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Summary record of the 28th meeting

Topic:
Formulation of the Nürnberg Principles

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28th MEETING

Thursday, 26 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. R. 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.

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

PARAGRAPH 5 OF THE SUB-COMMITTEE'S DRAFT

1. The CHAIRMAN opened discussion on paragraph 5 of the Sub-Committee's draft.[1] He drew attention to the amendments the Sub-Committee had made to article 6 (*c*) of the Charter of the Tribunal. The word " any " in " any civilian population " had been replaced by the word " the ". The word " persecutions " had been changed from the plural to the singular. The words " where such acts are done or such persecutions are conducted " were not included in the English text of the Charter, whereas they did figure in the French text *(lorsque ces actes ou persécutions sont commis)*. Finally, the last clause of article 6 (*c*) (in the English text) of the Charter had been altered to read: " notwithstanding that the municipal law applicable may not have been violated ".

2. Mr. SPIROPOULOS said that some of those alterations, such as putting the word " persecutions " in the singular, were doubtless due to typing errors and had not been intended by the Sub-Committee.

3. Mr. SANDSTROM explained that the Sub-Committee had thought it necessary to replace the word " any " in " any civilian population " by the word " the ", since it was laying down a general rule. The word " any " had been correct in the Charter because that document had dealt with crimes committed against the populations of various countries.

4. The CHAIRMAN thought that the expression " a population " would be more appropriate.

The amendment proposed by the Chairman was accepted.

The word " persecution " was put back into the plural.

5. The CHAIRMAN asked the members of the Sub-Committee to explain the reasons for the addition of the phrase " where such acts are done or such persecution is conducted " to the English text.

6. Mr. SANDSTROM said that that amendment was intended to clarify the meaning in the same way as the change in punctuation introduced by the Berlin Protocol of 1945: it was to show that the last part of the paragraph referred to the paragraph as a whole and not only to the word " persecutions ".

The addition proposed by the Sub-Committee was retained.

7. The CHAIRMAN asked the Commission's opinion on the retention of the words " against peace or any war crime ".

8. Mr. SANDSTROM said that, under article 6 (*c*) of the Nürnberg Charter, " acts committed. . . in connexion with any crime within the jurisdiction of the Tribunal ", namely crimes against peace, war crimes or crimes committed in connexion with war, were crimes against humanity. The Sub-Committee had retained that idea but had expressed it in a more general way.

9. Replying to the Chairman, he explained that the massacre of a civilian population had, in principle, been considered as a crime against humanity only if it had been committed in an occupied territory, since it had then been a crime committed in connexion with war. The same crime committed in Germany had not been considered as a crime against humanity, as defined in the Charter.

The Commission decided to retain the words " against peace or any war crime ".

10. The CHAIRMAN pointed out that the substance of the phrase " notwithstanding that the municipal law applicable may not have been violated " was contained in paragraph 6 of the

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

Sub-Committee's draft. He therefore proposed the deletion of that phrase.

The Commission decided to delete those words from paragraph 5.

11. The CHAIRMAN opened discussion on the words " before or during a war ". In that connexion, he said that the word " la " in the French text should be replaced by the word " une ", because it was no longer a question of the Second World War but of possible future wars. He wondered how the phrase would be interpreted in the case of a crime of preparing war, if that war never actually broke out.

12. Mr. AMADO thought that that would be a question of proof and that it would be for the judge to decide in each individual case whether a particular crime had been committed before a war.

13. Mr. BRIERLY said that those words had only been included in the Nürnberg Charter because that document had been concerned with a particular war. They would not serve any useful purpose in a formulation of a general nature, since their restrictive effect had already been achieved by the phrase " in connexion with any crime against peace or any war crime ".

14. The CHAIRMAN added that that expression was all the more necessary in that the Tribunal had refused to punish crimes against humanity committed *before* the war.

15. Mr. SANDSTROM explained that the Tribunal had refused to punish crimes against humanity committed before the war if they had not been committed in connexion with crimes against peace or war crimes. The Tribunal had thus stressed the idea of connexion and not the idea of time.

