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Summary record of the 54th meeting

Topic:
Draft code of offences against the peace and security of mankind (Part I)

Extract from the Yearbook of the International Law Commission:-
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deducible from the exchange of views that had taken place.

133. The CHAIRMAN agreed that the problems in hand were most formidable.

134. Mr. BRIERLY said it would be extremely difficult to reply at a moment's notice to the questions just put. He would like time for reflection before he replied.

135. Mr. CÓRDOVA suggested that Mr. Hudson set out very clearly the conclusions he thought could be reached on the points he had raised.

136. Mr. KERNO (Assistant Secretary-General) thought the words "reservations ... already ... *in operation*" in paragraph 101 of Mr. Brierly's report were worth emphasizing. Such reservations already in force were the ones referred to in point VII, and it would be helpful to have that idea lucidly expressed in the drafting of point VII.

137. Mr. HUDSON concluded that the terms meant that the reservations in question were already accepted. A State acceding to a treaty when a reservation was already in operation ought not to be at liberty to object to such a reservation; but it could always make a fresh reservation. The wording of point VII struck him as too succinct.

Point V

138. The CHAIRMAN suggested that the Commission go back to consider point V.

139. Mr. el-KHOURY remarked that, as bilateral treaties made up the great majority of treaties between States, the Commission might simplify its task by adopting under point V the rule that reservations were not admissible in the case of bilateral treaties, and were only permissible in multilateral treaties.

140. Mr. BRIERLY pointed out that point V referred only to multilateral treaties.

141. Mr. HUDSON hoped the Rapporteur would make the point in his report that States participating in negotiations for a treaty and deciding not to sign it had no right to make reservations. He mentioned the instance where the United States of America had been present during the negotiations resulting in the 1930 Hague Convention on certain questions relating to the conflict of nationality laws. The United States had declared its dissatisfaction with that convention and had declined to sign it. It had felt that it should be consulted where any State proposed to make a reservation.

141 a. Replying to a question put by Mr. Brierly, he said that in his opinion all signatory States should be consulted when a State wished to make a reservation; and he suggested that the words "all States and international organizations which have taken part in the negotiation of the projected treaty" be replaced by the words "all the signatories".

142. Mr. BRIERLY supported that proposal. It was his opinion that a State which had not signed had no right to be consulted, and could be ignored. But signatory States, which by the fact of being signatories were the originators of a convention or a treaty, should be consulted, and point V applied to such States.

143. Mr. KERNO (Assistant Secretary-General) thought that if the term "signatories" had to be defined, it should mean those signing on the occasion of the signing ceremony, as well as those signing within the period during which the treaty or convention was open for signature.

144. Mr. HUDSON pointed out that the Harvard Draft had attempted to formulate rules for cases where a treaty was open for signature at any time in the future.[4] In such cases, one might wait until Doomsday before all possible reservations were made. There were three distinct situations: reservations could be made first of all at the time of the simultaneous signature of the treaty by the negotiators; secondly, prior to a given date; and thirdly, at any time in the future. Could point V really apply to those three distinct cases?

145. The CHAIRMAN thought the explanations given during the discussion, and the various opinions put forward, had contributed to the clarafication of the problem. He thought it was true to say that there was a large measure of agreement on points I to VII, which might perhaps be expanded, in many instances on the basis of the articles of the Harvard Draft. He would like to add that the exchange of views which had just taken place had provided the Rapporteur with valuable data for his task. The Commission had admittedly not been able to deal with all the issues, nor to express an opinion on every point; but what it had done was undoubtedly of great value.

The meeting rose at 1 p.m.

54th MEETING

Monday, 26 June 1950, at 3 p.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.

[4] See A/CN.4/23, Appendix A.

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).

Preparation of a Draft Code of Offences against the Peace and Security of Mankind: report by Mr. Spiropoulos (General Assembly resolution 177(II) (item 3(b) of the agenda) (A/CN.4/25)

1-12. The CHAIRMAN stated that the Commission had a certain number of points of a general nature to discuss. He suggested that they should be discussed in the order followed by the Rapporteur.

The first concerned the nature of the criminal code to be prepared by the Commission: should it be a general international criminal code or a special code dealing with offences against the peace and security of mankind ?

A. NATURE OF THE CODE AND MEANING OF THE TERMS " OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND " (A/CN.4/25, para. 11 and ff.)

13. Mr. SPIROPOULOS thought that the first question to be examined by the Commission was the kind of code it should draw up.

14. Mr. HUDSON considered that the reply to that question was to be found in a phrase of General Assembly resolution 177(II): " (b) prepare a draft code of offences against the peace and security of mankind . . . "

15. The CHAIRMAN pointed out to Mr. Hudson that the view he had expressed was a personal one and that others might hold different opinions.

16. Mr. SANDSTRÖM agreed with the conclusions drawn by Mr. Spiropoulos from a study of the genesis of resolution 177(II).

