only that. The American draft would be a perfect article if we were charged with the duty of making a codification of rules of international law for the punishment of international war criminals, which we are not charged to do. We must not try to get too much in that draft, because it will not help. The result of the International Military Tribunal will not be judged by what is in that article, but it would be judged in the next 10 years-and I would not be afraid to say judged severely-by the American draft, by critics who would say that this is partly a political charge. We must leave the law to the judge to decide, and I am not afraid, as it has been said in other meetings, of what lawyers will say. I am afraid of the public opinion which will take the whole work of the Tribunal, and I would prefer to have this result: "Well, the victors have decided to judge the vanquished, and they put it to the court and that court has judged them for crimes committed by the people in the service of the leaders." That is sensible, and you will get no adverse comment from anyone for the years to come. On the contrary, if you put in a declaration deeming something to be international law, and saying that launching a war of aggression is a violation, you will be criticized, and not by lawyers but by people who will make accusations that the result of the trial was made beforehand. In that draft we are just making plain the work which has been given to us.

SIR DAVID MAXWELL FYFE. I want to make my position clear. I am confused. I thought the British draft gave expression to the common agreement, and I hoped that it included the American conception of the plan, which I think also of great importance. Like Professor Gros, I had thought that the American conception would be introduced more clearly if we introduced the words "or planning" or some such word, in the last paragraph. That was really the only substantial suggestion I had to make to the Soviet adaptation of our draft. We had the word "planning" in the first paragraph of our draft and thought we could put it in. But I do feel this very strongly: there is a special duty on me, as you have been good enough to treat me as chairman, to try to bring about an agreement. This has been my main purpose throughout, and I am still wondering whether we could not meet Mr. Justice Jackson's point by splitting our original (a) between aggression and domination; that is, not adding to the conceptions, but splitting it in two and, while keeping in "aggression over other nations", as in the Soviet adaptation, at the same time introducing another paragraph which would be "to enter into a conspiracy for domination", which would really meet the substance of the American paragraph (e). Mr. Justice Jackson, how would you feel on that as to meeting your point?

MR. JUSTICE JACKSON. Well, I agree with General Nikitchenko that we have been moving backward on this matter of definition since before I left Washington, because there was presented to me there an aide-memoire by the Soviet Government accepting in principle our definition, making additions which we thought embodied the same plan, making additions to it, making annihilation and other atrocities crimes, which we were agreeable to adding. Then the drafting committee had only a few points reserved, and now we are in questions involving everything. So I am afraid we are not making progress. We tried very hard in defining crimes, which is a very difficult and technical subject, to adopt definitions consistent with the views of Professor Trainin as we understood them from his book. It is a rather difficult subject to analyze without taking a good deal of time to do it. Of course, the violation of the laws, rules, and customs of war are matters for which no international tribunal is needed. I think that every one of the top prisoners that we have is guilty and provably guilty of joining in a plan of warfare that involved ordering the execution of American prisoners of war, etcetera, and they can be tried in our military courts and disposed of within the next two months. So far as it affects our nationals, our interest in an international trial of offenses set out in that paragraph is rather secondary. About the only difference we have about that is that we left out of our draft the destruction of villages and towns, because I have seen the villages and towns of Germany. I think that you will have great difficulty distinguishing between the military necessity for that kind of destruction as distinguished from some done by the Germans, assuming the war to be legitimate. It seems to me those subjects invite recriminations that would not be useful in the trial. The provision as to atrocities against civilians is much the same as the draft we submitted except that we expressly provided for disregard of domestic law because otherwise there would be difficulty reaching some of the German activities toward their own population. The difficulty with the phrase "aggression or initiation of war in violation of treaties, agreements, and assurances" seems to drop out entirely if the launching of war of aggression regardless of agreements, treaties, or assurances is in itself-as it is in our judgment-a crime. We are supported by a course of dealings in which the countries have given up war as a means of promoting policy.

The next definition, joining in a common plan aimed at other nations and involving in its execution any of the above crimes, may reach the same end that we have suggested; I am not quite sure.