16. Mr. KORETSKY did not agree that the words " before or during the war ", which appeared in the Nürnberg Charter itself, should be omitted. He recalled that the Convention on Genocide provided for the punishment of crimes committed both in time of peace and in time of war. The Commission could therefore not exclude the idea of crimes against humanity committed *before* a war, the more so in view of the fact that certain neo-fascist circles, which were preparing for another war, would be tempted to repeat the crimes committed by the fascist Powers.

17. If the words were omitted it would imply that the Commission condoned crimes against humanity which were committed before a war; such crimes were nevertheless crimes against peace and security.

18. Mr. SANDSTROM remarked that the omission of the words would not affect the scope of the paragraph in any way; it would in any event apply to all crimes, at whatever stage they might have been committed.

19. Mr. AMADO endorsed the view expressed by Mr. Koretsky. He pointed out that there was a definite example of the application of that provision of the Charter in the case of Streicher (A/CN.4/5, p. 69). From the judgment given on his case it was clear that the Tribunal had taken into account his persecution of the Jews before the war. Mr. Amado pointed out, further, that the crime of conspiracy to wage war could be committed only before a war.

20. Mr. ALFARO wondered, in the first place, exactly what was meant by the word " war ". Did it mean a state of open hostility, or a state of war in the technical sense, namely, without hostilities necessarily breaking out? In his view, moreover, it was not only crimes committed before and during a war that should be punished, but also those committed *after* a war. The latter category of crimes should therefore be covered in the formula.

21. The CHAIRMAN said that it would be difficult to take up the idea of crimes against humanity committed after a war, since the Nürnberg Charter dealt only with crimes against humanity committed in connexion with crimes against peace or war-crimes.

22. Mr. KORETSKY did not agree with Mr. Sandström that the deletion of the words in question would not affect the scope of the paragraph. Had the phrase not appeared in the Charter, it might perhaps have been possible to omit it. Since, however, it was there, its deletion would imply that the Commission intended to amend the text of article 6 (*c*) of the Charter in a limitative sense. With regard to Mr. Alfaro's suggestion, he thought that the question of crimes against humanity committed after a war might be dealt with in a separate study.

23. Mr. CORDOVA stated that, unfortunate though it might be, the Commission was bound by the limited terms of reference granted by the General Assembly. It was therefore required to follow carefully the provisions of the Nürnberg Charter and to maintain the words " before or during the war."

24. The last paragraph on page 68 of the Secretariat memorandum (A/CN.4/5) contained the following statement: " The acts may have been committed . . . 'before or during the war' but, obviously, their connexion with crimes against peace or with war crimes will be more difficult to prove if the acts have taken place before the war." Crimes committed before a war should be punished, the only limiting factor being the necessity to establish the connexion, which was, of course, more difficult to prove in the case of crimes committed before a war.

25. Although the Commission's terms of reference did not allow it to consider the question of crimes committed after a war, it would be well to draw the attention of the General Assembly to that point in the report.

26. Mr. SCELLE averred that General Assembly resolution 177 (II) could not be interpreted in such a restrictive sense. The Commission was not called upon to analyse the Charter and the Judgment of the Nürnberg Tribunal, but to establish the principles of international law upon which those documents were based. A crime under international law was always a crime, at whatever time it had been committed, before, during or after a war. The competence of the Nürnberg Tribunal had doubtless been limited by the Charter to crimes against humanity committed in connexion with the war, but the Commission was required to define the principles of international law of a permanent character upon which the Charter and Judgment were based. How, then, could it be maintained that the nature of a criminal act could change according to whether it were committed before, during or after a war?

27. He repeated that it was for the Commission to state the relevant general principles of international law, without adhering too closely to the letter of the Charter and the Judgment.

28. The CHAIRMAN said that, in those conditions, a murder, in whatever circumstances it was committed, would be a crime under international law.

29. Mr. SCELLE replied that all crimes were not necessarily crimes under international law but that a crime under international law, such as genocide, was always a crime under international law, regardless of when it was committed and independent of any question of war.

30. Mr. BRIERLY thought that if the words " before or during a war " were maintained, the field of application of paragraph 5 would be limited. It was a fact that crimes against humanity could be committed during the preparation for a war which might never break out.

