Document:-
**A/CN.4/SR.44**

# Summary record of the 44th meeting

Topic:
**<multiple topics>**

Extract from the Yearbook of the International Law Commission:-
**1950** , **vol. I**

in the mind of those who voted for it, reflected the desire to create an international court.

47. Replying to a further query from Mr. HUDSON as to how it could be deduced from article VI that the General Assembly was in favour of an international tribunal, the CHAIRMAN took note of his objection before putting to the vote the question whether it was desirable to establish an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction would be conferred upon that organ by international conventions.

*By 8 votes to 1, with 2 abstentions, the Commission decided that it was desirable to establish an international judicial organ.*

48. Mr. SANDSTRÖM said he had abstained from voting because a mere Yes or No would not have given a true picture of his views, which he proposed to submit later in writing.

49. Mr. BRIERLY said he had voted against the motion on the grounds that the projected court would exist only on paper, and so prove ineffectual.

50. Mr. HUDSON said he had abstained because the question of desirability and possibility were one and the same thing.

51. Mr. el-KHOURY said that, in voting for the motion, he had had in mind the weaker nations and those national minorities which at times were persecuted by stronger majorities. The existence of an international judicial organ would reassure the weak, and give them some recourse if they were unable to obtain satisfaction in any other way.

52. The CHAIRMAN next put the question of the " possibility " of establishing an international judicial organ. The General Assembly had not asked the Commission to decide on the competence of such a court, but merely to give an answer to a very general question.

53. Mr. HUDSON took the idea of " possibility " as meaning: Did an international judicial organ if established offer the possibility of being in a position to fulfil a need—i.e., of being able to function effectively ?

*By 7 votes to 3, with 1 abstention, the Commission decided that the establishment of an international judicial organ was possible.*

54. Mr. AMADO, after referring to the attitude of the Brazilian representative at the third session of the General Assembly, when the establishment of an international criminal court was being discussed,[4] said he had voted against, on the grounds that there was as yet no international police force to enforce the judgments of such a court. The veto was not, as some people held, the cause of disagreement between parties, but rather the symptom of that disagreement, and without agreement among the great powers there would be no international police.

55. Mr. FRANÇOIS said he had voted in favour on the understanding that the decision of the Commission in no way prejudged the scope of the jurisdiction which the court would have.

56. Mr. SANDSTRÖM, in voting against the motion, had taken the word " possibility " in the sense given to it by Mr. Hudson, and would submit the explanation of his vote in writing later.

57. Mr. HSU said he had voted in favour in the hope that the General Assembly would make a sincere effort to surmount the present difficulties.

58. The CHAIRMAN said that the Rapporteur would submit a draft report to the Commission in the usual way on the two questions on which a vote had been taken at the present meeting. He next recalled that the General Assembly had further asked the Commission whether it was possible to set up a Criminal Chamber of the International Court of Justice.

59. Mr. el-KHOURY was in favour of such a chamber, as likely to increase the prestige of the International Court.

60. Mr. HUDSON, as one who for thirty years had exerted every effort on behalf of the Court at The Hague—one of the essential organs of international life—feared it might mean the utter destruction of the Court's prestige if an international criminal jurisdiction were added to it. The International Court should remain an instrument solely for the settlement of disputes between States, and for giving advisory opinions. They must avoid any step which might make that great institution a centre of grave controversy.

61. The CHAIRMAN entirely agreed with Mr. Hudson.

*The meeting rose at 2.55 p.m.*

[4] See *Historical survey of the question of international criminal jurisdiction*, p. 37. United Nations publication, Sales No.: 1949.V.8.

## 44th MEETING

*Monday, 12 June 1950, at 3 p.m.*

CONTENTS



*Chairman:* Mr. Georges SCELLE.

*Rapporteur:* Mr. Ricardo J. ALFARO.

*Present:*

*Members:* Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris el-KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

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

**Desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions: working papers by Messrs. Alfaro and Sandström (General Assembly resolution 260 B (III) of 9 December 1948) (item 4 of the agenda) (A/CN.4/15 and corr. 1; A/CN.4/20)** *(continued)*

1. The CHAIRMAN reminded the Commission that it had to give an opinion on a third question put by General Assembly resolution 260 (III)B: whether it was possible to create a criminal chamber of the International Court of Justice. Mr. Hudson had already suggested that it was highly desirable to take no step which might be harmful to the International Court of Justice.

