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Summary record of the 46th meeting

Topic:
Formulation of the Nürnberg Principles

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

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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. 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).

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)

PRINCIPLE II

1. The CHAIRMAN read out Principle II (A/CN.4/22, part IV).

2. Mr. HUDSON thought that texts drafted by the Commission should serve as a model of drafting for members of the legal profession. If an idea was expressed in a particular way in one place, it must be expressed in the same way elsewhere, otherwise a suspicion might arise in the reader's mind that the different terms referred to different ideas. That was why he had tried to recast Principle II, so as to make it more precise and similar in form to Principle I. He presumed that the Commission would have to take a decision on the expression " domestic law ". It meant the law of the country where the act was committed. Article 6 (c) of the Nürnberg Charter read " domestic law of the country where perpetrated ". He would prefer to say " a person " rather than " any person ". The expression " does not punish an act ", was also unsatisfactory, as it was the person who was punished, and not the act. He proposed the following wording: " A person who commits an act which constitutes a crime under international law is not relieved of responsibility under international law because the act is not made punishable by the domestic law (local law) of the country in which the act was committed. "

3. Mr. ALFARO noted that Mr. Hudson used the expression " domestic law ".

4. Mr. HUDSON replied that it had been used at the previous meeting. It would be better to say " local ". The use of the word " national " would create difficulties in certain federal States where the criminal law was not federal. Alternatively, one might say " by the law of the country.... "

5. Mr. SPIROPOULOS thought the Commission should discuss separately each of the points raised by Mr. Hudson. The expression " domestic law " was a current expression which everyone understood. He asked the Commission to give its opinion on the point. The Commission incidentally had decided at its previous session to adopt the term " any domestic law " (A/CN.4/22, para. 40).

6. Mr. HUDSON maintained that the expression should not be taken out of its context. He was proposing to say " the domestic law of the country in which it was committed ", whereas the Commission had decided a year previously to say " any domestic law ".

7. The CHAIRMAN asked Mr. Hudson whether, as a matter of accurate terminology, it was really better to say " the law of the country in which the act was committed ". The law applicable might conceivably not be the law of the country where the crime was committed. That was the case, for example, with crimes committed on the high seas. In the " Lotus " case, Mr. Basdevant had held an opinion contrary to the opinion that prevailed.

8. Mr. HUDSON replied that the Nürnberg Charter had gone to great pains to use that expression. He quoted the text adopted by the Commission at its first session (A/CN.4/22, para. 40): " All persons committing any of the acts above referred to shall be responsible under international law, whether or not such acts are punishable under any domestic law." There was a fallacy here. Let him imagine a case where an act punishable under the law of Liberia had been committed in France by an American. A relationship must be established to the law of the country where the crime was committed, or to the law of the country of which the author of the crime was a national. The particular law referred to must be specified. But it was a question of draftsmanship. Referring to the phrase " Without discussing the new text " in paragraph 42, he observed that it was not the Commission, but the Sub-Commission, that was involved.

9. The CHAIRMAN thought Mr. Hudson's opinion differed from that of the Commission. He did not wish to theorize, but he liked the expression " any national law " as indicating the supremacy of international law over any national law.

10. Mr. HUDSON suggested the wording " because the act is not regarded as a crime by the law of a particular country ".

11. Mr. SPIROPOULOS could not accept this amendment. If the text read " the law of a particular country ", there would be no improvement. He had merely used the wording of the Charter of the Tribunal; the term was a current one.

12. The CHAIRMAN pointed out that the only consideration was to make the wording as far as possible fit the concept. Mr. Hudson followed the wording of Principle I much more closely, and his version was more strictly logical.

13. Mr. SPIROPOULOS considered that Mr. Hudson's proposal destroyed the uniformity of the texts included in his report. It could be seen from the final page of the report that all the principles began with the same wording. He had used uniform drafting for the three principles (II to IV), laying down that certain facts did not constitute a defence. If the sentence began as proposed by Mr. Hudson, it would be much weaker.

14. Mr. LIANG (Secretary to the Commission) thought that the term " domestic law " used in Principle II was ambiguous. It might mean any national law, the national law of a particular country, or even internal law as a concept. It might be advisable to link the idea of " domestic law " with the author of the crime, by taking account either of his nationality or of the place where the crime was committed. He did not consider that the term used in Principle II was as clear as that which had been employed in the first text submitted to the Commission at its first session (see A/CN.4/22, p. 40).