31. Mr. SANDSTROM wondered whether crimes known as crimes against humanity which were committed, not in occupied territory—for then they would be confused with war crimes—but on the territory of the State which committed them, could be considered as crimes under international law.

32. He drew attention to certain passages on pages 48, 82, 83 and 84 of the Judgment, [2] in which there was no evidence that the Tribunal had considered crimes against humanity as crimes under positive international law at the time of the Charter and Judgment; it had considered them as such only by reason of their connexion with crimes against peace or war crimes, which were crimes under international law by virtue of earlier Conventions. He reminded the Commission that that opinion was shared by Mr. Donnedieu de Vabres and by Sir Hartley Shawcross.

33. The reason, therefore, why the Charter considered those crimes as crimes under international law was, first, because they had been committed in occupied territory and secondly, because of their connexion with crimes that came within the Tribunal's competence. The Charter had been intended to enable the Tribunal to pass sentence on all the aspects of a single criminal act in one and the same verdict.

34. He therefore considered that it was very doubtful whether crimes against humanity as such could properly be considered as crimes under positive international law at the time of the Charter and Judgment of the Nürnberg Tribunal. There had, of course, been a certain development in international law since that time, by reason of the Convention on Genocide.

35. Mr. SPIROPOULOS also considered it a difficult question to decide. The Tribunal had stated that:

> " To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connexion with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connexion with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter." (page 84 of the Judgment and page 67 of document A/CN.4/5.

36. It followed that, with the exception of crimes against persons deported to Germany, the Tribunal had considered only crimes against humanity committed in occupied territory and that by reason of their obvious connexion with war crimes. For them, to constitute crimes against humanity however, it had had to be proved that the crimes committed in Germany itself had been committed in connexion with the war.

37. Mr. SANDSTROM emphasized that the important point arising from page 84 of the Judgment was that the Tribunal had not considered crimes against humanity as crimes under international law at the time the Nürnberg Charter was drawn up.

38. Mr. AMADO drew attention to a passage in Mr. Donnedieu de Vabres' memorandum, submitted to the Committee on the Progressive Development of International Law and its Codification (A/AC.10/29, pp. 5 and 6), in which Mr. Donnedieu de Vabres stated his opinion that a codification committee should not be bound by the restrictive interpretation placed on the Nürnberg Charter by the Tribunal.

[2] " 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.

39. That passage reads as follows:

" The assiduity which the International Military Tribunal appears to have displayed in order to restrict, if it did not exclude, the indictment of crimes against humanity, is explained by the fact that this was a completely new indictment and that some at any rate of the members of the Tribunal considered themselves bound by the principle of the legality of crimes and penalties. It is evident that the legislator and consequently also the Codification Committee would not have doubts of this kind. The idea of punishing the Governments of peoples who violate the natural law goes back to Grotius and Vattel. Action 'on behalf of humanity' has long been a commonplace of international practice. It is in line with modern evolution, characterized by the United Nations, that instead of the political character which it has borne up to the present, this action should now assume a judicial and punitive character. There should therefore be no question of excluding indictments for crimes against humanity."

40. He also quoted the following passage from the same memorandum (p. 4):

" Having enumerated the acts which constitute a crime against humanity, the Charter (article 6 (*c*)) adds the following:
'. . . in execution of or in connexion with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.'

" Thus crimes against humanity are not directly within the competence of the International Military Tribunal. They are only submitted to it by virtue of being connected with other acts: crimes against peace or war crimes."

41. Mr. SCELLE pointed out that the Tribunal had never stated that crimes against humanity were not crimes under international law. It had simply said that it was not " competent " to pass judgment on such crimes if they had not been committed in connexion with the war.

42. Mr. SPIROPOULOS said that crimes against humanity could not even yet be considered as crimes under international law, since the Convention on Genocide had not been ratified. Hence, when the Nürnberg Judgment was formulated there had been no principle or provision qualifying those crimes as crimes under international law. For that reason the Charter and the Judgment should be interpreted in a very restrictive way.

43. Sir Benegal RAU pointed out that the discussion seemed to be straying from the point. The Commission had to give its opinion on the retention of the words " before or during a war ", but the discussion seemed to be turning on the retention of the phrase: " 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 ". If that phrase were retained there would be no need to retain the words " before or during a war ".