2. Mr. ALFARO read out the third sub-heading of Part IV of his report (A/CN.4/15, paras. 132-134), emphasizing that his conclusion that it was feasible to establish a criminal chamber of the International Court of Justice, provided the Court's Statute were modified, did not mean that he was in favour of establishing such a chamber. On that point he shared the view of Mr. Hudson and the Chairman. He had merely considered the possibility of setting up a criminal chamber of the Court, which was the only question the Commission had been invited to study.

3. Mr. SANDSTRÖM admitted the force of Mr. Hudson's reasoning, and withdrew the proposal made in the final paragraph of his report (A/CN.4/20).

4. Mr. FRANÇOIS agreed with Mr. Hudson and Mr. Alfaro. There were three arguments against the creation of a criminal chamber of the International Court of Justice. Mr. Hudson had given the first of them. The second arose out of article 9 of the Court's Statute. A single chamber would not be enough to represent the principal legal system. In any case, the chamber system had not been found satisfactory. The criminal judicial organ would have to have equal authority with the Court itself. It was to be feared that, if nothing more than a chamber were to be set up, it would increase the lack of confidence in the Court which was already apparent. It would be better to set up a new court in which all legal systems would be represented. The third argument was that the functions of the two courts were essentially different. Not only would the new organ be called upon to judge individuals instead of settling disputes between States, but the field of its activities too would be quite different from that of the International Court of Justice. It would require specialists not in international law, but in criminal law, i.e. " magistrates ", since its task would be to try individual persons. That did not mean that a court on the lines of the International Court of Justice must be set up right away. A modest beginning might be made with a court which would not sit permanently, the members of which would perhaps not be precluded from holding other offices or following other pursuits, just as in the case of the members of the permanent International Court of Justice when it was established in 1920. He was against the establishment of a criminal chamber of the International Court of Justice.

5. Mr. HUDSON said he had been led by Mr. Alfaro's conclusion to wonder whether the General Assembly actually had put a third question to the Commission. After reading the last paragraph of resolution 260 (III) B, he felt that it would be sufficient to state that the Commission had paid attention to the possibility of establishing a criminal chamber of the International Court of Justice, and to give the Commission's views on that possibility, but to do so as it were in parentheses. There was no third question involved.

6. The CHAIRMAN thought it made no great difference whether there was a third question or not. The General Assembly had drawn the attention of the Commission to the possibility of setting up a criminal chamber of the Court, in order to have the Commission's advice. The Commission must state whether it was favourable or unfavourable to the establishment of the chamber. But the question might be presented as Mr. Hudson had suggested, mentioning that the Commission had paid attention to the possibility and had reached this or that conclusion.

7. Mr. KERNO (Assistant Secretary-General) agreed with Mr. Hudson. It was not an essential question, but a subsidiary one. At the General Assembly, some representatives had thought it might simplify matters if the Commission were invited to examine this possibility, as a solution which might be easier and more economical than the establishment of a new tribunal.

8. The CHAIRMAN thought nevertheless that, in view of the fears expressed by Mr. Hudson, members might wish the Commission to express a definite opinion on the point.

9. Mr. ALFARO thought there was an implicit question put by the General Assembly, which wished to be informed of the findings of the Commission's study of the problem. Once it had decided the question whether it was desirable and possible to create an international judicial organ, the Commission would intimate that it had given its attention to the possibility of creating a criminal chamber of the International Court of Justice, and had formed an affirmative or negative opinion.

10. Mr. YEPES shared the view of Mr. François regarding the disadvantages of setting up a special chamber, but he saw nothing to prevent entrusting criminal jurisdiction to the Court itself. The Statute would of course have to be amended accordingly. The judges at present constituting the Court were incidentally the best qualified persons who could be found; and the duties of the Court were not particularly heavy.

11. Mr. el-KHOURY agreed with Mr. Yepes. The Court was not overworked and could quite well undertake this new task. Moreover the criminal jurisdiction would have a moral effect. The Court's prestige would be a warning and a deterrent to warmongers. From the financial point of view, it would be inadvisable to

create a new item for the United Nations budget; the cost of another court, with its own registry, would be considerable. Mr. Hudson had been anxious not to endanger the prestige of the Hague Court. He did not know how far such fears were well-founded. So far, the Court's activities had not been very startling. World public opinion had no great confidence in the Court, and few States had accepted its jurisdiction. The criminal jurisdiction would be compulsory and would increase the Court's prestige. He maintained that it would be better to amend the Court's Statute and place the criminal jurisdiction under its auspices.