15. Mr. HUDSON stressed that that was his view.

16. Mr. CÓRDOVA believed that the Rapporteur's drafting was the best. The Commission wished to

emphasize that the crime was punishable regardless of the fact that it was not held to be a crime under certain domestic laws. It was not a matter of repeating the terms of the charter, which was limited by the facts which the Tribunal had to judge, but of trying to extract therefrom general principles of international law.

17. Mr. SANDSTRÖM proposed using the term " law applicable " and saying " an otherwise applicable national law "; that would take account of the Chairman's comment that it was not necessarily the law of the country in which the act had been committed. In Swedish law, it might happen that an act committed abroad by a Swede, and prejudicial to another Swede, was subject to Swedish law.

18. The CHAIRMAN thought it important to adopt a formula which avoided any kind of conflict of laws.

19. Mr. HSU thought it necessary first to decide the preliminary question raised by Mr. Hudson—namely, whether the texts adopted must be uniform. Personally, he would prefer it, but he thought that uniformity was not essential and might even result in monotony. The report had a general plan, and a change in one part would necessitate changing the whole; there was no justification for that, since the proposed texts were not unsatisfactory.

20. Mr. HUDSON thought Mr. Hsu's view amounted to stating that it was useless to try to improve the text.

21. Mr. CÓRDOVA asked whether the Commission was discussing the text of the report or Mr. Hudson's amendment.

22. The CHAIRMAN replied that it was discussing both, but must choose between them.

23. Mr. ALFARO suggested the following amendment to the amendment proposed by Mr. Hudson, in order to bring it closer to the text of Principle III: " The fact that an act which constitutes a crime under international law is not made punishable by the law of any particular country, does not relieve the person who committed the act of responsibility under international law."

24. Mr. HUDSON proposed the wording " is not held to be a crime under the law of any particular country . . . " He added that the two wordings meant the same thing.

25. Mr. ALFARO accepted that amendment.

26. The CHAIRMAN preferred the former wording, since an offence under domestic law might be involved.

27. Mr. BRIERLY observed that in English law there was no distinction between crimes and offences.

28. The CHAIRMAN explained that in French law. it was the gravity of the offence which made it a crime.

29. Mr. ALFARO pointed out that in Latin-American law the term *acto punible* (punishable act) applied to both crimes and offences.

30. Mr. SPIROPOULOS still considered his text the best. Mr. Alfaro had relied on the text of Principle III, which, however, used the words " acted as head of State ". There, it was a quality attaching to the person. Principle II, on the other hand, merely referred to the simple fact that an act was not contrary to domestic law. Nevertheless, he did not oppose the proposal.

31. Mr. el-KHOURY considered that the wording of the report was good. The applicable domestic law, whatever its nature, was replaced by international law, which was declared to take precedence over it.

32. Mr. AMADO was entirely satisfied with the decision taken on that point at the first session, and with the drafting of the report, for which he would vote. He did not think that the text proposed by Mr. Hudson was an improvement. With regard to Principle II, he wished to point out that popular language, which was important in the drafting of laws, used the expression " to punish an act ".

33. Mr. YEPES took the same view.

34. The CHAIRMAN said that the Commission must choose between the Rapporteur's text and that of Mr. Alfaro, which Mr. Hudson appeared to support.

35. Mr. ALFARO said that he had tried to meet the wish expressed by Mr. Hudson and other members of the Commission by referring to a particular domestic law, but above all, he had also wished to conform to the wording of Principles III and IV. He was quite prepared to accept the text of Principle II as it stood, subject to a very slight drafting amendment, if his own amendment were not accepted.

36. Mr. el-KHOURY pointed out that, in Arab countries where French concepts were adhered to, the word " crime " was translated by one special term, and the word " delit " (offence) by another. He asked whether it was desired that the word " crime " in Principle II should signify strictly crime, or both crime and offence.

37. The CHAIRMAN referred to the words " crime international " in the French text, and remarked that French people might wonder what would happen in the case of an offence (délit).

38. Mr. SPIROPOULOS replied that the wording should be " an act punishable under international law ", which applied both to crimes and offences. He observed that the term " international crime " was in conformity with the terminology usually adopted.

39. The CHAIRMAN objected that the dissemination of obscene publications was only an offence.

40. Mr. SPIROPOULOS replied that no such distinction was made in international law.

41. Mr. AMADO pointed out that the Nürnberg principles were only concerned with crimes.

42. The CHAIRMAN admitted the justice of that observation, and said that the doctrine of the Commission was clarified.

The amendment proposed by Mr. Alfaro was rejected by 6 votes to 5.

