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**Second Report on a Draft Code of Offences Against the Peace and Security of Mankind
by Mr. J. Spiropoulos, Special Rapporteur**

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

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DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

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Second report by Mr. J. Spiropoulos, Special Rapporteur

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Preface

1. In submitting the present paper to the International Law Commission (*second report on a draft code of offences against the peace and security of mankind*) we wish to present the following brief observations:

2. The text of chapter I, D has been given a definite form, so that, after discussion and adoption by the Commission, it might be submitted to governments in application of article 16 (g) and (h) of the statute of the International Law Commission.

3. A chapter has been devoted to the question of the possibility and advisability of a definition of "aggression". This subject has been very slightly touched upon in our first report on the draft code of offences against the peace and security of mankind, because we were of the opinion that any attempt to define the concept of aggression "would prove to be a pure waste of time".¹

4. However, considering the General Assembly resolution 378 B (V) of 17 November 1950 on the duties of States in the event of the outbreak of hostilities which requests the International Law Commission to examine the question of the definition of aggression in conjunction with matters under consideration by the International Law Commission, that is in conjunction with the draft code of offences against the peace and security of mankind, we have dealt also with this question, thus providing the Commission with a working paper.

5. With regard to the manner in which we approached this problem, we wish to make the following remarks: The various League of Nations Commissions which, in the past, have dealt with the question of the definition of aggression have followed a purely *casuistic method*. Due to this method of approach, the question of the possibility and desirability of a definition of aggression has not yet found a generally accepted positive solution.

6. In contrast to the above method of work used by the League of Nations Commissions, we ventured to undertake a *dogmatic* approach to the problem which centres on the systematic analysis of the "notion of aggression". In our view, only this way of examining the subject leads to definitive conclusions.

7. In concluding, we wish to observe that, in order to facilitate the work of the Commission, chapter II has been drafted so as to serve as the basis for the text to be submitted by the Commission to the General Assembly.

CHAPTER I

Draft code of offences against the peace and security of mankind

A. Introduction

8. By resolution 177 (II), paragraph (b), the General Assembly requested the International Law 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.

9. At its *first session*, the Commission appointed Mr. Jean Spiropoulos special Rapporteur on this subject and invited him to prepare a working paper for submission to the Commission at its second session. The Commission also decided that a questionnaire should be circulated to governments inquiring what offences, apart from those defined in the charter and judgment of the Nürnberg Tribunal, should, in their view, be included in the draft code.

10. At its *second session*, the International Law Commission examined the report of the special Rapporteur (A/CN.4/25) using it as a basis for its discussion. The Commission also took into consideration the replies received from governments (A/CN.4/19, part II, A/CN.4/19/Add.1 and A/CN.4/19/Add.2) to its questionnaire. The draft code which has been prepared by a drafting sub-committee composed of Messrs. Alfaro, Hudson and Spiropoulos (See *Report of the International Law Commission covering its second session, Official Records of the General Assembly, Fifth Session, Supplement No. 12* (A/1316, p. 17)) is contained in document A/CN.4/R.6 which has already been distributed to the members of the Commission.²

11. The above draft was not discussed by the Commission, but referred to the special Rapporteur who was requested to continue the work of the Commission and to submit a further report at its third session.

12. At its 81st meeting the Commission adopted that part of its report to the General Assembly which concerned the draft code of offences against the peace and security of mankind.

B. The report of the International Law Commission before the fifth session of the General Assembly

13. While the part of the report as above mentioned did not give rise to special discussion in the General Assembly, the part containing the formulation of the Nürnberg principles undertaken by the International Law Commission offered to the delegates of the Sixth Committee the opportunity of commenting on these principles. According to General Assembly resolution 488 (V) of 12 December 1950, the International Law Commission when preparing the draft code of offences against the peace and security of mankind, is requested to take into account the above comments as well as eventual observations made by Governments on the said formulation.

14. The text of the above resolution of the General Assembly reads as follows:

"The General Assembly,

"Having considered part III (Formulation of the Nürnberg principles) of the report of the Interna-

¹ A/CN.4/25, para. 60.

² Document A/CN.4/R.6 has been incorporated in footnote 2a of the summary records of the 72nd meeting.

tional Law Commission on the work of its second session,

"*Recollecting* that the General Assembly, by its resolution 95 (I) of 11 December 1946, unanimously affirmed the principles of international law recognized by the charter and judgment of the Nürnberg Tribunal,

"*Considering* that, by its resolution 177 (II) of 21 November 1947, the General Assembly directed the International Law Commission to formulate those principles, and also to prepare a draft code of offences against the peace and security of mankind,

"*Considering* that the International Law Commission has formulated certain principles recognized, according to the Commission, in the charter and judgment of the Nürnberg Tribunal, and that many delegations have made observations during the fifth session of the General Assembly on this formulation,

"*Considering* that it is appropriate to give the Governments of Member States full opportunity to furnish their observations on this formulation,

"1. *Invites* the Governments of Member States to furnish their observations accordingly;

"2. *Requests* the International Law Commission, in preparing the draft code of offences against the peace and security of mankind, to take account of the observations made on this formulation by delegations during the fifth session of the General Assembly and of any observations which may be made by Governments."

15. With regard to the comments on the formulation of the Nürnberg principles made by the various delegations in the Sixth Committee we wish to draw attention to the following facts:

(a) Part of the criticism, by certain delegations, on the formulation of the Nürnberg principles is counter-balanced by statements of other delegations approving the text submitted by the International Law Commission;

(b) A great deal of the arguments put forth against the wording of the formulation of the one or the other of the Nürnberg principles had already been taken into account by the International Law Commission when elaborating the text submitted to the General Assembly;

(c) Finally, some criticism and suggestions were made by one or two delegates only, while the rest of the sixty delegates comprising the Sixth Committee did not express any view on the subject in question, a fact which might be interpreted as an approval of the text under discussion.

Under these circumstances we have thought it wise to refrain from any positive suggestions on this matter, leaving to the International Law Commission the initiative to be taken.

C. Views expressed by delegations in the Sixth Committee on the text of the Nürnberg principles formulated by the International Law Commission

16. The comments, by delegations in the Sixth Committee, on the text of the Nürnberg principles as

formulated by the International Law Commission refer both to the way in which the International Law Commission has envisaged or executed its task in general and to the specific formulation of the principles by the International Law Commission. The following passages from the summary records of the Sixth Committee are reproduced as being illustrative of the position taken by the various delegations with regard to the formulation of the Nürnberg principles.

I. GENERAL VIEWS ON THE WAY IN WHICH THE INTERNATIONAL LAW COMMISSION APPROACHED AND EXECUTED ITS TASK

17. (a) Some delegations criticized the decision of the International Law Commission not to examine whether the principles recognized by the charter and judgment of the Nürnberg Tribunal were or were not principles of international law, while other delegations approved the decision of the Commission.

18. AMADO (Brazil) (A/C.6/SR.231, pp. 131-132):³ [The] third group [including Mr. Amado himself] was of the opinion that the Commission should restrict itself to the decisions which it had taken previously that, since the General Assembly had sanctioned the Nürnberg principles in resolution 95 (I) of 11 December 1946, the task of the Commission was not to express any appreciation of those principles as principles of international law but merely to formulate them. ... The third thesis had been accepted.

19. CHAUMONT (France) (SR.232, p. 141): Paragraph 96 of the Commission's report recalled the conclusion reached by the Commission at its first session and approved at the fourth session of the General Assembly that the task of the Commission was not to express any appreciation of the Nürnberg principles as principles of the international law, but merely to formulate them. Yet, as Professor Hudson had noted in his reservation, the Commission had not altogether adhered to that view in its later work, with the result that there had been some doubt as to the juridical character of the formulation. The Nürnberg judgment itself recognized that it constituted part of positive international law. That was also confirmed by General Assembly resolution 177 (II), which indicated that the principles to be formulated by the Commission should eventually find a place in the code of offences against the peace and security of mankind. ... It was therefore the Commission's duty to determine the juridical character of the Nürnberg principles, in preparation for their subsequent codification as existing principles of positive international law. ...

20. TIRADO (Mexico) (SR.233, p. 145): In its report on its second session, the International Law Commission had stated that it considered it as its task not to express any appreciation of the Nürnberg principles as principles of international law, but merely to

³ The references are to the summary records printed in the *Official Records of the General Assembly, Fifth Session, Sixth Committee*.

formulate the basic concepts. That was the proper approach. There was no doubt that the charter and judgment created new concepts in the field of international criminal law, some of which were in contradiction with the rules and principles prevailing prior to the time they were proclaimed. . . . A decision as to whether or not those principles were principles of international law was another matter, not within the terms of reference of the International Law Commission.

21. TIRADO (Mexico) (SR.237, p. 182): The Mexican delegation had felt that the Commission had been justified in confining itself to the formulation of those principles without considering whether or not they were principles of international law.

22. PETREN (Sweden) (SR.233, p. 146): It mattered little whether it was said that the principles had existed before the creation of the Tribunal or that the charter and the Tribunal had created them, since it had finally been recognized that they did exist.

23. PETREN (Sweden) (SR.233, p. 146): The second stage was the formulation of the Nürnberg principles. That was chiefly a matter of selection and wording and not of creating or affirming new law.

24. MOROZOV (USSR) (SR.234, p. 156): Mr. Morozov thought it necessary to refute the allegation that the Commission had not correctly interpreted the task entrusted to it by the General Assembly. That assertion had come mainly from the representatives of France and of the Netherlands. Mr. Spiropoulos had admirably defended the Commission's point of view, and had advanced most of the arguments which Mr. Morozov had intended to use. The International Law Commission had based its work on General Assembly resolution 177 (II) and had kept exactly to its terms. . . .

The International Law Commission was of the opinion that its duty was not to express any appreciation of the principles affirmed in the Nürnberg charter, but merely to formulate them. That was the only correct interpretation.

25. TARAZI (Syria) (SR.235, p. 159): He said the task of the Commission had been to formulate the principles contained in the Nürnberg charter and judgment; to extract them, so to speak. Its business had been solely to give judgments of facts, not of value (p. 160): The development of international penal law would be promoted not by attempting to pass judgment on those principles, but by endeavouring to clarify and emphasize them.

26. ABDON (Iran) (SR.235, p. 160): He did not agree with the French representative that the International Law Commission ought to have decided to what extent the principles contained in the Nürnberg charter and judgment were principles of international law. The General Assembly had affirmed and then reaffirmed the Nürnberg principles by its resolutions 95 (I) and 177 (II); and the task of the International Law Commission was therefore not to express opinions on those principles as principles of international law, but simply to formulate them.

27. VAN GLABBEKE (Belgium) (SR.235, p. 161): The International Law Commission had been instructed by the General Assembly to formulate principles—and nothing but principles—of international law. It might therefore have been asked whether all the principles contained in the charter of the Nürnberg Tribunal, which the latter had applied, were in fact principles of international law either because they were part of international law before the Nürnberg trial or because they could be described as new international law.

28. HSU (China) (SR.235, p. 164): There had also been discussions in the Sixth Committee as to whether the International Law Commission should have expressed any appreciation of the Nürnberg principles as principles of law. He took the view of the majority of the International Law Commission, which had not considered that to be its task.

29. CABANA (Venezuela) (SR.235, p. 165): He went on to speak of the doubts which had been expressed as to whether the International Law Commission had been right to limit itself to formulating the Nürnberg principles without appreciating their value. Most of those doubts had been dispelled by the brilliant statement of the Greek representative. In his delegation's opinion, such an appreciation was not required under General Assembly resolution and would have served no purpose.

30. CABANA (Venezuela) (SR.235, p. 165): His delegation thought that the formulation of the Nürnberg principles was only a stage in the process of the codification of international law. Certain representatives, amongst them the representative of Yugoslavia, had maintained the contrary opinion, and had alleged that resolution 95 (I) of the General Assembly had affirmed that the principles recognized by the charter and judgment of the Nürnberg Tribunal were principles of international law. The Assembly had not stated that all the principles appearing in those two instruments were principles of international law. It would therefore be well to analyse those documents with a view to deciding which were the principles included which might be considered as principles of international law and accepted as such.

31. BUNGE (Argentina) (SR.235, p. 166): It was, however, inadmissible to consider that the General Assembly had regarded as rules of international law principles which had not even yet been formulated, especially in view of the fact that it had adopted a second resolution instructing the International Law Commission to assume that task. It was clearly implied in the operative part of resolution 95 (I) that the Assembly had merely confirmed the principles of international law recognized in the charter and judgment of Nürnberg. A detailed consideration of the text of that resolution showed that the International Law Commission was called upon to formulate principles which had to be (a) principles of international law, and (b) recognized by the Nürnberg charter and Tribunal. That means that the General Assembly had not con-

firmed all the principles acknowledged at Nürnberg and that, as a result, it had not considered as principles of international law all the principles, without exception, on which the charter is based, or which have been accepted by the Tribunal.

32. BUNGE (Argentina) (SR.235, p. 166): The contention in paragraph 96 of the report of the International Law Commission was unfounded.

33. LOBO (Pakistan) (SR.236, p. 174): As the General Assembly had affirmed the Nürnberg principles by its resolution 95 (I), the task assigned to the International Law Commission under the terms of paragraph (a) of resolution 177 (II) was not to state an opinion on these principles as principles of international law, but purely and simply to formulate them.