12. The CHAIRMAN noted that agreement was not the foregone conclusion he had anticipated. One of the strongest arguments, in his opinion, was that if the International Court of Justice was to be given criminal jurisdiction, the Court's Statute and the San Francisco Charter would have to be revised, since the Statute was an integral part of that Charter. That was a decided drawback. If it was desired to create an international jurisdiction it would be better to adopt a convention laying down the court's organization. A revision of the Charter was unlikely, since certain Powers which were against an international criminal jurisdiction had the right of veto. He was afraid it was illogical to postulate that a criminal jurisdiction should be established and to recommed a procedure which was known in advance to be impracticable. He could not see how a criminal chamber of the Court could be set up without having to revise the Statute and the Charter.

13. Mr. ALFARO thought that, as resolution 260 (III) B spoke of the establishment of a judicial organ and of a criminal chamber of the International Court of Justice, it was not the intention of the General Assembly to confer this jurisdiction on the existing plenary Court at The Hague.

14. Mr. YEPES felt that the Chairman's argument against amending the Statute and the Charter applied to any organ which the General Assembly might propose to establish. The Commission might examine the question from another viewpoint. He recalled that when individuals had been involved before the permanent International Court of Justice, as in the *Mavrommatis* case, it had been admitted that the Court could not deal with cases in which either of the parties were individuals, but it had been agreed that the State of which the accused was a national could appear on his behalf. A method might be found of conferring criminal jurisdiction on the Court without modifying the Statute.

15. The CHAIRMAN disagreed with Mr. Yepes on this point.

16. Mr. YEPES regretted this, explaining that he had put forward his proposal as a matter for consideration; he himself was in favour of the establishment of an international criminal jurisdiction.

17. Mr. AMADO thought that if an international judicial organ was to be set up, a comprehensive court should be established without regard to the cost. He personally intended to abstain from voting.

18. The CHAIRMAN replied that there was no question of establishing a court, since that would be outside the Commission's competence. The General Assembly had asked the Commission whether it was in favour of the establishment of a special court distinct from the International Court of Justice, or a chamber of that Court. He thought the difficulties would be less great if a special court were created by means of a convention than if a system were followed which involved modification of the Charter.

19. Mr. el-KHOURY thought that the provision in the Charter (Article 7, para. 2) under which subsidiary organs could be established referred only to minor and temporary organs, and therefore did not apply. If a Criminal Court of Justice were to be established, it would be a permanent body, on a par with the International Court of Justice. The court in question would be regarded as a principal organ, and its establishment would necessitate amendment of the Charter. The creation of a criminal chamber of the International Court of Justice would involve only the modification of its Statute. It would obviously be possible to adopt the method of a convention signed by a number States, as Mr. Sandström had stated on the first page of his report. But the intention was to have an organ whose jurisdiction would be accepted by all Member governments. The only method would be to create a criminal chamber of the Court of Justice or to confer criminal jurisdiction on the Court.

20. Mr. HSU thought the Commission might advise the General Assembly that it was desirable to create a criminal chamber of the Court of Justice, and he personally was very much in favour of that; but the Commission ought to point out that from the point of view of possibility—on which the Commission was invited to give its opinion—it was almost out of the question.

21. Mr. HUDSON was disappointed that the problem he had raised previously had not come under discussion. If the Commission pronounced its opinion, it should be on a question of principle. It would be most unfortunate for the authority of the International Court, which was set up to settle disputes between States, if it were to be associated with the idea of a police court. The International Court had a mission to fulfil. To create a criminal chamber of the Court or to confer criminal jurisdiction on the Court would be a fatal blow.

22. Mr. BRIERLY shared the view of Mr. Hudson, who he felt had put the question into its true perspective. With regard to the argument that a revision of the Statute would be impossible because of the veto, it might be argued that the Commission had no special competence to assist the General Assembly to decide on that point. The real reason why it would be unwise to confer criminal jurisdiction on the present International Court had been given by Mr. Hudson. The exercise of that jurisdiction would discredit the Court and the United Nations. That was something he was most anxious to avoid. It would be disastrous if such discredit spread to the Court.

