Document:-
A/CN.4/SR.25

Summary record of the 25th meeting

Topic:
<multiple topics>

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Governments. Mr. Koretsky asked the Commission not to create a precedent inconsistent with the two-fold principle of supervision and co-operation. As for the Commission's prestige, it would be protected, since the publication of the draft would show the extent of the work which the Commission had accomplished.

79. The CHAIRMAN remarked that, in regard to the progressive development of international law, under sub-paragraphs (*b*) and (*c*) of article 16, the Commission must first establish a plan of work and send a questionnaire on the topics included therein to the Governments. The fact that that formality had not been observed, and that no member had suggested it, seemed to indicate that the Commission had not considered the draft Declaration as falling within the scope of article 16.

80. Again, the request for documents provided for in article 19, paragraph 2, in regard to codification, had not been addressed to the Governments either, doubtless because the Commission had thought that that was a special case and that the stage concerning application of that article had already been passed.

81. The Chairman pointed out that the procedure concerning direct transmission of drafts would not in any way prevent the General Assembly from consulting Governments, if it deemed it advisable. The latter would have received the text of the draft from the Secretariat before the opening of the session; they could therefore submit detailed comments during the discussion in the Assembly. If it decided to wait until they had submitted their comments, it would then be in a position either to take an immediate decision or to refer the draft to the Commission in order that the latter might reconsider it in the light of those comments. In any case, the General Assembly's freedom of action would in no way be hampered by the proposed procedure.

82. Mr. ALFARO supported the suggestion of the Chairman and pointed out that the draft Declaration constituted an exceptional case, which did not fall within the scope of progressive development or codification as they were defined in article 15 of the Statute. Moreover, it could be concluded from the juxtaposition of General Assembly resolutions 175 (II), 177 (II) and 260 (III) that three special questions were involved which were outside the field of the progressive development and codification of international law and with which it was the Commission's duty to deal.

83. Sir Benegal RAU asked if article 1 of its Statute did not strictly limit the competence of the Commission to the progressive development of international law and its codification.

84. Mr. HSU supported the Chairman's proposal. The draft declaration was a special question, to which the procedure of the Statute did not apply. However, if that treatment of the matter were insisted upon, it must be concluded, since it was principally a question of codification and considering the circumstances in which it had been submitted to the Commission, that the draft was at the stage mentioned in article 22, in other words suitable for transmission to the General Assembly. If the Assembly was not satisfied with the procedure followed, it could, in accordance with article 23, paragraph 2, always refer the draft back to the Commission for reconsideration. In any case, nothing prevented the transmission of the draft, as soon as it was adopted, to the General Assembly without further formality.

The meeting rose at 1 p.m.

25th MEETING

Monday, 23 May 1949, at 3 p.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.

Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Vladimir M. KORETSKY, Sir Benegal RAU, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. LIANG, Director of the Division for the development and codification of international law, Secretary to the Commission.

Draft Declaration on the Rights and Duties of States (*continued*)

THIRD READING (concluded)

Article 2

1. The CHAIRMAN recalled that at the preceding meeting, after a lengthy discussion on article 2, the Commission had decided to postpone the final vote on that article in order to permit the Rapporteur, Mr. Amado, who was absent at the time, to take part in the voting. [1] The Chairman gave a brief summary of the arguments that had been advanced for and against the retention of that article.

2. Sir Benegal RAU repeated the comments he had made at the preceding meeting.

3. The CHAIRMAN invited the Commission to vote on article 2.

The Commission decided to delete article 2 of the draft declaration, by 7 votes to 5.

Article 1

4. After sounding the views of the Commission, the CHAIRMAN decided to put to the vote once more article 1, which it had been decided to retain in the draft declaration by an equal vote taken at the previous meeting.[2] A new vote would give the Rapporteur, Mr. Amado, an opportunity to express his views on the retention of that article.

The Commission decided to delete article 1 of the draft declaration by 7 votes to 5.

Article 7

5. The CHAIRMAN pointed out that the Commission had reserved its decision on the proposal to delete the words " without distinction as to race, sex, language or religion " at the end of article 7.[3]

6. It had been emphasized as an argument for the deletion of those words that, whenever the question of respect for human rights appeared in the Charter, it was as an aim to be achieved (Articles 1. 3, 13. lb, 55 c, 62.2 and 76 c). The conclusion had been drawn that the Charter did not in any way impose on the Members of the United Nations a legal obligation to respect human rights and fundamental freedoms, and it had been pointed out that neither did existing international law impose any such obligation on non-member States.