The last is one of those rather vague declarations that I don't know that I object to particularly, but I think a better conspiracy provision, perhaps a more exact declaration of responsibility, could be made. Of course it omits our suggestion of a definition of aggression that, as I have said before, we did not make at the outset. It is not in our original draft, but it seems to us very essential as we have heard these discussions go on.

Now, however, we propose that no political, economic, or other consideration may be justification for a war of aggression, reserving, of course, the right of legitimate self-defense. As I have said before, our country was so far from this war and we were so late coming in that I am not at all worried, so far as the United States is concerned, about the countercharge that there has been no aggression, because there were acts of Germany's enemies which made the aggression really self-defensive in character. But I don't want to be in a position where the United States is obliged to enter into a discussion at this trial of the acts or policies of our allies. If that arose in the trial, I should withdraw and leave it to be discussed by the powers involved. I think it would be a most unfortunate situation if the trial became involved in the political policies that lay back of the war. Too many recriminations would result. And why should the court stop it if we four men are not willing to stop it? There is much more justification for us to stop it than for the court to stop it, and it seems to me this trial is likely to take a very unfortunate course if we don't so limit it that it does not get into the remote causes of the war.

SIR DAVID MAXWELL FYFE. On the last point-just to make one thing clear on the question of initiation of war-I think we could show that every war with which we were concerned was in violation of treaties, agreements, and assurances. That is the particular point. It looks to me as if there is no answer to the point made by both General Nikitchenko and Mr. Justice Jackson that we don't seem to be getting any further. It may be that the only answer to that is to adjourn for a final effort to see what concessions we are all prepared to make to get agreement before the announcement to a desolate world that we have failed to come to agreement on a question on which we all have the same designs. The only point I want to make clear is that I think the problem was covered by our draft and should be answered if the word "planning" were introduced in the suggested adaptation. I should be quite prepared to agree that to enter into a plan or conspiracy to dominate be made a substantive offense in order to reach an agreement, if the other delegations could consider that point. Then I should have thought that the major difficulty of Mr. Justice Jackson was met. I wasn't sure, Professor Gros, whether you had any objection to that.

PROFESSOR GROS. Not at all. We hope we show the right consideration, because finally we have accepted quite a lot of things and still are ready to accept quite a lot more, and the other would mean many modifications. We have criticized the American draft on two things: one, it covers all violations-it is an article which gives jurisdiction for all war criminals, not only the major; and two, in the last paragraph it wants to dispose of the whole question of reprisals-the question of reprisals in international law is one existing for the last 500 years and you cannot wipe it out in just one word. That is the real reason we cannot go on on the American draft. We could agree to improving, according to the desires of Mr. Justice Jackson, the Soviet draft and also would accept any suggestion because we think the meaning of the common plan is already in there. If we break the Conference and show the minutes of the conferences, they will not explain why it was broken because there is no fundamental difference between those two plans. And I do not know how we will reply to questions as to why we broke up. All questions are dealt with in the last Soviet draft. I should think that in consequence our differences are more or less this: the Americans want to win the trial on the ground that the Nazi war was illegal, and the French people and other people of the occupied countries just want to show that the Nazis were bandits. It is not very difficult to show. There has been an organized banditry in Europe for many years. The result was crimes, and we want to show that those crimes have been executed by a common plan. The result of that will be to show that the Nazis have launched and conducted an illegal war; so it is really a difference of wording, but the results will be shown to the world as you want to show them. I would like to make an appeal to the spirit of conciliation of Mr. Justice Jackson and ask him to consider our intentions and feelings when we are going to speak for the people of occupied countries and show that those Germans have acted as bandits and there has been a conspiracy; so we

are truly at a point where we do not know what to do, but we feel there is no fundamental difference in our views.

SIR DAVID MAXWELL FYFE. Would General Nikitchenko object to the adding of a paragraph explicitly mentioning the common plan?