17. Mr. ALFARO expressed his admiration for the work of Mr. Spiropoulos, which was a fresh proof of his scientific abilities. He was happy to share his view on the substance of the proposal concerning the definition of the code. He had, however, several comments to make concerning points closely related to the question of the establishment of an international criminal jurisdiction and the formulation of the Nürnberg Principles. He considered that those questions and the question of the preparation of a criminal code were inseparable. The code was indispensable in an international system for the suppression of crime, and the Nürnberg Principles ought to have their place in the code. But there was no point in possessing a criminal code if persons guilty of the crimes defined therein were not tried by an international court.

17a. As Mr. SPIROPOULOS had said, there was a choice of two methods (para. 1): the first consisting of preparing an " ideal " international penal code, the second of elaborating a text based on a realistic approach and able to serve as a basic of discussion at an international conference. Mr. Spiropoulos had declared in favour of the second method, and had suggested that that was the method contemplated by the General Assembly in resolution 177(II). He (the speaker) shared that opinon.

17 b. He considered that, apart from the question of whether the code should be adopted by means of a convention concluded only among Members of the United Nations or could be laid open to the accession of non-member states, the code should play in the community of nations the part played by a criminal code in a national community. Giving reality to that concept should not be difficult, for the Commission had already formulated the Nürnberg Principles, which should be considered as constituting the law applicable to the fifty-nine States which at present formed the United Nations. He would return to that point when the Commission discussed the first outline of the draft code.

18. The CHAIRMAN said that the Commission had another question to decide. Did the term " offence against the peace and security of mankind " refer to two types of crime or to only one ? Mr. Spiropoulos had come to the conclusion that only one type of offence was concerned, and that the General Assembly had had in mind offences endangering peace and security. Another opinion was possible. Some serious offences could jeopardize the peace, others endanger only security. Under Chapter VI of the Charter, the Security Council was called upon to deal with situations which might possibly endanger the peace, whereas Chapter VII laid down that it should deal with offences which already endangered the peace. The distinction made was not a purely academic one, for the list of offences depended upon it. If only major offences which might endanger the peace were to be considered, the list would be a short one; if, on the other hand, actions which might possibly endanger security were to be considered, the list would be a longer one. Counterfeiting money might endanger security, if a State encouraged or did not prosecute the counterfeiters. False reports might disturb the general peace; such reports did not constitute an immediate danger but they caused uneasiness in the public mind. All had read that morning in the newspapers that war had broken out between Northern and Southern Korea. That was a matter calculated to disturb the peace. If it were a question of a false report, the person disseminating it should be punished. In the case of the Balkans, it was stated every morning that mobilization had begun: that also was a report calculated to disturb the peace. It consequently came within the provisions of Chapter VI and ought therefore to be punishable. He considered himself that peace and security were one and the same thing.

19. Mr. SANDSTRÖM thought it desirable to make another distinction, which, in his opinion, was the most important of all. Mr. Spiropoulos in his report had correctly noted the political nature of offences against peace and security. In several of the examples quoted by the Chairman there had been no political element. He thought that such offences, for that reason, should not appear in the code. He nevertheless admitted that in some cases such offences might have a political character, as for example if a State instigated the counterfeiting of money in order to cause economic uneasiness

in another State. If, however, the act of a private person were concerned, the Commission had no need to concern itself with it.

20. The CHAIRMAN pointed out that agencies like Reuter and Havas were not unrelated to their respective governments.

21. Mr. SANDSTRÖM still did not see in the spreading of a false report an offence against peace and security.

22. The CHAIRMAN pointed out that there was also such a thing as mental security.

23. Mr. SANDSTRÖM held to his opinion that if the political element he had referred to was lacking, the Commission would be going beyond the limits bounding its work.

24. Mr. HUDSON was inclined to give a rather wide meaning to the expression " peace and security ". A people might feel endangered by actions affecting its economic situation. To take a further example, the production and sale of dangerous pharmaceutical products could cause a feeling of insecurity. He admitted the difficulty of fixing limits. He could not see why the Commission should give a restricted meaning to the expression " the peace and security of mankind "; a definition of the offences going beyond the scope of the code would in any case be as difficult as a definition of the offences within its scope. He approved of the distinction made by the Chairman between physical and mental security.

25. Mr. BRIERLY held the opposite opinion, agreeing with the view of the Rapporteur for the practical reason that if, as the Chairman and Mr. Hudson had suggested, the meaning of the term " peace and security " was extended, it was difficult to see where an end might be made. He also thought that the General Assembly had undoubtedly not had in mind two different things when it spoke of " the peace and security of mankind ", for that was an expression so much in common use that it meant the one thing only.

26. Mr. HUDSON admitted the soundness of Mr. Brierly's remarks. The solution he had advocated would be unpractical, and the Commission should keep within the limits indicated. He considered that the phrase appearing in Article 33 of the Charter had not had the effect of limiting the intervention of the Security Council. As far as he knew, the Security Council had never said that a dispute was such as to " endanger the maintenance of international peace and security ". Consequently, it was entitled to intervene under Article 33. The Council had not considered its action limited by that provision of Article 33.

