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Summary record of the 59th meeting

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

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viction that even cases in which there was no use of force should be condemned.

89. Mr. SANDSTRÖM proposed the following text: "The annexation of territories by the threat or use of force for an aggressive purpose, or otherwise, in a manner incompatible with the right of a State to independence".

90. Mr. YEPES recalled that he had also proposed an amendment (para 77 b, *supra*).

91. The CHAIRMAN thought that the situation was similar to that which the Commission had discussed in connexion with Crime No. VI. There was no doubt that certain annexations, with or without the use of force, were contrary to international law. He recalled the doctrine enunciated in 1932 by Mr. Stimson, the American Secretary of State, according to which any annexation by force was a violation of international law and such annexations should not be recognized. The difficulty was to determine whether or not there was an offence against the peace and security of mankind. He reminded the Commission that the principle of the right of self-determination of peoples was finding increasing acceptance in international law and was invoked by certain governments when they were about to violate it. That had been the case when Sudetenland had been annexed by Hitler. He thought it would be useful to insert the words "direct or indirect" in the definition of Crime No. VII, as proposed by Mr. Yepes. It was the duty of the Commission to state that there were cases in which annexation was a crime, whether it was carried out directly or indirectly or even in a disguised form. A decision must be taken; but in any case he thought it inadmissible for the Commission not to state that annexation was a crime. The Stimson doctrine did not make annexation a crime. The Commission should state that any annexation which was a threat to the peace and security of mankind was a crime under international law.

92. Mr. BRIERLY thought that the Commission was in general agreement on that point and that it was now only a question of drafting. Mr. Sandström's proposal should be taken into consideration by the Commission, which should ask the Rapporteur to take account of it and to prepare a new draft. The Rapporteur should also take account of Mr. Liang's proposal to establish a connexion between Crime No. VII and Crime No. I.

93. Mr. ALFARO approved of Mr. Brierly's proposal and the text submitted by Mr. Sandström. He merely wished to add the following words: "or against the will of the inhabitants of the territory".

94. The CHAIRMAN did not think it necessary to take a vote. The Commission had accepted the principle formulated in Mr. Sandström's text, as amended by Mr. Alfaro. It had also heard the proposal of Mr. Yepes. The Commission could rely on its Rapporteur to prepare a new draft.

95. Mr. SPIROPOULOS thought that the discussion had again been rather confused for the preparation of a new draft. He requested the appointment of a small sub-committee consisting of Mr. Hudson, Mr. Alfaro and himself. That would facilitate the preparation of a

text reflecting all the views expressed, and which would be more easily acceptable by the Commission.

96. There being no objection, the CHAIRMAN declared the proposal adopted.

CRIME No. VIII ¹⁰

97. The CHAIRMAN asked the Commission to turn to the consideration of Crime No. VIII. He thought that crime should also be examined in connexion with cultural genocide.

98. Mr. ALFARO said that the question of cultural genocide had been discussed at length by the Sixth Committee of the General Assembly and by the General Assembly itself. It had been decided that it was a very dangerous problem and that it was almost impossible to determine the conditions in which cultural genocide took place. Consequently, the two bodies had decided not to include cultural genocide in the text of the Convention.

99. The CHAIRMAN announced that the Commission would begin to consider that question at its next meeting.

The meeting rose at 12.55 p.m.

¹⁰ See A/CN.4/25, Appendix.

59th MEETING

Monday, 3 July 1950, at 3 p.m.

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Chairman: Mr. Georges SCILLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James J. BRIERLY, 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. 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) (*continued*)

CRIME No. VIII ¹ (*continued*)

1. Mr. SPIROPOULOS had considered that genocide,

¹ See A/CN.4/25, Appendix.

which had been accepted as a crime under international law in the Convention on Genocide, should appear in the draft code. He had also thought that the latter should contain Crime No. IX. The two crimes to some extent interconnected, since genocide included crimes against mankind. He had tried to separate them provisionally.

2. Mr. ALFARO held that there should be no confusion between Crime No. VIII and the definition of genocide contained in the Special Convention. He wondered whether the second sub-paragraph of paragraph 2 of definition No. VIII should not state that all those crimes against mankind were crimes for the purposes of the draft code only if they were committed as the result of one of the crimes covered by definitions Nos. I - VII—that is to say, if they were committed in connexion with crimes against peace or war crimes. It should be made clear that the Commission considered the acts referred to in paragraph 2 to be those not covered by the Convention on Genocide.

3. Mr. SANDSTRÖM considered that, nevertheless, genocide was a crime characterized by its extreme gravity and that for that very reason it constituted a crime against peace and security.

4. Mr. el-KHOURY read at the end of paragraph 2 the words “carried on in execution of or in connexion with any crime against peace or war crimes as defined by the Charter of the International Military Tribunal”. He thought that these words should be deleted since the Charter would, as the Commission had already stated, soon be no more than an historical document. It should therefore not form part of the code even by reference.