43. Mr. HUDSON proposed that the Rapporteur's text should be amended by deleting he words " an act which is an international crime ", and substituting the words " an act which constitutes a crime under international law ".

44. Mr. SPIROPOULOS accepted that amendment.

45. Mr. ALFARO believed the word " act " to be essential, and thought that the English text of Principle

II should be amended to read " the person who committed the act ".

46. Mr. HUDSON and Mr. BRIERLY approved of that amendment.

47. Mr. SPIROPOULOS agreed.

48. Mr. HUDSON proposed the wording " that the domestic law of any particular country " instead of " that domestic law ".

The amendment was rejected by 6 votes to 3.

The Rapporteur's text was adopted with the amendments proposed by Mr. Hudson and Mr. Alfaro and accepted by Mr. Spiropoulos.

It was decided to entrust the final drafting of the text of Principle II to Mr. LIANG (Secretary to the Commission).

49. The CHAIRMAN read out paragraph (1) of the comment on Principle II.

50. Mr. BRIERLY proposed that in lines 6 and 7 of that paragraph, the words " cannot keep in check the international responsibility of individuals " be replaced by the words " cannot free individuals from their international responsibility ".

51. Mr. SPIROPOULOS accepted the proposal.

52. Mr. HUDSON stated that he did not consider the first sentence strictly accurate. The paragraph should be amended to take account of the difference between the text of Principle II and that of article 6 (c), which mentioned only the domestic law of the country where crimes against humanity had been perpetrated. The deviation from the Nürnberg Charter should be explained in the comment.

53. Mr. CÓRDOVA considered that Mr. Hudson was quite right, and that the idea should be expressed more fully; otherwise it would never be known why the Commission had not adhered to the Nürnberg Principles.

54. Mr. SPIROPOULOS requested that a formal proposal should be submitted.

55. Mr. HUDSON explained that Principle II was based on article 6 (c), but differed from it. Sub-paragraph (c) referred to the " domestic law of the country where [crimes had been] perpetrated " and only applied to crimes against humanity. He proposed that the first two sentences of the paragraph be deleted.

56. Mr. SPIROPOULOS thought that it was implicitly admitted that the Nürnberg Principles, which had been enunciated in view of special facts, were to be formulated for general application. He did not think it necessary to state the fact expressly.

57. Mr. YEPES and Mr. SANDSTRÖM supported the amendment proposed by Mr. Hudson.

58. The CHAIRMAN announced that the Commission would rely on its Rapporteur to amend the drafting of the paragraph in question. He read out paragraph (2) of the comment on Principle II.

59. Mr. ALFARO pointed out that the third line of the French text contained the words " les dispositions de la loi nationale ", whereas the English text, also in the third line read " the attitude of domestic law ". He thought it would be preferable to say " the provisions of domestic law ", which corresponded exactly to the French text.

The amendment was adopted.

60. Mr. HUDSON asked whether, when domestic law made no provision that an act should be punishable, international law would nevertheless take precedence.

61. Mr. SPIROPOULOS replied in the affirmative.

62. The CHAIRMAN believed that that, too, was a question of supremacy. There was a general principle according to which anything that was not prohibited was permitted. If domestic law made no provision, it gave implicit permission. Where international law prohibited, its prohibition took precedence.

63. Mr. BRIERLY asked whether it was any use dealing with that philosophical question. He thought that only the quotation at the end of paragraph 2 should be retained in the general report. The other centences were unnecessary.

64. Mr. SPIROPOULOS recalled that the pervious year, a considerable minority had supported the view of their present Chairman. He had wished to satisfy that minority and that was the idea underlying Principle II.

65. Mr. BRIERLY asked the Chairman whether he found paragraph 2 satisfactory.

66. The CHAIRMAN replied that he did. On behalf of the previous year's minority, which he represented, he asked that paragraph (2) should remain unchanged.

67. Mr. ALFARO reminded the Commission that the first proposal regarding the supremacy of international law had been rejected. Nevertheless, article 14 of the draft Declaration on Rights and Duties of States, adopted by the Commission at its first session, proclaimed the " supremacy of international law ".[1]

68. Mr. HUDSON pointed out a slight difference in the last sentence of the paragraph between the English wording " characteristic of the above inference is the following passage of the Court's findings ", and the French wording " Le passage suivant des conclusions du Tribunal vient à l'appui de cette déduction " (the following passage of the Court's findings supports this inference).