27. The CHAIRMAN agreed. He was himself inclined to widen the scope of the concept, but he desired particularly to refer the question to the Commission, for it would find that difficulty cropping up at the definition of each and every offence. Suppose, for the sake of argument, that a certain press launched a series of insults against another State, saying that that country was a warmonger, etc., those acts were such as to endanger public order, an expression which, in French, bore a very wide meaning. Such daily accusations against the government of another country fitted well within the definition of offences against international peace and security. That question had already been examined in relation to material and moral genocide.

28. Mr. YEPES considered the concepts of international peace and security so closely linked as to be inseparable; if a state encouraged counterfeiting, it endangered public security, and for that very reason it also endangered the peace. Innumerable examples of a similar nature could be produced.

29. Mr. AMADO said that Mr. Spiropoulos had formulated the question admirably in paras. 27-32 of his report. He himself believed that the Commission should not seek to extend an already considerable task: an attempt should be made to do what could be done. He recalled that Mr. Donnedieu de Vabres had pointed out that there were two possibilities, one the drawing up of a code of offences against peace and security, the other the drawing up of an international criminal code which would comprise all the categories of offences not related to peace and security.

29 a. He read out two passages from Mr. Spiropoulos' report which stated that the proposal submitted by the United States delegation in 1946 had contemplated the appearance of the Nürnberg principles " in the context of a general codification of offences against the peace and security of mankind *or* in an international criminal code " (para. 27), and that, after the report by the Committee on the Progressive Development of International Law and its Codification which met in spring 1947, there had been no further mention of the code of international criminal law (para. 32). The mandate given had been lost sight of, and had, as it were, faded away in the innumerable commissions which had dealt with the question. Something practical and acceptable should be done quickly, and he accepted the limited interpretation of the Commission's task.

29 b. He understood the Chairman's view, but he would like the Commission to enquire into whether it was possible to reach an agreement on crimes against peace and security.

30. Mr. FRANÇOIS supported, like Mr. Amado, the narrowing down of the concept, but felt that it was impossible to draw a very clear dividing line. Counterfeiting, for example, might possibly be retained, but the question of harmful drugs left out. The Commission would have to examine that question when it came to decide upon the specific offences to be considered as affecting peace and security.

31. Mr. HSU considered that the Commission should certainly limit itself to offences against peace and security within the meaning given to those terms in Mr. Spiropoulos' report. He wondered, however, if Definitions I, II, III, IV, etc., provided for all the offences it was desirable to place in the code. He noted that war propaganda and the supply of arms were not mentioned among them. Some of the examples quoted by the Chairman could, in his opinion, be considered as coming within the ambit of the draft code if they formed part of a plan against peace and security.

31 a. Mr. Sandström had spoken of a political element; it would then be a question of whether an act committed had been committed with the intention of endangering peace and security.

32. Mr. el-KHOURY considered that offences against the peace and offences against security were one and the same, and that only one subject was concerned, not two. In the United Nations Charter peace and security had always been mentioned without any attempt made to distinguish between them. A threat to peace led to insecurity; if peace was disturbed, the security of mankind disappeared. It was clear that civil war could destroy the peace, but the Commission had not met to discuss the question of internal security. He admitted that such internal disturbances could be as dangerous as war, but it was not for the United Nations and the Security Council to intervene in that field. International peace and security were what was to be studied, and it was desirable to continue to consider them as one and the same thing.

33. Mr. AMADO asked the Commission not to forget that it was at the beginning of an immense task. In a single country, the drawing up of a criminal code took years. The Commission had a long way to travel, and all that was involved at present was the taking of the preliminary step; for that reason it was necessary to limit its task.

34. Mr. CÓRDOVA also thought it desirable to limit the work to be done by the Commission. An act by a State endangering the peace and security of other States was one of the offences the Commission ought to deal with. The political element in such an offence was what the General Assembly resolution had had in mind when it spoke of " offences against the peace and security of mankind ".

35. The CHAIRMAN thought that the great majority of the members of the Commission were in favour of the narrowest interpretation, that is, of the interpretation advocated by Mr. Spiropoulos. When each offence came up for discussion, the Commission would decide where the border-line lay between acts to be made punishable under the code and acts not coming within its purview.

36. Mr. HUDSON wished to ask another question concerning the nature of the offences contemplated. He read two passages from Mr. Spiropoulos' report (paras. 37 and 56). The latter concluded with the words " following international practice up to this time, and particularly in view of the pronouncements of the Nürnberg Tribunal, the establishment of the criminal responsibility of States—at least for the time being—does not seem advisable ".

36 a. He had listened carefully to the discussion, and thought that the Commission should state whether it was attempting to envisage the criminal responsibility of States or the criminal responsibility of individuals, or both. If Crime No. I were considered, it was a State which would use armed force. If Crime No. VI were considered, it was still a State, and not an individual, which would violate the military clauses of international treaties. As for Crime No. VII, he could not see how an individual could be guilty of an annexation of territories in violation of international law. He thought that the report failed to clarify the point.