5. Mr. SPIROPOULOS pointed out that the Commission had been given a two-fold task: firstly, to indicate the crimes endangering peace and security; and secondly, to incorporate in the code all the crimes provided for by the Nürnberg Charter. In order to include the latter crimes, he had thought it necessary to refer to the Charter, as it was not possible to define them otherwise. He was prepared to accept any other definition.

6. Mr. BRIERLY thought that the Rapporteur was interpreting the General Assembly's instructions too rigidly, since the Commission had not been directed to insert the whole of the Charter in its draft code. He entirely agreed with what Mr. Liang had said at the 54th meeting (para. 62(b)) about the historical background of the phrase: “indicating clearly the place to be accorded to the principles . . .” in General Assembly resolution 177 (II). The definitions contained in paragraphs 1 and 2 of Crime No. VIII overlapped. The Commission should not consider itself bound by the Nürnberg Charter, and should endeavour to find the best possible definitions for the crimes in question.

7. Mr. HUDSON agreed with Mr. Brierly. He proposed that paragraph 2 should end with the words “carried on in execution of or in connexion with Crime No. I or Crime No. IX”. It would be undesirable to refer in the code to another document.

8. Mr. SPIROPOULOS agreed that it was not a very good idea to mention the Charter, but he had wished to provide as clear a definition as possible. If Mr. Hudson's proposal were accepted, the definition would not apply to the same crime. Crime No. I consisted in the use of armed force, whereas the Charter spoke of “planning, preparation,” etc. This showed the difficulty of providing a definition.

9. Mr. HUDSON then proposed the wording “in execution of or in connexion with crimes Nos. I, IX or X”, which would incorporate all the elements of the Nürnberg Charter.

10. Mr. SPIROPOULOS pointed out that Mr. Hudson's definition covered more crimes than the Charter.

11. Mr. HUDSON replied that the Commission was not obliged to conform rigidly to the Charter.

12. Mr. SPIROPOULOS had another idea. He thought that the Commission would endeavour to adopt general terms and mention first genocide and then murder, etc. “in so far as they are not covered by the foregoing paragraph”. He hoped that the Commission would find a more satisfactory text.

13. Mr. ALFARO noted that in its sub-paragraphs (a), (b), (c), (d) and (e), paragraph 1 reproduced the terms of the Convention on Genocide, while paragraph 2 repeated those of the Nürnberg Charter. He agreed with Mr. Hudson that the code should not make reference to any other document.

13 a. He proposed to phrase the opening words of Crime No. VIII to read: “The commission of any of the following acts committed in execution of or in connexion with any crime against peace or war crime”, and then to enumerate the acts set forth in sub-paragraph (a), (b), (c), (d) and (e). Those crimes would thus be distinguished from the crime of genocide, since the latter could be committed in time of peace. If it was committed in time of war it came within the scope of the paragraph.

14. Mr. LIANG (Secretary to the Commission) wished to draw the attention of Mr. Spiropoulos and the Commission to two points. Firstly, definitions No. I and No. VIII were closely connected, and he thought it might be possible to make the wording of the two definitions more uniform. There would otherwise be the danger of defining crimes against peace in two different ways.

14 a. Secondly, there was the question of inserting an article of the Convention on Genocide in the definition of Crime No. VIII. The application of that Convention gave rise to a large number of problems. All its articles could, of course, be reproduced in the code, but he thought this undesirable. If the articles were not reproduced, it would be better to avoid using the terms of the Convention in the definition of Crime No. VIII, and to preserve the special structure of the draft code.

15. Mr. SPIROPOULOS stated that that had always been his opinion. The wording presented great difficulty unless part of the crime were sacrificed—which it might perhaps be desirable to do.

16. Mr. BRIERLY asked what was the exact wording of Mr. Alfaro's proposal. He thought that the latter had

suggested that genocide committed in time of peace should be excluded from the definition of Crime No. VIII. His own view was that genocide was at all times a crime against peace and security.

17. Mr. ALFARO thought so too, but the crime was dealt with in a special Convention and any repetition was to be avoided. In this instance they were dealing with a code of crimes against peace and security, while the Convention on Genocide dealt with crimes committed in time of peace or in time of war.

18. Mr. SANDSTRÖM approved the idea of excluding genocide from the draft code on the ground that it was the subject of a special convention. If it was desired to mention genocide, reference could be made to the Convention.

19. Mr. HUDSON thought that it would be undesirable to confuse the two ideas. Genocide was a crime designed to exterminate a group as such. Paragraph 2 did not refer to that act, but dealt merely with extermination carried on in time of war, and not with groups "as such". It did not apply to acts committed in time of peace—such as preparation, for example. A better course would be to amend the phrase "as defined by the Charter of the International Military Tribunal" if a better wording could be found.

19 a. He found it difficult to interpret paragraph 1, sub-paragraph (a), "killing members of the group". He asked how many members of the group had to be killed before the act constituted genocide. He preferred to delete paragraph 1, but if the Commission decided to retain it, it should read "mass murder". If that crime were provided for in time of war, the act of killing a portion of the enemy army of a "national group" might be called genocide. The term used in the Convention on Genocide was acceptable in a broad sense. In time of war, however, a national group was killed as such; if one fought against the army of a given state, one destroyed that army. It should be made clear that those acts did not constitute the crime of genocide.