69. Mr. BRIERLY considered that the French text was preferable and should be translated into English.

PRINCIPLE III

70. The CHAIRMAN read out Principle III (A/CN. 4/22, part IV).

71. Mr. HUDSON proposed adhering to the form adopted for the preceding principles and suggested the words " The fact that a person who committed an act constituting a crime under international law etc."

72. Mr. SPIROPOULOS accepted that amendment.

73. Mr. HUDSON considered that the final words " or

[1] Article 14 read as follows: " Every State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law."

mitigate punishment " should be deleted. Such a question was always for the Court to decide.

74. Mr. SPIROPOULOS recalled that, in the final draft adopted at the first session by the sub-committee responsible for revising the text, the words in question had been placed in brackets (A/CN.4/22, para. 41). He had retained the words in his report, but was agreeable to deleting them. He pointed out that that provision appeared in Article 7 of the Charter.

75. The CHAIRMAN proposed the words " or constitute an extenuating circumstance ".

76. Mr. CÓRDOVA wondered whether the concept of extenuating circumstances was recognized in Anglo-Saxon countries.

77. Mr. BRIERLY replied that in English law it was a matter for the Court to decide, and was not governed by any rule of law. On this point the report followed Article 7 of the Charter. However, he did not approve of the words in question; the fact of being an official might just as well be an aggravating circumstance as an extenuating one.

78. Mr. KERNO (Assistant Secretary-General) thought it would be preferable to retain the words in question in order to bring out the different application of the idea of mitigation of punishment in Principle IV.

79. Mr. SANDSTRÖM favoured the retention of that concept in the formulation of the Nürnberg Principles. It would be possible to revert to the point when discussing the draft Code of Offences against the Peace and Security of Mankind.

80. The CHAIRMAN noted that the Commission would then certainly have more freedom in making its decisions. In this case, it was bound by the precedent of the Charter.

87. Mr. FRANÇOIS said that it would be most important to decide whether the Commission should merely give a new form to the principles adopted by the Tribunal or whether it could express itself freely regarding them. He could support the proposed text of Principle III, but when the draft Code was discussed he would oppose the unconditional adoption of the Nürnberg text in respect of the matters dealt with in Principle IV.

82. Mr. SPIROPOULOS recalled that it was the duty of the Commission to formulate the principles recognized by the Charter. As that document contained the words " mitigation of punishment ", there was no choice.

83. Mr. YEPES did not consider that the Commission's task was to ratify the provisions of the Charter. It was not obliged to adopt them as they stood. The Commission might well delete the words " or mitigate punishment ".

84. Mr. HUDSON and Mr. CÓRDOVA took the same view.

85. The CHAIRMAN agreed that it was the Commission's duty to formulate the principles as principles of international law and to incorporate them in the code it was going to draw up. It was free to delete the reference to mitigation of punishment if it so desired.

86. Mr. CÓRDOVA thought that, in certain cases, a court might consider mitigation of punishment. For example, a legislative assembly might have declared war against the wishes of the Head of State. Because that case had no arisen in connexion with the great war criminals of the totalitarian countries of the Axis, the authors of the Charter had not taken it into consideration. But for the formulation of principles which would apply in future, it must be borne in mind.

87. Mr. el-KHOURY also thought that the Charter had been drafted with a view to punishing certain persons. They should try to formulate the principle in such a way that it could be applied in the future. It should be left to the court to decide whether there were aggravating or extenuating circumstances. He thought that the words in question should not be retained.

88. Mr. AMADO emphasized that the Commission's duty was to formulate the principles of international law as derived from the Charter and judgment of the Nürnberg Tribunal. Nevertheless, he thought that to accept those principles as at present formulated was a serious decision. After considering the matter, he felt that he should support the proposal to delete the words " or mitigate punishment " at the end of Principle III, since on that point the Charter had rejected a fundamental principle of law.

89. Mr. BRIERLY, while observing that it was the Commission's duty to formulate the principles of international law, did not consider it a principle of international law that the facts dealt with in Principle III could not mitigate punishment.

90. Mr. FRANÇOIS did not understand how the fact of acting as Head of State could mitigate punishment. There might, of course, be extenuating circumstances, but he doubted whether the mere fact of being Head of State could be considered as such.

91. Mr. SPIROPOULOS proposed the closure of the debate, since all members had now had an opportunity of expressing their opinions.

