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Summary record of the 45th meeting

Topic:
Formulation of the Nürnberg Principles

Extract from the Yearbook of the International Law Commission:-
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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.

45th MEETING

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

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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

individuals as well as States shall be tried before the bar of international justice." [1]

6. Mr. CÓRDOVA thought the Chairman's proposal would imply that the Commission was unanimously of the opinion that the principles of the Charter and judgment of Nürnberg were now established principles of international law affirmed by the General Assembly resolution. At the Commission's first session, this question had given rise to a discussion which was quite clearly reported in the summary records. Hence he felt that it would be preferable to abide by the previous year's decision.

7. The CHAIRMAN said that Mr. Córdova's attitude tended to distort the decision just taken. He could not declare that everything in the Nürnberg Charter and judgment constituted principles of international law. The Commission would specify that those which it retained were principles of international law, thus answering the request put to it to formulate the principles. It was not for the Commission to ascertain whether those principles existed already or whether the Nürnberg Tribunal had established them. That would involve research. With regard to the Charter, there would be no difficulty; whereas there would be regarding the judgment. Several of the principles applied by the Tribunal had not been accepted by the Rapporteur. For example, the Tribunal had affirmed that it was not obliged to apply the principle " nullum crimen sine lege ". If the Commission recorded all the principles applied in the judgment, it must accept that too; but it had felt that this was not desirable. There were principles in the Nürnberg judgment that the Commission did not wish to adopt.

8. If it did adopt principles, they would be principles of international law. There was no call to inquire whether they already existed before Nürnberg. That would in any case be too difficult, and the General Assembly had not asked the Commission to do it.

The Commission took up the study of Part IV of the report by Mr. Spiropoulos.

9. Mr. HUDSON could not understand why the words " *stricto sensu* " were used in the heading of Section A.

10. Mr. SPIROPOULOS explained that he had used the expression " The principles *stricto sensu* " because he mentioned crimes as well, and crimes could not be called principles. The Commission had been requested to formulate the principles; but the report spoke also of crimes. That was why he had made the distinction. He mentioned first of all principles, and then crimes not defined in the form of principles.

11. The CHAIRMAN suggested that the words " *stricto sensu* " be translated in French as " proprement dits ".

12. Mr. SPIROPOULOS pointed out that in Section B he spoke of crimes. Hence under Section A he had formulated principle in the strict sense. That was the only way of making the distinction. But crimes could be defined by formulating a principle and stating, for example: " any person . . . committing a crime ".

13. Mr. HUDSON felt that the words " *stricto sensu* " might create some confusion in the minds of some people. There was a heading already; why enlarge on it ?

14. Mr. SPIROPOULOS said he was prepared to alter the wording, but he pointed out that the expression " the principles of international law recognized . . . etc." included both principles and crimes.

15. Mr. YEPES suggested that the words " *stricto sensu* " be deleted.

16. The CHAIRMAN remarked that if that were done the distinction between the two things would no longer be made.

17. Mr. CÓRDOVA asked how crimes could be included under the heading " The principles of international law recognized . . ." if crimes were not regarded as principles.

18. Mr. SPIROPOULOS recalled that the Commission the year previously had decided to distinguish between crimes and principles. He asked his colleagues to be good enough to state what they wanted, rather than merely criticize the terms used.

19. Mr. BRIERLY did not think it was essential to make the division into principles and crimes. He suggested that the Commission examine all the principles laid down in Part IV, and decide whether they were acceptable.

20. The CHAIRMAN objected that it would still be necessary to draw up the list of crimes.

21. Mr. BRIERLY replied that the crimes could be formulated as principles.

22. The CHAIRMAN thought it would be difficult to maintain that the definition of a crime was a principle. In a national penal code there were principles— e.g., an accused person was regarded as innocent until he was proved guilty. On the other hand, it was laid down that murder was a crime, that was not a principle.