19 b. With regard to paragraph 2, if no limitation were inserted, any killing might be regarded as a crime against international law, and that would clearly be inadmissible.

19 c. He proposed that the Commission combine the two paragraphs and restate part of the Convention on Genocide and part of the Charter, without keeping rigidly to their text.

20. Mr. YEPES proposed that paragraph 1 be replaced by the word "genocide" so as to avoid repeating the terms of the Convention.

21. Mr. HUDSON thought that, in that case they should be more precise and say "genocide as defined in the International Convention on Genocide", but he doubted whether they could incorporate in the draft code a portion of a Convention which was open for signature and was not yet in force. He would prefer to delete paragraph 1.

22. Mr. SPIROPOULOS thought that this could be done if necessary, but it would be strange not to include in the code genocide, which had already been recog-

nized as a crime under international law. It would amount to a retrograde step. He wondered how all those crimes could be brought under a single definition. In paragraph 66 of his report, it was stated that "any attempt to include these two crimes into the draft code under any other form than the one suggested here will create considerable difficulties. That genocide cannot be omitted from the draft code should not be questioned. On the other hand, paragraph 2 of Crime No. VIII which constitutes the crime against humanity of the Nürnberg Charter should, in view of General Assembly resolution 117 (II), as far as possible also be included in the draft code".

23. Mr. SANDSTRÖM approved the idea of deleting paragraph 1 and substituting for it the words "the crime of genocide as defined in the Convention".

24. The CHAIRMAN noted that the proposals submitted overlapped one another. He thought it was difficult to suppress all reference to genocide, and it would be strange if the code contained no mention of it.

25. Mr. el-KHOURY also thought it impossible to omit genocide from the code, but in his view the definitions contained in sub-paragraphs (a), (b), (c), (d) and (e) were not sufficiently precise. Accordingly, he proposed that they retain merely the opening words of the paragraph—namely, "The commission of any of the following acts, committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such", and that they leave the task of interpreting the text to the International Criminal Court. He thought that the words "political party" should be added to the list.

26. Mr. SPIROPOULOS recalled that the definition of genocide and the question whether to include in that definition the destruction of political groups had been discussed at length at the third session of the General Assembly. The addition proposed by Mr. el-Khoury had already been rejected at the time, and they could not bring up the same point after two years. He did not see how the text could be changed. Mr. Yepes' proposal to mention merely the word "genocide" did not alter the situation. It simplified the text but the problem remained unchanged. Such great efforts had been made to punish genocide that it would be going too far to omit it now.

27. The CHAIRMAN asked the Rapporteur whether he thought that the Commission was bound to accept the text of the Convention.

28. Mr. SPIROPOULOS held that if the Commission modified the concept of genocide, it ran the risk of creating difficulties in regard to the ratification of the Convention. It would be better to leave it alone.

29. Mr. BRIERLY agreed that the Commission had not met merely to correct a mistake of the General Assembly's. It would be enough to refer to the principle of genocide without even mentioning the Convention. The judge would decide the exact meaning of the term.

30. Mr. SPIROPOULOS accepted this proposal.

31. The CHAIRMAN also thought that the judge should be left to interpret genocide for himself.

32. Mr. LIANG (Secretary to the Commission) stated that that would perhaps be better than no solution at all, but that it did not obviate the difficulty to which he had already referred. If, when the Convention containing the code came into force, the Convention on Genocide was already in force, the application of that article would raise a problem. It would be necessary to determine whether the code rescinded the earlier convention.

32 a. It would also be possible not to allude to genocide in the substantive portion of the code and to mention it in the preamble, since the act condemned under the name of genocide had been defined and declared punishable in another convention. In this way the application of the Convention on Genocide would be left outside the provisions of the code. He wished to stress the difficulty that would be raised by the application of the articles of the code relating to genocide if they were worded differently from those of the Convention on Genocide.

33. Mr. FRANÇOIS asked which were the states which had ratified the Convention on Genocide. He thought it peculiar to insert a reference to that Convention in the code if the majority of States did not wish to accept it.

34. Mr. LIANG (Secretary to the Commission) replied that twenty ratifications were required for the Convention to come into force. He did not think that any of the Great Powers had yet ratified the Convention but ratification by any twenty States would put it into force.

35. Mr. SPIROPOULOS thought Mr. Liang's proposal acceptable. It would be possible to refer to the Convention on Genocide in the preamble to the code without mentioning its contents, thus avoiding any possible contradictions between the two texts. It might indeed be difficult to secure ratification of the Convention, as to a certain extent it constituted interference in the internal affairs of States.

36. Mr. YEPES deemed it essential to mention genocide, since there had been such publicity about it that the public would not forgive the Commission if there were no reference to genocide in the body of the Code. He was opposed to Mr. Liang's proposal.

37. Mr. BRIERLY would prefer to avoid referring to genocide, but he did not think it was possible.

38. Mr. SANDSTRÖM thought that if genocide were mentioned in the preamble together with an explanation of why this was done, there could be no objection to its omission from the Code.