GENERAL NIKITCHENKO. First of all I would like to repeat that this actually is not the Soviet proposal the proposal which Professor Gros has supported. Just as the French Delegation would probably have a very different article 6, so the Soviet Delegation would have a different article 6 for its internal consumption. There are quite a few things here with which we might not have agreed, but, taking into consideration the fact we must try to reach agreement, we are of the opinion that that draft would be most suitable for a general agreement. I quite agree with Professor Gros' suggestion that at the beginning we should say, "shall be deemed crimes coming under jurisdiction of the Tribunal". That formula would be more precise, and it seems to the Soviet Delegation that, if we took this draft as a basis, that would be the shortest way to the agreement. We could put in alterations which would not in principle alter the spirit of it. As for the question about inclusion of the common plan idea, that would depend on its drafting; that is an idea that might very well be acceptable, but, if it were prepared in an unacceptable form, that would make a lot of difference. Just as Professor Gros says, I think that it is not our task to try to draft a code which could be applied at all times and under all circumstances. I wish to emphasize again that we must act under the Moscow declaration, and, although in that declaration there is nothing establishing a court, it does speak of the crimes for which these people must be punished. The last part of Mr. Justice Jackson's proposal about exercise of right of legitimate defense would invade a field which is outside our competence really. In any case the defendants might very well refer to this very paragraph and say they had been acting in legitimate self-defense; that is, the arguments which this paragraph is trying to avoid are not in fact avoided, because, if they do crop up, they will crop up in any case as legitimate defense.

When I was speaking about our going backward, I really meant not in our whole work, which was profitable but for the last few days. I have no minutes of our proceedings, and I may very well be mistaken, but I thought that, when the French proposal was submitted, there was more or less general agreement including Mr. Justice Jackson as to its forming a basis for discussion. And since then-but really not since San Francisco, Mr. Justice Jackson has said-we have made little progress. The draft that was submitted in San Francisco was not really discussed here although the Soviet Government had in principle agreed to it. I wish to point out in my comments on the draft agreement prepared in San Francisco that the Soviet Government had emphatically objected to the trial of organizations. Since then in respect to the American point of view we have found it possible to meet that point of view and to say that during the trial of individual persons organizations of persons may be declared criminal. That is why the Soviet Delegation since San Francisco has been trying to meet the views of other delegations and to reach common ground.

JUDGE FALCO. I ask Mr. Justice Jackson to reconsider and tell what he would add, or to what he objects, in the Soviet draft and what would be necessary to join their paragraph with his point of view.

SIR DAVID MAXWELL FYFE. Mr. Justice Jackson, it seems to me that, if we could find words as to the introduction or the clarification of the conspiracy or common plan, the other delegations would be prepared to meet on that. It seems to me that the much greater difficulty is on the question of defining aggression. I think that is fair, isn't it, Professor Gros? That was why I suggested such words as "violations of treaties, agreements, and assurances."

MR. JUSTICE JACKSON. Well, first of all, I would, of course, agree to consider the French draft. I would be willing to consider anybody's draft of any article, but I don't think that to agree to consider a draft binds me to accept it. Always I supposed I had made clear that I had reserved my position. I think there is a very basic difference between us. I think Professor Gros put his finger on it when he said the American Delegation wants to show that war is illegal, while they only want to show that the Nazis were bandits. Without boring you too much, I will tell you why we are interested in that and explain what our basic difference is here, as I see it.

It is probably very difficult for those of you who have lived under the immediate attack of the Nazis to appreciate the different public psychology that those of us who were in the American Government dealt with. Our American population is at least 3,000 miles from the scene. Germany did not attack or invade the United States in violation of any treaty with us. The thing that led us to take sides in this war was that we regarded Germany's resort to war as illegal from its outset, as an illegitimate attack on the international peace and order. And throughout the efforts to extend aid to the peoples that were under attack, the justification was made by the Secretary of State, by the Secretary of War, Mr. Stimson, by myself as Attorney General, that this war was illegal from the outset and hence we were not doing an illegal thing in extending aid to peoples who were unjustly and unlawfully attacked. Now we believed, and the American people believed, just the doctrine that I have put into this definition. No one excuses Germany for launching a war of aggression because she had grievances, for we do not intend entering into a trial of whether she had grievances. If she had real grievances, an attack on the peace of the world was not her remedy. Now we come to the end and have crushed her aggression, and we do want to show that this war was an illegal plan of aggression. We want this group of nations to stand up and say, as we have said to our people, as President Roosevelt said to the people, as members of the Cabinet said to the people, that launching a war of aggression is a crime and that no political or economic situation can justify it. If that is wrong, then we have been wrong in a good many things in the policy of the United States which helped the countries under attack before we entered the war. Now it may be that we were mistaken in our attitude and philosophy and that what Germany has done is legal and right, but I am not here to confess the error nor to confess that the United States was wrong, in regarding this as an illegal war from the beginning and in believing that the great crime of crimes of our century was the launching of a needless war in Europe.