34. LOBO (Pakistan) (SR.236, p. 174): His delegation shared the doubts of the International Law Commission on the subject of the Tribunal's statement to the effect that the Nürnberg charter was the expression of international law at the time of the creation of the Tribunal. The judgment of the Tribunal had considerably extended the scope of the Nürnberg charter and its findings, and there was a consequent doubt as to the juridical nature of the formulation adopted.

35. ROBINSON (Israel) (SR.236, p. 175): He shared the views of the French representative with regard to the work of the International Law Commission within the limited area of its research. The International Law Commission had been instructed by General Assembly resolutions 95 (I) and 177 (II) to formulate the principles enacted by the London charter and applied in the judgment of Nürnberg and recognized in both the charter and the judgment. It seemed obvious that the recognition of principles logically implied that they had existed previously. The General Assembly had adopted the view expressed by the International Military Tribunal that its charter was the expression of international law existing at the time of its creation, and he regretted that the International Law Commission had not gone more deeply into the question.

36. GOTTLIEB (Czechoslovakia) (SR.238, p. 187): In the view of his delegation, the Commission had in the main correctly interpreted its task under General Assembly resolution 177 (II) and rightly confined itself to the formulation of the principles of the Nürnberg charter and judgment. That did not mean that his delegation necessarily agreed with all of the principles as formulated by the Commission.

37. MAKTOŠ (USA) (SR.233, p. 147): It would be fruitless to question resolution 95 (I), in which the General Assembly had affirmed the Nürnberg principles... even as it would be premature at present to discuss the principles formulated by the Commission. The appropriate time to discuss them would be after the Commission had incorporated them in the code of offences, in doing which it would no doubt take the views expressed in the Sixth Committee into account.

38. BARTOS (Yugoslavia) (SR.234, p. 150): The Yugoslav delegation considered that the International

Law Commission must formulate the legal principles stated in the charter and judgment of the Nürnberg Tribunal—principles which had already been an integral part of international law at the time—so as to ensure definite application in the future.

39. ROBERTS (Union of South Africa) (SR.237, p. 181): The International Law Commission had not ascertained whether the principles contained in the charter and judgment constituted principles of international law; it had simply noted those principles, having regard to the fact that they had been affirmed by the General Assembly. The General Assembly was not a legislative body, and it could not be accepted that the principles contained in the charter and judgment were principles of international law solely because the Nürnberg Tribunal had recognized them as such. The main objection of his delegation to the report was, therefore, that it left a doubt as to the international recognition of those principles as formulated. Article 13, 1 (a) of the United Nations Charter required the General Assembly to encourage the development of international law and its codification, and it was for the International Law Commission to make recommendations to the Assembly for that purpose. It was difficult to see how the Commission could be of any assistance to the Assembly, if it expressed no opinion on the principles in question.

40. JIMENEZ DE ARECHAGA (Uruguay) (SR.234, p. 154): Whether or not the Nürnberg principles were principles of positive law in 1945, they certainly were today... He therefore considered that it would be useless to question the positive juridical nature that those principles now possessed.

41. SULTAN (Egypt) (SR.234, p. 155): Nevertheless, the only organ which had affirmed the legal character of the Nürnberg principles was a political one and the silence of the juridical organs with regard to a question which obviously fell within their competence was regrettable.

(b) Some delegates expressed the view that the task of the International Law Commission was not only to formulate the Nürnberg principles but also the principles underlying the charter and judgment while other delegates approved the decision of the Commission.

42. CHAUMONT (France) (SR.232, p. 141): A proposal made at the time to the effect that the Commission should formulate, not only the principles recognized in the charter and judgment, but also those underlying the charter and judgment, had been rejected by the Commission (A/CN.4/22, p. 23), although the General Assembly resolution 95 (I) clearly called for the formulation of both. If the Commission's interpretation were adopted, it would mean that the two sub-paragraphs of that resolution said one and the same things, which was obviously not the case... The task entrusted to the Commission, therefore, had not been to provide historical commentaries on the charter and judgment, or to throw some light on separate points contained therein, but to establish the underlying

principles with a view to assisting the future development of international penal law.

43. HSU (China) (SR.235, p. 164): Mr Georges Scelle had asked the International Law Commission to formulate the principles upon which the Nürnberg charter was based, instead of confining themselves to summarizing certain of them. The decision taken by the International Law Commission to reject that proposal was justified, but he thought that the Commission would not have been wrongly interpreting its terms of reference if it had accepted Mr. Scelle's proposal. It was a matter of two different methods, both equally legitimate. He would have preferred the method suggested by Mr. Scelle...

44. BALLARD (Australia) (SR.236, p. 169): The International Law Commission had fulfilled its task and its interpretation of resolution 177 (II) had been correct. It had been argued that the Commission had formulated rules of law instead of principles and that it should have formulated the general principles of international law on which the Nürnberg charter and judgment were based. The wordings of resolution 177 (II) perhaps contained a latent ambiguity, and subsequent discussion showed that the word "principles" was used in a loose sense in the resolution. Since a code should contain rules of law rather than principles, it could not be said that the Commission's interpretation was wrong.

45. FITZMAURICE (United Kingdom) (SR.233, p. 144): The Commission had not been asked to formulate the general rules of international law on which the Nürnberg principles had been based. It had been asked to formulate the principles themselves, as they were actually expressed in the Nürnberg charter. The Commission itself had adopted that attitude and on the whole it had done extremely well.

46. SPIROPOULOS (Greece) (SR.234, p. 152): ... the terms of reference given to the International Law Commission were simply to formulate the Nürnberg principles, and not the principles on which these were based.

(c) Some delegates found the International Law Commission guilty of certain omissions.

47. BARTOS (Yugoslavia) (SR.234, p. 151): Mr. Bartos then took up two essential principles with which the Nürnberg Tribunal had been concerned and which the International Law Commission had failed to formulate: the principle "*nulla poena sine lege*" and the principle according to which membership in a criminal organization constituted a crime under international law. The first principle had been cited by the defence at the Nürnberg trials and been rejected by the Tribunal. The Yugoslav delegation felt that the International Law Commission had committed a particularly serious omission by failing to formulate that principle, since the other principles stated did not fix the penalties. That principle, which was one currently applied and which had been proclaimed in the Universal Declaration of Human Rights, should

therefore be included. The second principle, according to which mere membership in criminal organizations which had as their purpose the commission of crimes against peace, war crimes and crimes against humanity constituted a crime under international law, was incontestably one of the principles recognized at Nürnberg. It had been asserted that organizations such as the SS, the SD and the SA were essentially German creations. That was not the case. Similar organizations had always existed, in particular organizations of volunteers which filtered into other countries, or which took the form of punitive expeditions vested with broad powers. In the opinion of the Yugoslav delegation, such activities constituted not merely participation in the execution of crimes against peace, war crimes, and crimes against humanity, as the International Law Commission considered, but special forms of criminal activity in war-time.

48. TARAZI (Syria) (SR.235, p. 159): The International Law Commission had unfortunately not pointed out that the Nürnberg Tribunal had been instructed to try only war criminals whose offences had no particular geographical localization. ... Nor had the International Law Commission mentioned the principle of group responsibility. ... Thirdly, the Commission should have mentioned in its report the Tribunal's interpretation of the rule *nullum crimen sine lege, nulla poena sine lege*, and also Article 11 of the charter, which laid down that any person convicted by the International Tribunal might also be charged before a national tribunal. It would have been extremely useful for any future international judicial organization if that principle had been thoroughly examined.

49. VAN GLABBEKE (Belgium) (SR.235, p. 162): When the principles as formulated by the International Law Commission were being considered, it was fitting to inquire if some principles had been omitted. That was undoubtedly the reason for the observations of some representatives, including those of France and Yugoslavia, who had referred to principles which were not mentioned in the report of the International Law Commission. It was equally regrettable that the members of that Commission had concluded that they were not expected to deal with the provisions concerning procedure, which were in the charter and which the Tribunal had applied. The Nürnberg trial had established the principle that a war criminal could be tried *in absentia* and that from the sentence, which might call for the death penalty, there was no appeal. ... (p. 163). He had already indicated some omissions and there might be others, for example the principle of the criminal responsibility of organizations, a principle which would make it possible to prosecute individuals because of their affiliation to a group which had been declared criminal by a judicial decision.

50. BUNGE (Argentina) (SR.235, p. 166): The first remark which sprang to mind was that the International Law Commission had not formulated all the principles of international law acknowledged in the Nürnberg charter and judgment. For instance, it had

not formulated the principle of the non-retroactivity of penal laws, which had been acknowledged by the Nürnberg Tribunal (p. 167). ... In view of the fact that the principle of the non-retroactivity of penal laws had not been incorporated in the formulation, it was not surprising that the Commission had failed to take into account similar principles, or other consequences of the principle *nulla poena sine lege* or *non bis in idem* or *in dubio pro reo*, and so forth.

51. LOBO (Pakistan) (SR. 236, p. 173): The principles formulated in the report did not include all those proclaimed in the charter and judgement of the Nürnberg Tribunal. They did not even express the essence of those principles, since the maxim *nullum crimen sine lege*, *nulla poena sine lege*, which the Tribunal had not applied in the Nürnberg trial, had been implicitly recognized by the Commission. Consequently, neither the principle of *ex post facto* punishment recognized in the charter and judgement of the Nürnberg Tribunal nor the principle of the criminal responsibility of groups and organizations defined in articles 9, 10 and 11 of the Nürnberg charter appeared in the formulation.

52. MAURTUA (Peru) (SR. 237, p. 180): The internal law of all countries tacitly accepted the principle of *nullum crimen sine lege*. In international law that principle should be expressly stated to avoid all possibility of misunderstanding.

II. VIEWS CONCERNING THE VARIOUS NURNBERG PRINCIPLES

(a) Views concerning principle I

53. AMADO (Brazil) (SR.231, p. 132): Principle I, based on the first paragraph of article 6 of the charter of the Nürnberg Tribunal, was the foundation of all international criminal law in that it affirmed the responsibility of the individual in the commission of international crimes. Moreover, it was a crystallization of the efforts made by a great many jurists to weaken the traditional doctrine under which States were the only subjects of international law. ...

54. RÖLING (Netherlands) (SR.232, p. 137): Mr. Röling said that principle I was of great importance and could be adopted as it stood.

55. BARTOS (Yugoslavia) (SR.234, p. 150): With regard to Principle I, the Yugoslav delegation agreed with either delegations that although that principle was correct, it had been drafted in too general terms. In fact, it should have been specified that "any person who commits an act which according to the principles of Nürnberg constitutes a crime under international law is responsible therefor and liable to punishment". As the International Law Commission had only been asked to formulate the principles of Nürnberg, it must be made clear that the crimes in question were crimes recognized as such by the charter of Nürnberg and not international crimes in general.

56. MOROZOV (USSR) (SR.234, p. 156): ... there was a gap in the text proposed by the Commission;

he proposed the following wording: "Any person who commits an act which constitutes a crime under international law is responsible therefor, whenever a relevant treaty exists, whether or not such act constitutes a crime under the domestic law of the country where it is perpetrated."

57. VAN GLABBEKE (Belgium) (SR.235, p. 152): ... The Belgian delegation accordingly accepted principle I as formulated. ...

58. HUNGE (Argentina) (SR.235, p. 167): He considered that the word "person" in principle I should be replaced by the word "author". The word "person" was held to mean moral persons, as well as individuals, in the juridical terminology of many countries. That distinction was rather important in referring to the criminal organizations dealt with in article 9 of the Nürnberg charter. In view of the fact that the charter undoubtedly did not wish to make moral persons subjects of international law, a suitable terminology should be used to make clear that the reference applied only to physical persons.

59. MAURTUA (Peru) (SR.237, pp. 179-180): The representative of Greece had stressed the fact that according to the principles recognized by the Nürnberg charter and judgment, the individual was subject to international law; on that point he shared the opinion of his illustrious compatriot, Mr. Politis. Another school of thought did not recognize the international responsibility of the individual, while a third took an intermediate position. ... Principle I, as formulated by the Commission, was not a definition of an international crime. The principle set forth in the text, to the effect that any person was responsible for criminal acts committed by him, was already recognized in the national legislation of all countries. What constituted a crime under international law should have been specified before anything else. Crimes were clearly defined in national law and the same should be true in international law.

(b) Views concerning principle II

60. RÖLING (Netherlands) (SR.232, p. 137): In paragraph 102 of the Commission's report that body stated that principle II expressed the principle of the supremacy of international law. Mr. Röling thought, however, that the case of a crime under international law, whilst the national law imposed no penalties for the act, was rather different from the case where national law obliged the individual to perform the very act which was considered a crime under international law. To that situation referred the sentence of the judgment quoted at the end of paragraph 102, that "the very essence of the charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State".

61. With regard to international duties, there were three situations in which an individual might find himself. First, there was the situation in which no contrary international obligation was involved; secondly, there was a situation where the national law obliged

the individual to act contrary to an international duty, a case which was not dealt with in the principle as formulated by the International Law Commission; and, thirdly, there was the situation where a national superior order imposed duties contrary to international obligations. The third situation was covered in principle IV. If the phrase "command of the law" were inserted in that principle, principle II would become redundant. Principle II was ambiguous, and, if taken literally, superfluous.

62. RÖLING (Netherlands) (SR.236, p. 171): It was apparent from the judgment of Nürnberg that there were rules of international law which applied directly to individuals, without passing through the intermediary of national law, and that some obligations of international law transcended the obligations imposed by the national administration.... The fact that the vanquished had been condemned on the basis of that concept signified that the concept must remain valid in the future....