23. Mr. BRIERLY considered that if it was declared that murder was unlawful, that constituted a principle.

24. Mr. SPIROPOULOS pointed out that in penal codes both principles and crimes were to be found. The Charter of the Nürnberg Tribunal spoke only of crimes and not of principles. It stated that " The following acts . . . are crimes. . . ." The task of the Commission was to deduce the principles contained in the Charter of the Nürnberg Tribunal and in its judgment, and it must make a distinction between the principles and the crimes.

25. Mr. AMADO pointed out that the heading " The principles *stricto sensu* " logically demanded the enunciation of principles *lato sensu*. If there were no principles *lato sensu*, there was no point in specifying that the principles were principles *stricto sensu*. He suggested that the terms " the principles " and " the crimes " be used for the headings of Sections A and B.

26. Mr. SPIROPOULOS had no objection to the deletion of the words " *stricto sensu* ".

[1] *The Charter and judgement of the Nürnberg Tribunal. History and analysis.* United Nations publication, Sales No. 1949.V.7, p. 11.

27. Mr. FRANÇOIS said that the General Assembly had asked the Commission simply to formulate principles. He agreed with Mr. Brierly that whatever was formulated must be in the form of principles.

28. The CHAIRMAN recalled that sub-paragraph (b) of General Assembly resolution 177 (II) provided for a draft code of offences against the peace and security of mankind.

29. Mr. ALFARO thought that technically the opinions of Mr. Spiropoulos and Mr. Amado were quite acceptable. The Commission was dealing with principles and with definitions of crimes which were not strictly principles. Obviously the General Assembly had regarded all these rules as principles, but it must be admitted that the definition of a crime in a penal code was not a principle. Yet that mistaken notion could be found in the second part of the Nürnberg Charter. The best solution was that advocated by Mr. Brierly. The Commission must not adopt a classification which seemed to exclude one part of the Charter.

30. The CHAIRMAN said that logically he had appreciated what Messrs. Brierly, François and Alfaro had said. But he thought it would be a pity if the distinction were to disappear from the excellent arrangement of the report. In Section II there were the elements of a penal code, and sub-paragraph (b) of resolution 177 (II) asked the Commission to prepare a draft code. Hence the Commission must establish a list of crimes and define them, and then find the place in the penal code to be accorded to the principles formulated under the directions given in sub-paragraph (a) of the resolution. Sub-paragraph (b) could only have that meaning. The Rapporteur had made this distinction on the model of the most recent draft adopted. He suggested that the general title be kept, as it satisfied everyone, and that Part IV be divided into two sections: (a) The principles and (b) The crimes.

31. Mr. SANDSTRÖM asker whether Mr. Brierly wanted the heading of Section A deleted and the introductory sentence retained, namely: " The Charter and judgment of the Nürnberg Tribunal recognize the following principles. "

32. Mr. BRIERLY explained that his suggestion was that the beginning of the text be deleted from " A. The principles . . ." as far as " . . . the following principles ".

33. The CHAIRMAN asked whether the Commission intended to formulate a principle in respect of each crime.

34. Mr. BRIERLY thought that it would be best to discuss this when the Commission came to deal with the crimes. He thought the Commission might inform the General Assembly that in carrying out its instructions under sub-paragraph (a) of resolution 177 (II), it had refrained from discussing the question of crimes, as it proposed to discuss them in connexion with the penal code.

35. Mr. ALFARO thought that the best way out of the difficulty would be to make use of the suggestion contained in the decision taken the previous year in regard to the formulation of principles.