37. Mr. SPIROPOULOS feared that there was some confusion in the discussion. The Commission was examining the question of what kind of code should be drawn up and what the meaning of the words " peace and security " was. The majority of the Commission had thought that there was only one offence involved, for the Charter used the term " international peace and security ". He recalled in that connexion the document prepared by Mr. V. Pella; the International Association of Penal Law had asked its members if one concept was involved, or two. The replies sent were divided in their opinions, but the majority had considered that only one concept was involved. Such was also the opinion of Mr. Pella and of Mr. Biddle.

37 a. He recalled that in the previous year, when the Commission had asked him to draw up its second report, there had been no very clear knowledge of which code was being referred to. To gain an idea of his task, he had consulted the correspondence between President Truman and Mr. Biddle, the records of the discussions of the competent United Nations bodies and also the views of Mr. Donnedieu de Vabres. He had thereby reached the conclusion that the code should bring together crimes having a political impact, crimes which *prima facie* were committed by States but which involved the responsibility of individuals. The draft code, in fact, endeavoured to fix the criminal responsibility of individuals only.

37 b. Offences such as the use of armed force, etc., could be committed either by an individual or by a State. In fact, they were committed by individuals. When he had spoken of " armed force ", he had meant the armed forces of the State. If a State made use of its armed forces it was responsible according to the traditional view. According to the draft code, the responsibility of the State was the individual responsibilty of the members of the government. If the Commission desired the State also to be held criminally responsible, the code could include a provision to that effect. So far the code did not contain such a provision.

37 c. Other offences could be committed by individuals, such as the violation of the military clauses of an international treaty. After the first world war Germany had set up an army when it had no right to do so. Such action constituted a violation of a clause of a treaty. That violation had been carried out on the orders of the government, but individuals might form a party and violations might be committed by individuals, by civil servants or by the State.

37 d. In his opinion the first thing to be studied was the meaning of the terms " peace " and " security ", then the question of the place to be accorded to the Nürnberg Principles; only afterwards could the Commission tackle the question raised by Mr. Hudson.

38. The CHAIRMAN said that that was a matter for the Commission to decide on. Mr. Hudson's suggestion changed the plan laid down, which had been to follow the order adopted by Mr. Spiropoulos in his report.

The Commission, however, was at liberty to decide if the question should be settled at once. According to Mr. Hudson, it was desirable to come to a decision without delay and to decide with whom criminal responsibility would lie. Mr. Spiropoulos had sought to clarify the subject. The Commission had decided, first, that the code would deal only with offences against peace and security, and second, that peace and security constituted a single entity. There was then the third point regarding the place to be accorded to the Nürnberg Principles. That point should be cleared out of the way first of all.

38 a. He agreed with Mr. Hudson that the problem the latter had raised was of capital importance. He did not personally believe in the criminal guilt of a State, but the question might be discussed. It could be discussed at an appropriate time, unless Mr. Hudson insisted and carried the Commission with him. He believed that the Commission might wait before discussing that supremely important point.

39. Mr. HUDSON added that it was also a preliminary point.

40. The CHAIRMAN did not agree. There might be discussion, he claimed, on a crime before it was known who was the guilty party. The fact of several parties bearing responsibility might be admitted, but it could also be claimed that war was a crime, whoever might be held to be guilty of it, either body corporate or individual. The crime might thus be defined before deciding who should be held guilty of it.

41. Mr. el-KHOURY considered that crime could not be ascribed to a body corporate, but might well be ascribed to individuals representing their country.

42. The CHAIRMAN pointed out that the matter before the Commission was which question it would deal with first.

43. Mr. el-KHOURY considered it desirable to begin with the question of the place to be accorded in the code to the Nürnberg Principles.

B. Place to be accorded in the Code to the Nürnberg Principles

44. Mr. SPIROPOULOS considered that the General Assembly resolution clearly indicated the place to be accorded. He read sub-paragraph (b). The Commission had reached a decision on the first part of that sub-paragraph relating to the preparation of a draft code of offences against the peace and security of mankind. It would now define the meaning of the words " indicating clearly the place to be accorded to the principles mentioned in sub-paragraph (a) above ". It was logical to proceed in that way.

45. Mr. BRIERLY referred to the conclusion appearing on page 18. In his opinion it could not have been desired that the Commission reproduce the principles word for word. It ought to reserve the right to weigh up those principles and modify or develop one or another. The last paragraph on page 18 expressed his opinion exactly.

46. Mr. el-KHOURY believed that the Nürnberg Principles should not be taken and inserted as such. They should be embodied in the code without any distinct place being given to them and without any mention of them as the Nürnberg Principles. The chapter in the general report dealing with the formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal would be the place where those principles would appear for the last time as a separate text.

47. Mr. SANDSTRÖM agreed with Mr. Brierly's opinion. He would add that the Commission should perhaps indicate in its report the place it had accorded to the Nürnberg Principles.