44. The CHAIRMAN stated that Mr. Sandström and Mr. Spiropoulos appeared to be advocating nothing less than the deletion of paragraph 5.

45. Mr. SCELLE wished to state in all solemnity that if the Commission deleted that paragraph it would constitute a backward step in international law rather than progress. It would then become necessary to abandon the time-honoured theory of intervention on behalf of humanity, in the name of which the United States had intervened in the Kichinev affair in Romania. He would never accept such a renunciation of the doctrine of intervention on behalf of humanity which had for so long formed an integral part of international law.

46. Mr. CORDOVA recalled that he had never been in favour of the restrictive interpretation of the Commission's terms of reference. Since such an interpretation had been adopted, however, the Commission must confine itself to the formulation of only those principles which had been laid down in the Nürnberg Charter and Judgment and must not go beyond them. Consequently, although everyone agreed in principle that crimes against humanity were always crimes under international law, that could not be stated in the present formulation. He considered it regrettable, however, that the General Assembly had seen fit to restrict the Commission's terms of reference in that way.

47. Mr. ALFARO stated that he would vote for the deletion of the words " before or during a war ", since that deletion would extend the scope of paragraph 5.

48. The CHAIRMAN put to the vote the deletion of the words " before or during a war ".

The Commission decided by 6 votes to 2, to delete those words.

49. The CHAIRMAN suggested that the word " inhuman " in the English text should be replaced by the word " inhumane ".

It was so decided.

50. The CHAIRMAN put to the vote the text of paragraph 5 as follows:

" The following acts constitute crimes against humanity, namely: murder, extermination, enslavement, deportation and other inhumane acts done against the civilian population, 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."

The above text of paragraph 5 was provisionally retained, by 9 votes to 1.

Paragraph 1 of the draft proposed by the Sub-Committee

51. The CHAIRMAN opened the discussion on paragraph 1 of the draft proposed by the Sub-Committee, pointing out that its contents had been drawn from the section of the Judgment relating to aggressive war (A/CN.4/5, p. 47). [3] In his opinion the statement that any violation of international law could constitute an international crime, even if no legal instrument characterized it as such, might be dangerous, as it was of too broad a scope.

52. Mr. SANDSTROM pointed out that the paragraph had been intended to serve as an introduction to the principles formulated subsequently in the draft. In view of the new arrangement of the paragraphs envisaged by the Commission, it was no longer necessary.

53. After a consultation with the members of the Sub-Committee, the CHAIRMAN announced that the latter would withdraw paragraph 1.

Paragraph 1 was therefore deleted.

Criminal Organizations

54. The CHAIRMAN noted that the Sub-Committee's draft contained no reference to the declaration made by the Nürnberg Tribunal of the criminal character of certain groups or organizations, in pursuance of articles 9, 10 and 11 of the Nürnberg Charter.

55. Mr. SPIROPOULOS explained that the Sub-Committee had studied the question after Mr. Alfaro had presented a draft formulation of approximately 16 paragraphs, which had contained, among other things, proposals regarding membership of criminal organizations, the prescribing of a maximum penalty and rights of defence. The Sub-Committee had had very little time in which to study the draft and had been unable to find in it anything which appeared at first glance to be in accordance with its concept of the principles of international law.

56. After having studied the Tribunal's interpretation of articles 9, 10 and 11 of the Nürnberg Charter, the Sub-Committee had not felt that their provisions contained a true principle. The proclamation of the criminal character of certain German groups or organizations had had no consequences of a penal nature: it had exerted no influence save on the application of that test to certain members of those groups or organizations in subsequent trials. In no instance had the accused been condemned solely because of his membership in a group or organization which had been declared criminal. In short, the only concept to retain from those articles would be that of complicity.

57. The CHAIRMAN pointed out that after the declaration of the criminal character of certain groups or organizations, some of their members had been brought before other courts: there would thus be some basis for maintaining that those declarations had produced results of a penal nature.