36-37. Mr. SPIROPOULOS felt that the Commission was wasting time. When the General Assembly had instructed it to formulate principles it had asked the Commission to formulate all that was contained in the Nürnberg Charter, since the principles without the crimes meant nothing. The General Assembly had been concerned with the crimes, and therefore they could not be disregarded. According to Mr. Alfaro they had two tasks in hand; the formulation of the Nürnberg principles and the drafting of a penal code. But it was possible that the latter would not be accepted by the General Assembly. Hence the formulation of the Nürnberg principles must be as complete as possible. The crimes were the essence of the matter, and it was because of the crimes that the General Assembly had decided to refer the question to the Commission. The words " *stricto sensu* " might be deleted. As they could never hope to find the ideal solution they must try for the second best. The Charter made the distinction, and the obvious thing was to follow it. But in deference to the misgivings of his colleagues he would agree to the deletion of the words " *stricto sensu* ".

The Commission decided by 7 votes to 0, with several abstentions, to delete the words " stricto sensu " from the heading of Section A.

38. Mr. HUDSON pointed out that General Assembly resolution 177 (II) spoke of the Charter and the judgment of the Nürnberg Tribunal. He wondered whether it would not be advisable to give both of these their proper titles, namely, the Charter of the International Military Tribunal and the Judgment of the International Military Tribunal. There were other tribunals at Nürnberg.

39. The CHAIRMAN referred to sub-paragraph (a) of the resolution and to the heading of Part IV of the report; he saw nothing to choose between what Mr. Hudson suggested and the formula adopted by the Rapporteur.

40. Mr. SPIROPOULOS had wondered why the General Assembly had repeated the name of the Tribunal. It was correct to say the Charter and judgment of the Nürnberg Tribunal.

41. Mr. CÓRDOVA took it that the intention behind Mr. Hudson's objection was that the Commission should not forget that the Tribunal under discussion was the International Military Tribunal and should bear in mind the nature of that tribunal.

42. The CHAIRMAN did not agree. When mention was made of a military tribunal, it was often in a pejorative sense—i.e., it implied that it was not altogether an ordinary law court. But that was wrong, at any rate in France. Why should the Commission try to let it be supposed that the Nürnberg Tribunal was not an ordinary law court ? It was after all the first example of an International Criminal Court. At the previous meeting Mr. Hudson had tried to show that the Nürnberg Tribunal was a chance phenomenon in international law. He personally held the opposite view, that it constituted a very important precedent. Was the Commission going to try to minimize that? The General Assembly had not set the example in that

direction. Incidentally, there had been very few military men on the Nürnberg Tribunal. It had included Professor Donnedieu de Vabres, who was decidedly not a military man. He would oppose the proposal.

43. Mr. SPIROPOULOS said he had constantly wondered what to call the Tribunal. He had felt that if he spoke of the " International Military Tribunal " he would not be understood. The name by which the world knew it was the " Nürnberg Tribunal ", and the General Assembly, which was a political body, had been well advised to use that term.

44. Mr. HUDSON pointed out that there had been many tribunals at Nürnberg, whereas there had been only one International Military Tribunal. He preferred in all cases to use the correct title for the institution he was speaking about.

45. Mr. SPIROPOULOS saw no reason to correct the term used by the General Assembly.

46. Mr. HUDSON argued that there was every reason, as the Commission was composed of persons competent in international law. It was a matter of draftsmanship.

47. Mr. CÓRDOVA thought that future generations would refer to the " Nürnberg Tribunal ", and would never dream of calling it the " International Military Tribunal ". Nürnberg would be a landmark in history, indicating that, from that date onwards, aggressive war was a crime for which the authors would be held responsible. The name should be kept. An example of a similar title was the " Geneva Conference ", which did not lead to confusion.

48. Mr. SANDSTRÖM saw no danger of confusion. The name was the one by which the Tribunal would be known to history. The terms used in the General Assembly's resolution should be kept.

49. Mr. SPIROPOULOS suggested that the discussion be closed.

50. Asked bv the Chairman whether he wished to submit a formal proposal on the point, Mr. HUDSON said he did not.

51. Mr. LIANG (Secretary to the Commission) remarked that the author of an article in the *American Journal of International Law* referred to tribunals other than the Nürnberg International Military Tribunal as " non-Nürnberg tribunals ".[2] He saw no objection to the name " Nürnberg Tribunal " as used in the General Assembly resolution.