39. Mr. el-KHOURY agreed that genocide could not be omitted. He repeated his proposal to retain paragraph 1 without sub-paragraphs (a) to (e) and to leave it to the International Court to determine what constituted the crime of genocide.

40. Mr. ALFARO asked Mr. Yepes to clarify his proposal. When he suggested that paragraph 1 should simply speak of "genocide", was he thinking of geno-

cide in general or merely genocide committed in execution of or in connexion with any crime against peace or war crime? He had in mind the task assigned to the Commission, which was to draw up a code of crimes against the peace and security of mankind. Genocide committed in time of peace was independent of peace and security. Hence, when the Commission referred to genocide, it should indicate whether it meant the crime in general or the crime when committed in execution of or in connexion with any crime against peace and security.

41. Mr. YEPES said that in submitting his proposal he had wanted the Commission to conform to the terminology used by the General Assembly in 1948. Article 1 of the Convention on Genocide stated: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish." If they merely spoke of "genocide", the judge responsible for applying the code would try to find out what the International Law Commission meant, and would naturally turn to the Convention on Genocide. That Convention undoubtedly had its faults, but if the Commission revised the work of the Assembly it would seem to be setting itself up against that body. They had either to accept the Convention or to say that it was bad.

42. The CHAIRMAN asked the Commission to make it clear what it wished to do.

43. Mr. SPIROPOULOS said that he supported Mr. Liang's proposal because he thought that it was in the interests of the Convention on Genocide not to link its fate with that of the code. It was possible that the Convention would be adopted. If the code were adopted also, it would be adopted without the crime of genocide.

44. The CHAIRMAN asked Mr. Spiropoulos whether he did not think that in that case the Code would appear to constitute a retrograde step.

45. Mr. SPIROPOULOS said that he did not think so. It depended upon the formula adopted and it was possible to find one which would save the situation.

46. Mr. ALFARO repeated that genocide had a general aspect and a particular aspect—that is to say, as a crime committed in execution of or in connexion with a crime against peace and security. He would accept Mr. Yepes' formula if it were made to read "Genocide committed in execution of or in connexion with any one of the crimes defined under Nos. I, II, III, IV and IX".

47. Mr. SPIROPOULOS wished to ask Mr. Alfaro whether he thought that genocide committed in time of peace did not affect peace. He himself had always thought that genocide was regarded as a crime affecting peace.

48. Mr. HUDSON quoted from the preamble to the Convention the words: "The Contracting Parties... being convinced that in order to liberate mankind from such an odious scourge..."

49. Mr. ALFARO thought that in certain cases genocide could be committed in such a way as not to

endanger the peace and security of mankind, because it was confined to a particular region. He quoted as an example what had happened in Pakistan and India as the result of an outburst of hatred. In his view, the word "mankind" in the language of the code meant "all mankind".

50. Mr. SPIROPOULOS said that he did not share this impression, but that possibly he was wrong. He would be prepared to accept Mr. Alfaro's proposal if that of Mr. Liang were not adopted.

51. The CHAIRMAN asked the Commission to take a decision of principle.

52. Mr. YEPES supported Mr. Alfaro's proposal.

53. Mr. LIANG (Secretary to the Commission) stated that his intention was not to decry the Convention on Genocide, but to preserve its dignity and to avoid contradiction between its provisions and those of the code. He proposed the following wording:

"Considering that the acts constituting genocide have already been defined and rendered punishable by the Convention on Genocide adopted by the General Assembly in 1948 and that it is therefore unnecessary to insert them in the present Code."

54. Mr. AMADO pointed out that the question became clearer if considered from the point of view of what was protected. The Convention on Genocide protected the human group as such. Mr. Hudson had said that to kill an army would be to kill a national group as such, but clearly it was not his intention to regard that act as constituting genocide, since it concerned the destruction of the enemy and not of the group as such. The General Assembly's view had been that what was protected by the Convention on Genocide was something other than peace and security. The Commission's aim was to protect the peace and security of mankind and that aim should not be lost sight of.

54 a. He was prepared to accept the text of the report. The Commission's aim in drawing up the code was to protect peace and security and the reason it was inserting genocide in the code was that it was a crime against peace and security. Mr. Alfaro's proposal brought this out by showing the relationship that existed between all acts committed with the object of destroying a group and acts which endangered peace and security. That proposal appeared more acceptable than the mere mention in the preamble which Mr. Liang had suggested. By inserting the crime of genocide in the code, the Commission was not linking the fate of the latter with that of the Convention on Genocide. It was establishing an independent crime, and public opinion would be satisfied. He said that he could agree to Mr. Spiropoulos' text, or to the proposal submitted by Mr. Alfaro.

55. Mr. SPIROPOULOS said that Mr. Amado's excellent arguments had convinced him, and he renounced Mr. Liang's proposal for that of Mr. Alfaro. He realized his mistake: genocide existed as a crime against peace and security. He agreed to the wording: "Genocide committed in execution of or in connexion with any

one of the crimes defined under Nos. I, II, III, IV and IX".