23. The CHAIRMAN thought that the argument used by Mr. Hudson and Mr. Brierly went further than they had stated, since it implied that the International Court of Justice must never deal with individuals. If he had

properly understood the two speakers, the Court had been set up to settle disputes between States and should be confined to that function. That was in contradiction to what Mr. Yepes had said. In the *Mavrommatis* case [1] the Court had connived at a special arrangement by admitting that a State might only be the ostensible litigant; and it had acted in a similar way in the episodes of the Serbian and Brazilian loans.[2]

24. Mr. HUDSON said that he had not gone so far as the Chairman thought.

25. Mr. BRIERLY also refuted this interpretation of his statement. In any modification of the Court's Statute, the background of the question which merited the modification must be examined. In the present instance, a modification of the Statute was not merited. As to the question of granting individuals the right to appear before the Court of Justice, he had no opinion to offer at the moment. That was a separate issue which the Commission had not been called upon to consider.

26. Mr. CÓRDOVA said he had been greatly impressed by Mr. Hudson's argument, but Mr. Hudson and Mr. Brierly had merely stated in a general way that it would be damaging to the Court's prestige to confer on it the function in question.

27. Mr. HUDSON explained that what he had said was that it would be damaging to its prestige as a body set up for the settlement of international disputes.

28. Mr. CÓRDOVA thought that to enable the Court to judge who was the aggressor in a dispute—in the strongest sense of the word, i.e. in a war—was to increase rather than lower its prestige. The Court must pronounce judgment on that point before it could judge the individuals responsible.

29. Mr. HUDSON remarked that the Commission must confine itself to the question of individual persons accused of committing crimes.

30. Mr. CÓRDOVA thought that the first step was to decide that aggression had taken place, otherwise there could be no crime.

31. Mr. el-KHOURY asked the Chairman if he agreed with Mr. Brierly that it would be injurious to the Court to confer criminal jurisdiction on it. He could not see why the Court's prestige should be lowered.

32. The CHAIRMAN thought that was a rather free interpretation of the statement by Mr. Brierly, who had not gone so far. Mr. Hudson and Mr. Brierly were anxious to safeguard the Court of Justice from criticism. They did not maintain that criminal jurisdiction would be unworthy of the Court, but that the Court was not set up to deal with such questions. It had been set up to settle disputes between States. This question of dignity did not arise in the present instance. He would like to see the criminal court established in the near future, and he thought it would be easier to bring this about by means of a convention than by adopting a procedure in which the veto could be applied. That was a thoroughly realistic point of view. He did not think that the fact of giving jurisdiction in criminal matters to the Court would diminish its prestige. In the national sphere, it frequently happened that criminal jurisdictions had greater prestige than others.

33. Mr. YEPES requested Mr. Hudson and Mr. Brierly to put forward definite arguments against conferring criminal jurisdiction on the Hague Court.

34. Mr. HUDSON thought that any international criminal jurisdiction was bound to become deeply embroiled in political controversies. This would mean less frequent recourse to the Hague Court in a sphere in which it had done admirable work, namely, in disputes between States; and even if States still submitted their disputes to the Court, its prestige would nevertheless be lowered.

35. The CHAIRMAN shared Mr. Hudson's view, adding that while he hoped the Commission would not take his remarks in a derogatory sense, he had a feeling that the present Court had no special competence in criminal matters. The French judicial system had been criticized on the grounds that it had several kinds of court; but he personally believed that a good civil judge was not necessarily a good criminal judge. He pointed out that States were tending to set up various types of jurisdiction. Speaking to an eminent criminal lawyer, it soon became quite clear that he was a criminal lawyer rather than international lawyer; and it was obvious, too, that the members of the Commission were international lawyers rather than criminal lawyers. He would like to see the International Criminal Court a special jurisdiction, and that for a practical reason which carried weight.

36. Mr. AMADO thought that the suggestion of bringing discredit on the Court arose from the idea of establishing a Court which would be unable to function for want of an international police force. That was how he had understood Mr. Brierly's statement. He would find it most embarrassing to have to explain to the various official bodies in his country that the Commission had created a court which was unable to function.

37. Mr. CÓRDOVA pointed out to Mr. Amado that the same argument might be used against the present International Court of Justice, which had no power to enforce its judgments.

38. Mr. ALFARO said he had been impressed by Mr. Yepes' proposal because it was practical, although it did entail difficulties. But to adopt it would be to answer a question which had not been asked of the Commission. The members of the International Court, who were specialists in international law, and had been elected under Article 2 of the Court's Statute, could not be expected to become criminal lawyers overnight. All the suggestions made for establishing a criminal court assumed that its members would be specialists in criminal law. The outlook of the international lawyer was not the same as that of the criminal lawyer.