7. Mr. SANDSTROM recalled that he had raised certain objections to the wording of article 7, and proposed a return to the formula appearing in article 21 of the Panamanian draft,[4] though with certain slight changes. Article 7 might be worded as follows: " It is the duty of every State to treat the persons under its jurisdiction in a manner which does not violate the dictates of humanity and justice, or offend the conscience of mankind."

8. In his opinion, the Commission would be going much too far if it enunciated as a legal obligation what the Charter of the United Nations and the Universal Declaration of Human Rights deemed an ideal to be achieved or a purpose to be realized. Moreover, it would be well to avoid the expression " human rights and fundamental freedoms " which led to confusion on account of the fact that some people considered that the human rights and fundamental freedoms involved in the Charter were not the same as those enunciated in the Universal Declaration of Human Rights. For himself, he thought it was difficult to maintain that the human rights mentioned in the Charter were different from those in the Declaration, and he therefore preferred the formula he had proposed, which corresponded to the current stage of development of international law.

9. Mr. ALFARO was very flattered by Mr. Sandström's proposal to return to the original text of the Panamanian draft; He was anxious to explain that in reproducing, in his draft. the formula of principle 2 of " The International Law of the Future: Postulates, Principles and Proposals ",[5] he had in fact had in mind the human rights referred to in the Charter. That was why he had agreed with pleasure to replace that formula by the current text, proposed by Sir Benegal Rau, which mentioned human rights expressly.

10. Without wishing to make any formal opposition to the inclusion in article 7 of the text proposed by Mr. Sandström also, he was afraid that it would be out of place, at the current stage of the Commission's work, to delete the direct reference to human rights. Such a deletion would risk being wrongly interpreted by public opinion.

11. Mr. YEPES was in favour of the text prepared by the Drafting Committee. The expression " human rights and fundamental freedoms " had acquired a precise meaning: public opinion might be shocked to see the Commission avoid reproducing the formulae of the Charter.

12. The CHAIRMAN remarked that the meaning of the expression " human rights and fundamental freedoms " was far from being precise, in view of the fact that, in his opinion, the Universal Declaration of Human Rights recently adopted by the General Assembly was not designed to define the human rights mentioned in the Charter.

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[1] A/CN.4/SR.24, para. 50.

[2] *Ibid.*, para. 23.

[3] *Ibid.*, para. 51.

[4] See A/CN.4/2, p. 38.

[5] *Ibid.*, p. 161.

13. He put to the vote the proposal to delete the words " without distinction as to race, sex, language or religion ".

The Commission decided to retain those words, by 7 votes to 5.

14. The CHAIRMAN then put Mr. Sandström's proposal to the vote.

The proposal was rejected by 7 votes to 5.

Article 7, in the form proposed by the Drafting Committee (A/CN.4/W.8) was adopted by 7 votes to 4.

Additional article relating to the jus communicationis *proposed by Mr. Yepes*

15. Mr. YEPES said that the *jus communicationis* was one of the principal rights of States and constituted the very foundation of international law. He thought it would be advisable to add to the draft declaration an article devoted to that right, which might be worded to read: " Every State has the *jus communicationis*, in the sense that it has the right to enter into trade relations with all other States, to maintain with them diplomatic, consular and other relations and to conclude with them treaties and conventions."

16. Mr. SPIROPOULOS said that there was no provision in international law for *jus communicationis* and that States were under no obligation to enter into diplomatic or commercial relations with other States.

17. Mr. FRANÇOIS, supported by Mr. BRIERLY, was opposed to the inclusion in the draft declaration of an article such as that proposed by Mr. Yepes, as the *jus communicationis* was a right which did not exist in international law and was a very vague conception.

18. Mr. SCELLE supported Mr. Yepes and added that relations between States were the basis of international law and that if the *jus communicationis* did not exist no international law would be possible.

19. The CHAIRMAN thought that Mr. Yepes' proposal should have been submitted at an earlier stage in the Commission's work.

20. Mr. YEPES explained that he was not formally suggesting the adoption of his text: he had merely wished to draw the Commission's attention, before the adoption of the draft declaration as a whole, to the desirability of including in that draft an article on *jus communicationis*.

