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**Summary record of the 26th meeting**

Topic:
**Formulation of the Nürnberg Principles**

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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.*

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*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.

applicable to all. Although it was true that the Tribunal had interpreted that article very widely, the competence conferred upon it by the Charter was limited to crimes committed only by persons acting in the interest of the Axis powers.

4. Mr. BRIERLY declared that such an interpretation would not leave standing a single one of the principles of the Charter and judgment of Nürnberg. It was obvious that the General Assembly, in laying upon the Commission the duty of formulating the principles recognized at Nürnberg, had interpreted article 6 of the Charter much more widely.

5. Mr. CORDOVA considered that article 6 of the Charter could be divided into two parts. The first dealt with the competence of the Tribunal, which was limited to crimes committed by persons acting in the interests of the Axis Powers; the second laid down general principles of international law in the light of which the judgment had been rendered. The task of the Commission was limited to formulating those principles without dealing with the limited competence of the Tribunal.

6. Mr. SANDSTROM also stated that the Nürnberg Charter was founded on the principle of the existence of crimes which were punishable under international law. The report of Judge Jackson, dated 6 June 1945, made that point sufficiently clear.[2]

7. The CHAIRMAN observed that the matter involved was a concept which appeared in the report of one of the negotiators of the agreement concerning the creation of the Tribunal, a concept which was not reflected in the verbatim reports of the Conference.

8. Mr. SANDSTROM emphasized that generally speaking the Conference had mainly discussed procedural questions.

9. Mr. SPIROPOULOS shared the opinion expressed by the preceding speakers to the effect that the Commission's mission was to formulate the general principles which had been evolved at Nürnberg. According to the Chairman's interpretation, the persons condemned at Nürnberg had not been condemned by virtue of a principle of international law but because they belonged to the Axis powers. It was common knowledge that the counsel for the defence had definitely pleaded the absence of any previously established principle enunciating individual responsibility. But it was the task of the Commission to sift out that principle from the Charter and the judgment of the Nürnberg Tribunal and to proclaim it in the form of a warning to possible future aggressors.

10. Mr. Spiropoulos quoted in that connexion a statement by President Truman to the effect that the setting up of " a code of international criminal law to deal with all who wage aggressive war . . . deserves to be studied and weighed by the best legal minds the world over . . ." (A/CN. 4/5, p. 11 and 12).

11. Mr. AMADO declared that the great principle which flowed from the Charter and the judgment was precisely that of individual responsibility. If that were not the case, Goering and the other accused would have been able to take shelter behind the responsibility of the German State. But the Nürnberg Charter had not been concerned with the responsibility of the German State as such but solely with that of the individual. That was a new concept, for up to then the individual had not been considered as capable of being guilty of an international crime.

12. Mr. Amado pointed out that other so-called international crimes such as piracy and the white slave traffic had an international character only because their suppression had been organized on an international basis, but they were not international crimes in the strict sense of the term. Mr. Amado found it difficult to believe that the principle enunciated in the Nürnberg Charter was to be applied only to criminals of the Axis Powers.

13. Mr. SCELLE recalled that according to the terms of General Assembly resolution 177 (II), the Commission was called upon to formulate the principles recognized by the Charter and judgment of Nürnberg. That implied that, in the opinion of the General Assembly itself, the Charter and judgment had not created but had confirmed principles already existent in positive international law or still in the process of development. Both had to be formulated by the Commission, which had to go even farther. Actually, the principle of individual responsibility was only the application of a more general principle to which Sir Hartley Shawcross had alluded and which was enunciated in the " reasons adduced " of the judgment, namely that the individual was subject to international law. In his indictment, Sir Hartley Shawcross had pointed out that that principle had already existed in international law and had been recognized by all States. It was therefore appropriate likewise to formulate that very general principle in view of the fact that the principle of individual responsibility was only its application.

14. Mr. Scelle thought that the Commission should give a very broad interpretation to General Assembly resolution 177 (II) and to the Charter and judgment so as to be able to sift out the great principles which constituted their base.