39. Mr. KERNO (Assistant Secretary-General) noted

[1] *The Mavrommatis Palestine Concessions.* Judgment No. 5, March 26, 1925. Publications of the P.C.I.J. Series A, No. 5, pp. 6-51.

[2] *Payment of various Serbian loans issued in France.* Judgment No. 14, July 12, 1929. Publications of the P.C.I.J. Series A, Nos. 20/21, pp. 5-89.
*Payment in gold of Brazilian federal loans issued in France.* Publications of the P.C.I.J. Series A, Nos. 20/21, pp. 93-155.

that the Members of the Commission appeared to agree that the functions involved were so different that it would be unwise to entrust them to a single body.

40. Mr. HSU thought that the best argument was the difference in the jurisdiction involved. He thought the Commission's answer to the question which had been put should be that the difficulties involved were insurmountable.

41. Mr. CÓRDOVA remarked that if the Commission decided to propose that criminal jurisdiction be conferred on a chamber of the Hague Court, the General Assembly would have to decide the matter when the new Members of the Court were being elected, and to take the fact into account when making the elections. It would thus be possible to avoid altering the organization of the International Court of Justice, and to request the Assembly to elect specialists in criminal law and to set up a criminal chamber of the Court.

42. The CHAIRMAN asked the Commission to state whether, now that it had given consideration to the question in hand, it felt or did not feel that it was possible to set up a criminal chamber of the International Court of Justice.

43. Mr. ALFARO said that in his Report he had reached the conclusion that it was possible to establish such a chamber, provided the Court's Statute were modified. But for the reasons already given the Commission, he did feel that it was not desirable to establish a criminal chamber of the International Court of Justice. He thought the question of possibility might be settled right away, before going on to examine whether it would be desirable to set up such a chamber. After that Mr. Yepes' proposal might be examined-namely, that criminal jurisdiction be conferred on the Hague Court.

44. The CHAIRMAN said that the question at issue was: Is it possible to create a criminal chamber of the International Court of Justice? But he wondered whether the Commission was not at liberty to state that in its opinion it was not desirable. The question was whether the Commission would give its opinions separately on possibility and desirability, or on the two questions simultaneously.

45. Mr. YEPES said that he had made no definite proposal; he merely suggested that the Commission take a decision as to the possibility of creating an international judicial organ for the trial of persons charged with genocide or other crimes. He personally was in favour, whatever form the organ might take—whether it should be a special criminal chamber, or whether the suggestion were made that the International Court of Justice should deal with such cases along with the rest.

46. The CHAIRMAN said that Mr. Hudson had drafted a text which might win the support of the entire Commission.

47. Mr. HUDSON said that the text he had proposed was a simple statement to the effect that the Commission had carried out its task and had examined the question whether it was possible to create a criminal chamber of the International Court of Justice; and had reached the conclusion that this was possible; but that the Commission did not recommend it, on the grounds that it did not consider it desirable.

48. Mr. FRANÇOIS recalled that it had been stated that the establishment of such a chamber was possible by amendment of the Statute of the International Court of Justice. He enquired what was to be understood by the word " possible ".

49. Mr. HUDSON agreed to insert the words " by amending the Court's Statute ".

50. Replying to a comment by Mr. François that on that basis anything was " possible ", Mr. KERNO (Assistant Secretary-General) specified that the word " possible " had already been used in a particular sense. whereas here it had the meaning of possibility of, as it were, a physical of material kind. The Commission might thus omit the expression and state simply that such a chamber could be created by amending the Court's Statute, but that the Commission did not recommend this.

51. Mr. HUDSON, in reply to a question by Mr. Alfaro, said he had not made up his mind whether his text was a point of order or a resolution.

52. Mr. ALFARO thought that the decision to be taken was not a resolution proper, and that the whole discussion would be summarized in his report.

53. Mr. CÓRDOVA wondered what would be the significance of the decision taken by the Commission. If it declared that it would not be possible to establish a criminal chamber of the International Court of Justice, did that mean that the creation of an international criminal jurisdiction would be possible outside the international court? The Commission must outline the method, since it had replied affirmatively to the other two questions put by the General Assembly.

54. The CHAIRMAN recalled that the terms of reference of the Commission were to study the disirability and the possibility of establishing an international criminal jurisdiction. If, in regard to the method to be followed, it did not recommend the establishment of a criminal chamber of the International Court of Justice, there would be nothing contradictory in its decision.