58. Mr. SANDSTROM stressed the fact that the articles in question had been interpreted in a very restrictive manner in the Judgment. No organization had been declared criminal as a whole; it was only groups within those organizations, composed of persons who had taken an important part in their activities who had been aware of their criminal objectives, that had been declared criminal. Hence the Sub-Committee had not thought that a principle could be derived from those provisions of the Charter. The most that could be deduced was a broader concept of complicity than that which was admitted by national codes of law.

59. Mr. ALFARO did not think that the question of criminal organizations could be omitted from a statement of principles. Articles 9, 10 and 11 of the Nürnberg Charter stated that groups or organizations could be declared criminal, that membership in those groups or organizations could be cause for prosecution and that the penalty imposed under that count was different from that incurred for crimes committed directly by a member of the organization. In addition to the crimes referred to in article 6, the Charter had therefore defined a special crime, namely participation in criminal organizations. That crime should therefore be included in the list retained by the Commission.

60. Mr. BRIERLY did not think that a principle of international law could be derived from those articles of the Charter which particularly concerned the case of Nazi Germany and groups such as the S.S. and the S.A. For that reason he could not support Mr. Alfaro's suggestion.

61. The CHAIRMAN requested the Commission to decide whether it wished provisionally to retain the principle that membership in a criminal group or organization would in itself constitute a crime.

Mr. Alfaro's proposal was rejected by 6 votes to 2.

Complicity

62. Mr. SANDSTROM thought that the idea of complicity which had been eliminated from paragraph 6 of the Sub-Committee's draft should be

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

reintroduced in some form in the text of the principles retained by the Commission. [4]

63. Mr. BRIERLY was also of the opinion that that idea should be restored in the formulation, since it appeared in the Nürnberg Charter.

64. The CHAIRMAN thought that the matter could be considered by the new Sub-Committee which would be responsible for the final drafting of the texts provisionally retained by the Commission.

It was so decided.

Conspiracy

65. Mr. BRIERLY asked if the Sub-Committee had intentionally omitted any separate reference in its draft to the conspiracy referred to at the end of article 6 of the Nürnberg Charter.

66. Mr. SANDSTROM replied that the Tribunal itself had considered that the idea of conspiracy could be applied only to crimes against peace. The Sub-Committee had accordingly referred to it only in sub-paragraph (*b*) of paragraph 3 of its draft.

67. Mr. BRIERLY proposed that that sub-paragraph should be separated and that the principle it embodied should be expressed separately, so that it would not apply exclusively to crimes against peace.

68. The CHAIRMAN proposed that the redrafting of that principle should be left to the sub-committee which was to be set up.

It was so decided.

Establishment of maximum sentence

69. Mr. ALFARO drew the attention of the Commission to article 27 of the Nürnberg Charter, which referred to the sentences which could be imposed on criminals. No equivalent of that article was to be found in the text retained by the Commission, yet that article reaffirmed the principle *nullum crimen, nulla poena sine lege.* The Commission should consider, therefore, whether it was not advisable to establish at least the maximum sentence for criminals in the formulation of the principles.

70. Mr. SANDSTROM pointed out that paragraph 2 of the text provisionally retained by the Commission covered the principle *nullum crimen sine lege.* It was only the sentences that the Commission had not envisaged.

71. The CHAIRMAN found it difficult to recognize that article 27 of the Charter contained a principle of international law. That undoubtedly explained why no proposal had been made in that connexion.

Right of self defence

72. Mr. ALFARO considered that the right of self defence although connected with procedure, constituted a principle of international law which moreover had already been affirmed by the Universal Declaration of Human Rights. The right of self defence was covered by article 16 of the Nürnberg Charter, which had been applied during the Nürnberg trial. The Commission should therefore consider whether that article should be included in the formulation of the Nürnberg principles.

73. The CHAIRMAN did not see what principles could be drawn from article 16 of the Charter.

74 Mr. SANDSTROM recalled that the Sub-Committee had considered that there was no need to formulate the rules of procedure contained in the Charter.

75. Mr. SCELLE considered that the right of self defence was certainly a principle of international law which had been recognized in the Charter and the Judgment and which at the same time constituted one of the general principles of law recognized by civilized nations, referred to in paragraph 1 (*c*) of article 38 of the Statute of the International Court of Justice. He therefore proposed that the following statement should be inserted in the Nürnberg principles: " Any accused person has the right of self defence ".