Adoption of the draft declaration as a whole

21. Mr. YEPES proposed placing article 9, on the duty of States to refrain from fomenting civil strife in the territory of other States, after article 5, on the duty of non-intervention.

It was so decided.

22. The CHAIRMAN put to the vote the English text of the draft declaration as a whole.

The English text of the draft declaration was adopted by 11 votes to 2.[6]

23. Mr. KORETSKY explained that he had voted against the draft declaration as it contained many defects to which he had already previously referred. The final text was even less satisfactory than the original text proposed by Panama.

24. The CHAIRMAN said he had voted against the draft declaration because the provisions of former article 7 (new article 6) went beyond the Charter and the current stage of development of international law.

25. Mr. SPIROPOULOS explained that he had voted for the draft declaration as it appeared satisfactory as a whole, although, in his opinion some articles should not have been included, while others were not entirely acceptable.

26. Mr. ALFARO had voted for the draft declaration as the Commission had succeeded, in a general way, in finding satisfactory wording for the most important articles. He regretted, however, that the Commission should have decided to delete the three fundamental articles on the existence of the State which, logically, should have been placed at the beginning of the Declaration on the Rights and Duties of States. The draft just adopted by the Commission was composed of fourteen articles, whereas the Panamanian draft consisted of twenty-four. It should not, however, be assumed that ten of the articles of the Panamanian draft had been deleted; certain articles had been incorporated in the preamble to the Declaration, while others had been combined into a single article. The essential points of the Panamanian draft were, as a whole, retained in the text adopted by the Commission.

27. Mr. BRIERLY was in favour of the draft declaration which he thought satisfactory as a whole. He entirely disapproved of the provisions of former article 7 (new article 6) which went beyond those of the Charter and existing international law, but no member of the Commission could expect all his wishes to prevail over those of the majority.

28. Mr. SCELLE said he had voted for the draft declaration not because he believed that the concept of the rights and duties of States was a real legal concept, but because he felt that the extent of the legal powers of the Governments of States should be defined in one form or another.

Procedure to be followed after the adoption of the draft declaration (continued)

29. Mr. SANDSTROM agreed that the drafting of a declaration on the rights and duties of States was a special task which had been entrusted to the

[6] See A/CN.4/SR.29, paras. 1-11 for discussion of the French and Spanish texts; see also A/CN.4/SR. 30, paras. 1-21 for a proposed additional article.

Commission by the General Assembly and for which the Commission should lay down its own procedure. In his opinion, the draft which had been adopted should be referred to the General Assembly, which would decide what effect should be given to it.

30. Sir Benegal RAU pointed out that under article 1 of its Statute, it was the Commission's duty to promote the development of international law and its codification. The procedure to be followed was laid down in article 16 or article 21 of the Statute, according as the task entrusted to the Commission fell within the field of the progressive development of international law or that of the codification of international law. It had, however, to be admitted that the preparation of a draft declaration on the rights and duties of States was a special task which did not derive either from the progressive development of international law or from its codification and that, therefore, the provisions of articles 16 and 21 did not apply in the case in point.

31. In submitting to the General Assembly the draft declaration it had just adopted, the Commission should make it clear that it had felt that the General Assembly had entrusted it with a special task and for that reason it had not followed the procedure laid down in articles 16 and 21 of the Statute.

32. Mr. KORETSKY said that it was very easy to side-step the provisions of the Statute, and to evade the obligation to conform to them by alleging that a special task had been imposed on the Commission.

33. When the General Assembly decided to set up the International Law Commission, it might well have been thought that the members of that Commission, as jurists, would provide all other United Nations bodies with an example of how legal obligations should be respected. However, after having been invited by the General Assembly, to exercise its functions in accordance with its Statute (resolution 174 (II)), the Commission, which had been instructed by the General Assembly to prepare a draft declaration on the rights and duties of States (resolution 178 (II)) appeared inclined to disregard those provisions. Indeed, it seemed disposed to submit directly to the General Assembly the draft declaration it had adopted without first asking the various Governments, as the Statute required, to submit their comments on that draft. It thus appeared to wish to ignore the views of Governments and public opinion.