92. The CHAIRMAN asked the Commission to take a decision on the deletion of the words " or mitigate punishment " in Principle III.

It was decided by 8 votes to none to delete the words in question.

93. Mr. HUDSON noted that Principle III used the words " public official " (in French, " fonctionnaire ") whereas article 7 of the Charter of the Nürnberg Tribunal used the term " responsible officials " (in French, hauts fonctionnaires). He considered the terms of the principle too broad, and thought that the Commission would agree to state that responsible officials—i.e., those of high rank—were meant.

94. Mr. SPIROPOULOS asked whether there could be any official who had no responsibility and requested the Commission to clarify its meaning.

95. Mr. HUDSON and Mr. CÓRDOVA thought that the Commission should understand by the term " public official ", as used in Principle III, all officials having real responsibility, whereas Principle IV referred to officials having lesser responsibility.

96. Mr. SPIROPOULOS accepted that definition of the term " public official ".

97. Mr. KERNO, Assistant Secretary-General, thought that Principle III certainly referred to officials of high rank, who thus had heavy responsibility, as distinct from officials or persons acting on the orders of their government, or of a superior. As used in Principle IV, the term had a very broad meaning.

98. The CHAIRMAN proposed the word " gouvernant " (responsible ruler) instead of " public official ". It was certainly a neologism, but the use of the term was accepted and had become frequent since the work of the Bordeaux Commission. The distinction between gouvernants and public officials was that the former had no superiors in rank whereas a public official had superiors and acted on their orders.

99. Mr. HUDSON thought that the meaning of the term " responsible official " was very broad. He recalled that article IV of the Convention on Genocide read as follows: " Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." Under the terms of that article of the Convention, the meaning of the words " public officials " was certainly very broad. He preferred the term " responsible government officals ".

100. The CHAIRMAN thought he was right in assuming that Principle III applied to superiors and to " gouvernants ", whereas Principle IV applied to public officials.

101. Mr. BRIERLY asked that the term " public official " should be understood to mean a responsible official attached to the government of his country, as suggested by Mr. Hudson.

102. The CHAIRMAN asked Mr. Alfaro and Mr. Spiropoulos to find an English equivalent for the word " gouvernant ".

103. The CHAIRMAN read out the comment on Principle III (A/CN.4/22, part IV). He observed that the words " actes condamnés " (English: which are condemned as criminal) were not correct and should be replaced by the words " actes considérés " (acts held to be criminal).

104. Mr. SPIROPOULOS accepted that amendment to his text.

105. Mr. HUDSON wondered whether it was correct to say, as stated in the first line of the paragraph, that the text of Principle III reproduced in a more precise form the principle laid down in article 7 of the Charter. He proposed deleting the words " in a more precise form " which did not appear to be strictly accurate.

106. Mr. SPIROPOULOS replied that he would consult the text of the Charter to see how far the passage could be amended.

107. Mr. BRIERLY suggested the words " principle based on article 7 of the Charter " instead of " principle laid down in article 7 ". He suggested that the Commission should give the General Assembly some explanation of the reasons which had led it to delete the words " or mitigate punishment ".

108. Mr. SPIROPOULOS thought that his text was more precise than that of the Charter of the Tribunal, which read: " The official position of dependants . . . shall not be considered as freeing them from responsibility or mitigating punishment "; whereas the formula used in his report stated that the fact of having acted as Head of State or public official " does not free him from responsibility under international law or mitigate punishment ".

109. Mr. BRIERLY referred to the second sentence of the paragraph which read: " If, according to a general rule, a person acting as a State organ is considered as acting on behalf of the entity ' State ', and as such not responsible for his actions, in cases of acts constituting international crimes, according to the Charter and the judgment, the fact that an individual acted in an official capacity does not free him from responsibility under international law. " He did not find that sentence clear, and could not attach any precise meaning to it.

110. Mr. SPIROPOULOS said that he had wished to explain that persons acting in a public capacity would be fully responsible for their acts under international law.

11. Mr. SANDSTRÖM found some difficulty in accepting the words " according to a general rule " at the beginning of the second sentence of the paragraph.

112. Mr. SPIROPOULOS said that he would explain his idea. If a Head of a State declared war, he might not be held personally responsible under domestic law, since he was performing an act of State in his capacity as head of State; but under international law he was responsible. That was the meaning he had intended to convey by the sentence in question.

113. Mr. BRIERLY thought that that implied that the Charter of the Nürnberg Tribunal had created a new rule of international law providing for the responsibility of Heads of State.