48. Mr. ALFARO agreed with the conclusion expressed by the Rapporteur in paragraph 45 of his report. An automatic incorporation of the principles should not be contemplated. He had concluded, perhaps wrongly, from paragraph 39 of Mr. Spiropoulos' report, that in the latter's opinion those principles had already been embodied in the list of crimes and that it was therefore pointless to reproduce them in the code. If such were the case, two documents, the Nürnberg Principles and the code, would confront readers, and the principles would appear in two different texts. Some people would say that there was risk of ambiguity and confusion and that there would be no means of settling any difficulties that might arise. He proposed that the report should indicate the part of the code where the principles had been embodied and the manner in which they had been embodied. He thought that the code should contain some kind of a provision stating which of the two texts should take precedence for purposes of interpretation. In that matter, it was desirable to be extremely precise, otherwise the international criminal court, when confronted with two texts where the crimes were defined in different terms, would not know which to apply.

49. Mr. AMADO considered it a matter of indifference whether the list of the Nürnberg Principles was inserted at the beginning, in the middle or at the end of the report. In any case, the code could not be framed without incorporating the principles in it. He thought, however, that the Commission had not yet reached a stage permitting it to fix the place to be accorded to each of the principles within the framework of the Code.

50. Mr. CÓRDOVA agreed with the opinion expressed by Mr. Alfaro. It seemed very difficult to him to formulate the principles to be inserted in the code in the same terms as had been used in the Charter and judgment of the Nürnberg Tribunal. The code the Commission was to draw up should be in conformity with international law. The Nürnberg Principles should therefore be adapted to that law. He thought it essential, however, that the Commission should give the reasons why it formulated those principles differently from the Charter of the Tribunal and the judgment. Moreover, some of those principles had already been formulated by the Commission with minor modifications as compared with the Charter of the Tribunal. He had often wondered what exactly the General Assembly had meant in asking the Commission to formulate the Nürnberg Principles. He thought that the Commission was

free to formulate them as it thought best, while leaving the General Assembly with the final decision as to what it would do with those principles. However that might be, they must be embodied in the code.

51. Mr. SANDSTRÖM considered that if that were done the formulation by the Commission of the principles recognized in the Charter and judgment of the Nürnberg Tribunal would merely be of historical interest and would form a subsidiary document. In any case it would be essential to explain in the report the reasons for the differences between the formulation of those principles under the formulation of the Nürnberg Principles and the formulation in the code.

52. Mr. BRIERLY stressed an important point in Mr. Córdova's statement. The latter seemed to start from the hypothesis that the code should be drawn up in conformity with existing international law. His own view was that in carrying out that part of its work the Commission should think of international law as in the process of evolution and should therefore make suggestions with a view to improving it. Thus it might insist that the taking of hostages be included in the list of offences against peace and security, irrespective of whether that act was already forbidden under existing international law. He thought be could state that the Commission should reserve the right to develop international law and should not content itself with codifying it as it existed at present.

53. The CHAIRMAN strongly supported Mr. Brierly.

54. Mr. el-KHOURY agreed with the views of Mr. Alfaro. He nevertheless did not agree with him when he claimed that there would be two distinct documents, one the Nürnberg Principles, the other the code, both having equal validity in international law. The Commission had been entrusted with the preparation of a draft code which would perhaps form part of a future convention and which in any event would be submitted to the General Assembly as a basis of discussion. The General Assembly could do with it what it liked, but he did not think it possible for it to be confronted with two separate documents. The formulation of the Nürnberg Principles was a preliminary task. The principles as formulated could be modified by the Commission for insertion in the code; they would nevertheless remain the same. He did not see why so much importance should be attached to the Nürnberg Principles, as the Commission was preparing a draft code. In the future the Nürnberg Principles would have a certain historical interest. Those who had prepared the Charter of the Nürnberg Tribunal had sought to establish a foundation for legal action which they proposed to undertake, and the principles they had adopted for that purpose should be accepted as setting up an international judicial organization with a fixed but limited purpose. In preparing its draft code, the Commission would be assisting the General Assembly to contribute towards the progressive development and the codification of international law.

55. Mr. FRANÇOIS pointed out that the affirmation of the Nürnberg Principles by the General Assembly had no legal force. The Assembly had no right to legislate by a majority of votes and to bind its members. Accordingly, it had not desired to do so. If it had, there would have been no point in entrusting the Commission with the formulation of the principles of international law recognized at Nürnberg. Consequently, he thought that the Commission, in drawing up the code, was entirely free to criticize those principles and to formulate them as it thought best in its capacity as an independent group of international jurists. Even when it was said that the General Assembly had affirmed those principles, that did not mean that the principles were unchangeable; the affirmation was merely of secondary and passing importance.