34. Mr. Hudson had sought to show that the preparation of the draft Declaration on the Rights and Duties of States did not fall within the scope of the progressive development of international law or the codification of that law and that therefore the provisions of the Statute were not applicable in the case under consideration. Mr. Koretsky did not see how the Commission could have been entrusted with a task which did not come within the framework of the Statute which necessarily governed all its work. In his opinion, it was inappropriate to make an absolute distinction between the progressive development of international law and its codification. In that connexion, he pointed out that article 15 of the Statute specified that the distinction between progressive development and codification was made "for convenience". Certain work might relate exclusively to the progressive development or to the codification of international law; other work might relate to both at the same time. That seemed to him to be the case of the draft declaration which the Commission had been instructed to prepare.

35. It had been said that the General Assembly had already consulted the Governments and organizations concerned before instructing the Commission to prepare the draft declaration. Mr. Koretsky pointed out that the terms of resolution 178 (II) revealed that the General Assembly had noted that very few comments and observations on the Panamanian draft had been received by the United Nations and that it felt that the attention of Member States should be drawn to the desirability of submitting their comments and observations without delay. It could therefore not be said that the General Assembly had consulted Member States before instructing the Commission to prepare a draft declaration; what it had done was to request the Secretary-General again to invite Member States to submit their comments to the United Nations without delay and at the same time to instruct the International Law Commission to prepare the draft declaration. The General Assembly had not studied the Panamanian draft and had not approved it before sending it to the Commission for use as a basis of discussion.

36. Moreover, no Member State had submitted comments on the draft which the Commission had just adopted; the few comments which had been received related to the Panamanian draft. It was nevertheless essential to consult Governments on the draft which had been prepared by the Commission before sending that draft to the General Assembly.

37. It had been held that Governments would have an opportunity to explain their views verbally at the General Assembly. It must, however, be remembered that the Assembly was a body which generally had an extremely heavy agenda. Arrangements should therefore be made to ensure that the draft declaration would be submitted to the Assembly only after the various Governments had been consulted and after consideration had been given to the comments that they might present in connexion with the draft prepared by the Commission. The draft which the Commission had just adopted might possibly have impor-

tant gaps: consultation with Governments and public opinion would make it possible to fill those gaps.

38. The Statute of the Commission provided for no exception to the two procedures which it defined. In its resolution 178 (II), the General Assembly had not authorized the Commission to depart from those procedures. Consequently, in accordance with articles 16 and 21 of the Statute, the Commission was required to request the Secretary-General to issue the draft declaration as a Commission document and to request Governments to submit their comments on that document within a reasonable time.

39. The fact that the Commission had not drawn up a plan of work and that it had not circulated a questionnaire to Governments in no way empowered it to refuse to follow the other steps in the procedure established in articles 16 and 21. The Commission had not drawn up a plan of work because that plan had already been determined by the General Assembly; it had not circulated a questionnaire to Governments because principles of international law relating to general questions were involved and because Governments had already received the Panamanian draft which was to serve as the basis of discussion. It was none the less true that, once the Commission had decided by 11 votes to 2 that the draft which it had prepared was satisfactory, it should, in accordance with articles 16 and 21, have the Secretary-General publish it as a Commission document and invite Governments to submit their comments on the draft within a reasonable time. If such an invitation was not extended to Governments and if the Commission decided to send the draft directly to the General Assembly, the Secretary-General could refuse to transmit it and decide to send it back to the Commission with an indication that the normal procedure had not been followed.

40. Mr. SPIROPOULOS observed that Mr. Koretsky seemed to think that the Commission could only be entrusted with work concerning the progressive development of international law or work connected with the codification of that law, and that consequently it must always apply the procedure laid down in article 16 of the Statute or that stated in article 21. In his opinion, that was not the case. The Commission's principal task was obviously to promote the progressive development of international law and its codification, and the Statute laid down precise rules for the procedure to be followed in connexion with work in those two fields. The General Assembly, however, always had the right to ask the Commission, as in the case of the Declaration on the Rights and Duties of States, to carry out certain work not provided for under the Statute. For such work, the Commission was free to apply the procedure of article 16 or that of article 21, but it was not obliged to do so.

41. Mr. Spiropoulos remarked that the preparation of a declaration on the rights and duties of States was not the only example of special work entrusted to the Commission. For example, the study of the question of the establishment of an international judicial organ for the trial of persons accused of genocide or other crimes, entrusted to the Commission by resolution 260 B (III) was another.