56. Mr. HSU asked whether genocide should be linked to some of the articles in the draft code. It was agreed that genocide was a crime against peace and security. Was it necessary to link it to one of the articles? A crime similar to genocide had been committed in Turkey in the past, and the Turkish Government had had no intention of attacking another State or of endangering international peace. He thought that the text could be adopted without any reference to the Convention.

57. Mr. ALFARO considered that where genocide did not constitute a crime against peace and security it was the ordinary crime of genocide, and the Convention would apply.

58. Mr. AMADO pointed out that genocide could be one of the crimes committed with intent to disturb peace and security.

59. Mr. BRIERLY did not think it desirable to distinguish between two types of genocide. Genocide was at all times and by its very nature a crime against peace and security. In India genocide had constituted a serious threat to peace, and the same applied to the atrocities perpetrated in Armenia. Irrespective of what the State intended, those acts could cause international tension leading to a breach of the peace. Genocide was a crime against peace.

60. Mr. HUDSON thought that the Commission had gone as far as possible and had given its Rapporteur all the guidance in its power. He wondered into what category genocide committed against a group inside a country would fall if Mr. Alfaro's wording were adopted. Supposing that the ethnic group constituted by the Red Indians were destroyed in the United States, into what category would that act fall if Mr. Alfaro's proposal were adopted?

60 a. When discussing Crimes Nos. I, II, III and IV, the Commission had given its Rapporteur a certain amount of latitude. He could not say whether he wanted a reference to Crimes Nos. I, II, III and IV to be inserted at that point. With regard to Crime No. III, the Commission had said that it concerned solely a crime committed by constitutionally responsible rulers and not by individuals. The Convention on Genocide, however, was directed against constitutionally responsible rulers, public officials, and private individuals (article IV).

60 b. He repeated that he thought it better not to give the Rapporteur too explicit instructions, since the latter had to take into account the various factors contained in definitions Nos. I, II, III and IV. As things were, he wanted the Rapporteur to be left to settle the very difficult problem of deciding whom to make responsible for the crime in certain cases.

61. Mr. SANDSTRÖM agreed with Mr. Brierly that acts of genocide were characterized by the fact that they were crimes against peace and security. The Rapporteur could be given latitude to insert the Commission's views in his report and to express the text more

clearly. If, however, the Commission intended to take a vote, he preferred Mr. Liang's proposal.

62. Mr. el-KHOURY observed that genocide was synonymous with the massacre of a minority. Did the Commission intend to protect such minorities, whether political, ethnical or religious? He recalled that after the First World War the League of Nations had attached very great importance to the protection of minorities, and had in many cases provided protective measures for the benefit of minority groups. Were the Commission now to exclude the crime of genocide, it would be abandoning to their fate large sections of the population in a large number of countries, and would even appear to wish to encourage the majorities to threaten and persecute their minorities. He therefore thought that genocide should be regarded as an international crime for the purposes of the draft code. Minorities always existed, and governments always found pretexts for persecuting and maltreating them both in time of peace and in time of war. In time of peace, such crimes were even more reprehensible than in time of war, as there was no excuse. In time of war it was possible that governments might fear that the minorities would support the enemy and organize espionage in his favour.

63. Mr. YEPES thought that the majority of the Commission was in favour of including genocide in the draft code. He therefore asked that a vote be taken.

64. The CHAIRMAN said that he would prefer not to do so. Certain members of the Commission considered that the effect of a vote was always to isolate some of the members, and he did not want this impression to arise. Nevertheless, he admitted that the discussion had been very confused and that the Commission was still befogged. If he were the Rapporteur, he would not know what conclusion to draw from the discussion.

64 a. In reply to Mr. Amado's statement that the Commission appeared to agree that genocide should be included in the code, he said that for his part he did not think that the Commission should concern itself with the Convention on Genocide when drawing up its code. That did not mean that the crime of genocide should not be included in the code. In his view, however, the code should be drawn up quite independently of the Convention on Genocide.

64 b. He asked Mr. Spiropoulos whether he wanted a vote taken on the question of including genocide, or whether he thought that the discussion had been sufficiently enlightening for him to draw conclusions.

65. Mr. SPIROPOULOS replied that the discussion seemed to be becoming more and more complicated. He had accepted Mr. Alfaro's proposal that genocide committed in execution of or in connexion with any one of the crimes defined under Nos. I, II, III, IV and IX, should be regarded as constituting a crime against the peace and security of mankind. As Mr. Hudson had pointed out, however, most of the crimes which the Commission had already decided to include in the code applied to constitutionally responsible rulers, while the Convention on Genocide also applied to individuals.

He now thought that he had been too hasty in agreeing to Mr. Alfaro's proposal, and therefore wished to revert to his original position.

65 a. The Commission had to find a way out of its difficulty. The Convention on Genocide was the result of much hard work by the General Assembly, and it would be very satisfactory if it were ratified by a large number of countries. He thought it dangerous, however, to link that Convention with the code, if only for the reason that if the Convention were not ratified, the code would not be ratified either.