114. Mr. SPIROPOULOS objected that it could not be affirmed forthwith that the Charter had created a new rule of international law.

115. Mr. HUDSON proposed deleting the first part of the sentence from the words " If, according to a general rule . . ." down to and including the words " responsible for his actions "; the sentence would then begin " In cases of acts etc."

116. Mr. CÓRDOVA thought that comment on Principle III contained in the report might give the impression that it was intended to free from responsibility those who had authority to act as Head of State, and he wondered whether the terms of the Charter were really intended to grant certain Heads of State the benefit of traditional immunity. The last sentence of the comment appeared to confirm that impression.

117. Mr. SPIROPOULOS explained that he had wished to point out that a Head of State or high official who, under customary international law, could invoke the responsibility of the State as a defence, could not

do so in the case of a crime under international law. If, for example, the chief of police of a city such as Geneva were to arrest a person enjoying diplomatic immunity, he would be violating international law but not committing any criminal act, either under domestic law or under international law, provided there was no rule of international law making such an act punishable, but if that act were held to be a crime under international law, the chief of police would be responsible under international law. In order to avoid any misunderstanding, he proposed the deletion of the last sentence of the comment.

118. Mr. HUDSON saw no reason for deletion.

119. Mr. AMADO said that he favoured the retention of the sentence, since he thought that the Commission should stress what had been done by the Nürnberg Tribunal in respect of Heads of State and responsible officials.

120. Mr. KERNO (Assistant Secretary-General) thought that the Commission was in agreement that the first sentence of the comment should be amended by deleting the words " in a more precise form " and by explaining the reasons why Principle III had been formulated as it was. The Commission also appeared to consider that the first part of the second sentence should be deleted down to and including the words " responsible for his actions ".

121. Mr. SANDSTRÖM pointed out that, under Swedish law, the sovereign enjoyed immunity for all acts performed in his capacity as Head of State. He had thought that the second sentence under discussion had been inserted in the comment to recall the principle stated in numerous constitutions, according to which the sovereign or Head of State enjoyed such immunity.

122. The CHAIRMAN stated that there was a difference regarding the exercise of authority. That was the difference between the case of Hitler and that of Wilhelm II. He thought that the interpretation of the Charter given by Mr. Spiropoulos was correct, and that a chief of police would in fact be responsible for an act he performed, if he had thereby committed a crime under international law.

123. Mr. HUDSON requested the deletion from the third sentence of the comment on Principle III of the words " under certain circumstances ", which weakened the idea expressed. He also asked that the word " court " should be replaced throughout by the word " tribunal ".

The comment on Principle III was adopted as amended.

PRINCIPLE IV

124. The CHAIRMAN read out Principle IV and the comment thereon (A/CN.4/22, part IV).

125. Mr. YEPES stated that he would be obliged to vote against that principle and asked the Commission to reject it. The report transcribed the principle contained in article 8 of the Charter of the Nürnberg Tribunal. The reason why that principle had been included in the report was that the resolution of the General Assembly had instructed the Commission to formulate it. But the International Law Commission consisted of independent international jurists and its members should act in that capacity. So far as he personally was concerned, he could not subscribe to principles that were contrary to all legal concepts. Was it possible to say that an official who received a formal order from his superior could avoid carrying out that order ? Such an official was in reality faced with a *force majeure* from which there was no escape and he could not possibly avoid obeying the order. One of the essential principles of law was free will; before he could be held responsible for his acts, a man must be free to choose and to act according to the dictates of his conscience. In this case, the Commission appeared to be maintaining the contrary. He fully understood that a high official who was a member of the higher councils of governments might be free to perform or not to perform an act determined by the government; but that did not apply, for example, to an officer, a non-commissioned officer or a soldier who received an order from his superior and must carry it out because he would otherwise be in danger of losing his life. In his opinion, a man must be morally free to make his choice if he was to be held responsible for it and consequently he was obliged to vote against anything that was contrary to all ethical principles.

126. Mr. FRANÇOIS, speaking on a point of order, said he thought the Commission was about to discuss a question with which it would have to deal again when examining the report submitted by Mr. Spiropoulos on the draft Code of Offences Against the Peace and Security of Mankind; he thought it advisable for the Commission to adjourn the discussion of Principle IV and the comment thereon until it had finished examining the other report of Mr. Spiropoulos.