42. Mr. Koretsky had said that Governments had been able to express their views on the Panama draft, but that they had not had an opportunity to submit their observations on the draft the Commission had just adopted. It should not, however, be forgotten that, according to the Statute, the final text prepared by the Commission in accordance with article 16 (i), and on the basis of the comments of Governments, did not need to be submitted to the latter so that they might present new observations: only the original draft had to be sent to them. In the case in point, the Panama draft might be considered as the original draft declaration; that draft had been submitted to various Governments, and it might be said that essentially the provisions of article 16 had been applied.

43. He thought that, as the Commission had considered the draft declaration to be satisfactory, it should refer it directly to the General Assembly.

44. Mr. KERNO (Assistant Secretary-General) explained the Secretariat's point of view. He recalled that Sir Benegal Rau had rightly defined the problem as being a matter of deciding whether the Commission should always act in accordance with its Statute or whether in certain particular cases it could depart from it. It was a question of the interpretation of the Commission's terms of reference; in accordance with United Nations custom, the body concerned itself gave the interpretation, and the General Assembly in the last resort decided whether that interpretation was correct.

45. In the case under discussion, the Commission might consider that it was carrying out a normal task, in which event it should apply the provisions of its Statute, in particular those of articles 16 and 21. It might equally well decide that the drafting of the draft declaration was a special task given it by the General Assembly, which had no relation either to the progressive development of international law or to its codification; in that case, the Commission could conclude that the provisions of its Statute were not relevant. It should be noted that, in the case in point, the Commission could not invoke article 23 of the Statute; it should limit itself to presenting its report and the draft declaration, without making recommendations.

46. Mr. Kerno then called special attention to the last sub-paragraph of resolution 174 (II) establishing the International Law Commission,

in which it was said that the Commission " shall be constituted and shall exercise its functions in accordance with the provisions of its Statute ". The Commission must decide whether the provisions of resolution 174 (II) enabled it to act outside its Statute, even in the event of a case referred to it by a special decision of the Assembly.

47. He remarked that the Secretary-General could not pass judgment on the Commission's decision; he would limit himself to transmitting the draft declaration to the General Assembly or to Governments, according to the Commission's instructions. Only the General Assembly was entitled to judge whether the Commission had acted in accordance with its terms of reference or not.

48. Mr. ALFARO recalled that Sir Benegal Rau and Mr. Spiropoulos had invoked article 2 of the Statute to show that the preparation of the draft declaration was a special task outside the terms of reference conferred on the Commission by resolution 174 (II). Article 15 of the Statute confirmed that interpretation, for the preparation of the draft declaration could not be included among the definitions given there. The provision of resolution 174 (II), cited by Mr. Kerno, could not therefore be taken into consideration in the case in point.

49. Mr. Alfaro said Mr. Koretsky was asking that the draft should be referred to Governments so that they might present their comments. That had already been done in accordance with resolution 38 (I) of 11 December 1946, when the initial draft had been sent to all Member States. The extent to which the Governments had shown their interest was known to the members of the Commission: only seventeen States had sent their comments; the USSR was among the numerous States which had failed to reply. There were no grounds for hoping that the newly adopted draft would call forth more numerous replies, for it would come up against the customary inertia of administrations when they had before them questions that were not urgent.

50. If the newly adopted draft were sent directly to the General Assembly, it would be examined by the Sixth Committee; all Member States would be able to present their point of view with full knowledge of the facts, as the text of the draft would have been communicated to them by the Secretary-General before the opening of the General Assembly. If, as a result of that examination, the draft proved to be unsatisfactory, the General Assembly would take what decision it thought fit.

51. Mr. Alfaro thought that by transmitting the new draft to the General Assembly the Commission would have faithfully respected the provisions of resolution 178 (II) of 21 November 1947, thanks moreover to the collaboration of the Secretary-General, who had faithfully carried out the duty entrusted to him by that resolution. It was he who had indeed drawn the attention of Governments to the desirability of their comments and observations being sent in without delay; he had also provided very full documentation, which had enabled the Commission to reach rapid and satisfactory results.

52. He pointed out that Mr. Koretsky had voted against the draft because he did not consider it satisfactory. It might be wondered why Mr. Koretsky had not thought fit to present, in the course of the various readings, amendments to the articles of which he did not approve. The Commission had utilized all the data at its disposal; it would have welcomed new elements enabling it to improve its draft.