63. FITZMAURICE (United Kingdom) (SR.233, p. 144): ... He fully agreed that individuals who committed crimes under international law should be subject to trial and punishment, but that aim could be achieved without adopting the theory of the responsibility of the individual under international law. All that was in fact necessary was to establish the position in which the States admitted that the individuals under their jurisdiction would be subject to punishment for certain acts recognized as crimes under international law....

64. FITZMAURICE (United Kingdom) (SR.237, p. 181): He had never said that individuals should not be punished for certain acts, such as offences against peace and humanity, and that, unless it was in accordance with their national laws, it was not possible to punish them. His observations had related solely to the *modus operandi*, to the legal methods to be used in attaining the generally desired objective. He had simply said that, in order to punish the individual, there was no need at all to regard him as being subject to international law, and that the desired result could be attained without affecting the classic concept that international law solely governs relations between States....

65. MAURTUA (Peru) (SR.233, p. 146): The principle of the supremacy of international law was only one doctrine amongst many. The International Law Commission's work should be regarded as an expression of opinion, which was open to discussion.

66. PETREN (Sweden) (SR.233, p. 146): ... principle II, which implied that, if an individual committed a crime under international law which was not considered a crime under the laws of the country of which he was a national, the country would nevertheless be obliged to punish him or deliver him up for trial to a foreign or international tribunal. Many States would prefer to have the opportunity to broaden their penal code to cover crimes against international law rather than allow their nationals to be extradited.

67. BARTOS (Yugoslavia) (SR.234, p. 150): The Yugoslav delegation approved of principle II in its present form because it clearly proclaims the duty of all States to make provision in their national legislation to punish all crimes against peace, war crimes and crimes against humanity with which the Nürnberg trials were concerned.

68. SPIROPOULOS (Greece) (SR.234, p. 154): The judgment proclaimed that international law imposed duties and responsibilities on physical persons, which meant that the individual, whose personality in international law was henceforth recognized, came into contact with international law direct and no longer through the intermediary of the State.

69. ARECHAGA (Uruguay) (SR.234, p. 155): ... The principle of the responsibility of individuals under international law was therefore no "fashion", but a firmly-based principle of great practical value.

70. SULTAN (Egypt) (SR.234, p. 155): In his own opinion, it was obvious that principles of international law were intended to apply not to individuals but to social groups, even though it would be possible to split those groups into their component parts. At the present time, the concept of state responsibility was losing ground. Some legal principles applied to individuals also, and thus made individuals in certain respects subject to international law. However, that was the exception rather than the general rule and should therefore be interpreted very strictly (p. 156)... the Egyptian delegation would have preferred to avoid making any allusion to the principle of the supremacy of international law.

71. BAEZ (Dominican Republic) (SR.235, p. 161): ... he could not accept the idea that international law prevailed over domestic law.

72. VAN GLABBEKE (Belgium) (SR.235, p. 162): He next considered principle II which was the principle of the "supremacy" of international law over national law. In the completely general form in which the International Law Commission had stated it, he feared that that principle might lead to very serious practical difficulties. It might be asked whether such an extension and generalization of the principle of the "supremacy" of international law over national law was not a mistake.

73. CABANA (Venezuela) (SR.235, p. 165): He wondered whether it would not be preferable to adopt the Union Kingdom representative's suggestion itself to the effect that the direct responsibility of the individual should be transformed into an obligation on the part of the State either itself to punish the guilty or to allow an international court to sentence them.

74. BUNGE (Argentina) (SR.235, p. 167): The principle ... that an individual could be subject to international law has, as a corollary, the principle of the supremacy of international law. In that connexion, the Argentine delegation shared the United Kingdom representative's view that the suppression of crimes against peace and mankind could be organized perfectly well without necessarily subscribing to the theory of

the responsibility of the individual under international law. Conventions which laid down direct relations between the individual and international law had always constituted exceptions. . . . Principle II asserted the supremacy of international law over internal law. That principle had not yet been recognized as a principle of positive international law. The Argentine Republic did not accept it and its constitution explicitly authorized the contrary principle.

75. CHAUMONT (France) (SR.236, p. 170): It was inconceivable that an individual could be criminally liable under international law unless he were himself a subject of international law. The situation as regards legal persons was different: a legal person could not be considered as criminally liable; it could only be made liable indirectly, or rather its liability was only a civil or administrative one. But as regards individuals, it was impossible to deny that they were subjects of international law without denying the possibility of the international punishment of offences under international law.

76. ROBINSON (Israel) (SR.236, p. 175): The International Law Commission had not confined itself strictly to the task of formulation; paragraph 99 mentioned a "general rule underlying principle I . . . that international law may impose duties on individuals directly without any inter-position of internal law." Secondly, paragraph 102 implied the supremacy of international law over national law. Mr. Robinson congratulated the International Law Commission on having departed from the actual terms of the charter and on having attacked the fundamental problem of international law. He felt that in so doing the Commission had not acted arbitrarily.

77. AMADO (Brazil) (SR.237, p. 184): The United Kingdom representative had already emphasized that the question of the supremacy of international law was entirely a matter of theory, and could not be included in the formulation.

78. GOTTLIEB (Czechoslovakia) (SR.238, p. 187): The concept of the punishability of the individual under international law did not exempt the individual from the jurisdiction of the State; it was not a case of extradition. Even from the point of view of implementation, it was primarily the responsibility of the State to enact appropriate provisions for the punishment of certain crimes. . . .

79. The Netherlands representative had proposed that the entire second principle should be reduced to the recognition of the supremacy of international law. That proposal, which went back to the concepts of the monistic school, which explained the structure of law as a hierarchy of norms, was not only utterly unacceptable, but also superfluous, if it were accepted that the fundamental substance of international law was the common will of sovereign States. . . .

(c) Views concerning principle III

80. AMADO (Brazil) (SR.231, p. 133): With regard to principle III, which was based on article 7 of the

Nürnberg charter, Mr. Amado had supported the proposal to delete the words "or mitigate punishment" which appeared in the Rapporteur's original draft.

81. RÖLING (Netherlands) (SR.232, p. 138): Principle III formulated the responsibility of heads of States or government officials, a position which did not relieve them from responsibility under international law. The charter of Nürnberg went further, however, since it said in article 7 that those positions should not even be grounds for the mitigation of punishment. He could not agree with the Commission's views on principle III, for, while the concrete mitigation of punishment might be a matter for the Court to decide, to forbid mitigation of punishment in certain circumstances was surely a matter for the legislator.

82. As he had mentioned in discussing the significance of the plea of superior order or command of the law, Mr. Röling felt that the provision concerning the official position of a defendant could not be applied in the same way to major and minor war criminals and in practice many doubts had been raised as to the justification of the provision.

83. MAURTUA (Peru) (SR.233, p. 146): Principle III created a serious conflict between international law and internal law by eliminating the prerogatives of the chief of State.

84. BARTOS (Yugoslavia) (SR.234, p. 150): The Yugoslav delegation viewed favourably principle III. . . .

85. VAN GLABBEKE (Belgium) (SR.235, p. 162): Turning to principle III, he said that there was still some confusion regarding the exact meaning of the words "responsible government official". Opinions differed: some said "responsible government official" referred solely to a member of a government, others said it included a former member of a government or even any person occupying an important post in the three important branches of government, the legislative, the executive or the judicial. Some documents referred to highly placed officials and the meaning of that expression was no clearer than the words "responsible government official". It was most important, in the cases of proceedings which might involve the death penalty, that the meaning and the exact scope of each idea in the texts should be quite clear. . . . the Commission had omitted the last phrase of article 7 of the charter of the Tribunal which said that the fact that an individual acted as head of State or responsible government official not only could not prevent prosecution or relieve him of responsibility but also could not even be taken into consideration as a reason for mitigating punishment. He suggested the Commission had been wrong in changing the text of the charter in that particular.

86. LOBO (Pakistan) (SR.236, p. 173): . . . the principle stated in article 7 of the Nürnberg charter, which dealt with the responsibility of heads of States and responsible officials, had been considerably watered down in the formulation contained in the report. The principle that the official position of defendants would

not be considered as mitigating punishment had been omitted by the Independent Law Commission, which, as the discussion at its 46th meeting — and particularly Mr. Amado's speech — had shown, had decided that on that point the Nürnberg charter had rejected a fundamental principle of law.

87. MAURTUA (Peru) (SR.237, p. 180): With respect to principle III, the representative of Belgium had already pointed out the difficulties which might arise in the application of that principle. Although the principle was a very important one, it must be borne in mind that in all democratic States the head of State was responsible to the people for his acts.

(d) *Views concerning principle IV*

88. AMADO (Brazil) (SR.231, p. 133): In opposing the rigid formula contained in article 8 of the charter, Mr. Amado had recalled that the Military Tribunal itself had recognized that "the true test" (of criminal responsibility) "which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible."

89. RÖLING (Netherlands) (SR.232, p. 137): ... an "order of a superior", although properly excluded as a defence in article 8 of the charter of Nürnberg, should not be ruled out for people who did not belong to the small group of leaders to whom the provisions of the Charter applied. ... (p. 138) The draft of principle IV, which was based on the judgment, was not very satisfactory. The judgment said that a superior order did not remove responsibility, but recognized that there might be situations when a superior order amounted to a situation of duress and where consequently, according to the general principles of law, no obligation any longer existed, and responsibility disappeared. Those two situations were not adequately covered by the phrase "provided a moral choice was in fact possible to him". The only question to consider was whether a legal obligation still existed and whether obedience to the international duty contrary to a superior order was still humanly possible. The ambiguous wording of the judgment should not be followed in the principles to be adopted by the United Nations.

90. FITZMAURICE (United Kingdom) (SR.233, p. 144): As a general formulation the principle was correct, but a great deal depended upon the interpretation of the words "provided a moral choice was in fact possible to him". If a person was threatened with immediate execution for disobedience of an order, then it could reasonably be argued that he had no moral choice but to obey. There were also many cases in which a person might incur degradation or imprisonment or suffer some slight disability as the result of disobedience, but not a severe enough penalty to remove all moral choice. Between those two extremes there were infinite possibilities of borderline cases in which it would be very hard to decide whether a moral choice had or had not existed. He suggested therefore that, when preparing the draft code of offences against

the peace and security of mankind, the International Law Commission should consider that point. If it could not actually define moral choice, it might at least give some indication of the type of circumstances in which a moral choice could be said to exist.

91. BARTOS (Yugoslavia) (SR.234, p. 150): With regard to principle IV, the Yugoslav delegation wished to make an observation of a technical nature: it felt that the Commission had departed here from the charter and judgment of Nürnberg. According to those instruments, the fact that a person who committed a criminal act had acted pursuant to an order of his government or of a superior, did not relieve him from responsibility but in exceptional cases might be considered in mitigation of punishment. If this position were supplanted by the criterion of "possible moral choice", the number of cases in which the court could acquit the guilty would be increased. Moreover, the courts might consider that the very fact that a person was in a subordinate position limited the moral choice possible to him. It was to be feared that that modification of the principle would give rise to ambiguity, and prejudice its application. Apart from that, the Yugoslav delegation fully understood the feelings of the members of the Commission which made them want to avoid having the penalty automatically applied to subordinates and to place the responsibility upon superiors. Even though the question was left to the discretion of the court, it could give rise to abuse.

92. SPIROPOULOS (Greece) (SR.234, p. 153): The only point on which the International Law Commission was open to criticism was principle IV which it had formulated. ... The International Law Commission, after sharing his opinion at its first session, had decided at its second session to abandon that point of view and to alter the drafting of the fourth principle. The Commission, which was already at work on the formulation of the code of offences against the peace and security of mankind, had sought to introduce a more flexible principle. For that purpose it had made use of a passage from the judgment of the Nürnberg Tribunal, to the effect that: "That true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible."

All things considered, he approved the decision taken by the International Law Commission in the matter, as the text elaborated in London had been a little too rigid. ... The text as drafted by the International Law Commission could thus be inserted in the code of offences against the peace and security of mankind without any modification.

93. ABDOLAH (Iran) (SR.235, p. 160): His delegation agreed with the drafting of principle IV. ... The passage of the judgment on which principle IV was based appeared to indicate that the Tribunal had not wished to go any further than the principle of penal law according to which the fact that a person acted pursuant to order of a superior did not free him from responsibility if he had freedom of choice.

94. VAN GLABBEKE (Belgium) (SR.235, p. 163): The problem of moral choice was particularly delicate; the United Kingdom representative had referred to it, but Mr. van Glabbeke did not concur in the views which he had expressed in that connexion. He thought that it was not the responsibility of the International Law Commission to examine all the possibilities. . . . He therefore thought that on this point the judges should be relied on to make a humane application of the principle of freedom of choice, and it was with that reservation that he accepted principle IV.

95. HSU (China) (SR.235, p. 164): He agreed with Mr. Spiropoulos concerning principle IV, and regretted that the phrase "providing a moral choice was in fact possible to him" had been inserted instead of the phrase "but may be considered in mitigation of punishment".

96. ROBINSON (Israel) (SR.236, p. 175): There did not, however, appear to be any justification for asserting that the fact of having acted under orders might lessen the responsibility of the defendant, instead of considering that factor as having a bearing only on the punishment or in omitting any reference in principle IV to the authority of the Court to mitigate the punishment.