15. Mr. KORETSKY felt that the Commission should not involve itself in a discussion of general principles, but should keep either to article 6 of the Nürnberg Charter or to the amendment which

[2] Department of State Publication 3080, Washington, 1949.

he himself had presented. In his opinion, the amendment of Mr. Brierly should be dismissed, as it raised questions of principle of a general nature.

16. The CHAIRMAN stated that it was not advisable at that stage to limit the debate in any way.

17. Contrary to the view held by Mr. Koretsky, Mr. SPIROPOULOS thought it was definitely on article 6 of the Charter that the discussion turned for the whole problem was to ascertain whether that article enunciated a general principle or whether it had in view provisions applicable only to individual persons belonging to the Axis Powers. Now, the Commission's task was not to codify the Nürnberg law in a restrictive sense, but to formulate the general principles that flowed from it and that were of a nature to be applied in the future. If that were not the case, then the principles which were being formulated would lead to the conclusion that any person belonging to the Axis would be punished if he committed an international crime—all of which was of no interest whatever since the Axis Powers no longer existed.

18. Mr. YEPES shared the opinion of those who favoured a broad interpretation of article 6 of the Charter. That article was divided into two parts. The first part was connected with the competence of the Tribunal to judge certain specific persons. The Commission did not need to take that part into account. The second part laid down principles of substance, of a permanent character, applicable not only to persons belonging to the Axis Powers but to any person who committed the international crimes listed in paragraphs (*a*), (*b*) and (*c*) of article 6. It was doubtless the second part of the article which the General Assembly had in mind when it had entrusted the Commission with the formulation of the principles of Nürnberg. That was, therefore, the task of the Commission.

19. The CHAIRMAN invited the Commission to voice opinion on the texts before it: paragraph 6 of the draft of the Sub-Commission and the amendments to that paragraph proposed by Mr. Brierly and Mr. Koretsky.

20. Mr. ALFARO felt that the amendment of Mr. Brierly, which set out the principle of individual penal responsibility in international law, was sufficiently important to be the object of a separate article. The provision in the second part of paragraph 6 of the draft of the Sub-Commission could constitute a second article.

21. Furthermore, Mr. Alfaro proposed the addition of the words " as hereinafter defined " after the word " crime " in Mr. Brierly's amendment.

22. Mr. BRIERLY accepted that addition.

23. Mr. SANDSTROM was opposed to the addition of those words because the enumeration of crimes contained in article 6 of the Charter was not complete.

24. The CHAIRMAN proposed to amalgamate as follows the first part of Mr. Koretsky's amendment with Mr. Brierly's amendment, leaving the question of complicity for later examination.[3]

> " Any person who commits any of the following acts is guilty of a crime under international law and is liable to punishment."

25. Mr. SPIROPOULOS felt that it was advisable to enunciate the general principle in a first article and to declare in the following article that " The Charter and the judgment of Nürnberg considers as crimes the following acts. . . " That was the method which had been followed in the drafting of the Convention on Genocide. Moreover, he would like the first article to read " Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment."

26. Mr. ALFARO shared the opinion of Mr. Spiropoulos.

27. Mr. SCELLE supported the formula proposed by the Chairman. He pointed out however that a crime could be perpetrated either by " commission " or by " omission ". Thus, a military commander who did not prevent a massacre, although he was in a position to do so, or Governments which permitted the perpetration of the crime of genocide would be guilty of a crime of omission.

28. To make allowance for that idea, he proposed a modification of the Chairman's formula in the following manner:

> " Any person who commits an act or who is guilty of an omission which constitutes a crime under international law is responsible for that act or for that omission and liable to be punished."

29. Mr. CORDOVA declared himself in favour of the new wording proposed for Mr. Brierly's amendment, because it had the advantage of specifying the crimes involved. If the article was drafted in too general terms the question would arise in the future of knowing what the acts were which constituted crimes under international law. Acts which at the present time were not considered crimes under international law might well be considered as such later on and the whole question of the principle of *nullum crimen sine lege* would come up again.

30. Mr. SANDSTROM replied that there would be but little risk of that in view of the fact that the Commission was called upon to prepare a draft code of crimes against the peace and security of humanity which would contain a list and definition of such crimes.