53. Mr. Alfaro concluded by pointing out that the initial draft had been communicated to Member States after the first session of the General Assembly; there were therefore no grounds for beginning the same procedure again, for to do so was to run the risk of never reaching a definite result. The Commission had acted in accordance with resolution 178 (II); it only remained for it to give an account of its work to the General Assembly.

54. The CHAIRMAN put to the vote the proposal to submit the draft declaration to the General Assembly, through the good offices of the Secretary-General.

The Chairman's proposal was adopted by 12 votes to 1.

55. Mr. KORETSKY said he had voted against the proposal for he felt that it violated the provisions of resolution 174 (II), and in particular its last paragraph. Furthermore, it violated the Statute of the Commission.

56. The decision just taken illustrated the desire of the large majority of the Commission to escape the control of public opinion and to avoid any close co-operation with the Governments of Member States. That tendency had become apparent from the very beginning of the session; it showed that the Commission wished to become an independent organ through which certain Governments would be able to impose their views on all the States. He pointed out that on the whole the Secretary-General's memorandum contained only views from the American Continent. Moreover, the observations of the seventeen States mentioned by Mr. Alfaro dealt with the initial plan submitted by Panama and not with the draft declaration drawn up by the Commission itself.

57. The CHAIRMAN said that the Commission should bring the French and Spanish versions into harmony with the adopted English text: the question would be examined at a later meeting. He asked the Rapporteur to let the Commission have, as soon as possible, the part of his report relating to the draft Declaration on the Rights

and Duties of States. He expressed his satisfaction with the work already done by the Commission.

Formulation of the Principles recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (A/CN.4/5) (*resumed*)

GENERAL DISCUSSION (resumed)

58. The CHAIRMAN asked the Commission to begin the task entrusted to it by the General Assembly under resolutions 177 (II) of 21 November 1947;[7] under that resolution, the Commission was asked to formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal.

59. The Sub-Committee [8] entrusted with the formulation of the Nürnberg principles had drawn up a draft [9] which would serve as a basis for the Commission's work.

60. Mr. SPIROPOULOS presented the Sub-Committee's draft. He pointed out that it followed closely the provisions of articles 6, 7 and 8 of the Charter of the International Military Tribunal. Indeed, paragraphs a, b and c of article 6 of the Charter defined crimes against peace, war crimes, and crimes against humanity; the Sub-Committee had adopted those definitions without any modification; articles 7 and 8 of the Charter had also been adopted for the draft with mere drafting changes.

61. He pointed out that the Sub-Committee had examined the text proposed by Mr. Alfaro which defined eighteen principles. Some of them were identical with those contained in the Sub-Committee's draft, while others concerned questions of procedure which the Sub-Committee had decided not to include in its draft at present.

62. The CHAIRMAN said that the General Assembly resolution 177 (II) directed the Commission to formulate the principles of international law; the aim of the second paragraph of article 6 of the Charter of the International Military Tribunal, however, was to define the crimes within the Tribunal's jurisdiction and not crimes which constituted violations of the principles of international law. Consequently, it could be asked whether the Sub-Committee had sufficiently realized the essential distinction between crimes within the Tribunal's jurisdiction and crimes under international law when it had textually reproduced the definitions of article 6 of the Tribunal's Charter.

63. He believed that paragraphs 6, 7 and 8 of the draft proposed by the Sub-Committee set forth principles of international law recognized by the Charter of the International Military Tribunal. On the other hand, he felt that paragraph 1 could not be regarded as setting forth a principle of international law. He drew attention to resolution 95 (I) of 11 December 1946, in which the General Assembly confirmed the principles of international law recognized by the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal.

64. Mr. SPIROPOULOS stated that the Sub-Committee was quite aware of the difference between crimes coming within the competence of the International Military Tribunal and crimes under international law. The Sub-Committee had taken into account the fact that the judgment qualified as international crimes certain crimes which the Statute only defined as crimes coming within the competence of the International Military Tribunal.

65. Mr. SANDSTROM drew attention to paragraph 5 of the Sub-Committee's draft relating to crimes against humanity. The proposed definition was not general enough as it seemed to restrict those crimes to acts committed in certain circumstances; that was due to the fact that the

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[7] The general discussion opened at the 17th meeting. See A/CN.4/SR.17, para. 1,

[8] *Ibid.*, para. 58.