65 b. Moreover, Mr. Yepes' proposal appeared to be too restrictive. For all those reasons he reverted to Mr. Liang's proposal that they should merely refer to the Convention on Genocide in the preamble to the code without thereby establishing any formal connexion between the two texts.

66. Mr. ALFARO wished to clarify the situation reached at that stage in the discussion. Six different proposals were before the Commission: (1) to make no mention of the crime of genocide in the code; (2) merely to refer to genocide without adding any qualification; (3) to refer to the Convention on Genocide with a mention of article II thereof, as Mr. Spiropoulos had done in his report; (4) to refer to genocide and say that genocide constituted a crime under the code when it threatened the peace and security of mankind; (5) to link up the crime of genocide, for the purposes of the code, with the acts committed under Crimes Nos. I, II, III, IV and IX; and (6) to mention the Convention on Genocide in the preamble to the code.

67. The CHAIRMAN said that he thought that Mr. Liang's proposal to refer to the Convention in the preamble to the code was a curious method. It might be necessary to refer to other Conventions.

67 a. Mr. YEPES pointed out that codes did not have preambles.

68. Mr. LIANG (Secretary to the Commission) said that the sole purpose of his proposal was to recall in the code the existence of the Convention on Genocide. In that way the two texts—namely, the code and the Convention on Genocide—would continue to be completely independent of each other. It would be awkward to have two different texts dealing with the same subject. He pointed out that if the code were not incorporated in a draft Convention, it could have no more authority than, for example, a "restatement", or legal recapitulation. The General Assembly could not impose the code upon States.

68 a. He agreed with Mr. Spiropoulos that the only way to ensure the implementation of a code was to give it the form of a convention which would later be ratified by States. He considered that this was a question of the progressive development of international law—that is to say, the establishment of a new law.

69. The CHAIRMAN recalled that the Commission had not been directed to draw up a convention but to prepare a draft code for submission to the General Assembly. The latter would do what it liked with it. The Commission's task was a much more modest one

than that of drawing up a convention. The Commission had to prepare a draft code, and he thought that the crime of genocide should be included in that code. It would be for the General Assembly to decide whether it wished to retain the crime in the code or to omit it.

70. Mr. HUDSON considered it extremely important to remember which persons could be guilty of genocide. The Commission's view had been that Crime I did not apply to private soldiers or to separate individuals, while the Convention on Genocide provided that persons guilty of genocide could be constitutionally responsible rulers, public officials or private individuals. Hence, in regard to genocide, there was a discrepancy between the attitude taken up by the Commission and the decisions adopted by the General Assembly. The Convention was very comprehensive as it did not confine itself to constitutionally responsible rulers but included all private individuals. The difference was fundamental. If the Commission wished to go as far as the Convention, there were no great objections as regards paragraph 1 of Crime No. VIII, but could it go as far as that in regard to paragraph 2? Did the Commission really wish to state that genocide committed by an individual was a crime against the peace and security of mankind?

71. Mr. BRIERLY replied that it was impossible in practice for a single private individual to commit an act of genocide. Moreover, genocide should not be restricted to acts committed by constitutionally responsible rulers. There had to be two groups, one of which wished to murder or exterminate the other. That had happened in India as well as in Pakistan. Both sides had been guilty of genocide and mass murder, but the governments were not involved. Mass murder of that kind, however, carried out by groups acting without the connivance of governments, always constituted a threat to the peace and security of mankind.

72. Mr. HUDSON proposed that they should not mention the Convention on Genocide and should merely state in the code that the murder, extermination, enslavement and so forth of one group by another should be punished as constituting a crime against the peace and security of mankind.

73. Mr. BRIERLY thought it unnecessary to state that explicitly, since the code would have to be applied by judges who would consider disputes rationally and in a spirit of justice.

74. The CHAIRMAN agreed that the Commission should not forget that it would be for the judges to apply the provisions of the code and that the judges were at all times required to act in accordance with equity and justice. He therefore proposed that the Commission should decide whether it intended to include genocide in the code whenever that crime endangered the peace and security of mankind.

75. Mr. BRIERLY observed that that formula was tantamount to restricting the crime to specific cases.

76. The CHAIRMAN replied that it was possible simply to speak of genocide on the basis that any act

of genocide was an international crime endangering the peace and security of mankind.

77. Mr. YEPES approved the Chairman's formula.

78. Mr. ALFARO asked the Commission whether, in its view, a group of fanatics, such as the members of the Ku Klux Klan, for example, who sought to exterminate certain groups of the population in their own country, were committing a crime constituting a threat to the peace or security of mankind. He considered that their acts constituted genocide but not the crime provided for in the code.

79. The CHAIRMAN said that he thought that the activity of such groups was undoubtedly a threat to the peace and security of mankind, since the word "mankind" also included the inhabitants or citizens of a country in which their life was threatened by fellow citizens.

79 a. He put to the vote the question whether the Commission wished to retain the crime of genocide in the code.

7 votes were cast in favour of retention.

80. The CHAIRMAN then put to the vote the question whether the Commission wished to insert the crime of genocide in the code without any additional qualification.

4 votes were cast in favour of retaining the crime of genocide without any qualification.