76. Mr. ALFARO proposed the following text: " Any person accused of one of the crimes defined above has the right to conduct his own defence or to have the assistance of counsel. He may present any evidence and may ask direct questions of all witnesses called by the prosecution ".

77. Mr. YEPES thought there was no need to indicate how the accused could defend himself. He preferred the more general text of Mr. Scelle.

78. Mr. KORETSKY pointed out that the Commission was once again faced with suggestions which would broaden the scope of the well defined task assigned to it. The essential purpose of the Nürnberg Charter and Judgment had been to ensure the punishment and the prevention of atrocious crimes which had shocked the conscience of mankind. All the principles of Nürnberg were therefore linked to that idea of responsibility and suppression. It was not logical, therefore that concern for the protection of the accused should appear in the formulation of those principles. That was an entirely different question involving human rights; if the right of self defence was not adequately guaranteed in the Universal Declaration, it was still possible to ensure its protection in the draft international covenant which was being drawn up. In any case, that question had no immediate connexion with the definition of international crimes. The Charter dealt with the matter only in connexion with the procedure to be followed by the Tribunal. While, therefore,

[4] See A/CN.4/SR.26, para. 24.

he in no way objected to the principle of the protection of the right of self defence, he considered that that right could not be included in the list of principles of Nürnberg.

79. Mr. SPIROPOULOS pointed out that the guarantee of the right of self defence before an international penal tribunal could not have existed as a principle before the establishment of the Nürnberg Charter, since the Nürnberg Tribunal had been the first international jurisdiction of that kind. It could not therefore be said that the principle had been recognized in the Charter or the Judgment.

80. With reference to the argument which Mr. Scelle had drawn from article 38 of the Statute of the International Court of Justice, it should be pointed out that the general principles of law mentioned in that article were principles of municipal law. The meaning of that paragraph was that the Court should, when necessary, apply the general principles of municipal law in the settlement of international disputes. It could not therefore be held that there was a principle of international law in that matter, which, moreover, came under penal procedure.

81. Mr. SCELLE objected that article 38 in no way stipulated that it applied only to principles of municipal law: that adjective did not appear in the text. It could therefore be held that the Statute of the Court referred in that paragraph to the principles of international law as well as to the principles of municipal law. That was perfectly logical, since any principle of international law had its origin in custom, which was actually a repetition by States of acts covered by their municipal law. Before becoming a principle of international law, therefore, any principle was first a general principle of municipal law and at both stages of its development it could be applied by the Court in international matters.

82. With regard to the inclusion of the right of self defence among the rules of procedure, Mr. Scelle could not accept that position at all. In that connexion he recalled that the reason the Dreyfus affair had shocked France to such an extent was that one of the documents presented by the prosecution had not been communicated to the accused. The French people had not been wrong on that point: it had considered that something more than a procedural irregularity was involved; it had seen in that fact a violation of a fundamental principle of justice.

83. Mr. CORDOVA thought that any discussion on the nature of the right of self defence was only of a purely academic interest. Since the right of the defendant to defend himself was written in the Nürnberg Charter, the Commission could also include it among the principles which it was formulating. In that case, it might be asked what could be thought of the provisions of the Nürnberg Charter which restricted the right of self defence, in particular article 3, which ruled out any possibility of objecting to the judges. Was it not necessary to consider them as a limitation by the Charter of a principle of international law which that Charter its lf recognized?

84. Mr. BRIERLY was of the opinion that Mr. Alfaro's proposal was altogether too detailed and contained rules which were not included in the general conception of the right of self defence: cross-examination of witnesses for the prosecution by the defence, for example, took place only in countries of Anglo-Saxon law. It was therefore preferable to adopt a more general formula which would simply ensure that defendants were to have a just trial.

85. Mr. FRANÇOIS shared the opinion of Mr. Brierly and explained that the right of the defendant to question witnesses for the prosecution directly was unknown in the legislation of the Netherlands, for example.