56. Mr. ALFARO wished to explain his point of view. He did not ask that the Nürnberg Principles be formulated in absolutely identical fashion in the two reports that the Commission was to place before the General Assembly. He was thinking rather of the fact that difference of terminology in the two texts might cause confusion, not only in the public mind generally, but also among jurists. He asked that the Commission decide clearly what the position would be, after the adoption of the code it was preparing, with regard to the Nürnberg Principles as they had been formulated by the Commission. Would they be regarded as an integral part of the code or as a separate text being merely of historical interest? He pointed out that Nürnberg Principle I, as adopted by the Commission, and basis of discussion No. 2 in the report by Mr. Spiropoulos on the draft code said substantially the same thing; nevertheless, the terminology was not uniform. The same was also true of other Nürnberg Principles and of the bases of discussion dealing with the same subjects. To avoid all confusion of mind, he thought it essential that it should be clearly stated in a provision of the code why the Commission had not used the same terminology in the two cases it had to deal with. If the Commission did not wish to insert such an explanation, it should make the two texts uniform. He asked the Commission to take a decision on that point.

57. Mr. HUDSON pointed out that the Commission was not as yet confronted with two different texts. It had so far adopted no text in the draft code of offences against the peace and security of mankind. Not until it came to discuss the texts to be included in the code would it have to decide on the terminology to be used for their drafting.

58. Mr. ALFARO repeated that he wished to know whether the explanations on the differences between the terminology used, on the one hand, in the formulation of the Nürnberg Principles, and, on the other hand, in the texts to be embodied in the code, would be contained in the report or in the code itself.

59. Mr. CÓRDOVA thought that there would be general mention of the matter in the report, which should state how the Commission had carried out the task entrusted to it under the terms of the last clause of resolution 177(II).

60. Mr. SANDSTRÖM pointed out that the Commission had been entrusted with the task of preparing a code which might perhaps be the basis of a convention, and of including the Nürnberg Principles in

that code; but the formulation of the Nürnberg Principles, such as had now been decided upon would merely be the expression of the views of a group of independent international jurists and would have no legal validity.

61. The CHAIRMAN agreed with the opinion of Mr. el-Khoury. He, too, thought that there could only be one legally valid document. The formulation of the Nürnberg Principles had no legal validity and was neither binding nor unchangeable. Nevertheless, as the principles had to be incorporated in the code, it was necessary for the report to state the reason why they had been formulated in the code in terminology differing from that found in the Commission's report on their formulation.

62. Mr. LIANG (Secretary to the Commission) considered that resolution 177(II), adopted by the United Nations General Assembly in 1947, requested the Commission to carry out one composite task rather than two separate tasks. He pointed out that General Assembly resolution 95(I), of 11 December 1946, after confirming the principles of international law recognized in the Charter and the judgment of the Nürnberg Tribunal, comtemplated only one task, that of the formulation of those principles " in the context of a general codification of peace and security of manking, *or* of an international criminal code ".

62 a. The Committee on the Progressive Development of International Law and its Codification, which had met in May and June 1947, in its attempt to meet the objections of the Soviet Union representative to the idea of a codification of international criminal law, had recommended in its report on the subject (A/AC.10/52) the preparation of (a) a draft convention containing the Nürnberg Principles, and (b) a " detailed draft plan of general codification of offences against the peace and security of mankind in such a manner that the plan should clearly indicate the place to be accorded to the principles mentioned in (a) ".

62 b. Sub-Committee 2 of the Sixth Committee, at the second session of the General Assembly had replaced the words " detailed draft plan of general codification " by the words " draft code " found in the text of resolution 177(II). By mistake, however, the clause " in such a mamier that the plan should clearly indicate . . .", which was to have been deleted, was allowed to stand. Too much importance should not therefore be attached to that clause. Moreover, once the code was drawn up it would be clear where the Nürnberg Principles were to be found in it.

63. The CHAIRMAN believed that the Commission already agreed on the first point raised by Mr. Liang. As for the second point, he thought that the report should clearly indicate that the sole text that could be regarded as official and binding would be the code.

64. Mr. ALFARO requested the Commission for a decision that the explanation to be inserted in the report should give the reasons why the provisions of the code were drafted differently from the Nürnberg Principles as formulated by the Commission, and that the code only should be binding.

65. The CHAIRMAN considered that the Commission should first decide whether that explanation should be given in the draft code or in the report on the formulation of the Nürnberg Principles. In both cases the Commission should, in his opinion, state that the Nürnberg Principles were not binding, and that only the text of the code or of a convention would have legal validity.

66. Mr. AMADO stated that no judge would explain what was not the law, and that there was no doubt that only the code would constitute the law. He therefore considered it unnecessary to vote on the points put forward by the Chairman.

67. Mr. YEPES thought that the Nürnberg Principles were only of historical interest and that in the drafting of the code the Commission was at liberty to revise them, modify them or leave them as they were at present. Being a Commission of independent jurists, it could adopt the Nürnberg Principles only inasmuch as they tallied with the standards of international law.

68. Mr. CÓRDOVA considered that Mr. Amado was right in stating that the judges should apply nothing but the law; it was necessary, however, to say in the text of the report on the formulation of the Nürnberg Principles or in the code what the Commission had done with those principles and what reasons it had had for considering it had to modify them for incorporation in the code. If that explanation were not found, there would inevitably be confusion in the public mind and even in the minds of jurists.