55. On the invitation of the Chairman, Mr. HUDSON read out his draft resolution:

> " In making the foregoing answers to the question which the Commission was invited to study, the Commission has paid attention to the possibility of establishing a Criminal Chamber of the International Court of Justice. That course is possible by amendment of the Court's Statute, but the Commission does not recommend it for practical reasons as well as reasons of principle."

56. Mr. el-KHOURY and Mr. CÓRDOVA suggested that the end of the final sentence—" as well as reasons of principle "—be deleted. The CHAIRMAN felt that unless these words were kept the text did not give a true picture of the discussion.

57. Mr. ALFARO suggested deleting all mention of reasons in the text to be voted upon. The report would record the opinions expressed by the members of the

Commission, thus emphasizing the reason why the majority had felt that it should not recommend the establishment of the chamber.

58. Mr. HUDSON accepted this suggestion.

59. The CHAIRMAN thought that in view of the amendments proposed, it would be useful to vote separately on the various parts of the text submitted by Mr. Hudson.

60. After some discussion on the voting procedure Mr. KERNO (Assistant Secretary-General) pointed out that on the first two sentences of Mr. Hudson's text, and the beginning of the third sentence " But the Commission does not recommend it ", members were in agreement. He suggested that the remaining phrase (" for practical reasons as well as reasons of principle ") be treated as a separate proposition, and a vote taken on its two halves separately and then on the whole text as far as it had been adopted, in accordance with Rule 128 of the General Assembly rules of procedure. Thus, members who preferred that the two types of reasons should be mentioned, but did not agree that just a single type should be mentioned, would still be at liberty to vote against the proposal as a whole, as amended by the separate voting.

*It was so decided.*

61. *The Commission adopted the words " for practical reasons " without a vote.*

*The Commission decided by 6 votes to 5 to delete the words " as well as reasons of principle ".*

In the vote on the proposal as a whole as amended by the previous votes, *the Commission decided by 6 votes to 4 to delete the words " for practical reasons ".*

62. The CHAIRMAN noted that the final part of the resolution had been deleted, and that the resolution now ended with the words " but the Commission does not recommend it "; that the Rapporteur would give an account of the discussion on the point.

63. Mr. ALFARO said that it was not for him, as Rapporteur, to decide what should be included in the report. The Commission would discuss the text and make the final decision.

### Invitation from the Government of the Principality of Liechtenstein

64. Before passing on to another item of the agenda, the CHAIRMAN informed the Commission of the invitation to members to visit the Principality of Liechtenstein. He undertook to write to the Liechtenstein Government to the effect that some of the members of the Commission would be happy to accept the kind invitation, and that the date of the visit would be fixed at one of the next meetings.

### Formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal: Report by Mr. Spiropoulos (item 3(a) of the agenda) (A/CN.4/22)

GENERAL

65. The CHAIRMAN invited Mr. Spiropoulos to present his report.

66. Mr. SPIROPOULOS said that the report had already been distributed to the Commission, so that members would have had an opportunity to note its contents. He did not think it was necessary to expatiate on it, but he would be glad to answer any questions.

67. Mr. HUDSON drew the Commission's attention to paragraph 36 of the report, and read the paragraph. The Commission had been instructed to formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in its judgment. But it seemed particularly difficult to formulate principles of international law without taking a stand and deciding whether or not these principles were in fact principles of international law. The text of resolution 177 (II) [3] of 21 November 1947 of the General Assembly was ambiguous. He did not think that resolution prevented the Commission from examining whether the Nürnberg Principles were principles of international law. The paragraph of the report which he had read did not seem to him to have any point. He would be glad to have the matter cleared up.

68. Mr. SPIROPOULOS said that the section of his report mentioned by Mr. Hudson was taken almost verbatim from the report submitted a year previously to the General Assembly. The Commission had decided that its task was not to establish principles of international law, but merely to formulate the principles recognized in the Charter of the Nürnberg Tribunal and in its judgment, and already affirmed in General Assembly resolution 95 (I) [4] of 11 December 1946.

69. Mr. HUDSON emphasized that he was not criticizing Mr. Spiropoulos' report, but wondering how the Commission could formulate principles of international law if it could not decide whether they were or were not principles of international law. The point required further discussion.

70. The CHAIRMAN agreed that it was difficult to decide without knowing whether the principles were principles of international law or not.