31. Mr. SPIROPOULOS thought that the new text proposed by Mr. Brierly, which included

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[3] See A/CN.4/SR.28, paras. 62-64.

Mr. Alfaro's amendment, restricted the general scope of the article.

32. Mr. BRIERLY said that the Commission had to codify only the principles recognized in the Charter and judgment of Nürnberg and not principles of more general application. The same comment also applied to Mr. Scelle's amendment.

33. Mr. SCELLE agreed that crimes of omission had not been recognized by the Charter. But that document did set forth certain fundamental principles which had been applied in the judgment. The first and most important of those principles was the following: that rulers could commit international crimes and be held responsible for them. That principle had not been definitely established before Nürnberg.

34. The Commission was called upon to lay down the general principles of an international penal code, of which the primary principle, established at Nürnberg, was that a ruler was not justified by his quality as a ruler and could not shelter behind the State. A ruler could be guilty of a crime, because only he could " will " a crime; the State could not. The actions of rulers could be described as criminal, not only by virtue of international agreements, as was stated in Mr. Koretsky's amendment, but by virtue of other sources of law, such as custom and legal practice. As a result, any action which disturbed international public order was a crime under international law.

35. Mr. Scelle thought that the article under discussion was of a purely abstract nature and should constitute, as it were, an introduction to all the other Nürnberg principles. It was also necessary to state that crimes of omission could be perpetrated, regardless of whether or not such crimes had actually been punished by the Nürnberg Tribunal.

36. The CHAIRMAN expressed surprise at the wide interpretation which Mr. Scelle gave to the Commission's terms of reference as set out in General Assembly resolution 177 (II).

37. Mr. FRANÇOIS was also surprised by such a wide interpretation of the Commission's terms of reference. The General Assembly resolution had directed the Commission to formulate only the principles recognized by the Charter and judgment of the Nürnberg Tribunal, and no more. Crimes of omission had not been mentioned either in that Charter or in the judgment.

38. Mr. SCELLE quoted the letter from President Truman, dated 12 November 1946, in which the latter had said that the cause of peace would be served if the United Nations could draw up a code of international crimes. Mr. Scelle stated that the Commission should try to find in the Charter and the judgment not only the immediate principles, but the foundations on which those principles rested.

39. He reiterated the statement that the cardinal principle was that an individual could commit an international crime. That principle was a new one in international law. Some fifty years ago rulers had been able to make war when they wished, provided only that they observed the formalities. The right to make war was a discretionary power, arising out of the sovereignty of the State. Since that time, the Covenant of the League of Nations, the Kellogg Pact and the Charter of the United Nations had marked different stages in a long evolutionary process which had ultimately been defined by the Charter and judgment of Nürnberg. War was currently regarded as a crime for which the responsibility lay not with the State, but with the rulers who prepared for war or declared it. That was a vital principle which should be enunciated and recorded once and for all. It was impossible, therefore, to interpret the Charter and judgment of Nürnberg restrictively, as Mr. Brierly and Mr. François apparently wished.

40. Mr. KORETSKY stated that Mr. Scelle's concepts could not be included even in an international penal code, with which, in any case, the Commission would have to deal only at a later date. The details which Mr. Scelle had discussed, such as crimes of omission or commission, came under the domestic law of States.

41. Mr. Koretsky recalled that his amendment contained the words: " subject to the existence of appropriate international agreements ". The first point to decide was whether the Commission was considering only the crimes listed in paragraphs 3, 4 and 5 of the Sub-Committee's draft, or other crimes which might, at some time, be committed. If only the crimes included in paragraphs 3, 4 and 5 were considered, no doubt arose, since the appropriate international agreement already existed. If, however, the possibility of other crimes was considered, it was necessary to see that those crimes were defined as such by international agreements; only in that way was it possible to respect the principle of sovereignty, which States were not yet ready to waive. He therefore asked the Chairman to give a ruling on the question whether the Commission was to consider only the crimes enumerated in paragraphs 3, 4 and 5 of the Sub-Committee's draft, or crimes of a different kind which might possibly be committed.