127. The CHAIRMAN partly agreed with the objections raised by Mr. Yepes, but reminded the Commission that it was called upon to formulate the Nürnberg Principles. He thought, however, that Principle IV, as stated in the report, could be examined at once, with the addition of a few words expressing the idea that the court could take account of the fact that a person committing a crime had acted on the order of a government or of a superior, not only to mitigate punishment but also as grounds for acquittal, if justice so required. With that addition, the Principle could be considered immediately, without subsequent decisions of the Commission being prejudiced by its decision on the point. Mr. Yepes had stated that the essential principle of all law lay in the free choice of the individual. If he was not acting freely he might not have *mens rea.* That condition might also be lacking if he were subject to *force majeure*—i.e., if he were confronted by an event which prevented him from taking a decision and he had to obey an order.

127a. He (the Chairman) recalled that a matter which had aroused very strong feeling was then before the French courts; he was referring to the Oradour incident, which was an appalling crime against mankind. Old men, women and children had been shut in the church at Oradour, to which the Germans had set fire.

The non-commissioned officers and soldiers guilty of this act were at the present time appearing before a French military tribunal. It had been asked whether some of those soldiers and non-commissioned officers could be acquitted. Certain criminal lawyers held that the men had not acted freely, that they had been faced with the choice of obeying or being killed, and that that fact must be taken into account; other jurists took the opposite view. That was the situation in fact. It had aroused strong feeling, and he thought it would be difficult to tell the Commission in which cases there might be an acquittal—i.e., in which cases one or other of the men was not responsible. Consequently, he asked the Commission to consider whether it did not think fit to add to Principle IV a provision not only for mitigation of punishment but also for possible acquittal. The additional clause might be in the following terms: "... in mitigation of punishment or even as grounds for acquittal if justice so requires". He considered that the Commission was not bound to adhere strictly to the principles applied at Nürnberg, but that in formulating the principles it should take care to avoid contradictions. It must, after all, be free to choose. In these circumstances, he thought that—as Mr. François had pointed out—the question raised in Principle IV was bound up with the question raised in the other report submitted by Mr. Spiropoulos, and he proposed that the Commission decide whether to adjourn the discussion as just proposed, or to take an immediate decision by which it would be bound when it came to examine the other report.

128. Mr. BRIERLY thought that a way out of the dilemma might be found in the words contained in the judgment of the Nürnberg Tribunal, according to which the true test of criminal responsibility was "whether moral choice was in fact possible" (A/CN.4/22, part IV).

129. Mr. CÓRDOVA thought that there was a certain analogy between an officer who ordered torture and a gangster chief who compelled one of his men to commit a criminal act. In both cases, the subordinate was acting under constraint, but that did not relieve him of personal responsibility; for in his opinion a man must act rightly even if it meant losing his life. There was no obligation to obey the order of a criminal or to obey a criminal order when it was known that a criminal act was involved. The declaration or conduct of war was a different matter. In political crimes such as the conduct of war, an officer, non-commissioned officer or soldier could not be held personally responsible if he acted in conformity with the laws of war; but a distinction must be made between such acts and crimes against mankind for which such men must be held responsible.

130. Mr. SPIROPOULOS said that during the last two or three days he had thought a great deal about the Commission's work. He believed that the difficulties with which it was faced were due to the fact that it was carrying on its business and discussions without members being in full agreement as to its task. Some thought that the Commission should formulate the Nürnberg Principles independently of the fact that they might or might not be considered as principles of international law. Others considered that it should concern itself exclusively with the principles contained in the Charter and Judgment of the Tribunal, which were principles of international law. If they were right, how had the commission been able to adopt chapter III of the first part of its report on the first session? The previous year, the Commission had decided that it was not called upon to determine whether the Nürnberg Principles were principles of international law. If the Commission could not now reach agreement it could, it was true, adopt principles, but each member would interpret them as he pleased. Consequently, the Commission should first decide whether it intended merely to formulate principles or to discuss those principles as principles of international law. In his report, he had reproduced the principles adopted the previous year. Mr. Yepes was now asking that the principles be re-examined. That was an entirely new departure. If the Commission accepted the principles as recognized principles of international law, its task would be easy. But if it did not, there would be interminable discussions with no solid foundation.