71. Mr. CÓRDOVA replied that the question had already been discussed at the first session. He had asked the same question and it had been answered by all the members of the Commission as follows: it was not the duty of the Commission to examine whether the principles were or were not principles of international law. He recalled having expressed the view that the General Assembly, in restating the Nürnberg Principles, had not made them principles of international law since the Assembly itself was not an international legislative body. Its decision had only a political character. The Commission had decided that its only instructions were to formulate the principles; but it would be useful to re-open discussion on the point.

72. Mr. FRANÇOIS did not understand the passage in paragraph 36 of the report which stated that " the conclusion of the Commission was that, since the Nürn-

[3] See *The Charter and judgment of the Nürnberg Tribunal. History and analysis.* United Nations Publication, Sales No. 1949.V.7, p. 14.

[4] *Ibid.*, p. 32.

berg Principles 'had been affirmed' by the General Assembly in its resolution 95 (I), it was not the task of the Commission to examine whether these principles were or were not principles of international law." That was not the reason why the Commission should not examine the principles, but simply because its only instructions were to formulate the principles. He agreed with Mr. Córdova that affirmation by the General Assembly of the Nürnberg Principles had not made them principles of international law.

73. Mr. CÓRDOVA recalled that the sentence in question had appeared in the draft report discussed by the Commission a year previously. The Commission had been unable to modify the sentence at that time, because it represented a previous decision by the Commission. Hence he hoped that the discussion would be taken up again, and that the Commission would not formulate the principles until it had decided whether they were principles of international law.

74. The CHAIRMAN asked the Commission whether it wished to re-open the question. He himself would be glad to have it re-opened, as he had always been of the opinion that it was the Commission's duty to examine whether the Nürnberg Principles were really principles of international law.

75. Mr. AMADO asked the Chairman if he had considered the procedure for discussion. He thought the most practical method would be discussion principle by principle.

76. The CHAIRMAN thought that what was in Mr. Hudson's mind was that the Commission should decide whether it would regard each principle it formulated as really a principle of international law.

77. Mr. HUDSON said that the question was of the utmost concern to him. He had consulted a number of persons to ascertain their views. Some had maintained that the Charter of the Nürnberg Tribunal contained no principle of international law, any more than the London Agreement of 1945. The Nürnberg Tribunal was a military tribunal, and not strictly a court. The Secretary-General's Memorandum [5] on pages 37-38 examined the legal nature of the Charter. The question was raised again on pages 79-80. The report by Mr. Spiropoulos scarcely mentioned this point. Would it not be advisable first of all to examine the legal character of the Tribunal and the judicial significance of its judgment? Some of the persons he had consulted were of the opinion that, from the legal point of view, the value of the Charter and the London Agreement of 1945 [6] as documents formulating principles of international law was contestable. The London Agreement of 1945 had been concluded by the four governments appointed for the occupation of Germany. The Agreement was not subject to ratification. It came into force the moment it was signed, for the period of a year, and was then extended. The four governments had instructed the Tribunal to act in the name of all the Allied governments. Nineteen other Allied governments had signed the London Agreement. It was based on the notion that occupying Powers have legislative powers in occupied territory. The constitution of the Tribunal was an executive act by the occupying Powers based on their legislative powers arising from the fact of occupation. The Tribunal had only a limited jurisdiction namely, over occupied territory and war criminals of the European Axis countries. The execution of the Tribunal's decisions was entrusted to the Control Council for Germany (article 29 of the Charter) and the expenses of the Tribunal were charged against the funds allotted for the Control Council (article 30). Thus it was an executive act by occupying Powers. It was difficult to consider it as significant for international law in general. On the other hand, there were others who maintained that the principles established by the occupying Powers and by the Nürnberg Tribunal could be international in application, and that the question as a whole constituted a legal precedent. If the Commission considered these opinions, they might to some extent influence its views on the Charter and judgment of the Nürnberg Tribunal. He felt that the question could be summarized as follows: How far is the Tribunal's judgment in conformity with the Charter, and how far has it international competence?

78. Mr. KERNO (Assistant Secretary-General) thought the question whether the London Agreement and the judgment of the Nürnberg Tribunal had created an international customary law might be left aside. But in any case, by resolutions 95 (I) and 177 (II) adopted in 1946 and 1947, the General Assembly had unanimously affirmed that there were principles of international law in the Charter and judgment of the Court. It did not seem possible to interpret those resolutions differently to-day. Moreover at that particular moment the progress shown by the establishment of the Nürnberg Court had been a matter of great pride. On the other hand it must not be forgotten that the Commission a year ago had decided that its concern was not whether such principles were in conformity with the international law, but simply to formulate the principles. It had communicated that decision in its report to the Assembly, and the report had been formally approved by the Assembly in 1949.