42. If the phrase " subject to the existence of appropriate international agreements " were maintained, the provision in the Charter itself namely: " whether or not in violation of the domestic law of the country where perpetrated " should also be maintained, for in cases which were covered by an international agreement, an act could be considered as criminal, regardless of all provisions to the contrary in the domestic law of the country where it was perpetrated.

43. Furthermore, Mr. Koretsky considered that all mention of punishment should be omitted from paragraph 6, which should be limited only to the question of responsibility.

44. The CHAIRMAN observed that, as a result of the discussion which had just taken place, the proposal of Mr. Brierly had undergone some modification. Its author agreed in particular to eliminate the clause: " and is liable to punishment ". Furthermore, Mr. Scelle had suggested that crime by omission should be mentioned after the positive act constituting the crime.

45. Mr. SANDSTROM was in favour of maintaining the phrase " and is liable to punishment " because, without such a specification, there would be no modification of what sort of responsibility was involved: for example, it might be a purely moral or pecuniary responsibility. Accordingly, it was advisable to indicate with precision that the responsibility incurred by the author of the crime was of a penal nature.

46. Mr. SPIROPOULOS thought that the observation made by Mr. Sandström was not without value. Indeed, besides penal responsibility, there did exist civil responsibility, and it was best to specify to which of the two the article alluded. Mr. Spiropoulos was therefore of the opinion that the paragraph should include the two ideas of responsibility and punishment. A somewhat similar duality existed in the first article of the Convention on Genocide which spoke both of prevention and punishment. Moreover, the judgment of the Nürnberg Tribunal expressly emphasized the importance of the idea of punishment in the following terms:

> " Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced " (A/CN.4/5, p. 41).

47. The CHAIRMAN put to the vote the proposal of Mr. Brierly, the revised text of which read: " Any person who commits an act which constitutes a crime under international law is responsible therefor ".

*The text was provisionally retained by 11 votes.*

48. The CHAIRMAN put to the vote Mr. Scelle's proposal to add the phrase " or is guilty of omission " after the word " act ".

*The suggestion was rejected by 7 votes to 2.*

49. The CHAIRMAN invited the Commission to decide on the addition at the end of the text of the words " and is liable to punishment " in accordance with the proposal of Mr. Sandström.

50. Mr. KORETSKY noted that if mention were made of punishment in the text, it would necessarily have to be indicated by whom and in what manner the punishment should be applied. That is what was done in the Moscow Declaration in the following passage:

> " (Those responsible) will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be created therein " (A/CN.4/5, p. 87).

51. If, then, the purpose of the paragraph under discussion was simply to enunciate a general principle, it should not include any mention of punishment. Moreover, there could be no doubt whatever concerning the nature of the responsibility incurred: since crimes were involved, there could be no question but of penal responsibility. The idea of responsibility was therefore sufficient in itself, and it was the only thing that could be mentioned in a text of a general character, since it was independent of the provisions of internal law as specified at the end of the proposal of Mr. Koretsky.

52. The CHAIRMAN put to the vote the suggestion of Mr. Sandström to add the words: " and is liable to punishment ".

*The addition was approved by 10 votes to 2.*

53. The CHAIRMAN asked the Commission to decide for or against the inclusion, after the text that had been retained, of the following clause of Mr. Koretsky's proposal: " subject to the existence of appropriate international agreements."

54. Mr. KORETSKY declared that he was asking for the insertion of that reservation in the paragraph, only if it was supposed to enunciate a principle applicable to all crimes of international law, whatever they might be. On the other hand, it would not be necessary if the text was supposed to cover only the crimes enumerated in paragraphs 2, 3, 4 and 5 of the draft of the Sub-Committee, crimes which had already been made the object of an international agreement. It was of the highest importance to resolve that essential question.

55. Mr. SPIROPOULOS noted that it was precisely because the paragraph aimed at enunciating the very broad principle of the responsibility of authors of international crimes that it could not be limited by a reservation restricting its application to cases where international agreements existed.

56. Mr. CORDOVA feared that such a reservation might be a source of serious inconvenience, if it should happen in the future that international agreements did not recognize certain crimes as being crimes under international law.