97. LACHS (Poland) (SR.236, p. 178): . . . in particular, he could comment at length on principle IV, because he was far from being satisfied with the formula on moral choice, as it omitted any mention of the self-imposed duty of self-sacrifice which is necessary when the choice is between the life of one individual and the life of hundreds or thousands of human beings.

98. GOTTLIEB (Czechoslovakia) (SR.238, p. 188): During the discussions in the Committee, for example, there had been a lengthy debate on the concept of "moral choice" in principle IV. His delegation felt that the International Law Commission had exceeded its task of "formulating" with regard to that principle. Having stated, in its comment to principle III, that "the question of mitigating punishment is a matter for the competent court to decide", it had taken an entirely opposite view in the case of principle IV. Moreover, a proviso such as that formed in principle IV might have undesirable effects psychologically.

(e) *Views concerning principle V*

99. RÖLING (Netherlands) (SR.232, p. 138): There was no doubt that one of the principles of the charter and judgment of Nürnberg was that of a fair trial, which was contained in principle V. He wondered, however, whether the phrase "on the facts and law" should be added. Only in doubtful cases did equity demand discussion of the law.

100. BARTOS (Yugoslavia) (SR.234, p. 150): The Yugoslav delegation approved of principle V and had no criticism to make of the text submitted by the International Law Commission.

101. VAN GLABBEKE (Belgium) (SR.235, p. 163): . . . He regretted, however, that the International Law Commission, in stating that any person had the right

to a fair trial, had proposed the addition of the words "on the facts and law". On this point, he was prepared to support the Netherlands representative, who for the sake of simplicity had proposed the deletion of those words. It was preferable to adhere rigorously to the statement of the principle, because if "on the facts and law" were specified, the procedure seemed to be neglected. Some trials which appeared to be fair were based on a fraudulent preliminary investigation. . . . When the draft code of offences against the peace and security of mankind came to be examined, consideration might be given to the principle of a preliminary investigation in which both sides would be heard, and the right of the accused to the assistance of counsel at all stages of the proceedings.

102. ROBINSON (Israel) (SR.236, p. 175): With regard to the right to a fair trial, which his delegation considered to be the most important of all, he remarked on the absence of a definition of a "fair trial" in the International Law Commission's report, whereas the expression "on the facts and the law" had a definite meaning. The word "law" meant not only substantive law but procedural law, including the principle of equality of the parties in the trial.

103. MAURTUA (Peru) (SR.237, p. 180): The representative of Peru thought that principle V was contrary to the spirit of the charter of the Nürnberg Tribunal. Article 12 of that charter authorized the Tribunal to judge, *in absentia*, any person accused of crimes mentioned in article 6; and article 19 provided that the Tribunal should not be bound by the technical rules governing the submission of proof. In Mr. Mauritua's opinion, the International Law Commission, in its formulation of principle V, should have taken into consideration article 19 of the charter of the Tribunal.

104. SPIROPOULUS (Greece) (SR.238, p. 190): A third criticism had been made regarding the inclusion of the words "on the facts and law" at the end of principle V. He explained that the original text submitted to the International Law Commission by a sub-committee had referred simply to the right to a fair trial. On re-reading the judgment, however, Mr. Spiropoulos has discovered that it referred to a fair trial "on the facts and law". He had therefore incorporated the same wording in his draft and the Commission had accepted it. Since the words appeared in the judgment, he could see no reason why anyone should object to them.

(f) *Views concerning principle VI (a)*

105. RÖLING (Netherlands) (SR.232, p. 135): The Soviet Foreign Minister, speaking at the 380th meeting of the First Committee on 28 October 1950, had made a distinction between just and unjust wars, and not between aggressive and defensive wars. A just war, he had said, was a liberating war designed to defend a people from foreign attack or an attempt to enslave it, or to liberate it from capitalist and imperialist domination. If that were the attitude of the Government of the Soviet Union, there would be two fundamentally

different concepts of aggression. On the one hand, the charter forbade a change in the *status quo* brought about by armed force. On the other hand, there was the view that wars could be fought to achieve an ideological purpose. As long as that divergence of opinion existed, no code of offences against the peace and security of mankind could be drafted which did not include a definition of aggression.

106. RÖLING (Netherlands) (SR.232, p. 138): Principle VI mentioned the crimes punishable as crimes under international law. Once again it did not contain real principles but merely details of the charter of Nürnberg, and wrong details at that. To sum up all the stages in which the crime against peace could manifest itself—including even the conspiracy to plan or prepare a war of aggression—was to repeat a formulation criticized by anyone who had been connected with the application of that provision of the charter. The provision should not be repeated as a principle of international law, especially as the judgment had not distinguished between planning and preparation. Nor had the judgment followed the directive of the charter to regard as a crime what, in the opinion of the Tribunal, had been too far removed from the time of decision and action. In the light of the decision of the Tribunal, the wording of the charter was no longer correct, and the Committee should not forget that the General Assembly had requested the formulation of principles recognized both in the charter *and* in the judgment.

107. RÖLING (Netherlands) (SR.236, p. 172): Principle VI reproduced the enumeration of crimes against peace contained in the Nürnberg charter. That part of the charter which had been severely criticized had not been applied by the Tribunal. Principle VI classified as a crime against peace not only planning, preparation, initiation or waging of a war of aggression but also participation in a conspiracy for the accomplishment of any of the aforementioned acts.... The Tribunal had not considered it a criminal act to participate in a conspiracy to plan or prepare a war but only to participate in a concerted plan to wage war, in a concerted plan existing shortly before the war broke out. Consequently the formulation of principle VI of the International Law Commission was not in accordance with the concept of conspiracy as defined in the judgment. He considered that the International Law Commission had been mistaken on that point.

108. FITZMAURICE (United Kingdom) (SR.233, p. 144): In that connexion, he referred to the comments in paragraph 117 of the report: "Some members of the Commission feared that everyone in uniform who fought in a war of aggression might be charged with the 'waging' of such a war. The Commission understands the expression to refer only to a high-ranking military personnel and high state officials, and believes that this was also the view of the Tribunal." He fully agreed with that interpretation, and thought that a corresponding definition of the phrase "waging of a war of aggression" should be incorporated in principle VI, to safeguard the interests of the ordinary soldier.

If a definition could not be included in the actual text of the principle, it should at least be incorporated in the draft code of offences against the peace and security of mankind.

109. BARTOS (Yugoslavia) (SR.234, pp. 150-151): The wording adopted by the Commission for sub-paragraph (a) (i) and (ii) of that principle [principle VI] was excellent.... [Pursuant to Polish and Yugoslav proposals] a sub-paragraph should have been inserted in the text defining as criminal all propaganda inciting to hatred—or the propagation of hatred—among nations, and hatred based on racial and religious discrimination.... The Yugoslav delegation considered that any propaganda inciting to war carried on in conjunction with plans of aggression constituted preparation for war and as such should be included among the acts condemned under principle VI. Where such propaganda was not carried on together with plans of aggression, it constituted an act of a particular kind and should be the subject of a special indictment; that is, it should be included not among the acts indicated at Nürnberg but in a draft code of crimes against the peace and security of mankind.

110. VAN GLABBEKE (Belgium) (SR.235, p. 163): Among the crimes against peace, the International Law Commission had cited wars of aggression but not acts of aggression. That could be explained in the case of the Nürnberg Tribunal which did not want to take into consideration acts committed in Austria or Czechoslovakia. The Belgian delegation considered, however, that the question of acts of aggression should be reviewed when offences against the peace and security of mankind were codified. The idea embodied in the expression "waging of a war of aggression" was not defined. It had been said that it did not refer to each man who wore a uniform but merely to superior officers and high officials; but at what precise point was an officer considered a superior and an official a high official? These terms should be defined, and definition was particularly important in a field where capital punishment might be involved.

111. CHAUMONT (France) (SR.236, p. 170): With regard to offences against peace, many texts could be quoted to prove that a war of aggression had for a long time been regarded as an international crime.... Thus, the concept adopted at Nürnberg had not been a new one; it was merely a new and more effective application of that concept.... He recalled that the French Government considered a war of aggression as an international crime; the contrary statements made by Mr. Gros at the London Conference, as recalled by the Greek representative, did not alter the French Government's position.

112. LACHS (Poland) (SR.236, p. 177): The waging of a war of aggression had indeed constituted a crime at the time when Germany had provoked the Second World War. The authors of the Nürnberg charter had been convinced of that fact, since they had based their conclusions not only on the Pact of Paris, but on many other documents in which it was clearly stated

that a war of aggression constituted a crime under international law. The judgment itself was also explicit in that connexion, for it specified that the principles applied by the Tribunal constituted the expression of the international law in force at the time of their application.... The concept of aggression had been reaffirmed at Nürnberg, and the question was not altered by the fact that a distinction between just and unjust wars had been introduced. That distinction could give rise to no confusion unless a deliberate attempt was made to create such confusion. The struggle for liberation from foreign domination could never be defined as aggression.

113. MOROZOV (Union of Soviet Socialist Republics) (SR.234, p. 157): Referring to the Netherlands representative's quotation from the speech made at the 380th meeting of the First Committee on 28 October 1950 by the Minister for Foreign Affairs of the Soviet Union, he said that the Netherlands representative was distorting the Soviet position in alleging that the Soviet Government recognized a distinction not between aggressive and defensive wars, but only between just and unjust wars. That distinction was the result of distorting what had been said by Lenin and quoted by Mr. Vyshinsky, USSR Foreign Minister at the 380th meeting of the First Committee. From the actual description given by the great Lenin and the great Stalin of just, non-aggressive wars, it followed that they were not aggressive wars but wars of liberation, whereas unjust wars were always wars of aggression.

(g) Views concerning principle VI (b)

114. RÖLING (Netherlands) (SR.232, p. 138): Sub-paragraph (b) of principle VI mentioned war crimes. Once again, he believed that the enumeration of examples as given in the charter was no longer a principle but a detail which should not be included in a formal declaration of the principles of Nürnberg.

115. VAN GLABBEKE (Belgium) (SR.235, p. 163): The report referred to "killing of hostages" among war crimes. Without going as far as the representative of Syria who wished the taking of hostages to be considered as a crime, and in support of this view had cited the text of the Red Cross Convention, Mr. van Glabbeke thought that the case of ill-treatment of hostages should have been considered. He therefore made full reservation regarding that enumeration, which should be completed at the time of the drafting of the code of offences against the peace and security of mankind.

(h) Views concerning principle VI (c)

116. AMADO (Brazil) (SR.231, p. 133): He wished, however, to draw the Committee's attention to paragraph 120 of the report, which dealt with crimes against humanity. Those acts constituted international crimes only when committed in connexion with other crimes falling within the category of crimes against peace and war crimes.

117. RÖLING (Netherlands) (SR.232, p. 138): Sub-paragraph (c) mentioned the crimes against humanity. The Commission had enumerated the acts which came under that heading but had omitted to bring out the important features of those crimes, that they could have been committed even before the war, although that was mentioned in paragraph 123 of the report. There again he believed that such an enumeration of details should not be included in the formulation of the principles of Nürnberg.

118. CHAUMONT (France) (SR.232, p. 141): In principle VI, the Commission had retained the idea embodied in the Nürnberg charter that crimes against humanity were linked with crimes against peace and war crimes. Furthermore it was clear from the report by Mr. Spiropoulos on the draft code of offences against the peace and security of mankind (A/CN.4/25, p. 28) that he had been reluctant to include in the draft code crimes against humanity as they had been defined in the Nürnberg charter and thought it might be preferable to include genocide only. The whole difficulty had arisen because the International Law Commission had misinterpreted its terms of reference and had retained the actual wording of the Nürnberg charter instead of formulating the wider principles of international law underlying that charter. Indeed, in paragraph 123 of its report, the Commission recognized the fact that crimes against humanity need not necessarily be committed in time of war, but that conclusion did not tally with the wording it had adopted in paragraph (c) of principle VI. The Commission had failed to recognize that its terms of reference were broader than those of the Nürnberg Tribunal which had been set up solely to try and to punish the major war criminals of the European Axis countries.... (p. 142) At the 231st meeting Mr. Amado had argued that if crimes against humanity were not necessarily connected with war, they would then become simply offences under the ordinary law. The French delegation was convinced, however, that such crimes had certain definite characteristics which distinguished them from crimes under the ordinary law. In the first place, the whole point of establishing the nature of international crimes was that they could only be punished at the international level. The peculiar characteristic of crimes against humanity was that they were in general committed by governments, or with the complicity or tolerance of governments, so that the only possible form of punishment was on the international level. Secondly, the concept of the crime against humanity had been incorporated in the Convention on Genocide which had now come into force and was thus a concrete part of international law. It was clear from article I of that convention that genocide, an act which all representatives would surely recognize as coming within the general concept of crime against humanity, was considered a crime under international law, whether it was committed in time of peace or in time of war. It was therefore contrary to existing international law to lay down as a principle that crimes against humanity were inseparably linked with crimes against peace or war crimes.

119. BARTOS (Yugoslavia) (SR.234, p. 151): The Commission had therefore respected the terms of its mandate and had not included among war crimes and crimes against humanity the crimes defined by the Geneva Conventions of 1949 concerning the protection of war victims. Consequently, while it supported the text proposed by the International Law Commission, the Yugoslav delegation considered that the Commission's enumeration was incomplete and that it should be supplemented in future international instruments so as to indict all war crimes and crimes against humanity defined in any international convention that would enter into force upon the outbreak of a war in the course of which such crimes might be committed.