PRINCIPLE I

52. The CHAIRMAN read out Principle I.

53. Mr. el-KHOURY asked whether the term " a crime under international law " did not refer to something which had not yet been decided at the time when the acts in question were committed. He thought it would be better to say " an international crime ". The Charter of the Tribunal constituted the law which it must apply. Approval by the General Assembly or by a special convention was what would make them crimes under international law.

54. Mr. SPIROPOULOS saw no difference between an international crime and a crime under international law. Ir Mr. el-Khoury would read the summary records of the first session, he would find that Mr. Brierly had proposed the definition given in the report before the Commission. So that he was not responsible for it, though it seemed to him perfectly sound.

55. Mr. HUDSON pointed out that in the preamble to Article I of the Convention on Genocide, the same expression " under international law " was used.

The Commission decided to proceed with the examination of the report.

56. The CHAIRMAN read paragraph 1 of the Commentary on Principle I.

57. Mr. HUDSON thought the second sentence was rather short, and did not give the reasons why the principle was drafted in general terms.

58. Mr. SPIROPOULOS replied that the principle adopted was drafted in general terms.

59. Mr. CÓRDOVA thought it should be stated why the Commission had adopted the principle in general terms. The Commission had to draft a general principle not limited just to a few specific individuals, as the Nürnberg Charter was limited to the chief war criminals of the European Axis countries.

60. The CHAIRMAN reminded the Commission that its instructions were to state not what were the Tribunal's decisions, but the principles on which those decisions were based. The Commission had surely recognized a year previously that the judgment did not contain any declaration of principle. It was not for the judges to enunciate principles. That was the legislative task of the Commission.

61. The CHAIRMAN read out paragraph 2 of the Commentary on Principle I.

62. Mr. HUDSON thought that possibly footnote 45 was unnecessary. The Commission should let the text speak for itself and not give references to preparatory studies.

63. Mr. SPIROPOULOS had no objection to the footnote being deleted.

64. Mr. CÓRDOVA thought that nothing in Mr. Spiropoulos' report must be deleted. It was its substance that was being discussed, not the report itself.

65. Mr. SPIROPOULOS thought that there was a very important question of principle involved; what report was to be submitted to the General Assembly, the report of the special rapporteur or the general report of the Commission ? He assumed that the general report would mention the dicussions and decisions taken and the special report would be sent to the General Assembly. But he had no objection if the Commission decided otherwise.

66. Mr. HUDSON thought that the question of the Nürnberg Principles would have comprised one of the chapters of the general report. The commentaries on the principles formulated would have to be adopted by

[2] Willand B. Cowles, " Trials of War Criminals (Non-Nuremberg) ", *American Journal of International Law*, Vol. 42 (1948), pp. 299-319.

the Commission, and it was most important to quote them in the general report.

67. Mr. KERNO (Assistant Secretary-General) said that there was a question of form and a question of substance involved. With regard to form, the various special reports were reports by individual members of the Commission for the Commission's use, whereas the general report was a report from the Commission itself to the General Assembly. A general rapporteur had been elected by the Commission for the purpose of drafting this general report. The special reports would thus become chapters of the general report. With regard to the substance, the contents of the general report would have to be approved by the Commission, which would thus have to pass an opinion on the substance of the special reports to decide what should be kept and what modified for the purposes of the general report. That would require the collaboration of the general rapporteur and the special rapporteurs. In the case of the special report at present under discussion, the Commission should give its opinion, not only on the principles, but on the commentary on those principles.