57. Mr. YEPES was of the opinion that the insertion of the reservation would weaken the principle laid down by the paragraph to the point of uselessness.

58. Mr. SANDSTROM wanted to know who would conclude the international agreements to which the reservation of Mr. Koretsky referred.

Were they agreements that might possibly be reached by the victors in a war?

59. Mr. SCELLE thought that the reservation proposed by Mr. Koretsky was contrary to the judgment of the Nürnberg Tribunal which had declared that the acts judged by it constituted crimes by virtue of principles which existed previously to the Nürnberg Charter, and not by virtue of international agreements.

60. Mr. KORETSKY specified that his proposed reservation was intended to bring out the connexion between international and domestic law, to which reference was made in the latter part of his text. As a matter of fact, the reservation could not be taken out of the text. He recalled that the retention of that reservation in the paragraph depended, in his opinion, on the extent of the scope of the application of the principle enunciated.

61. The CHAIRMAN asked the Commission to decide whether it wanted to add to the retained text the phrase: " subject to the existence of appropriate international agreements ".

*The Commission decided against the inclusion of that phrase by a large majority.*

62. The CHAIRMAN invited the Commission to consider whether there was any need to add to the wording retained either the last sentence of the Sub-Committee's draft: " whether or not his offence is punishable under municipal law " or the last part of the proposal submitted by Mr. Koretsky: " whether or not the acts committed constitute crimes under the domestic law of the country on whose territory they had been perpetrated ". That was an important point, for in many countries international law was not incorporated into domestic law. Mr. Koretsky's wording was preferable, in the opinion of the Chairman, since it mentioned specifically what domestic law was being referred to.

63. Mr. SPIROPOULOS favoured the wording of the Sub-Committee of which the scope was not limited to any given territory. He recalled that the major war criminals had been punished regardless of the countries in which their crimes had been perpetrated.

64. Mr. ALFARO held the view that a decision should be reached first as to whether the question was to be dealt with in paragraph 6 of the Sub-Committee's draft, or isolated from that article to form a separate principle.

65. Mr. Scelle had proposed that the principle of individual responsibility in international law, rightly considered by him to be the essential principle, should come at the head of the draft. Then would come the list of international crimes. Only then, in Mr. Alfaro's opinion, could there be laid down the principle of the primacy of international law over domestic law, which was the question under discussion and one which raised a vast and complex problem calling for a special debate.

66. Mr. SANDSTROM favoured the wording submitted by the Sub-Committee which did not contemplate any specific domestic law. In the Nürnberg Charter itself, in fact, all ideas of the geographical localization of crimes placed under the jurisdiction of the tribunal had been dismissed.

67. The CHAIRMAN invited the Commission to take a decision concerning the addition of the last part of Mr. Koretsky's proposal.

*Mr. Koretsky's text was rejected by 9 votes to 3.*

*The Commission decided by 4 votes to 1 not to retain in the text of paragraph 6 the words " whether or not his offence is punishable under municipal law ".*

68. Mr. SANDSTROM felt that it would be difficult to formulate separately the idea contained in the words in question.

69. Mr. AMADO stated that for that very reason he had voted in favour of the retention of those words in the text of paragraph 6.

70. Mr. SCELLE held the view that a separate wording should be found to express that idea.

71. Mr. CORDOVA said that the provisional draft submitted for paragraph 6 did not appear to him to be satisfactory. It had to be clearly understood, in future, that international crimes would involve only those crimes previously defined as such. Yet the words " an act constituting a crime under international law " provided no safeguard in that respect. It was clearly not necessary that the crime should be defined in an international agreement, as Mr. Koretsky would have wished, and it was for that reason that Mr. Córdova had voted against that reservation. He felt, however, that the question should be specified clearly in another paragraph.

### Additional paragraph proposed by Mr. Córdova

72. Mr. CORDOVA proposed the adoption of the following paragraph to be inserted after paragraph 6:

> " All persons committing any of the acts above referred to shall be responsible under international law, whether or not such acts are punishable under municipal law."