86. Mr. YEPES would vote in favour of the two proposals, because he wanted one or the other of them to be retained; his preference, however, was for Mr. Scelle's text.

87. The CHAIRMAN put the two proposals to the vote.

Mr. Alfaro's proposal was rejected by 4 votes to 1.

The Commission decided, by 6 votes to 2, to retain provisionally the following text proposed by Mr. Scelle: " Every defendant shall have the right to defend himself."

Draft formulation submitted by Mr. Scelle

88. Mr. SCELLE asked the Chairman to submit to the Commission an alternative draft of the formulation of the Nürnberg principles, of which he was the author, and which reads as follows:

" The principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal are as follows:

" 1. The individual is subject to international law, including international penal law.

" 2. The office of head of State, ruler or civil servant, does not confer any immunity in penal matters nor mitigate responsibility.

" 3. This subjective criminal responsibility of heads of States, rulers and agents is distinct from the objective responsibility of the State, which may become a subsidiary issue.

" 4. International law, including international penal law, has precedence over municipal law. It follows that rulers and agents of State are directly responsible for their international crimes and offences whether or not these are offences under the domestic penal law of their

countries. Consequently, any person who commits a crime against international law, either of commission or of omission, is responsible therefor and liable to punishment.

" 5. Superior orders do not constitute a complete defence, but only a mitigating circumstance when justice so requires.

" 6. A court of international jurisdiction appears particularly suitable to try international crimes and offences, especially those committed by heads of State, rulers or high civil servants.

" 7. In the present state of international law such a court is not necessarily bound by the principle that offences and penalties are not retroactive; this presupposes the preparation and drafting of an international penal code.

" 8. In conformity with the Nürnberg Charter and Judgment the following are already now international crimes:

" Crimes against peace;

" War crimes;

" Crimes against humanity.

" 9. Crimes against peace are: ".

89. In his opinion, the work accomplished so far comprised nothing but an analysis of the Nürnberg Charter and Judgment and, in addition, of the principal international crimes. The Commission had not yet defined any of the fundamental principles of international law which had existed at the time of the drafting of the Nürnberg Charter and Judgment, and which had been recognized by the Charter and applied by the Tribunal. The terms of reference of the Commission were precisely that.

90. The first of those fundamental principles, invoked by the Public Prosecutor and recognized in the Judgment, stated that the individual was subject to international law, including international penal law. It was in accordance with that principle that individuals could be punished: it should therefore appear at the head of the list.

91. The next step was to establish the fact that the old theory according to which any act performed on behalf of the State exempted rulers or officials from individual responsibility has been discarded. It was recognized that the office of head of the State, ruler or civil servant did not confer any immunity in penal matters nor mitigate responsibility. The Commission had admittedly drawn certain deductions from that principle, but it had not expressed it as did his draft.

92. Apart from that subjective responsibility of rulers, there was an objective responsibility of the State, which might become a subsidiary issue. It would certainly be necessary to specify later the nature of that responsibility, but whether it was penal, civil or pecuniary, its existence could not be denied. It therefore constituted a principle of international law which was contradicted by neither the Charter nor the Judgment of the Nürnberg Tribunal, which had not had to deal with it.

93. The fourth principle was that of the precedence of international law over municipal law. It was an obvious principle that the Commission had expressed in the draft Declaration on the Rights and Duties of States and which was the basis of the Charter and Judgment of the Nürnberg Tribunal. From that principle the Commission had drawn the conclusion that the individual was responsible for his crimes under international law, whether those crimes were or were not punishable under municipal law; it had not, however, formulated the principle itself.

94. The Commission had formulated none of the essential principles which were the subject of the first four paragraphs of his draft; it had merely drawn conclusions from some of them. It was imperative that those principles should be defined, the more so since the Commission was to be asked to prepare a code of crimes against international peace and security, of which those principles should constitute the preamble.

95. If the Commission intended to limit itself to the mere task of analysis which it had so far performed, Mr. Scelle could not take part in work which in no way answered the true purpose which the Commission was to fulfil. He had therefore presented his draft formulation, which could be put into final form by the sub-committee whose duty it would be to prepare the final draft.