81. The CHAIRMAN then put to the vote the question whether the Commission wished to retain the crime of genocide in the code with an additional qualification.

One vote was cast in favour of retaining genocide with a qualification.

Paragraph 2

82 - 83. The CHAIRMAN called upon the Commission to proceed to consideration of paragraph 2 of Crime No. VIII. He asked the Rapporteur to make an explanatory statement on this item in his report.

84. Mr. SPIROPOULOS stated that in formulating Crime No. VIII he had adopted the definition contained in article 6, paragraph (c), of the Charter of the Nürnberg Tribunal. He had thought it his duty to confine himself exactly to those terms, since the Commission had been instructed to incorporate in the draft code the crimes as formulated in the Charter and judgment of the Nürnberg Tribunal. It would be for the Commission to say whether it wanted any amendments to be made.

85. Mr. HUDSON held that the acts under discussion were not crimes against the peace and security of mankind if they were committed in time of war or in connexion with a war crime. His opinion had to a certain extent been confirmed by the observations made on Crime No. IX by the Rapporteur in paragraph 67 of his report, where it was stated that the crime of violating the laws or customs of war "does not affect the peace and security of mankind and, consequently, from a purely theoretical point of view, it should have

no place in the draft code. Nevertheless... it figures among the crimes enumerated in the Nürnberg Charter. It is only on account of this connexion that we suggest its conclusion in the draft code". He considered that the crimes listed in paragraph 2 of Crime No. VIII were such as to lead to war or to increase insecurity in time of peace. How far did the Commission wish to go, however? Did it want to include those crimes in the code? Was it bound to incorporate all the Nürnberg Principles in the code? He was by no means sure that paragraph 2 of Crime No. VIII should really form part of the code.

86. Mr. BRIERLY said that he shared Mr. Hudson's doubts.

87. Mr. SANDSTRÖM suggested that those crimes, being connected with war, could be regarded as being to a certain degree accessory to war and as therefore having a place in the list of crimes which the code was to contain.

88. Mr. ALFARO said that the Commission was dealing with a list of crimes of a particularly odious character which both before and during the recent war had aroused unanimous condemnation. The terms of reference of the Nürnberg Tribunal had been restricted to the judgment of crimes which had been committed in connexion with the war, and the Tribunal had therefore been right not to consider crimes of that category committed before the outbreak of the war. However, he did not see how the Commission could omit them from its code. They represented such appalling crimes that they had to be punished, whether committed during or before a war, with a view to preparation for war, or even irrespective of it. In his view, the entire list as it appeared in Mr. Spiropoulos' text should be retained in full in the code which the Commission was preparing on the basis of the Charter and judgment of the Nürnberg Tribunal.

89. Mr. el-KHOURY recalled that he had already proposed the deletion from Crime No. VIII, paragraph 2, of the final words "as defined by the Charter of the International Military Tribunal".² If the final words were deleted as he proposed, the paragraph would establish a rule of international law under which crimes committed by constitutionally responsible rulers against the populations of their own countries could be punished.

90. The CHAIRMAN asked whether the Commission agreed that those crimes should at all times be regarded as crimes against the peace and security of mankind. The question was one affecting the protection of human rights as defined in the Universal Declaration of Human Rights and in the draft Declaration on the Rights and Duties of States.

91. Mr. HUDSON and Mr. BRIERLY observed that there appeared to be a discrepancy between the French and English texts of that paragraph.

92. Mr. HUDSON wondered whether the phrase "when such acts are done or such persecutions are

carried on in execution of or in connexion with any crime against peace or war crimes" applied solely to "persecutions on political, racial or religious grounds", or also to "murder, extermination, enslavement, deportation and other inhuman acts done against a civilian population". In the French text, there was a comma before the words "lorsque ces actes..." while in the English text there was no comma before the words "when such acts..."³

93. The CHAIRMAN said he noted a much more substantial discrepancy between the two texts. The English text said "...in execution of or in connexion with..." whereas the French text said "...à la suite de..."

94. Mr. HUDSON considered that the Commission should study the question as a whole in order to determine whether the acts referred to in paragraph 2 of Crime No. VIII were crimes against peace and security if committed in connexion with war or war crimes.

94 a. He recalled that he had suggested amending the text of Crimes Nos. VIII and IX given by the Rapporteur. However, in order to do so effectively, he proposed that the Commission should not begin consideration of Crime No. VIII at that point, but should study Crime No. IX before doing so.

95. Mr. SPIROPOULOS thought that Mr. Hudson had raised a fundamental point when he said that he did not think that paragraph 2 of Crime No. VIII should figure in the draft code. He had carefully studied the question of which crimes should be included in the code. He had been particularly struck by paragraph (b) of resolution 177 adopted by the United Nations General Assembly on 21 November 1947, which directed the Commission to prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal. He had interpreted that text to mean that the Commission was required to include those principles in its code, and for that reason the draft code which he had submitted to the Commission contained that paragraph 2 of Crime No. VIII.