131. The CHAIRMAN paid tribute to the care and conscientiousness shown by the Rapporteur. He reminded the Commission that it must carry out the task assigned to it by the General Assembly—namely, to formulate the principles of international law recognized in the Charter and Judgment of the Nürnberg Tribunal, and that it must then incorporate those principles in the draft Code of International Law. In the circumstances, he did not think that the Commission could include in its code principles on which it was not in agreement. Could a jurist affirm something which was contrary to the evidence, and was the Commission going to affirm something which it was not prepared to incorporate in the Code? That was the question with which the Commission was now faced. It had acted too hastily the previous year and had made a mistake. In his opinion, it was that mistake which was now hampering the debates.

132. Mr. SPIROPOULOS asked whether the Commission intended to adopt Principle IV and the comment thereon contained in his report. If so, it should decide on the attitude it wished to adopt as a basis for discussion.

133. Mr. FRANÇOIS thought it possible to formulate the principles as contained in the Charter and judgment of the Nürnberg Tribunal; on that point, the whole Commission seemed to be in agreement. Moreover, in formulating those principles, it would not be stating that it supported them. In his opinion, the Commission's first duty was to formulate the principles, considering them as principles of international law as the Nürnberg Tribunal had done. The list of principles had been drawn up, and it was from that point of view that the Commision should decide on their adoption. The second duty of the Commission was itself to examine the principles from the viewpoint of international law, and to decide whether it could incorporate them in the draft

Code of Offences against the Peace and Security of Mankind.

132. Mr. BRIERLY did not think that that was the problem. In no country did the law recognize superior orders as a defence when a crime had been committed.

133. Mr. el-KHOURY expained that under the law of his country, which was based on Islamic law, an order given by a superior did not in itself free from responsibility the person to whom the order was given. The order of a chief who had power to enforce the execution of his order might remove that responsibility. He observed that the text of Principle IV, which was based on the text of article 8 of the Charter of the Nürnberg Tribunal, had been established by the Commission the previous year. But as he had not then been able to attend the meetings of the Commission, he could give no opinion on its intentions at that time. He thought, however, that the Commission must now examine the extent to which the Nürnberg Tribunal had utilized and implemented the provisions of article 8 of the Charter. The crimes in question were listed in article 6. He wondered how many subordinates had committed such crimes in Germany. There were certainly millions of them. But how many of such persons had been brought before the Nürnberg Tribunal and sentenced by it ? Perhaps twenty, one hundred, or even a thousand. Since the Nürnberg Tribunal, which was responsible for applying article 8 of the Charter, had failed to do so by limiting itself to a certain number of cases, the Commission should not formulate that principle, which would be binding upon other courts in future.

134. Mr. SPIROPOULOS emphasized that he had not decided any issue in the principle and the comment he had formulated. He had merely confined himself to the task assigned to the Commission by the General Assembly.

135. Mr. KERNO (Assistant Secretary-General) did not consider it absolutely essential for the Commission to take a formal decision at that stage on the exact interpretation it placed upon the words " principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal ", which appeared in General Assembly resolution 177 (II). The Commission had already adopted the text of Principles I to III. Principle V would probably raise no difficulty. It therefore only remained to formulate Principle IV. The Rapporteur's text and Mr. Brierly's amendment might perhaps form the basis for a solution.

136. The CHAIRMAN thought that the Commission should adjourn in order to form a definite opinion on the policy to be followed in respect of the principles it was to state in its report.

137. Mr. SANDSTRÖM reminded the Commission that the principles it was to formulate must be in conformity with the Charter and judgment of the Nürnberg Tribunal. He considered that article 8 of the Charter was drafted in very categorical terms, but the judgment was not so clear.

138. Mr. SPIROPOULOS thought that the Commission must now decide whether or not it wished to adopt the principles that an order given by a superior made the subordinate responsible; that was the first question it would have to decide.

139. The CHAIRMAN again requested the Commission to consider the matter and to form an opinion so that it could adopt a definite position with regard to the decisions it was about to take.

The meeting rose at 1 p.m.

47th MEETING

Thursday, 15 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).

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

PRINCIPLE IV (*continued*)

1. The CHAIRMAN was convinced that it was useless for the Commission to decide in a purely theoretical way how it was to interpret the task entrusted to it. The drafting of Principle IV was acceptable. There might seem to be some contradiction between Principle IV and what the Commission intended to include in the draft criminal code. But it was only apparently so; there was no real contradiction. The Charter merely spoke of mitigation, and if the Commission wished to include mitigation or even absolute defence in the criminal code, it could do so without contradiction. It could even allow a judge to acquit the accused. The criminal code would enlarge on the Nürnberg principles. The Nürnberg principles referred to " justice "; he personally would prefer to say " equity ", though the idea