68. Mr. LIANG (Secretary to the Commission) recalled that the terseness of the previous report to the General Assembly on the Commission's first session had been very favourably commended. It comprised a Part I—" General " dealing with administrative matters and the stage of progress reached in the study of the various topics; and a Part II consisting of the draft Declaration on Rights and Duties of States. The General Assembly had felt that this was a very convenient arrangement, as it could thus figure as a single item in its agenda with a division into two or more paragraphs. He suggested that the same form be adopted for the report on the Commission's second session. With regard to the formulation of the Nürnberg Principles, it was thus not necessary for a special report to be submitted, to constitute a separate item in the General Assembly's agenda. The question would be dealt with in one of the chapters of the general report.

69. Mr. SPIROPOULOS repeated that the question was most important from the point of view of method. What had happened last year could not be taken as a precedent, since at that time the Commission had no special rapporteurs. But the Commission had involved its Statute and nominated several such rapporteurs. The question now was whether a special report should be submitted, and whether that report would still be the report of the Commission. It was important to decide that point. Actually, if he had known that his conclusions were to be embodied in a general report, he would not have taken the trouble to arrange his report as he had done, but would have confined himself to enunciating the principles and giving his comments. In a comprehensive report to the General Assembly, this historical background ought to appear, as it was essential for a proper understanding of the subject. On the other hand, if the special report was intended for the Commission, he would not have drafted the first part, since all the members of the Commission were familiar with the background of the question. He had imagined that the special report would be forwarded to the General Assembly as the Commission's report.

70. Mr. CÓRDOVA thought the special rapporteurs had been nominated to provide the Commission with a basis for discussion. If all the special report where submitted to the General Assembly, there would have been no point in electing a general rapporteur. The special reports might of course be annexed to the Commission's general report, which was the work of the Commission as a whole.

71. The CHAIRMAN agreed with Mr. Córdova. The report which the Commission would draft would be the general report on the debates which had taken place in the Commission, and it would include an annex giving the various documents, including the report presented to the Commission by Mr. Spiropoulos.

72. Mr. HUDSON did not altogether agree with the Chairman's suggestion. He thought that the whole significance of the Nürnberg principles as formulated in the report depended on the comments made by the Commission. As the Commission's report should reflect the opinion of the members of the Commission, it was for the Commission to decide what parts of Mr. Spiropoulos' report it wished to keep, and what parts it would like to alter or delete. To take an example, footnote 45 was not essential for the understanding of the text, whereas footnote 47 was most important as a commentary on the text, and should be included in the general report.

73. Mr. SPIROPOULOS was agreeable to this procedure.

74. Mr. CÓRDOVA thought it was essential to put before the Members of the General Assembly all the documents on which the general report was based; those documents should be distributed along with the report.

75. Mr. LIANG (Secretary to the Commission) recalled that all the reports on special topics were for general distribution, like other United Nations documents. The report by Mr. Spiropoulos retained its full value as a report submitted to the Commission, and would be mentioned along with the other special reports in the report to be adopted by the Commission and submitted to the General Assembly. They might be treated as annexes to the general report, but that would make the report too bulky. The special reports would always be available to members of the General Assembly.

76. Replying to a question by Mr. Spiropoulos, Mr. LIANG said that, as a general rule, only the summary records of the main committees of the General Assembly were printed. The records of other committees and commissions were mimeographed, but their distribution was not restricted, and they were available to all members of the Assembly, who received copies. A great many libraries also received them.

77. At the request of Mr. Yepes, the CHAIRMAN read out footnote 45.

78. Mr. SPIROPOULOS thought the footnote should be retained, as showing that the extension to the provisions of the final paragraph of Article 6 of the Nürn-

berg Charter, which Principle I gave by laying down the responsibility of accomplices in crimes under international law, as well as accomplices in a common plan or conspiracy, had already been contemplated when the text of the London Agreement was drafted.