Now I realize fully that the interests of those who were under immediate physical attack take a different angle. That the war was an attack on the international order does not have so much significance to them, because it affected them in more direct and immediate respects. But it was the attack on world peace that involved us and justified, we thought, the course we took. When it came to dealing with war criminals, the position of the President was clearly stated to the American people-the launching of a war of aggression was a crime. That is one of the things we want to prove, because we want the Germans and anybody else to know that as far as the United States is concerned it regards any attack on the peace of the world as an international crime. It may become necessary to abandon the effort to try these people on that basis, but there are some things worse for me than failing to reach in agreement, and one of them is reaching an agreement which would stultify the position which the United States has taken throughout. I can realize that our position may seem academic and theoretical to those who have been subject to more direct attack, but it was not too theoretical a basis for our help in action. I do not consider that I would be authorized to abandon the American position, and, if I were so authorized and it were left to my discretion, I would not be willing to do it. I think there are four possible courses here: one is to set up the international Four Power trials we have been considering; another is to refer the war-criminal matter back to the Potsdam Conference for a political decision as to what they will do with these prisoners; another is for the United States, whose interests and views in the matter do not seem to be in accordance with those of the European Allies, to turn over its prisoners to the three Allies and permit their trial or disposition by such method as you three agree upon; and the fourth course would be for each of us, by separate trials, to proceed to try those we have as criminals. I am willing to recommend sending the question to Potsdam for a political decision if we cannot a

SIR DAVID MAXWELL FYFE. I do not think anyone suggests that aggression does not make a crime. "The following acts shall be deemed crimes": number one, aggression.

MR. JUSTICE JACKSON. Well, aggression limited to violation of specific treaties, not the general treaty to outlaw war of aggression. Now, Germany did not attack us in violation of treaties, or otherwise.

PROFESSOR GROS. They violated the pact of Paris.

MR. JUSTICE JACKSON. But they would not attack the United States. We were acting under the theory that there was an illegal war long before we were attacked. As I say, your position is a somewhat different position from ours.

PROFESSOR GROS. Everybody examined if the war was illegal in France and Great Britain and found it so in 1939. Also we realized the attack by Germany against Poland and the German war was illegal on the German side. I always thought the decision of the Tribunal would begin by first considering that Germany, having violated the Pact of Paris, launched an illegal war and that it would be said to be illegal by the court as its first finding. That would cover the fact of aggression and the explanation could be given by the court; so we would all agree that the war of aggression is illegal. What is not agreed is that the fact of launching the war of aggression makes it possible to have a government of war criminals. So, if you put it as accepted by the three delegations, you do not imply that the members of the German Government are war criminals-you'd just say that the court will judge for itself and the decision will remain with the Tribunal. As I said the other day, I don't quite see how, if Germany had launched a war of aggression but had not committed any acts in (b) and (e), we could actually set up a court to judge members of the German Government. It is what is in the aggression, what comes after the aggression, that makes really the necessity and the right of judging those men. We cannot speak of American political history but remind you that more than a century ago America participated in destroying international banditry when some men came and captured Algiers, which was a port of piracy; so it is not the first time the Americans have come to us-and to the other European countries-to fight when it is useful. So there is no difference.

SIR DAVID MAXWELL FYFE. But I thought that we were prepared to include aggression against other nations as a crime.

GENERAL NIKITCHENKO. It does say in paragraph (a) that aggression or domination shall be considered crimes; so I do not think anyone objects to saying that aggression is a crime.