73. Mr. SPIROPOULOS pointed out that the idea contained in that new proposal was the same as the concept set forth in the last part of paragraph 6 of the Sub-Committee's draft. The Sub-Committee had thought that the idea was not a principle in the strict sense of the word, and it had therefore preferred to insert it after the paragraph proclaiming the general principle of the responsibility of the individual in international crimes.

74. Mr. KORETSKY approved the insertion

of that concept in a separate paragraph, but he thought that the paragraph should adopt the terminology used in the latter part of article 6, paragraph (*c*) of the Charter of the Nürnberg Tribunal reading as follows: " whether or not in violation of the domestic law of the country, where perpetrated". That text accurately reflected the aim of Mr. Koretsky's draft of paragraph 6: the only differences to be found were due to its double translation into Russian and then into English.

75. The CHAIRMAN pointed out that the phrase quoted by Mr. Koretsky only applied to crimes against humanity, referred to in article 6, paragraph (*c*) and not to crimes against peace or war crimes.

76. Mr. SANDSTROM thought the reason for that was to be found in the fact that at the time when the Charter was drawn up, crimes against peace and war crimes had already been recognized as international crimes, while a doubt might have existed in that respect with regard to crimes against humanity.

77. Instead of the Charter's wording, Mr. ALFARO preferred the Sub-Committee's text which was the same as the version contained in Mr. Córdova's new proposal. The latter text was more inclusive than the other, as it included not only the law of the criminal's country of origin and the law of the country which should enforce the penalty, but the domestic law of the country where the crime had been perpetrated as well. Such at least was Mr. Alfaro's interpretation, in consideration of which he favoured the Sub-Committee's text.

78. Mr. AMADO was also of the opinion that the text should cover all national legislations and not only the domestic law of the country in which the crime had been perpetrated.

79. Mr. SCELLE also favoured the Sub-Committee's text which he thought much better than that of the Charter. He proposed however the addition of the word " whatsoever " at the end of Mr. Córdova's proposal. According to Mr. Scelle, Mr. Koretsky's text seemed to refer to the principle of territoriality in criminal matters, which constituted the most important obstacle to the development of international penal law. He recalled that the question of the establishment of an international penal tribunal was included in the Commission's agenda (A/CN.4/3): in formulating the Nürnberg principles it was therefore preferable for the Commission at all costs to avoid giving the impression that it was reluctant to consider that the development of international penal law should lead to the creation of an international judicial organ.

80. Mr. KORETSKY objected that no intervention could be permitted in affairs essentially within the domestic jurisdiction of the State. One of its primary functions was precisely the trial and punishment of criminals, functions which it had a right to exercise with full sovereignty. The problem which arose was to ascertain how the authors of international crimes would be punished. To that question the Moscow Declaration had given an unequivocal reply when it had specified that criminals would be tried in the country where their crimes had been committed and in conformity with the laws of that country. The phrase included towards the end of article 6, paragraph (*c*) of the Nürnberg Charter: " whether or not in violation of the domestic law of the country where perpetrated " was only the sequel to that passage of the Moscow Declaration. That historic aspect of the question should not be neglected any more than should the importance of the rule laid down at Moscow to ensure efficacious punishment. In fact, what the criminals had dreaded above all was to be tried in the countries in which they had committed their crimes. That was why they had done all in their power to avoid falling into the hands of the authorities of the USSR and of the other popular democracies and to flee to other countries. Therefore Mr. Koretsky was surprised that certain members of the Commission seemed to wish to deviate on that point from the text of the Charter, as any such deviation would tend considerably to restrict the scope of a principle which the Commission had been given the task of formulating exactly as it had been recognized in the Charter and judgment of the Nürnberg Tribunal.

81. Mr. SANDSTROM pointed out that in his argument, which was based entirely on territorial penal jurisdiction, Mr. Koretsky had not taken account of the third paragraph of the recital of the Agreement for the establishment of an international military tribunal, which specifically said that the Moscow Declaration " was stated to be without prejudice to the case of major criminals whose offences have no particular geographical location and who will be punished by the joint decision of the Governments of the Allies;" (A/CN.4/5, p. 89).