120. SPIROPOULOS (Greece) (SR.234, p. 153): Outside the crimes against humanity defined by the Nürnberg charter, no concept of crimes against humanity existed under international law. . . . He was unacquainted with any notion of crimes against humanity independent of the notion of crimes against peace, and of war crimes, in accordance with the French representative's theory. . . . He believed that crimes against humanity and the crime of genocide were two quite different things. Doubtless, the crime of genocide might constitute a crime against humanity, but only if it was perpetrated against a group of human beings either in wartime or in connexion with crimes against peace or war crimes. That was why the conception embodied in the operative part of the draft resolution submitted by France (A/C.6/L.141), which declared the notion of crimes against humanity to be "distinct from the notion of crimes against peace and the notion of war crimes", was in his view erroneous.

121. ABDON (Iran) (SR.235, p. 160): He did not agree with the French representative's view that the International Law Commission ought to have extracted from the charter and the judgment a general definition of crimes against humanity. There were no crimes against humanity generally under international law; crimes against humanity existed only under the Nürnberg charter. . . . The Commission had omitted the phrase "before or during the war" contained in article 6 of the charter because it referred to a particular war, the war of 1939. It would have been preferable in formulating the Nürnberg principles to make a general reference to all wars, by replacing the words "the war" by "a war". The total omission of those words might lead to confusion in connexion with the definition of crimes against humanity.

122. CHAUMONT (France) (SR.236, p. 170): As regards crimes against humanity, there was no denying that they were regarded by all civilized nations as common crimes. If they were committed by responsible government officials, their punishment must be effected on the international plane and could not be left to the national law of the country. . . . The Greek representative, whose words had perhaps outrun his thoughts, had stated that there were no crimes against humanity under international law. He had gone further than the judges at Nürnberg who had not denied the inter-

national character of crimes against humanity, but had refused to take cognizance of the crimes against humanity committed by the Nazi leaders before 1939 solely because of the relation between those crimes and the 1939-1945 war had not been established, and the Tribunal was competent only to take cognizance of crimes against humanity if they had been committed as a result of crimes against peace or war crimes or in conjunction with such crimes.

123. LOBO (Pakistan) (SR.236, p. 174): While he was willing to accept the Tribunal's statement that violations of the laws and customs of war constituted crimes under international law at the time of the creation of the Tribunal, he doubted whether the same could be said in 1939 of crimes against humanity. Though it could be admitted that crimes against humanity perpetrated against the populations of other countries constituted violations of existing international law, the question whether crimes against humanity committed against nationals came exclusively under national jurisdiction or international law was one over which the claims of national and international jurisdiction conflicted.

124. ROBINSON (Israel) (SR.236, p. 175): The timidity of the International Law Commission was most clearly demonstrated by its refusal to recognize the independent character of crimes against humanity and its insistence that those crimes could only be committed as a result of, or in connexion with crimes against peace and war crimes. . . . There was no justification for omitting the phrase "before or during a war" in principle VI (c), particularly in view of the comment in paragraph 123. It was unfortunate that principle VI (c) did not emphasize the fact that certain acts might be crimes against humanity even if they were committed against fellow-nationals, although that idea was stressed in the comment in paragraph 124 of the report.

(i) *Views concerning principle VII*

125. AMADO (Brazil) (SR.231, p. 132): The Commission had considered it preferable to make a separate formulation of the principle proclaiming the responsibility of an accomplice in order to bring into clearer focus principle I which stated the general rule of individual responsibility for international crimes.

126. RÖLING (Netherlands) (SR.232, p. 138): The Commission's commentary on principle VII stated, however, that the only provision in the charter regarding responsibility for complicity was contained in the last paragraph of article 6 which laid down that "leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such a plan". That was not a complicity rule but a rule about the responsibility of conspirators, and a very bad one at that. It tried to establish the responsibility for acts which were unknown to the defendant—a type of responsibility which was decisively

rejected, at least in continental law. It was a typical conspiracy rule severely criticized in Anglo-American jurisprudence. It had nothing to do, however, with the general theory of complicity and participation, which was partly covered by the provision of the charter of Nürnberg about planning and preparation. Neither charter nor judgment recognized any other form of participation or complicity with regard to crimes against peace. The Tribunal had clearly recognized that the rule applied only to conspiracy. That there was confusion was confirmed by the conclusion in paragraph 126 of the report that the statement contained in the judgment to the effect that the provision had been designed to "establish the responsibility of persons participating in a common plan" to prepare, initiate and wage aggressive war "would seem to imply that the complicity rule did not apply to crimes perpetrated by individual action". The Tribunal had not invoked that rule when acknowledging the criminal character of participation and complicity in war crimes and crimes against humanity committed by individuals.

127. RÖLING (Netherlands) (SR.236, p. 172): An even more serious mistake had been committed in the formulation of principle VII which recognized that the ordinary rules of complicity were valid with regard to crimes against peace. ... That principle was not recognized in the charter or in the judgment of Nürnberg. The judgment took care to limit the scope of crimes against peace. ... According to the formulation of principle VII as it stood, not only industrialists, but all workers in munitions factories, not only the chief of staff but also all soldiers in the field from generals to privates, would be considered as criminals. That was a flagrant violation of the rules laid down in the charter and applied by the Tribunal.

128. BARTOS (Yugoslavia) (SR.234, p. 151): With regard to principle VII, the Yugoslav delegation did not agree with certain delegations that it was drafted in too general terms and that if it were interpreted too liberally all combatants who had participated as a duty in any war of aggression might be labelled war criminals.

129. VAN GLABBEKE (Belgium) (SR.235, p. 163): In principle VII, the International Law Commission had retained only the word "complicity". He accepted that wording only if the idea of complicity included co-authors, instigators and provocators, although that constituted an extension of the idea of complicity which it was not for the International Law Commission to decide. He approved the idea of making accomplices in the three categories of crimes enumerated in principle VI responsible, although he thought that in thus extending the idea, the International Law Commission had not remained strictly within the limits of its task.

130. TIRADO (Mexico) (SR.237, p. 183): ... Principle I was based on the first paragraph of article 6 of the charter of the Tribunal, which dealt with the responsibility of the individual under international

law. Since that paragraph did not draw any distinction between the criminal and his accomplices, he could see no reason why the International Law Commission should have devoted a separate principle to the responsibility of the accomplices. In the criminal law of most countries, the responsibility of accomplices and of the actual criminal were both governed by the same provisions.

131. SPIROPOULUS (Greece) (SR.238, p. 190): ... The representative of the Netherlands had expressed the view that the Commission had given too wide an interpretation to the notion of complicity. Subsequently, however, the representative of Israel had contended that the Commission's interpretation was quite acceptable, since the judge in each instance would have wide discretion as to how the principle should be applied. The other members of the Committee had not mentioned that point and it might therefore be assumed that they found the Commission's text acceptable.

Draft text to be submitted to governments in application of article 16 (g) and (h) of the statute of the International Law Commission

Draft code of offences against the peace and security of mankind

I. INTRODUCTION

1. By resolution 177 (II), paragraph (b), the General Assembly requested the International Law 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.

2. At its first session the Commission appointed Mr. Jean Spiropoulos special Rapporteur on this subject and invited him to prepare a working paper for submission to the Commission at its second session. The Commission also decided that a questionnaire should be circulated to Governments inquiring what offences, apart from those defined in the charter and judgment of the Nürnberg Tribunal, should, in their view, be comprehended in the draft code.

3. At its second session, Mr. Spiropoulos presented his report (A/CN.4/25) to the Commission, which took it as a basis of discussion. The subject was considered by the Commission at its 54th to 62nd meetings. The Commission also took into consideration the replies received from Governments (A/CN.4/19, part II, A/CN.4/19/Add.1 and A/CN.4/19/Add.2) to its questionnaire.

In the light of the deliberations of the Commission, a Drafting Sub-Committee, composed of Messrs. Alfaro, Hudson and Spiropoulos, prepared a provisional text (A/CN.4/R.6) which was referred by the Commission without discussion to the special Rapporteur, Mr. Spiropoulos, who was requested to continue the work on the subject and to submit a new report to the Commission at its third session.

4. At its third session, Mr. Spiropoulos presented a new report (A/CN.4/44) to the Commission which, taking it as a basis of discussion, adopted the present draft of a code of offences against the peace and security of mankind.

5. The Commission, in submitting the present text to the Governments in conformity with article 16 (g) and (h) of its statute, wishes to present the following observations as to some general questions the Commission had to solve in drafting the present draft code

(a) The Commission first considered the meaning of the term "offences against the peace and security of mankind", contained in resolution 177 (II). The view of the Commission was that the meaning of this term should be limited to offences which contain a political element and which endanger or disturb the maintenance of international peace and security, and that the draft code, therefore, should not deal with questions concerning conflicts of legislation and jurisdiction to international criminal matters. Nor should such matters as piracy, traffic in dangerous drugs, traffic in women and children, slavery, counterfeiting currency, damage to submarine cables, etc., be considered as falling within the scope of the draft code.

(b) The Commission thereafter discussed the meaning of the phrase "indicating clearly the place to be accorded to the Nürnberg principles." The sense of the Commission was:

(i) That the above phrase should not be interpreted as meaning that the Nürnberg principles would have to be inserted in their entirety in the draft code. The Commission felt that the phrase did not preclude it from suggesting modification or development of these principles for the purpose of their incorporation in the draft code.

(ii) That the Commission was not bound to indicate the exact extensions to which the incorporation of the various Nürnberg principles in the draft code had taken place. Such an attempt would have met with considerable difficulties since there exist divergencies of opinions as to the scope of some of these principles. Only a more or less general reference to the correspondent Nürnberg principles has been considered possible.

(c) On the question of the subjects of criminal responsibility under the draft code, the Commission decided:

(i) To deal only with the criminal responsibility of *individuals*, following the example of the Nürnberg charter, and

(ii) Not to follow the Rapporteur who had defined the offences against the peace and security of mankind in a general way so that these crimes could be committed by any individual whether the said individual acted as authority of a State or as a private person. The Commission established a distinction in the sense that some crimes, according to their definition, could only be committed by the authorities of the State while other crimes could be committed by any individual.

(d) Considerable thought was given by the Commission to the question of the implementation of the code. It was felt that only the implementation by an international judicial organ could give satisfactory results. The Commission was of the opinion that pending the establishment of such an international criminal court, the implementation by national courts would practically be the only possible procedure.

6. Finally it may be noted that the Commission considered a communication from the United Nations Educational, Scientific and Cultural Organization in which it was recommended that, with a view to the protection of historical monuments and documents and works of art in case of armed conflict, the destruction of such cultural objects should be defined as a crime punishable under international law. The Commission took note of the recommendation, and agreed that such destruction comes within the general concept of war crimes.

II. TEXT OF THE DRAFT CODE

Article 1

The following acts are offences against the peace and security of mankind. They are crimes under international law for which the responsible individuals shall be punishable.

1. *The employment or threat of employment, by the authorities of a State, of armed force against another State for any purpose other than national or collective self-defence or execution of a decision by a competent organ of the United Nations.*

(a) The text proposed by the Rapporteur reads as follows: "The use of armed force in violation of international law and, in particular, the waging of aggressive war".

(b) The above text corresponds to article 6 (a) of the charter of the International Military Tribunal. But while the latter has in view only "a war of aggression or a war in violation of international treaties, agreements or assurances", the present text, going further, characterizes as crimes under international law not only any employment of the armed forces of a State against another State but also the threat of employment of these armed forces.

(c) The threat or use of force is prohibited by Article 2, paragraph 4, of the Charter of the United Nations which binds the Members of the Organization to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations".

The same prohibition is contained in some other international instruments and in the draft declaration on rights and duties of States prepared by the International Law Commission.

(d) Crime No. 1, by its nature, can only be committed by the authorities of a State. A penal responsibility of private individuals may however result through application of crime No. 11 of the draft code.

2. *The planning of or preparation for the employment, by the authorities of a State, of armed force against another State for any purpose other than national or collective self-defence or execution of a decision by a competent organ of the United Nations.*

See note (b) under the preceding crime.

3. *The incursion into the territory of a State by armed bands coming from the territory of another State and acting for a political purpose.*

(a) The text proposed by the Rapporteur reads as follows: "The invasion by armed gangs of the territory of another State".

(b) The members of the armed bands would be guilty of the above crime. A penal responsibility of the authorities of a State under international law may, however, result through application of crime No. 11.

While in the case of crime No. 1 the simple soldier would not be criminally responsible under international law, in case of invasion by armed bands of the territory of another State, any member of the band would be responsible. This difference of treatment is justified because, in the case of state action, it would go beyond any logic to consider a mere soldier as criminally responsible for an action which has been decided and directed by the authorities of a State while in the case of armed bands the participation in them will result from the free decision of the individual members of the band.

4. *The undertaking, encouragement, or toleration by the authorities of a State of organized activities calculated to foment civil strife in the territory of another State.*

(a) The text proposed by the Rapporteur reads as follows: "The fomenting, by whatever means, of civil strife in another State".

(b) The fomenting of civil strife is expressly prohibited by article 4 of the draft declaration on rights and duties of States prepared by the International Law Commission.

(c) The above crime can be committed by the authorities of a State only. A penal responsibility of private individuals under international law may, however, result through application of crime No. 11 of the draft code.

5. *The undertaking, encouragement or toleration by the authorities of a State of organized activities intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public in another State.*

(a) The text proposed by the Rapporteur reads as follows: "Organized terrorist activities carried out in another State".