SIR DAVID MAXWELL FYFE. But I do not think we are at any difference from you there.

MR. JUSTICE JACKSON. Where does it say that aggression is a crime? That definition limits it decisively. That is why we set it up separately after a good deal of consideration and study.

SIR DAVID MAXWELL FYFE. I should myself be prepared to say both are crimes: aggression against other nations and initiation Of war in breach of treaties. If that would help toward getting agreement, I would be prepared to have it in that way. It happens to be my view.

GENERAL NIKITCHENKO. Without a reference to the European Axis powers.

SIR DAVID MAXWELL FYFE. That would be in the introductory paragraph according to the draft. That is Professor Gros' suggestion on that point, that it would be pushed up to the beginning. I think we suggested one way of dealing with that at the beginning of ours: "to convict any person . . . on the part of the European Axis powers". We make it quite clear we are dealing in accordance with our reference from Moscow. It seems to me that there is really no difference on that point. I should not think you would get three people who hold more generally that war of aggression is a crime than General Nikitchenko, Mr. Justice Jackson, and myself.

MR. JUSTICE JACKSON. That is why I find it hard to understand why no simple statement to that effect comes to the table in any definition except that of the Americans.

SIR DAVID MAXWELL FYFE. What we were considering with the view to trying to find a reality that we all agree on was "aggression or initiation of war of aggression on other nations" in this combined draft.

You make two offenses there. What I suggested was "aggression against other nations"; or "initiation of war in violation of treaties, agreements, or assurances". Mr. Justice Jackson presents his own phrase of launching a war of aggression.

MR. JUSTICE JACKSON. I don't want to stand on that. I think it would be better to say "initiating a war of aggression or initiation of war in violation of treaties, agreements, or assurances", and we had added "or otherwise in violation of international law". Going to war without a declaration is a violation and has been for many years, and we want to get all of these recognized violations in if possible; so we think we should not drop "or otherwise in violation of international law" in order to have available the repeated cases in which these people went to war without declaration, et cetera.

MR. TROYANOVSKY. Is there any difference between initiation and launching?

SIR DAVID MAXWELL FYFE. No, just a more colorful term.

GENERAL NIKITCHENKO. Is it supposed then to condemn aggression or initiation of war in general or to condemn specifically aggressions started by the Nazis in this war? If the attempt is to have a general definition, that would not be agreeable.

SIR DAVID MAXWELL FYFE. But it would be covered by the fact that the Tribunal would only be empowered to convict a person who committed the act of aggression on behalf of the European Axis powers. It would be limited. We are avoiding your difficulty by doing that. We are saying expressly that this Tribunal can only deal with the following crimes on behalf of the Axis; so it is limiting the trial as clearly as it could to those who were doing it on behalf of the Axis.

GENERAL NIKITCHENKO. If we leave it as it is in Mr. Justice Jackson's proposal, wouldn't that limit it more, that is, a person who had not acted on the part of the European Axis powers would not have committed the crime. Perhaps the translation is at fault, but, as it is, it seems to us that it refers not only to the past but to the future-so that in the future they shall be deemed criminal violations.

SIR DAVID MAXWELL FYFE. "Shall" in a document such as this is merely mandatory. In English it is obligation and not tense. We could use the present tense "are deemed and do come within powers". It is really only a legislative form. Mr. Justice Jackson, if that point is met, don't we really meet your view?

MR. JUSTICE JACKSON. I think that takes care of that point. There are other points in connection with this. We avoided use of the word "conspiracy" in view of technical differences in the law of conspiracy in the Continental and the common-law countries and put in the words "common plan". I think you drop what is important in making the proof if you omit joining in the common plan. It is likely to be much easier to prove that they became parties to the plan to expand Germany by force than to a plan to start a war. You will have some difficulty with that because Hitler always showed people up to the last moment that his plan would not involve war because his enemies would not fight. At the same time it was always understood that it might involve war and they were taking that chance, and I think careful words are necessary to avoid a handicap in proof.