79. Mr. ALFARO thought the Commission was anticipating the drafting of its report. If it decided to retain the footnote in the report, he would abide by this decision. But when the Commission did not take a definite line on what should be included in its report or what omitted, it should authorize the Rapporteur to decide for himself. He asked the Commission to give him that much latitude. He would try to bring out in all instances points of substance mentioned in the footnotes or other parts of the special report presented to the Commission. In the case under discussion, he would mention the fact that the Commission recognized the responsibility of accomplices in any crime under international law, although the Nürnberg Charter had only recognized this responsibility in the case of conspiracies.

80. Mr. SPIROPOULOS thought the Commission had before it two possible procedures; either it could decide to retain the footnote as it stood in the report which the Commission would draw up, or it could omit it. A third possibility would be to leave it to the Rapporteur to make use of parts of the text submitted to the Commission, or to omit them. With regard to footnote 45, he suggested that it be inserted in the Commission's report as it stood.

81. Mr. HUDSON thought the Commission should establish principles on which the general report was to be drafted. It would be sufficient to indicate what points it would like to see inserted or omitted.

82. The CHAIRMAN put to the vote the question whether footnote 45 should be inserted. There were 5 votes in favour, and 5 against. To avoid any misgivings which might arise from the outcome of the vote, the Chairman and Mr. Spiropoulos said they would vote against is.

The proposal to insert footnote 45 was therefore rejected.

83. The CHAIRMAN proceeded with the reading of paragraph (ii) under Principle I.

84. Mr. HUDSON drew attention to the fact that the quotation in the English text beginning: " The Tribunal, commenting on the last paragraph of Article 6 . . ." was incorrect, and that the inverted commas before the quotation in the last sentence—preceding the words " these words were designed "—should be deleted and inserted in front of the words " establish the responsibility . . ." Moreover, he thought that the official text from which this quotation was taken should be given—i.e., the official proceedings of the Nürnberg Tribunal—rather than the publication entitled " Nazi Conspiracy and Aggression, Opinion and Judgment ".

85. Mr. SPIROPOULOS explained that he had quoted the text given him by the Secretariat, and that when he drafted his report he had not had the official publications at his disposal. He agreed that the report should be altered as suggested by Mr. Hudson.

The Commission decided to retain footnote 47 for insertion in the general report.

86. The CHAIRMAN proceeded with the reading of the text of the report, and passed on to paragraph (3) of the commentary on Principle I (in Part IV). He drew the attention of the Commission to an error in line 2, which should read " *interpretation* of domestic law " instead of " interposition ".

87. Mr. HUDSON pointed out that the term " domestic law " was incorrect and should be replaced by " national law " or " internal law ".

88. The CHAIRMAN agreed to this alteration to the English text; the expression " droit interne " in the French text was correct.

89. Replying to a question by Mr. Hudson, Mr. SPIROPOULOS said that the second sentence of the paragraph: " A conception which in theory is considered as involving the ' international personality ' of individuals " had been inserted to meet the views expressed the year previously by some of the members of the Commission. In drafting it, he had been extremely careful to state that it was a conception " in theory " considered as involving the international personality of individuals. He had hesitated to go further than that, as he was aware that this view would be challenged by some of the members of the Commission.

90. The CHAIRMAN recalled that the year previously he had made a considerable concession to the Commission in that he had not insisted that the idea of an individual being subject to international law should be specified in the report with the utmost precision. He personally felt that such a specification was of the greatest importance; and he therefore proposed that the following sentence be added after the final words of Principle I: " Thus the individual is subject to international law, at least in criminal law. " This idea had often been expressed; in fact, it was implicit in Principle I, and it must be agreed that those who committed criminal acts were men. However, if the Commission did not share his views, he was prepared this year again to make a concession by adding the words " at least in criminal law ".

91. Mr. CÓRDOVA thought a distinction should be made between passive personality and active personality, and a formula must therefore be sought giving the precise meaning of the notion which the Commission wished to express. He could agree to the idea of passive personality, but not that of active personality.