(b) The encouragement of terrorist activities is prohibited by article 1 of the Convention for the Prevention and Punishment of Terrorism of 16 November 1937.

(c) Terrorist activities of single persons without any organized connexion between them do not fall within the scope of crime No. 5.

(d) The above crime can be committed by the authorities of a State only. A penal responsibility of private individuals under international law may however result through application of crime No. 11 of the draft code.

6. *Acts by the authorities of a State in violation of international treaty obligations designed to ensure international peace and security, including but not limited to treaty obligations concerning:*

(i) *The character or strength or location of armed forces or armaments;*

(ii) *The training for service in armed forces;*

(iii) *The maintenance of fortifications.*

(a) The text proposed by the Rapporteur reads as follows: "The violation of military clauses of international treaties defining the war potential of a State, namely clauses concerning: (i) the strength of land, sea and air forces; (ii) armaments, munitions and war material in general; (iii) presence of land, sea and air forces, armaments, munitions and war material; (iv) recruiting and military training; (v) fortifications."

(b) The Commission thought it wise to include in the code the case of violation of treaty obligations designed to ensure international peace and security. It may be recalled that the League of Nations Committee on Arbitration (memorandum on articles 10, 11 and 16 of the Covenant) considered the failure to observe conventional restrictions as those mentioned in the definition of crime No. 6 as raising, under many circumstances, a presumption of aggression.

(c) The above crime can be committed by the authorities of a State only. A penal responsibility of private individuals under international law may however result through application of crime No. 11 of the draft code.

7. *Acts by authorities of a State resulting in or directed toward the forcible annexation of territory belonging to another State, or of territory under an international regime.*

(a) The text proposed by the Rapporteur reads as follows: "The annexation of territories in violation of international law".

(b) Forcible annexation of territories is prohibited by various international instruments.

(c) The above crime can be committed by the authorities of a State only. A penal responsibility of private individuals under international law may, however, result through application of crime No. 11 of the draft code.

8. *Acts committed by the authorities of a State or by private individuals with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such, including:*

(i) *Killing members of the group;*

(ii) *Causing serious bodily or mental harm to members of the group;*

(iii) *Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*

(iv) *Imposing measures intended to prevent births within the group;*

(v) *Forcibly transferring children of the group to another group.*

(a) The text proposed by the Rapporteur is identical with the corresponding text of the Convention on the prevention and punishment of the crime of genocide.

(b) The text adopted by the Commission is, in substance, identical with the crime of genocide as defined in the Convention on the prevention and punishment of the crime of genocide.

(c) The above crime can be committed either by the authorities of a State or by private individuals.

9. *Inhuman acts committed by the authorities of a State or by private individuals against any civilian population, such as mass murder, or extermination or enslavement, or deportation, or persecutions on political, racial or religious grounds, when such acts committed in execution of or in connexion with the offences defined in Nos. 1, 2, 5, 7 and 10.*

(a) The text proposed by the Rapporteur reads as follows: "The commission of any of the following acts in as far as they are

not covered by the foregoing paragraph: Murder, extermination, enslavement, deportation, and other inhuman acts done against a civilian population, or persecutions on political, racial or religious grounds 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 as defined by the Charter of the International Military Tribunal."

(b) The above crime corresponds to the "Crime against humanity" of the Nürnberg charter.

While, according to the Nürnberg charter, the above-cited inhuman acts constitute a crime under international law *only* if they are committed in execution of or in connexion with any crime against peace or war crime as defined by the charter, the text adopted by the International Law Commission, going further, characterizes crimes under international law inhuman acts when these acts are committed in execution of or in connexion with any of the crimes defined in Nos. 1, 2, 5, 7 and 10.

(c) The above crime can be committed either by the authorities of a State or by private individuals.

10. *Acts committed in violation of the laws on customs of war.*

(a) The text proposed by the Rapporteur reads as follows: "Violation of the laws or customs of war".

(b) The above crime is provided for by article 6 (b) of the charter of the International Military Tribunal. In reality it does not affect the peace and security of mankind. Nevertheless, it figures among the crimes enumerated in the Nürnberg charter. It is only on account of this connexion that the International Law Commission decided to include it in the draft code.

(c) The Commission faced two problems in connexion with the definition of war crimes. Firstly, it had to decide whether *every* violation of the laws or customs of war were to be considered as a crime under the code or whether only acts of a certain gravity should be characterized as such. The Commission decided in favour of the first conception.

The second problem faced by the Commission was whether the code should enumerate all war crimes *exhaustively* or whether a general definition was to be preferred. The Commission considered that only the second was practically possible.

11. *Acts which constitute:*

(a) *Conspiracy to commit any of the offences defined in Nos. 1-10.*

(b) *Direct incitement to commit any of the offences defined in Nos. 1-10.*

(c) *Attempts to commit any of the offences defined in Nos. 1-10;*

(d) *Complicity in the commission of any of the offences defined in Nos. 1-10.*

(a) The text proposed by the Rapporteur reads as follows:

(i) Conspiracy to commit any of the acts enumerated under crimes No. 1-9 (of the draft code⁴ submitted by the Rapporteur).

(ii) Direct and public incitement to commit any of the acts under crimes No. 1-9.

(iii) Preparatory acts to commit any of the acts under crimes No. 1-9.

(iv) Attempt to commit any of the acts under crimes No. 1-9.

(v) Complicity in any of the acts under crimes No. 1-9.

(b) The notion of conspiracy is found in article 6, paragraph (a), of the charter of the International Military Tribunal and the notion of complicity in the last paragraph of the same article. The notion of conspiracy in the charter is limited to the "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances", while the text proposed by the International Law Commission provides for the application of the above notion to all offences against the peace and security of mankind.

The notions of incitement and of attempt are found in the Genocide Convention as well as in several municipal enactments on war crimes.

⁴ See A/CN.4/25, Appendix, basis of discussion No. 1.

Article II

The fact that a person charged with a crime defined in this code acted under the orders of a government or a superior may be taken into consideration either as a defence or in mitigation of punishment if justice so requires.

(a) The text proposed by the Rapporteur reads as follows: "The fact that a person acted under command of the law or pursuant to superior orders may be taken into consideration either as a defence or in mitigation of punishment if justice so requires".

(b) The above text corresponds to article 8 of the charter of the International Military Tribunal.

Article III

Pending the establishment of a competent international criminal court, the States adopting this Code undertake to enact the necessary legislation for the trial and punishment of persons accused of committing any of the crimes under international law as defined in the Code.

(a) The text proposed by the Rapporteur reads as follows: "The parties to the Code undertake to enact the necessary legislation giving effect to the provision of the present code, and, in particular, to provide effective penalties for persons guilty of any of the acts declared punishable by the Code.

"The parties to the Code undertake to try by a competent tribunal persons having committed on their territory any of the acts declared punishable by the present Code.

"The foregoing provision does not affect the penal jurisdiction possessed by States under their municipal law."

(b) The above system of implementation of the code has been taken from the Genocide Convention. The International Law Commission is aware that the punishment of perpetrators of crimes under the code by domestic courts is not the ideal solution, yet it considered that, in the absence of an international judicial organ, the solution proposed above is, for the time being, practically, the only possible one.

Article IV

Crimes defined in this Code shall not be considered as political crimes for the purpose of extradition.

The States adopting the Code undertake to grant extradition in accordance with their laws and treaties in force.

(a) The text proposed by the Rapporteur reads as follows: "The acts declared punishable by the present code shall not be considered political crimes for the purpose of extradition.

"The parties to the Code pledge themselves to grant the extradition of the perpetrators of crimes under this Code in accordance with their laws and treaties in force."

(b) The above text is found, *mutatis mutandis*, in the Genocide Convention.

Article V

Disputes between the States adopting this Code relating to the interpretation or application of the provisions of the Code may be brought before the International Court of Justice by an application of any party to the dispute.

The text proposed by the Rapporteur reads as follows: "The parties to the Code accept the jurisdiction of the International Court of Justice in disputes between them relating to:

"(i) The interpretation, application or fulfilment of the present Code;

"(ii) The responsibility of a State under international law for any of the acts declared punishable under the present code.

"A dispute may be brought before the Court at the request of any one of the parties to the Code."

CHAPTER II (ANNEX)

THE POSSIBILITY AND DESIRABILITY OF A DEFINITION OF AGGRESSION

(General Assembly resolution 378 B (V) of 17 November 1950 : Duties of States in the event of the outbreak of hostilities)

A. Introduction

132. At the 385th meeting of the First Committee of the General Assembly of the United Nations in 1950, in connexion with item 72 ("Duties of States in the event of the outbreak of hostilities"), included on the agenda at the request of the Government of Yugoslavia (A/1399), the representative of the USSR presented a resolution the preamble of which expressed the necessity of giving an accurate definition of aggression.

133. The proposal submitted by the Delegation of the USSR reads as follows:

"The General Assembly,

"Considering it necessary, in the interests of general security and to facilitate agreement on the maximum reductions of armaments, to define the concept of aggression as accurately as possible, so as to forestall any pretext which might be used to justify it.

"Recognizing that all States have equal rights to independence, security and the defence of their territory:

"Inspired by the desire, in the interests of general peace, to guarantee all nations the right freely to develop by such means as are appropriate to them and at the rate which they consider to be necessary, and for that purpose to provide the fullest possible protection for their security, their independence and the integrity of their territory, and also for their right to defend themselves against aggression or invasion from without, but only within the limits of their own countries, and

"Considering it necessary to formulate essential directives for such international organs as may be called upon to determine which party is guilty of attack.

"Declares :

"1. That in an international conflict that State shall be declared the attacker which first commits one of the following acts:

"(a) Declaration of war against another State;

"(b) Invasion by its armed forces, even without a declaration of war, of the territory of another State;

"(c) Bombardment by its land, sea or air forces of the territory of another State or the carrying out of a deliberate attack on the ships or aircraft of the latter;

"(d) The landing or leading of its land, sea or air forces inside the boundaries of another State without the permission of the Government of the latter, or the violation of the conditions of such permission, particularly as regards the length of

their stay or the extent of the area in which they may stay;

"(e) Naval blockade of the coasts or parts of another State;

"2. *Attacks* such as those referred to in paragraph I may not be justified by any arguments of a political, strategic or economic nature or by the desire to exploit natural riches in the territory of the State attacked or to derive any other kind of advantages or privileges, or by reference to the amount of capital invested in the State attacked or to any other particular interests in its territory, or by the affirmation that the State attacked lacks the distinguishing marks of statehood:

"In particular, the following may not be used as justifications for attack:

"A. The internal position of any State as, for example:

"(a) The backwardness of any nation politically, economically or culturally;

"(b) Alleged shortcomings of its administration;

"(c) Any danger which may threaten the life or property of aliens;

"(d) Any revolutionary or counter-revolutionary movement, civil war, disorders or strikes;

"(e) The establishment or maintenance in any State of any political, economic or social system;

"B. Any acts, legislation or orders of any State, as for example:

"(a) The violation of international treaties;

"(b) The violation of rights and interests in the sphere of trade, concessions or any other kind of economic activity acquired by another State or its citizens;

"(c) The rupture of diplomatic or economic relations;

"(d) Measures in connexion with an economic or financial boycott;

"(e) Repudiation of debts;

"(f) Prohibition or restriction of immigration or modification of the status of foreigners;

"(g) The violation of privileges granted to the official representatives of another State;

"(h) Refusal to allow the passage of armed forces proceeding to the territory of a third State;

"(i) Measures of a religious or anti-religious nature;

"(j) Frontier incidents.

"3. In the event of the mobilization or concentration by another State of considerable armed forces near its frontier, the State which is threatened by such action, shall have the right of recourse to diplomatic or other means of securing a peaceful settlement of international disputes. It may also in the meantime adapt requisite measures of a military nature similar to those described above, without, however, crossing the frontier."

134. Mr. El-Khoury, the representative of Syria, proposed that the International Law Commission should be requested to include the definition of aggression in its studies for formulating a criminal code for international crimes and to submit a report on the subject to the General Assembly, at the 390th meeting of the First Committee, and at his suggestion a joint draft resolution was presented by Bolivia and Syria for the consideration of the matter by the International Law Commission. This draft resolution which was a result of consultation among the representatives of Brazil, Ecuador, Bolivia, Syria and the United States reads as follows:

"*The General Assembly,*

"*Considering* that the question raised by the Union of Soviet Socialist Republics proposal (A/C.1/608) can better be examined in conjunction with matters under consideration by the International Law Commission, a subsidiary organ of the United Nations.

"*Decides* to refer the proposal of the Union of Soviet Socialist Republics and all the records of the First Committee dealing with the question to the International Law Commission, so that the latter may take them into consideration in formulating its conclusions as soon as possible."

135. The above proposal was adopted by the General Assembly by 49 votes in favour, 5 against and one abstention.

B. Historical survey

I. THE TREATY OF MUTUAL ASSISTANCE

136. The problem of the definition of aggression was considered systematically for the first time in connexion with the various attempts made by the League of Nations⁵ to close the "fissure" of the Covenant which, under certain conditions, made the recourse to war "legally" possible.

137. In this connexion mention should be made of the *Treaty of Mutual Assistance* of 1923 which, though not containing a positive definition of aggression, stipulates negatively that "a war shall not be considered a war of aggression if waged by a State which is party to a dispute and has accepted the unanimous recommendation of the Council, the verdict of the Permanent Court of International Justice, or an arbitral award against a Contracting Party, which has not accepted it, provided, however, that the first State does not intend to violate the political independence or the territorial integrity of the High Contracting Party".