69. The CHAIRMAN was of the personal opinion that the explanation should not appear in the code but in the report on the formulation of the Nürnberg Principles. He would even like a commentary added to the preamble to the Nürnberg Principles to fix the value attributed by the Commission to those principles.

70. Mr. SPIROPOULOS thought that the Commission should clearly distinguish what it had been instructed to do. Two tasks had been entrusted to it: the one, that of formulating the Nürnberg Principles, the other, that of preparing a draft code of offences against the peace and security of mankind, at the same time indicating the place that the Nürnberg Principles would be accorded in that code. The Commission should therefore draw up two documents to put before the General Assembly. It was not for the Commission to alter the tasks as they had been entrusted to it.

70a. He recalled that he had given all the necessary explanations in his report by insisting upon the necessity of the Commission's stating how and where it proposed to incorporate in its draft code the Nürnberg Principles it had formulated. The first thing left for it to do was to examine the code and draw up its details; only when that had been done could it consider what it should say concerning the work it had done and give the necessary explanations required. In his opinion the explanations should not appear in the code.

71. Mr. ALFARO thought that Mr. Spiropoulos' proposal should be accepted. He thought that the Commission should at once begin an examination of the code, and when it had finished it could consider how it

proposed to carry out the task entrusted to it under the General Assembly Resolution regarding the place to be accorded to the Nürnberg Principles. All he wanted was to prevent confusion arising in the mind of people in general concerning the work carried out by the Commission in execution of the General Assembly resolution. A great majority of those reading that resolution would conclude that the words " indicating clearly the place to be accorded to the principles " of Nürnberg implied the necessity for the Commission to state in what place in the code those principles had been embodied. He had raised the question in order to avoid such confusion. He was, he repeated, in agreement with Mr. Spiropoulos' proposal that that precise point should be examined after consideration of the provisions of the code.

72. Mr. AMADO felt he should stress the fact that, as he had said to the Sub-Committee of the Sixth Committee of the General Assembly at its second session, the clause " indicating clearly the place to be accorded to the Nürnberg Principles " was justified just as long as mention was made of a " plan of codification ", but was no longer justified (see A/CN.4/25, para. 40) when it had been decided to draw up a code. In drawing up the code, the Commission should, therefore, embody in it the Nürnberg Principles, but he believed that it was impossible to examine at once the question of where they should be embodied in the code. They should certainly not be inserted in a separate chapter.

73. The CHAIRMAN believed that the Commission was in agreement in postponing its decision regarding the incorporation of an explanation either in the code or in its report on the formulation of the Nürnberg Principles until such time as it had examined the various items in the code. He invited the Commission to proceed to examine the rules relating to criminal responsibility in the draft code.

C. Determination of criminal responsibility (Part III of the Report)

74. Mr. SPIROPOULOS stated that he had expressed his views clearly on that matter in his report. So far there existed no precedents for the recognition of the criminal responsibility of States or organizations; the Nürnberg Tribunal had also restricted itself exclusively to the criminal responsibility of individuals. For that reason the draft code he had prepared envisaged the criminal responsibility of individuals only.

75. The CHAIRMAN pointed out that Mr. Spiropoulos' suggestion was that the Commission should examine only the criminal responsibility of individuals, leaving aside the responsibility of corporate bodies such as the State, or organizations whose criminal responsibility had not so far been recognized although their civil responsibility could legally be entailed.

76. Mr. SPIROPOULOS proposed that to shorten the discussion only those members of the Commission who opposed the exclusion of the question of the criminal responsibility of States and organizations should speak.

77. Mr. FRANÇOIS said that theoretically the question of the criminal responsibility of States could arise in certain countries; the criminal responsibility of corporate bodies was recognized by law. Such was the case in the Netherlands, where the responsibility of corporate bodies in taxation matters had been established. He agreed, however, that discussion of the draft code should be limited to settling the responsibility of individuals.

78. The CHAIRMAN pointed out to Mr. François that in speaking of compensation of victims by the State he had referred to a matter which was within the province, not of criminal law, but of civil law. He believed, however, that if the Commission wished to introduce the culpability of corporate bodies into the code it would deal with the principle of responsibility on a broader basis than it should.

79. Mr. SPIROPOULOS said that he had been guided by the principles embodied in the Nürnberg Charter and judgment, which stated that only individuals could be held responsible.

80. Mr. HUDSON pointed out that the Commission was not bound by the Nürnberg Principles.

81. The CHAIRMAN said that in his opinion it was extremely difficult to determine group responsibility.

82. Mr. CÓRDOVA asked the Commission to confine itself to an examination of the question of the criminal responsibility of individuals, so as to avoid lengthy discussion. The Commission would in due course be free to examine the responsibility of States.