92. Mr. YEPES thought the Commission might accept the Chairman's proposal.

93. Mr. SPIROPOULOS recalled the saying about giving and inch and taking a yard. A year previously the Chairman's proposal had been rejected. However, so as not to disregard completely the idea behind that proposal, he had inserted into his report the sentence he had just mentioned. Before inserting it in the report, he had given it a good deal of thought; and it was because he felt it would give rise to objection on the part of certain members of the Commission that he had drafted it in very conservative terms, and not tried to

enunciate it as a universally recognized principle. If an individual could be regarded as subject to international penal law, it was a theoretical and doctrinal question on which there was no likelihood of unanimity in the Commission. He thought the Commission should be content with what was stated in his report.

94. The CHAIRMAN, speaking as a member of the Commission, thought there was no necessity to study the philosophical significance of what " subject to law " implied. A definition of the term " individual " acceptable to all would be roughly: " a person possessing free will and capable of committing acts ". He was now to be forbidden by international law to commit certain acts. Hence he was subject to international law. From a strictly logical point of view, individuals were directly subject to international law and international law prevailed over national law. He mentioned that the new French constitution provided that if an internal law was contrary to international law, the internal law was automatically null and void. He wondered why the Commission should not state explicitly in the principle formulated what was implicitly admitted in the commentary—namely, that the individual is directly subject to international law. Wat it the unconscious fear of stating something which had long been in the minds of a great many people, although it had not been explicitly formulated as yet ? Or was it that the Commission still harboured the notion that only States were subject to the law of nations ?

95. Mr. SPIROPOULOS recalled that the question had been thoroughly discussed the year before, and that his report was a reflection of that discussion. This year, the Commission had just discussed it again, and he felt that it would be well to proceed to the vote, and to put an end to a discussion which was unproductive.

96. Mr. SANDSTRÖM said that although he appreciated Mr. Spiropoulos' point regarding his report, he thought it would be more striking to insert in the Commission's next report the affirmation of the concept formulated by the Chairman. He thought it would be better not to attach it to the principle itself, which should be short and concise.

97. Mr. ALFARO felt that in any case the individual was subject to established international law. In various places in the San Francisco Charter there were references to the individual and his duties and rights. Hence he agreed with the Chairman's proposal, though he feared that the words " at least . . . etc." weakened the sense. The fundamental principle to be affirmed was that the individual was subject to international law. He therefore suggested that the Chairman's proposal be adopted, with the deletion of the words " at least in criminal law ". The principle might even begin with the above-mentioned affirmation.

98. Mr. BRIERLY agreed to the proposal as stated by the Chairman. What was needed was a clear and explicit statement of what was in the mind of the Commission.

99. Mr. CÓRDOVA thought it was not for the Commission to give an opinion on the principles based on the Charter, which contained nothing very specific, and in which everything was stated by implication.

100. The CHAIRMAN said that the Charter was not altogether silent but spoke in a whisper, and much of what should be said explicitly had to be read between the lines. He noted that Mr. Alfaro was prepared to sponsor the proposal he himself had just made as a further concession—in the sense that he had accepted an inch in the hope that in due course he would be given an ell.

101. Mr. BRIERLY thought the wording proposed by Mr. Alfaro was inappropriate to the formulation of the Nürnberg Principles, whereas the Chairman's wording expressed an idea implicitly recognized in the Nürnberg Charter.

102. Mr. ALFARO once more expressed his misgivings at the words " at least ", which seemed to be at variance with the Declaration of Human Rights.

103. The CHAIRMAN and Mr. BRIERLY agreed that these words should be deleted, the proposal to read as follows: " Thus the individual is subject to international criminal law. "

On a vote being taken, the addition of this sentence was rejected, 5 votes being cast in favour and 6 against.

Paragraph 3 of the commentary to Principle I in Part IV of the report was adopted.

The meeting rose at 1 p.m.

46th MEETING

Wednesday, 14 June 1950, at 10 a.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).