II. THE LEAGUE OF NATIONS' PERMANENT ADVISORY COMMISSION

138. The problem of the notion of aggression became the subject of a special study by the League of Nations'

⁵ For a synthetic historical survey of the efforts made by the League of Nations to define "aggression" see Clyde Eagleton, "The attempt to define aggression", in *International Conciliation*, 1930, No. 264.

Permanent Advisory Commission. The *Opinion of the Permanent Advisory Commission regarding Assembly resolutions XIV and XV* is of interest. It reads as follows:

"The Belgian, Brazilian, French, and Swedish delegations express the following opinions in regard to:

...

"(d) *How can the mutual assistance provided for by a treaty of guarantee be automatically brought into play?*

"It is not enough merely to repeat the familiar formula, unprovoked aggression; for under the condition of modern warfare it would seem impossible to decide, even in theory, what constitutes a case of aggression.

"Thus:

"Aggression should be defined in the treaty;

"The signs should be visible, so that the treaty may be applicable;

"Lastly, the signs should be universally recognized, in order to make the operation of the treaty certain.

"1. Definition of Aggression

"Hitherto, aggression could be defined as mobilization or the violation of a frontier. This double test has lost its value.

"Mobilization, which consisted, until quite recently, of a few comparatively simple operations (calling up of reserves, purchases or requisitions and establishment of war industries, *after the calling up of the men*), has become infinitely more complicated and more difficult both to discover at its origin and to follow in its development. In future, mobilisation will apply not merely to the army but to the whole country before the outbreak of hostilities (collection of stocks of raw materials and munitions of war, industrial mobilization, establishment or increased output of industries). All these measures which give evidence of an *intention* to go to war may lead to discussions and conflicting interpretations, thus securing *decisive* advantages to the aggressor unless action be taken.

"The violation of a frontier by 'armed forces' will not necessarily be, in future, such an obvious act of violence as it has hitherto been. The expression 'armed forces' has now become somewhat indefinite, as certain States possess police forces and irregular troops which may or may not be legally constituted, but which have a definite military value. Frontiers themselves are not easy to define, since the treaties of 1919-1920 have created neutral zones, since political and military frontiers no longer necessarily coincide, and since air forces take no account of either.

"Moreover, the passage of the frontier by the troops of another country does not always mean that the latter country is the aggressor. Particularly in the case of small States, the object of such action may be to establish an initial position which shall be as advantageous as possible for the defending

country, and to do so before the adversary has had time to mass his superior forces. A military offensive of as rapid a character as possible may therefore be a means, and perhaps the only means, whereby the weaker party can defend himself against the stronger. It is also conceivable that a small nation might be compelled to make use of its air forces in order to forestall the superior forces of the enemy and take what advantage was possible from such action.

"Finally, the hostilities between two naval Powers generally begin on sea by the capture of merchant vessels, or other acts of violence—very possibly on the high seas outside territorial waters. The same applies to air frontiers of States.

"These few considerations illustrate some of the difficulties inherent in any attempt to define the expression "cases of aggression" and raise doubt as to the possibility of accurately defining this expression *a priori* in a treaty, from the military point of view, especially as the question is often invested with a political character.

"2. Signs which Betoken an Impending Aggression

"But, even supposing that we have defined the circumstances which constitute aggression, the existence of a case of aggression *must be definitely established*. It may be taken that the signs would appear in the following order:

- "1. Organization on paper of industrial mobilization.
- "2. Actual organization of industrial mobilization.
- "3. Collection of stocks of raw materials.
- "4. Setting-on-foot of war industries.
- "5. Preparation for military mobilization.
- "6. Actual military mobilization.
- "7. Hostilities.

"Numbers 1 and 5 (and to some extent number 2), which are in all cases difficult to recognize, may, in those countries which are not subject under the Peace Treaties to any obligation to disarm, represent precautions which every Government is entitled to take.

"Number 3 may be justified by economic reasons, such as profiting by an advantageous market or collecting stocks in order to guard against the possible closing of certain channels of supply owing to strikes, etc.

"Number 4 (setting-on-foot of war industries) is the first which may be definitely taken as showing an intention to commit aggression; it will, however, be easy to conceal this measure for a long period in countries which are under no military supervision.

"When numbers 6 and 7 are known to have taken place, it is too late.

3. Universal Recognition of Impending Aggression

"In the absence of any indisputable test, Governments can only judge by an *impression* based upon the most various factors, such as:

- "The political attitude of the possible aggressor;
- "His propaganda;
- "The attitude of his Press and population;
- "His policy on the international market, etc.

"Now, the impression thus produced *will not be the same* on the nations which are directly threatened as upon the guarantor nations; thus, as every Government has its own individual standpoint, no simultaneous and universal agreement as to the imminence of an attack is possible.

"It will be seen, in short, that the first act of war will precede the outbreak of military hostilities by several months or even more, and that there is no reason to expect any unanimous agreement as to the signs which betoken the imminence of danger. There is therefore a risk that the mutual assistance would only come into action in reply to military mobilization or hostilities on the part of the aggressor. Such assistance, not being *preventive*, will always come *too late*, and will therefore only allow a slight reduction in the individual provision which must be made by each nation for the organization of its own defence.

"Despite these points, in which 'collective guarantees' are inferior to 'national guarantees' we must not abandon the former class, nor must we give up our attempts to strengthen them. They involve, however, important results as regards the latter class, and these results we must now enumerate..."⁶

III. THE LEAGUE OF NATIONS SPECIAL COMMITTEE OF THE TEMPORARY MIXED COMMISSION

139. Another document dealing with the question of the definition of aggression to be mentioned in this connexion is the commentary of the definition of a case of aggression drawn up by a Special Committee of the League of Nations Temporary Mixed Commission. This document reads as follows:

"1. It would be theoretically desirable to set down in writing, if it could be done, an exact definition of what constitutes an act of aggression. If such a definition could be drawn up, it would then merely remain for the Council to decide in each given case whether an act of aggression within the meaning of this definition had been committed.

"It appears, however, to be exceedingly difficult to draw up any such definition. In the words of the Permanent Advisory Commission, under the conditions of modern warfare, it would seem impossible to decide even in theory what constitutes an act of aggression.

"2. Hitherto, according to the opinion expressed by certain members of the Permanent Advisory Commission, in the report drawn up by that Commission, aggression could be defined as mobilization or the violation of a frontier. This double test has lost its value.

"It is further stated that:

"Mobilization, which consisted, until quite recently, of a few comparatively simple operations (calling up of reserves, purchases or requisitions and establishment of war industries, after the calling-up of the men), has become infinitely more complicated and more difficult both to discover as its origin and to follow in its development. In future, mobilization will apply not merely to the army but *to the whole country before the outbreak of hostilities* (collection of stocks of raw materials and munitions of war, industrial mobilization, establishment or increased output of industries). All these measures, which give evidence of an *intention* to go to war, may lead to discussions and to conflicting interpretations, thus securing *decisive* advantages to the aggressor unless action be taken'.

"3. Similarly, in the view of the Permanent Advisory Commission, the text of the violation of a frontier has also lost its value.

"The report states:

"The violation of a frontier by 'armed forces' will not necessarily be, in future such an obvious act of violence as it has hitherto been.

"...The passage of the frontier by the troops of another country does not always mean that the latter country is the aggressor. Particularly in the case of small States, the object of such action may be to establish an initial position which shall be as advantageous as possible for the defending country, and to do so before the adversary has had time to mass his superior forces. A military offensive of as rapid a character as possible may therefore be a means, and perhaps the only means, whereby the weaker party can defend itself against the stronger. It is also conceivable that a small nation might be compelled to make use of its air forces in order to forestall the superior forces of the enemy and take what advantage was possible from such action.

"Finally, the hostilities between two naval Powers generally begin on sea by the capture of merchant vessels or other acts of violence—very possibly on the high seas outside territorial waters. The same applies to air operations which may take place without any violation of the air frontiers of States.'

"Nevertheless it is still conceivable that in many cases the invasion of a territory constitutes an act of aggression and, in any case, it is important to determine which State had violated the frontier.

"If the troops of one Power invade the territory of another, this fact in itself constitutes a presumption that the first Power has committed a wrongful act of aggression.

⁶ League of Nations, *Records of the Assembly, Minutes of the Third Committee*, pp. 115-117.

"But, apart from the considerations already given, this is not entirely conclusive. When armies have been practically in contact on the frontier which divides their respective countries, it may be exceedingly difficult to obtain conclusive evidence as to which of them first crossed the frontier; and, once the frontier is crossed and hostilities have begun, it may not be possible to know from the geographical position of the troops alone which State was guilty.

"4. In order to avoid such a case arising, the Council might desire, in certain cases where such a course could be followed without disadvantage to either party, either before hostilities began or even after they had begun, to invite both parties to withdraw their troops a certain distance behind a given line. It might be that such a request could be made by the Council with the intimation that, if either party refused to accede to it, such refusal would be considered as an element in deciding which was the aggressor.

"5. There may, of course, be other cases in which some action of one of the parties will simplify the matter by proving it clearly to be the aggressor. If, for example, one Power carried out a large-scale attack upon the territory of the other, that would be conclusive. Similarly, a surprise attack by poison gas, executed from the air on the territory of the other party, would be decisive evidence.

"6. It may, however, be accepted that no satisfactory definition of what constitutes an act of aggression could be drawn up. But even supposing that such a definition were possible, there would still be difficulty in determining when an act of aggression within the meaning of the definition has actually taken place. In the view of the Permanent Advisory Commission, the signs of an intention of aggression would appear in the following order:

"(1) Organization on paper of industrial mobilization.

"(2) Actual organization of industrial mobilization.

"(3) Collection of stocks of raw materials.

"(4) Setting on foot of war industries.

"(5) Preparation for military mobilization.

"(6) Actual military mobilization.

"(7) Hostilities.

"Numbers (1) and (5) (and to some extent Number 2), which are in all cases difficult to recognize, may, in those countries which are not subject under the Peace Treaties to any obligation to disarm, represent precaution which every Government is entitled to take.

"Number (3) may be justified by economic reasons, such as profiting by advantageous markets or collecting stocks in order to guard against the possible closing of certain channels of supply owing to strikes, etc.

"Number (4) (setting on foot of war industries) is the first which may be definitely taken as showing an intention to commit aggression; it will, however,

be easy to conceal this measure for a long period in countries which are under no military supervision.

"When Numbers (6) and (7) are known to have taken place, it is too late.

"In the absence of any indisputable test, Governments can only judge by an impression based upon the most various factors, such as:

"The political attitude of the possible aggressor;

"His propaganda;

"The attitude of his press and population;

"His policy on the international market, etc.

"7. One of the conclusions which follows from the above contentions set forth in the report of the Permanent Advisory Commission is that, quite apart from the material sides of the aggressive intention, the real act of aggression may lie not so much in orders given to its troops by one of the parties as in the attitude which it adopts in the negotiations concerning the subjects of dispute. Indeed, it might be that the real aggression lies in the political policy pursued by one of the parties towards the other. For this reason it might perhaps appear to the Council that the most appropriate measures that could be taken would be to invite the two parties either to abstain from hostilities or to cease the hostilities they have begun, and to submit their whole dispute to the recommendation of the Council or the decision of the Permanent Court of International Justice, and to undertake to accept and execute whatever recommendation or decision either of these bodies might give. Such an invitation might again be accompanied by an intimation that the party which refused would be considered to be the aggressor.

"8. It is clear, therefore, that no simple definition of aggression can be drawn up, and that no simple test of when an act of aggression has actually taken place can be devised. It is therefore clearly necessary to leave the Council complete discretion in the matter, merely indicating that the various factors mentioned above may provide the elements of a just decision.

"These factors may be summarized as follows:

"(a) Actual industrial and economic mobilization carried out by a State either in its own territory or by persons or societies on foreign territory.

"(b) Secret military mobilization by the formation and employment of irregular troops or by a declaration of a state of danger of war which would serve as a pretext for commencing hostilities.

"(c) Air, chemical or naval attack carried out by one party against another.

"(d) The presence of the armed forces of one party in the territory of another.

"(e) Refusal of either of the parties to withdraw their armed forces behind a line or lines indicated by the Council.

"(f) A definitely aggressive policy by one of the parties towards the other, and the consequent refusal

of that party to submit the subject in dispute to the recommendation of the Council or to the decision of the Permanent Court of International Justice and to accept the recommendation or decision when given.

"9. In conclusion, it may be pointed out that in the case of a surprise attack it would be relatively easy to decide on the aggressor, but that in the general case, where aggression is preceded by a period of political tension and general mobilization, the determination of the aggressor and the moment at which aggression occurred would prove very difficult.

"But it must be remembered that in such a case the Council, under the provisions of the Covenant, will have been engaged in efforts to avoid war and may therefore probably be in a position to form an opinion as to which of the parties is really actuated by aggressive intentions."⁷

IV. THE GENEVA PROTOCOL

140. The Treaty of Mutual Assistance did not meet with the approval of Governments—the lack of an acceptable definition of aggression was considered the chief defect of this Treaty—and therefore the question of the definition of aggressive drew general attention to the drafting of the *Protocol for the Pacific Settlement of International Disputes* ("Geneva Protocol"). The provision of the Geneva Protocol of interest here, is contained in Article 10 of this instrument and reads as follows:

"Every State which resorts to war in violation of the undertakings contained in the Covenant or in the present Protocol is an aggressor. Violation of the rules laid down for a demilitarized zone shall be held equivalent to resort to war.