SIR DAVID MAXWELL FYFE. Well, I cut these words out because I thought from the last captured documents I had seen that there would be no difficulty in showing the plan would involve war. This added complication for our Russian and French friends. These are legal phrases we are familiar with and they are not. The simpler form I like better. Will you forgive me if I leave? I must go and learn my fate at the polls. Sir Thomas will carry on.

SIR THOMAS BARNES. Do you attach great importance to those words?

MR. JUSTICE JACKSON. I don't attach great importance, and it has no more meaning to us than it has to anyone else.

GENERAL NIKITCHENKO. It has no real importance. It is hardly likely we could settle this on the spot. Perhaps, if Mr. Justice Jackson would find it possible to put his suggestion in 'writing as to alterations of this text, it could be taken as a basis for discussion.

SIR THOMAS BARNES. Would the best thing be for us of the drafting committee to prepare a document now along the lines of the compromise which we have suggested? In collaboration with our colleagues we shall consider documents which were circulated some time ago. In redrafting we shall bear in mind the discussion which has taken place this afternoon. We shall circulate that, and you can consider it.

GENERAL NIKITCHENKO. We cannot recommend that. We are afraid that, if the text turns out to be too new, we would go back to where we were before.

SIR THOMAS BARNES. We shall do our best to maintain our whole text as we have in this discussion. We have taken the compromise from both. We hope it won't be too far away.

Well then, does Mr. Justice Jackson object to the last paragraph of the Soviet draft-the question of responsibility?

MR. JUSTICE JACKSON. No, not if the common plan is clear.

SIR THOMAS BARNES. The whole purpose of this, as I understand it, is to place personal responsibility on the major war criminals for all the criminal acts which have been committed by the armed forces, civilians, and otherwise, and I thought it a useful thing to put in. Whether we have got to the actual phraseology I do not know. Then we agree that that or something of that sort goes in. Then we come to the definition of aggression, which is a rather difficult one. What do you feel about it?

MR. TROYANOVSKY. The last draft of the Americans on definition of aggression-

SIR THOMAS BARNES. Shall we put the last American draft defining aggression into the new draft for consideration? I should like myself to put it in and so would the Attorney-General.

GENERAL NIKITCHENKO. We have already had occasion to state our opinion, and we still think that it is outside of the competence of this committee and that it would not be any help at the trial.

JUDGE FALCO. I think it is also outside of consideration. I thought we agreed to take that proposed by the Soviet Delegation. If we take a new point, I am afraid we would be delayed.

GENERAL NIKITCHENKO. If we start discussion on that again, I am afraid the war criminals would die of old age.

SIR THOMAS BARNES. What would you like to do about that, Mr. Justice Jackson? Would you like to reconsider it?

MR. JUSTICE JACKSON. As I have said before, the thing concerns chiefly the European powers. I think nothing would be more unfortunate in relations with the United States than for us to get into the causes of war, and the risks are not mine but yours. I will not commit the United States to litigating the causes of the war. Maybe you will have judges who without such provision would rule such matter out, but, if I were sitting and you objected to their political or economic justification, I would say you were drawing the agreement. If you thought it an illegal defense, why did you not say so?

GENERAL NIKITCHENKO. The judges perhaps would be experienced enough to consider that as irrelevant.

SIR THOMAS BARNES. This may put into the minds of the defense some arguments which otherwise would not occur to them.

GENERAL NIKITCHENKO. Yes, the defendants might very well make use of that paragraph by saying that they were acting in legitimate self-defense.

MR. JUSTICE JACKSON. That has been their position for a long time in propaganda in my country, and I don't think it will suggest anything to them that is new.

SIR THOMAS BARNES. Well, shall we have a redraft? We will go ahead and see what we can do.

The Conference adjourned until July 27, 1945.(1)

(1) Because of Mr. Justice Jackson's absence in Potsdam and the change in the British Government, the Conference did not reconvene until Aug. 2, 1945.

Source:

International Conference on Military Trials : London, 1945
Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials : London, 1945
International organization and conference series; II
European and British Commonwealth 1
Department of State Publication 3080
Washington, DC : Government Printing Office, 1949

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