82. Mr. BRIERLY suggested that the word " domestic " should replace the word " municipal " in the English text of Mr. Córdova's proposal.

83. Mr. CORDOVA accepted that suggestion, and also the addition of the word " whatsoever " proposed by Mr. Scelle.

84. The CHAIRMAN put to the vote the supplementary paragraph proposed by Mr. Córdova as amended.

*The paragraph as amended was provisionally retained by 8 votes to 1.*

PARAGRAPH 7

85. The CHAIRMAN pointed out that paragraph 7 closely followed the wording of article 7 of the Nürnberg Charter. [4]

86. He put to the vote the first part of the paragraph up to and including the word " responsibility ".

*The first part of paragraph 7 was provisionally retained by 10 votes to none.*

87. The CHAIRMAN put to the vote the final portion of the paragraph: " or mitigate punishment."

88. Mr. BRIERLY agreed that the wording should be retained since it merely reproduced an idea contained in article 7 of the Nürnberg Charter; in principle, however, there was no reason why the official position of accused persons could not be taken into consideration as grounds for the mitigation of punishment.

89. The CHAIRMAN put to the vote the end of paragraph 7.

*The end of paragraph 7 was provisionally retained by 8 votes to 1.*

PARAGRAPH 8

90. The CHAIRMAN requested the Commission to decide seriatim on the two sentences of paragraph 8 the text of which was very close to that of the corresponding article of the Nürnberg Charter. [5]

*The first sentence of paragraph 8 was provisionally retained by 11 votes.*

*The second sentence of paragraph 8 was provisionally retained by 10 votes.*

PARAGRAPH 2

91. The CHAIRMAN doubted the usefulness of including paragraph 2 in the list of principles as international crimes were enumerated in the succeeding paragraph. [6]

92. Mr. ALFARO, who shared that view, proposed that the following text should be substituted for paragraphs 2, 3, 4, and 5 of the draft:

" The following acts shall constitute crimes punishable under the preceding article:

" (*a*) Crimes against peace;

" (*b*) War crimes;

" (*c*) Crimes against humanity."

93. Each of the sub-paragraphs, (*a*), (*b*), and (*c*), would be followed by the clauses of the Charter which specifically defined the corresponding kind of crime.

94. The proposed paragraph would necessarily be inserted after the statement of the general principle enunciated in paragraph 6, as provisionally retained, and would therefore appear before Mr. Córdova's additional paragraph.

95. The CHAIRMAN thought that the simplest course would be to delete paragraph 2 and recast paragraphs 3, 4, and 5 as a single paragraph.

96. Mr. AMADO favoured the retention of paragraph 2, which was intended to list the crimes recognized by the Charter and judgment of the Nürnberg Tribunal as international in scope.

97. Mr. YEPES held that the proper procedure would be to set forth international crimes in general in an initial paragraph, and to list them specifically in one or more succeeding paragraphs.

98. Mr. SCELLE shared the point of view of Mr. Amado and Mr. Yepes that it was best to follow the plan adopted by all penal codes according to which offences were first grouped in categories and then named specifically.

99. Mr. SANDSTROM preferred Mr. Alfaro's proposal to the Sub-Committee's formulation. It seemed difficult, indeed, to put crimes against humanity, defined in so specific a way, into a general paragraph enunciating the various categories of international crimes.

100. Mr. SPIROPOULOS emphasized the justness of Mr. Sandström's observation. The restrictions included in the definition of crimes against humanity made the specific mention of that category in a paragraph debatable, to say the least. In the Sub-Committee, Mr. Spiropoulos had suggested leaving out the paragraph concerned, but he had given way, in the end, to the arguments of those who wished to include it.

101. The CHAIRMAN felt that the discussion ought not to be limited to paragraph 2; it should cover paragraphs 3, 4, and 5, which formed a logical whole with it.

The meeting rose at 6 p.m.

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[4] See text in A/CN.4/SR.25, footnote 9.

[5] *Ibid.*

[6] *Ibid.*

## 27th MEETING

*Wednesday, 25 May 1949, at 3 p.m.*

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