79. Mr. BRIERLY wondered where Mr. Hudson's argument was likely to lead the Commission. It might lead to the conclusion that there were no principles to be formulated. Resolution 177 (II) debarred the Commission from adopting that point of view. Public opinion was no doubt divided as to whether international law had been created in Nürnberg and Tokyo, and whether it could be applied internationally. But the Commission's task was not to discuss the substance of the Nürnberg Principles. As a body created by the General Assembly, it was not at liberty to criticize the actions of the Assembly; its task was to formulate principles, according to its terms of reference.

80. Mr. el-KHOURY, supplementing Mr. Kerno's statement, said that in 1947 no representative had called in question that there were principles of international law in the Charter and judgment of the Nürnberg Tri-

[5] *Ibid.*

[6] *Ibid.*, pp. 89-91.

bunal. The Commission could now accept such principles as were really principles of international law and reject such as were not.

81. The CHAIRMAN asked the Commission if it agreed that in formulating the principles, it would formulate only such as were in the Charter or judgment of the Tribunal, on the implicit understanding that such of the principles as it formulated would constitute principles of international law.

82. Mr. CÓRDOVA pointed out that the discussion had in point of fact been re-opened, and that the Commission should now consider what were the Nürnberg Principles of international law, with a view to formulating them in due course. The Charter and judgment of the Tribunal contained principles which some recognized as principles of international law, while others did not. For example, there was agreement that aggression was unlawful, but there was no agreement as to whether aggression implied individual responsibility on the part of the aggressor. He recalled that after the First World War. Kaiser Wilhelm II was to be prosecuted under the provisions of the Treaty of Versailles. But the Netherlands had refused to hand over the Kaiser on the grounds that his individual responsibility was not recognized in international law. As a result of the Nürnberg trial, was individual responsibility recognized henceforth as a principle of international law? The Commission should assess what was recognized as international law in the principles under consideration, and formulate those principles.

83. Mr. SPIROPOULOS thought he was right in saying that the Commission was studying the question differently today from the way it studied it a year previously. Then, the Commission had taken decisions of which his report was the outcome, while today the Commission seemed anxious to take up the entire question again from the beginning.

*The meeting rose at 6.20 p.m.*

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## 45th MEETING

*Tuesday, 13 June 1950, at 10 a.m.*

CONTENTS



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*Chairman:* Mr. Georges SCELLE.

*Rapporteur:* Mr. Ricardo J. ALFARO.

*Present:*

*Members:* Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris el-KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Jesús María YEPES.

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

### Formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal: Report by Mr. Spiropoulos (item 3(a) of the agenda) (A/CN.4/22) (continued)

GENERAL (*continued*)

1. Mr. BRIERLY recalled that at the previous meeting the Commission had discussed at some length the relationship between the Charter of the Nürnberg Tribunal and international law. Practically all the jurists in the world had expressed their opinions on the subject, and he wondered whether the Commission would be likely to find a fresh solution. He suggested that for the moment abstract notions be abandoned and the study of the principles formulated in the report by Mr. Spiropoulos be taken up. Possibly the Commission might decide that some of those principles were not principles of international law.

1a. Messrs. AMADO, YEPES, ALFARO, el-KHOURY, SANDSTRÖM, and the CHAIRMAN supported this suggestion.

2. The CHAIRMAN asked whether Mr. Brierly meant that the principles to be formulated by the Commission would be formulated as principles of international law and the others would be rejected as not being principles of international law.

3. Mr. BRIERLY suggested passing on to examine the principles in the hope that this embarrassing question might be avoided.

4. The CHAIRMAN thought the Commission would be prepared to adopt the five principles enumerated by Mr. Spiropoulos as principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal.

*The Commission decided to proceed with the reading of the report.*

5. Mr. KERNO (Assistant Secretary-General) was glad that the Commission had taken this wise decision. He recalled that it was at the instigation of the United States delegation that the General Assembly had first taken up the question of the Nürnberg Principles, and that in his speech to the Assembly during the second part of the first session, President Truman had said:

> " In the second place, I remind you that 23 Members of the United Nations have bound themselves by the Charter of the Nürnberg Tribunal to the principle that planning, initiating or waging a war of aggression is a crime against humanity for which