83. Mr. SPIROPOULOS read the following conclusion from the chapter in his report on responsibility: " following international practice up till this time, and particularly in view of the pronouncements of the Nürnberg Tribunal, the establishment of the criminal responsibility of States—at least for the time being—does not seem advisable " (A/CN.4/25, para. 56). He added that that did not rule out the possibility of the Commission's examining the question of the responsibility of States at a later stage.

84. The CHAIRMAN thought that the Commission agreed to leave aside for the time being the question of the responsibility of States and groups.

85. Mr. HUDSON considered it impossible to examine the formulation of offences in international law without knowing where criminal responsibility lay. That would only be possible if the Commission agreed to consider also the responsibility of the State. In the case of the State, however, he could not see who could be made criminally responsible for a crime committed by it.

86. Mr. SPIROPOULOS said that Mr. Hudson was right, but he would repeat that he had desired in his report to confine himself to individuals only, for they, according to the Nürnberg Charter and judgment, could alone be held criminally responsible.

87. Mr. el-KHOURY observed that in general law there existed civil responsibility and criminal responsibility; between those two concepts there was a very close link. The government, he thought, was responsible for crimes committed by its officials, but it could be held that the State was responsible civilly for those

crimes, not criminally. If the Commission were considering the guilt of highly placed persons who had committed crimes, it was, in his opinion, still a matter of the criminal responsibility of individuals.

88. The CHAIRMAN noted that in French law a distinction was made between a delict committed in the course of duty and a personal delict committed by an official. If it were a case of a delict committed on duty, the State was responsible. On the other hand, if it were a personal delict the State could not be held responsible. French law did not recognize, for example, offences committed by communes, but the representative of a commune could commit an offence such as a breach of trust. In such a case the commune would be financially liable for the offence committed in its name by its official, while the offender could also be prosecuted criminally for the breach of trust. Corporate bodies, however, such as the communes, were never criminally responsible for a crime committed by their officials or representatives.

89. Mr. BRIERLY thought he must emphasize that it had never been stated that the Commission should examine the criminal responsibility of States. The Commission was in the process of examining a code, which was concerned only with individuals rendering themselves guilty of a crime and becoming criminally responsible. It could be decided to deal with individual responsibility only in the code. Clearly that influenced the definition of the crimes it might be desired to include in the code. The question would require examination in respect of each and every act. How, for example, could it be said that an individual could annex a territory and be held responsible for that action ? He suggested therefore that the Commission should confine itself provisionally to the examination of the criminal responsibility of individuals.

90. Mr. ALFARO accepted the view expressed by Mr. Spiropoulos. He would add that it seemed clear to him that crimes could be committed by States and that they could be held responsible.

91. Mr. SPIROPOULOS thanked Mr. Brierly for his contribution to the debate. By confining itself to the examination of the criminal responsibility of individuals, the Commission was embarking upon the only path which could ensure reasonably brief discussion. The point raised by Mr. Hudson was an important one, there was no doubt of that. In drawing up his report, however, he had not been able to examine the responsibility of States or of groups. He asked the Commission to restrict itself for the time being to the question of the responsibility of individuals, which alone had been provided for in his report. He asked the Commission that the passage " General Rules of Responsibility " of his report (para. 86) should be read: It dealt with the responsibility of the State and formed an essential part of his report, setting out the reasons why he had confined himself exclusively to the examination of the responsibility of individuals.

92. Mr. ALFARO read out that passage of the report.

93. Mr. SPIROPOULOS considered that the Commission could, by studying that passage, ascertain the kind of responsibility he had wished to examine: Responsibility, for example, for the conduct of war, in other words, the responsibility devolving upon those in whose hands lay the conduct of war—i.e., the governments, the foreign ministers and so on. As for the fomenting of civil strife, he recalled the example of the assistance given by Albania to the Greek guerrillas. In that case the responsibility of the Albanian Government and even the responsibility of private persons was involved: the responsibility of Albania for the commission of an international crime, and also the responsibility of the individuals who had been accessories to that crime. To take another example, in the case of an annexation it was not the State as a whole that could be held responsible, but rather those who had taken part in the annexation, the government, the ministers and also those who had assisted the government to make preparations for the annexation (as for example Schacht in Germany). In that case the situation was the same as that contemplated by the Nürnberg Tribunal.

94. Mr. CÓRDOVA asked that a vote be taken on the proposal of the Rapporteur that the draft code deal only with the criminal responsibility of individuals.

The CHAIRMAN thought it possible to vote without prejudicing in any way any possible opinion that the Commission might come to later on the responsibility of States. He did not think, however, that it was necessary to vote, as the Commission seemed to be in agreement for the time being not to consider more than the criminal responsibility of individuals in the draft code.

95. Mr. SANDSTRÖM believed it necessary also to take into account the responsibility of groups. He agreed, however, with the view of Mr. Spiropoulos that such responsibility might conceivably be equated with complicity. He did not wish therefore to press the point.

96. The CHAIRMAN made it clear that the Commission's decision to begin by examining the responsibility of individuals was only a provisional one.

The meeting rose at 6 p.m.

55th MEETING

Tuesday, 27 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.