[9] Principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal:

1. A violation of international law may constitute an international crime even if no legal instrument characterizes it as such.

2. The categories of international crimes recognized by the Charter and the Judgment of the Tribunal are crimes against peace, war crimes and crimes against humanity.

3. The following acts constitute crimes against peace, namely:

(*a*) The planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances;

(*b*) Any participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (*a*).

4. The following acts constitute war crimes, namely: violations of the laws or customs of war.

5. The following acts constitute crimes against humanity, namely: murder, extermination, enslavement, deportation and other inhuman acts done against the civilian population before or during a war, or persecution on political, racial or religious grounds, where such acts are done or such persecution is conducted in execution of or in connexion with any crime against peace or any war crime, notwithstanding that the municipal law applicable may not have been violated.

6. Any individual author of or accomplice in an international crime is responsible under international law and liable to punishment, whether or not his offence is punishable under municipal law.

7. The official position of an individual as Head of State or responsible official does not free him from responsibility or mitigate punishment.

8. The fact that an individual acts pursuant to order of this Government or of a superior does not free him from responsibility. It may, however, be considered in mitigation of punishment, if justice so requires.

Commission had felt obliged to use the phrasing of article 6 paragraph (*c*) of the Statute of the International Military Tribunal. He hoped that the Commission would modify that drafting in the course of its work.

66. Mr. KORETSKY thought that if the Commission was going to examine the draft paragraph by paragraph it would be preferable to examine paragraph 1 last as it would be easier to draft that paragraph after all the other principles had been formulated.

67. The CHAIRMAN pointed out that a general discussion seemed absolutely essential: if the Commission had to formulate the principles of international law, it was not bound by the provisions of article 6 of the Statute of the International Military Tribunal.

68. Mr. ALFARO agreed with the President that paragraph 1 of the Sub-Committee's draft should be thoroughly discussed. He also thought that the Commission should clarify the meaning of the phrase " principles. . . recognized ". It was necessary to decide whether it referred to new principles established by the Tribunal or to principles which had already been in existence. In his opinion the Commission had to formulate certain principles of international law relating to individual penal responsibility on the basis of the Statute and the judgment of the International Military Tribunal.

69. The CHAIRMAN thought that since the Statute and judgment recognized that it was a question of principles of international law, it was immaterial whether or not those principles had existed before the Tribunal was established. The Tribunal had considered that certain violations of international law fell within its competence, but it was questionable whether it had thereby laid down a principle of international law.

70. He pointed out that the judgment spoke of international crimes but that the Statute never used that expression. The wording of General Assembly resolution 95 (I) gave the Commission no help as it did not specify what principles of international law had been recognized by the Tribunal and confirmed by the General Assembly.

71. Mr. SPIROPOULOS thought that Mr. Alfaro had raised an interesting question; but he pointed out that there was no difficulty, as the Tribunal had considered that the principles stated in article 6 of the Statute were principles of international law which had existed before the Tribunal's Statute had been adopted.

72. In support of Mr. Spiropoulos, Mr. SANDSTROM quoted certain passages from the judgment published by the United States Government [10] which stated that the Statute expressed the international law existing at the time the Tribunal was established and that it was therefore a contribution to international law.

73. Mr. BRIERLY suggested that the Commission should begin by examining paragraphs 6, 7 and 8 of the Sub-Commission's draft which stated respectively the principle of individual penal responsibility, the principle that the official position of an individual did not free him from responsibility and the principle that the fact that an individual acted on superior orders did not free him from responsibility. The Commission might then examine paragraphs 2, 3, 4 and 5 in which crimes against peace, war crimes and crimes against humanity were defined.

74. Mr. SPIROPOULOS supported that proposal.

Mr. Brierly's proposal was adopted.

Paragraph 6 of the draft proposed by the Sub-Committee

75. The CHAIRMAN invited the Commission to examine paragraph 6 of the draft proposed by the Sub-Committee.

76. Mr. BRIERLY proposed the following text as an alternative to the Sub-Committee's draft:

> " Any person who commits or is an accomplice in the commission of an international crime is responsible under international law and liable to be punished therefor."