96. The CHAIRMAN thought that, in view of the importance of the question raised by Mr. Scelle, the Commission should express its opinion of the new draft before referring it to a sub-committee.

97. Mr. FRANÇOIS disagreed entirely with Mr. Scelle's views on the scope of the Commission's terms of reference: its task consisted only in formulating the principles contained in the Nürnberg Charter and Judgment. It was indeed regrettable that the task was so restricted and the Commission might indicate, when it submitted to the General Assembly the result of the work which had been assigned to it, that the principles thus formulated did not represent its own conception of the principles of existing international law; it was, however, the prerogative of the General Assembly to request, if it deemed fit, that the Commission should not formulate the Nürnberg principles once again, but those of positive international law, as the Commission understood them.

98. Mr. YEPES thought that Mr. Scelle's draft, a great part of which he approved, deserved a very thorough study in the Commission, which should certainly not confine itself merely to transcribing the Nürnberg texts.

99. Mr. SPIROPOULOS noted that the various paragraphs of Mr. Scelle's draft set forth or less

the same principles as the Sub-Committee's draft, but in a different form. The first principle was only of theoretical interest. It could be implicitly admitted, without being formulated: that had been the procedure at the time of the codification of the laws of war. The second principle was none other than that contained in paragraph 7 of the Sub-Committee's draft, which had the advantage of reproducing very closely the terms of the Charter of the Nürnberg Tribunal. A great part of the idea contained in paragraph 3 of the alternative draft was also contained in the Sub-Committee's draft. The first part of paragraph 4 was a sort of axiom, which there was no need to formulate. The remainder of the paragraph found its counterpart in the Sub-Committee's draft. Paragraph 5, which dealt with the influence of superior orders on responsibility, corresponded to paragraph 8 of the Sub-Committee's draft, which reproduced article 9 of the Nürnberg Charter almost word for word. As for paragraphs 6 and 7, which dealt with international jurisdiction, the ideas which they contained were not recognized in either the Nürnberg Charter or Judgment.

100. On the whole, therefore, Mr. Scelle's draft differed very little from the Sub-Committee's draft, except that it deviated from the terminology adopted by the Nürnberg Charter to which the Sub-Committee had wished to remain faithful. As, however, the new draft presented the formulation of the Nürnberg principles in a new guise, a discussion of it could not fail to be useful for the planning of the Commission's work.

101. Mr. FRANÇOIS urged the Commission to determine first of all the nature and limits of the task which had been entrusted to it by the General Assembly. In his opinion, that task could consist only in the formulation of the principles which were contained in the Charter and Judgment. It was for that reason that he had voted in favour of paragraphs of the draft which he himself had not favoured, simply and solely because the rules which they set forth appeared also in the Charter and Judgment.

102. Mr. KORETSKY, while not finding Mr. Scelle's draft at all satisfactory, thought that the Commission should study it carefully.

The meeting rose at 5.50 p.m.

29th MEETING

Friday, 27 May 1949, at 10.30 a.m.

CONTENTS

Chairman: Mr. Manley O. HUDSON.

Rapporteur: Mr. Gilberto AMADO.

Present:

Members: 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, Professor 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 (*resumed*)

CONCORDANCE OF TEXTS IN THE THREE WORKING LANGUAGES

1. The CHAIRMAN said that the Commission had to adopt the French and Spanish texts of the draft declaration which should correspond with the English text already adopted. [1]

1. FRENCH TEXT

2. Mr. FRANÇOIS pointed out that the heading of the French text *(Projet de déclaration sur les droits et devoirs des États)* was not identical to that of the English text; it seemed to indicate that the draft declaration related to all the rights and duties of States which was not the case.

3. Professor SCELLE thought it would be difficult to modify the French text; furthermore, he thought the expression *sur les droits et devoirs* meant that all the rights and duties had not been envisaged.

4. Mr. YEPES wondered if, in the second paragraph of the preamble, the word *efficace* in French had the same meaning as the word "effective" in the English text. In the third clause, the French text used the expression *sous l'égide de la charte* whereas the English text said "under the Charter". In his opinion, the French term did not correspond to reality as the new international

[1] At the 25th meeting. See A/CN.4/SR.25, para. 22.