95 a. There was, however, another question which the Commission had to appreciate—namely, whether it was entitled to amend the texts of the principles which it had formulated. He thought that the Commission had that right. There was still another problem: if the Commission eliminated from the code all the crimes referred to in paragraph 2 of Crime No. VIII, as well as war crimes, as not being connected with crimes against the

³ The French text read as follows:

"2. L'un quelconque des actes suivants, dans la mesure où ils ne sont pas visés les dispositions du paragraphe précédent : L'assassinat, l'extermination, la réduction en esclavage, la déportation et tout autre acte inhumain contre toutes populations civiles, ou bien les persécutions pour des motifs politiques, raciaux ou religieux, lorsque ces actes ou persécutions ont été commis à la suite de tout crime contre la paix ou crime de guerre défini par le Statut du tribunal militaire international."

² See para. 5, *supra*.

peace or security of mankind, and if, accordingly, it wished to include in the code only crimes committed in connexion with a war of aggression, it would be performing a fragmentary task which would not be well received by public opinion. Little of the Nürnberg Principles would remain. He thought that the Commission should study all those questions once again so as to decide which rule it wished to follow.

96. Mr. HUDSON believed that something else of Nürnberg would still be left in the code—namely, the crimes referred to under Crime No. I and basis of discussion No. 2.

97. Mr. BRIERLY did not want to omit all crimes against mankind. The problem, in his view, was to find a formula which would distinguish between crimes against mankind properly so-called, and crimes against peace and mankind. The latter category should be retained in the draft code. He was inclined to thank that Mr. Sandström's proposal might provide the solution.

97 a. Mr. HUDSON said that Mr. Sandström had considered that cases of crimes committed in connexion with a war of aggression were covered by the provisions of Crime No. X, which also established complicity in crimes of that type.

98. Mr. SANDSTRÖM stated that that was not what he had meant. He had meant that there was not only war to be considered, but also the effects produced by war. If war and war crimes alone were punished, the effects of war and crimes resulting from the effects of war would not be punished at the same time. In his view, the code of crimes against the peace and security of mankind should include the crimes referred to in paragraph 2 of Crime No. VIII as accessories of war.

99. Mr. ALFARO thought that some members of the Commission doubted whether the code should include all the categories of crimes referred to in article 6 (i) of the Charter of the Nürnberg Tribunal. All the crimes should be mentioned. A distinction should be made between "peace" and "security of mankind". Even if peace had already been violated and no longer existed, it was still possible to commit crimes against the security of mankind as, for example, if persons invading the territory of another State committed crimes against the civil population. The phrase "peace and security of mankind" should not be regarded as constituting a single concept the various elements of which could have no independent meaning. The crimes covered by paragraph 2 of Crime No. VIII were crimes against the security of mankind.

100. Mr. AMADO quoted the example of a Chief of State who declared war on another country. A section of the population of the country declaring war was opposed to the war and attempted to revolt against those who had started it. The Chief of State who had declared war then sought to exterminate the section of the population which had revolted against him. That constituted a crime against the peace and security of mankind *par excellence*. All crimes committed against the population of a country, even if that population

were made up of various races, were crimes against the peace and security of mankind. A government which suppressed or exterminated those opposed to its policy of war committed a typical crime against the peace and security of mankind. He thought that at this point the Commission was discussing what was quite evident.

101. Mr. SPIROPOULOS thought the problem was clear if considered calmly. In the absence of war, such acts constituted a threat to the peace and security of mankind. They also did so if they were committed with a view to preparation for war. As soon as there was a war, those crimes could constitute war crimes, but if they were committed against the population they could not be so described. In his opinion, the whole question was whether or not war crimes should be included in the code. He proposed that to clarify the discussion, the Commission should first consider Crime No. IX and then return to the crimes referred to in paragraph 2 of Crime No. VIII.

102. The CHAIRMAN said that there was no doubt that those crimes should be included in the code and that the Commission had been directed to give them a place therein.

103. Mr. HUDSON and Mr. BRIERLY did not consider that the Commission's task should be interpreted in that way.

104. Mr. FRANÇOIS agreed in principle. The Commission could decide that a particular principle should not be embodied in the code. He would, however, be sorry if those crimes were omitted.

105. The CHAIRMAN reminded the Commission that it had been directed under resolution 177 (II) to formulate the Nürnberg Principles and to prepare a code of crimes against the peace and security of mankind, indicating clearly the place accorded to those principles. Since the Commission had formulated those principles, it should embody them in the code.

106. Mr. FRANÇOIS recalled that the Commission had first of all formulated the principles recognized in the Nürnberg Charter and in the judgment of the Tribunal as principles of international law. The Commission had now to determine what it regarded as principles of international law.

107. The CHAIRMAN saw no reason why the Commission, having formulated the principles, should not include them in its code.

108. Mr. BRIERLY said that Mr. Liang had given the Commission the historical background to the question. The Commission was not bound to include all the Nürnberg Principles in its code but was authorized to omit or modify them. He accepted Mr. Spiropoulos' proposal to take up Crime No. IX before continuing the discussion on paragraph 2 of Crime No. VIII.

109. The CHAIRMAN had no objections to this procedure.

The meeting rose at 6 p.m.