77. Mr. KORETSKY proposed the following variant in place of the Sub-Committee's draft:

> " Any person committing acts which constitute crimes under international law is responsible for such acts, subject to the existence of appropriate international agreements, whether or not the acts committed constitute crimes under the domestic law of the country on whose territory they had been perpetrated."

78. Mr. ALFARO supported the text proposed by Mr. Brierly. He thought, however, that it was necessary to specify the exact meaning of the expressions " international crime " or " crime under international law " used in the paragraph. Indeed, the Commission was not dealing at present with international crimes such as genocide, piracy, white slave traffic or traffic in narcotic drugs, as it had to confine itself to examining the crimes defined in the Charter of the International Military Tribunal, namely crimes against peace, war crimes and crimes against humanity.

79. The CHAIRMAN pointed out that the Conventions relating to crimes mentioned by Mr. Alfaro, to wit, piracy, white slave traffic and traffic in narcotic drugs, never described them as international crimes.

80. Mr. CORDOVA said that under the domestic legislation of many countries the crimes mentioned by Mr. Alfaro were regarded as international crimes in view of their nature: The signatories to

[10] " Nazi Conspiracy and Aggression—Opinion and Judgment—Office of United States Chief of Counsel for Prosecution of Axis Criminality— United States Government Printing Office—Washington: 1947. "

the Conventions relating to those crimes were under the obligation to punish them whatever the place of their commission. He supported Mr. Alfaro's proposal to specify the exact meaning of the expression " international crimes " used in paragraph 6.

81. Mr. AMADO said that the crimes mentioned by Mr. Alfaro could be described as international crimes only because punishment thereof had been organized on an international scale. He did not agree with the text submitted by Mr. Brierly. The Tribunal had laid down that any violation of international law might constitute an international crime even if no legal instrument characterized it as such, provided, however, that the great majority of States had made it clear that they intended to regard the act in question as criminal. It would apparently be necessary to bring the provisions of paragraph 6 into harmony with the aforesaid opinion of the Tribunal.

82. Mr. SPIROPOULOS wished to point out that the principle laid down in paragraph 6 did not apply solely to crimes defined by the Charter of the International Military Tribunal but to all international crimes.

83. He made it clear that the principles recognized in the judgment of the Tribunal applied to all international crimes and not only to crimes defined in the Charter. He quoted an extract from the said judgment published by the United States Government in connexion with the Nürnberg trial[11] stating that crimes under international law were committed by individuals and not by abstract entities. Respect for the provisions of international law could therefore be enforced by punishing the individuals perpetrating those crimes.

84. The CHAIRMAN said that the text quoted by Mr. Spiropoulos seemed to exclude crimes committed by States. That was an important question: the Commission should decide whether it wished to limit itself to a study of crimes committed by individuals.

The meeting rose at 6 p.m.

[11] *Ibid.*

26th MEETING

Tuesday, 24 May 1949, at 3 p.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.
Rapporteur: Mr. Gilberto AMADO.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. ROBERTO CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Vladimir M. KORETSKY, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. LIANG, Director of the Division for the Development and Codification of International Law, Secretary to the Commission.

Formulation of the Principles recognized in the Nürnberg Tribunal and in the Judgment of the Tribunal (*continued*)

PARAGRAPH 6 OF THE DRAFT PROPOSED BY THE SUB-COMMITTEE (continued)

1. The CHAIRMAN invited the Commission to continue the discussion of paragraph 6 of the draft submitted by the Sub-Commission (See A/CN.4/SR.25, footnote 9) together with the amendments proposed thereto by Mr. Brierly and Mr. Koretsky.[1] He observed that the phrase " liable to punishment ", which appeared in the Sub-Commission's draft as well as in Mr. Brierly's amendment, raised the question of who would inflict the punishment.

2. The Chairman wondered, furthermore, whether paragraph 6 stated a general principle of international law actually recognized by the Charter and the judgment of Nürnberg. By the terms of article 6 of the Charter, the Tribunal was competent " to try and punish persons who, acting in the interests of the European Axis countries . . ."

3. It followed that the crimes enumerated later must have been committed by persons acting in the interests of the Axis. Even had this definition been absent, nowhere in the Charter were there to be found provisions according to which accused persons would have to answer for crimes against international law. The records of the London Conference responsible for the drawing up of the Charter did not make clear whether, in the opinion of its authors, article 6 of the Charter laid down a general principle of international law

[1] See A/CN.4/SR.25, paras. 76-77.