"In the event of hostilities having broken out, any State shall be presumed to be an aggressor, unless a decision of the Council, which must be taken unanimously, shall otherwise declare:

"1. It has refused to submit the dispute to the procedure of pacific settlement provided by Articles 13 and 15 of the Covenant as amplified by the present Protocol, or to comply with a judicial sentence or arbitral award or with a unanimous recommendation of the Council, or has disregarded a unanimous report of the Council, a judicial sentence or an arbitral award recognizing that the dispute between it and the other belligerent State arises out of a matter which by international law is solely within the domestic jurisdiction of the latter State; nevertheless, in the last case the State shall only be presumed to be an aggressor if it has not previously submitted the question to the Council or the Assembly in accordance with Article 11 of the Covenant.

"2. If it has violated provisional measures enjoined by the Council for the period while the pro-

ceedings are in progress as contemplated by Article 7 of the present Protocol.

"Apart from the cases dealt with in paragraphs 1 and 2 of the present Article, if the Council does not at once succeed in determining the aggressor, it shall be bound to enjoin upon the belligerents an armistice, and shall fix the terms, acting, if need be, by a two-thirds majority and shall supervise its execution.

"Any belligerent which has refused to accept the armistice or has violated its terms shall be deemed an aggressor.

"The Council shall call upon the signatory States to apply forthwith against the aggressor the sanctions provided. . . ."

141. As it appears on reading the above provision, its purpose is to set up, by means of certain presumptions, an automatic test for determining the existence of aggression, unless the Council, by an unanimous vote, refuted those presumptions.

V. THE YEARS 1925 TO 1932

142. The question of definition of aggression has played an important part in the discussions and drafts between the years 1925-1932. In this connexion special mention should be made of the work of the League of Nations' Committee on Arbitration and Security and in particular of the memorandum on Security Questions (Politis) as well as the memorandum on Articles 10, 11 and 16 of the Covenant (Rutgers).

VI. THE CONFERENCE OF DISARMAMENT OF 1932-1934

143. A definition of aggression adopted by several international instruments was submitted to the League of Nations' General Commission by N. Politis, Rapporteur of the Committee for Security Questions (Confer. D/C.G.108); it was based on a Russian proposal of 6 February 1932 (Confer. D/C.G.38) (it is the text of *this* Russian proposal which constitutes the new "definition of aggression" submitted by the Soviet Union delegation to the fifth session of the General Assembly and which is reproduced above). The text of the "Politis definition" is the following:

"Article 1

"The aggressor in an international conflict shall, subject to the agreements in force between the parties to the dispute, be considered to be that State which is the first to commit any of the following actions:

"(1) Declaration of war upon another State;

"(2) Invasion by its armed forces, with or without a declaration of war, of the territory of another State;

"(3) Attack by its land, naval, or air forces, with or without a declaration of war; on the territory, vessels, or aircraft of another State;

⁷ League of Nations, *Records of the Fourth Assembly, Minutes of the Third Committee*, pp. 183-185.

"(4) Naval blockade of the coasts or ports of another State;

"(5) Provision of support to armed bands formed in its territory which have invaded the territory of another State, or refusal, notwithstanding the request of the invaded State, to take in its own territory all the measures in its power to deprive those bands of all assistance or protection.

"Article 2

"No political, military, economic, or other considerations may serve as an excuse or justification for the aggression referred to in Article 1."

VII. THE TREATIES OF LONDON

144. The definition contained in the above-mentioned report of Politis to the Conference of Disarmament has been adopted by the so-called Treaties of London concluded in 1933 between the USSR and Afghanistan, Estonia, Latvia, Persia, Poland, Roumania and Turkey (3 July 1933), between the USSR and Czechoslovakia, Roumania, Turkey and Yugoslavia (4 July 1933) and between the USSR and Latvia (5 July 1933). All these treaties contain the "Politis" definition in their articles 2.

VIII. THE LONDON CONFERENCE OF 1945

145. After the Second World War, an attempt was made by the United States delegation at the London Conference of 1945 to have "aggression" defined. This delegation submitted to the Conference the following definition of aggression with a view to having a definition of this crime included into the Nürnberg charter:

"An aggressor for the purposes of this Article, is that State which is the first to commit any of the following actions:

- "1. Declaration of war upon another State;
- "2. Invasion by its armed forces, with or without a declaration of war, of the territory of another State;
- "3. Attack by its land, naval, or air forces, with or without a declaration of war, on the territory, vessels, or aircraft of another State;
- "4. Naval blockade of the coasts or ports of another State;
- "5. Provision of support to armed bands formed in its territory which have invaded the territory of another State, or refusal, notwithstanding the request of the invaded State, to take in its own territory, all the measures in its power to deprive those bands of all assistance or protection.

"No political, military, economic or other considerations shall serve as an excuse or justification for such actions; but exercise of the right of legitimate self-defence, that is to say, resistance to an act of

aggression, or action to assist a State which has been subjected to aggression, shall not constitute a war of aggression."

146. The United States delegation replaced the above text by a new text which did not contain the acts mentioned in paragraphs 4 and 5 of the old text. The United States proposal did not lead to any practical result.

IX. THE SAN FRANCISCO CONFERENCE

147. Some consideration was given to the problem of the definition of aggression at the San Francisco Conference in connexion with the discussion of several amendments and comments on the Dumbarton Oaks Proposals. Yet the Conference did not think it wise to comply with these proposals.

148. The report of the Rapporteur of Committee III/3 to Commission III on chapter VIII, section B, contains the following passage of interest here:

"C. Determination of acts of aggression

"A more protracted discussion developed in the Committee on the possible insertion in paragraph 2, section B, chapter VIII, of the *determination of acts of aggression*.

"Various amendments proposed on this subject recalled the definitions written into a number of treaties concluded before this war but did not claim to specify all cases of aggression. They proposed a list of eventualities in which intervention by the Council would be automatic. At the same time they would have left to the Council the power to determine the other cases in which it should likewise intervene.

"Although this proposition evoked considerable support, it nevertheless became clear to a majority of the Committee that a preliminary definition of aggression went beyond the possibilities of the Conference and the purpose of the Charter. The progress of the technique of modern warfare renders very difficult the definition of all cases of aggression. It may be noted that, the list of such cases being necessarily incomplete, the Council would have a tendency to consider of less importance the acts not mentioned therein; these omissions would encourage the aggressor to distort the definition or might delay action by the Council. Furthermore, in the other cases listed, automatic action by the Council might bring about a premature application of enforcement measures.

"The Committee therefore decided to adhere to the text drawn up at Dumbarton Oaks and to leave to the Council the entire decision as to what constitutes a threat to peace, a breach of the peace, or an act of aggression."⁸

⁸ Documents of the United Nations Conference on International Organization, San Francisco, 1945, vol. 12, p. 505.

C. Dogmatical part

I. THE DETERMINATION OF AGGRESSION UNDER EXISTING INTERNATIONAL LAW

149. Upon examining whether a definition of aggression can be achieved and, if so, whether such a definition is *desirable*, it appears necessary to begin with considering which applies in connexion with the determination of aggression in an international armed conflict.

150. It must be considered a fact that general international law does not contain any definition of "aggression". Nor does the Charter of the United Nations or any general treaty provide for such a definition. The same applied, in the past, to the Covenant of the League of Nations. Only a small number of treaties, entered into by a limited number of States—this applies to the Treaties of London—define the term "aggression". In the relations between the signatories of these treaties the concept of aggression as drawn up by these instruments constitutes the law.

151. On the other hand, it must also be considered a fact that, according to international practice, the determination of aggression either by governments or by international organs, has never been considered an *arbitrary* function of the latter. If we study the international practice to this effect, we are led to the conclusion that whenever governments are called upon to decide on the existence or non-existence of "aggression under international law" they base their judgment on criteria derived from the "natural", so to speak, notion of aggression, which, inherent in any mind, is based on "sentiment" (impression) and not on legal constructions. It is the same natural notion which, *mutatis mutandis*, constitutes the basis of the concept of aggression in domestic law.

152. If one wants to shape the above situation into a legal principle, one could formulate it as follows: In the absence of a positive definition of aggression provided for by an international instrument and applicable to the concrete, this case, international law, for the purpose of determining the "aggressor" in an armed conflict, is assumed to refer to the criteria contained in the "natural" notion of aggression.

II. ANALYSIS OF THE NOTION OF AGGRESSION AS APPLIED IN INTERNATIONAL PRACTICE

153. The (natural) notion of aggression, as applied by governments in international practice, is composed of both *objective* and *subjective* criteria. While the objective criteria consist of the fact that a State committed, *the first, an act of violence*—even if this act of violence be an "indirect" one (see below)—the subjective criterium consists of the fact that the violence committed must be due to *aggressive intention*.

(1) As to the *objective* criteria of the notion of aggression the following is to be said:

(a) Although there is no divergence of opinion as to the fact that aggression presupposes some kind of

violence—even if this violence be an "indirect" act—it seems impossible to decide *a priori* which kind of violence may constitute aggression.

Acts of violence which in State practice have been considered as constituting "aggression under international law" are: the invasion by armed forces of the territory of another State, the attack by armed forces of the territory, the vessels and aircrafts of another State, the blockade of the coasts of a State, etc.

A particular case of aggression is provided for by the definition of aggression submitted to the fifth session of the General Assembly by the Soviet Union delegation which, in case of the landing of the land, sea and air forces of a State within the frontiers of another State or conducting said forces across such frontiers with the permission of this latter State, considers "*the violation of the conditions of such permission*" particularly as regards the length of the stay of the foreign troops or the extent of the area in which they may stay, as a case of "aggression".

However, not only violence committed by a State *directly* may constitute "aggression under international law", but also the *complicity* of a State in acts of violence committed by their parties—private individuals or States (indirect or disguised violence).

A very illustrative example of this case of aggression is given in the "Politis" definition of aggression which has been adopted in the Treaties of London and which enumerates among the acts constituting aggression: *the support given to armed bands invading the territory of another State*. In a note to the above text it is said in the report of the Committee on Security Questions:

"The Committee, of course, did not wish to regard as an act of aggression any incursion into the territory of a State by armed bands setting out from the territory of another country. In such a case, aggression could only be the outcome of complicity by the State in furnishing its support to the armed bands or in failing to take the measures in its power to deprive them of help and protection.

As regards both direct and indirect aggression, it cannot be said in advance what *degree* of violence or complicity must exist in order that one may consider itself in the presence of "aggression under international law". An answer to this question can only be given in each concrete case in conjunction with *all* constitutive elements of the concept of aggression.

(b) The second objective criteria of the notion of aggression as applied in international law consists in the fact that the State to be considered as responsible must be *the first* to act. This element, which encounters in all the definitions of aggression, is logically inherent in any notion of aggression. Aggression is presumably: *acting as first*.

(2) The mere fact that a State acted as first does not, *per se*, constitute "aggression" as long as its behaviour was not due to: *aggressive intention* (subjective element of the concept of aggression).

That the *animus aggressionis* is a constitutive element of the concept of aggression needs no demonstration. It follows from the very essence of the notion of aggression as such.

(3) As results from the above analysis of the (natural) notion of aggression as applied in international practice, this latter concept consists of both objective and subjective criteria which, only if taken altogether, make it possible to decide which State, in an international armed conflict, is to be considered as "aggressor under international law". The (natural) notion of aggression is a concept *per se*, which is inherent to any human mind and which, as a *primary notion*, is *not susceptible of definition*. Consequently, whether the behaviour of a State is to be considered as an "aggression under international law" has to be decided not on the basis of specific criteria adopted *a priori* but on the basis of the above notion which, to sum it up, is rooted in the "feeling" of the Governments concerned.

154. It may be added that, since this general feeling of what constitutes aggression is not invariable, the "natural" notion of aggression is not invariable either. Nor all the periods of the international relations must necessarily have the same notion of aggression.

155. Finally, it is to be said that the (natural) notion of aggression, as a concept having its roots in the "feeling" of governments, will not always be interpreted by these latter in the same way, which amounts to saying that the *objective* criterium of the "notion of aggression" will, in last analysis, depend on the *individual* opinion of each Government concerned. It is in the same order of ideas that the League of Nations' *Permanent Advisory Commission* (opinion of the Belgian, Brazilian, French and Swedish delegations) expressed the following view with regard to "impression" as criterium for the determination of aggression: "The impression thus produced *will not be the same* on the nations which are directly threatened as upon the guarantor nations; thus, as every government has its own individual standpoint, no simultaneous and universal agreement as to the imminence of an attack is possible."

III. THE ATTEMPT TO DEFINE AGGRESSION BY POSITIVE RULES AND THE INTRINSIC VIRTUE OF "LEGAL" DEFINITIONS

156. As stated in the historical survey, several attempts have been made within the League of Nations to define aggression by positive rules. Besides, the "Politis" definition has been adopted in a number of international treaties (Treaties of London).

157. The question rises now as to the intrinsic virtue of such "legal" definitions. From a twofold point of view these definitions are open to criticism.

158. *Firstly*: It is not possible to determine, in advance, exhaustively which behaviour of a State the "feeling" of governments in a given period of international relations will consider as "aggression under international law". While, for instance, the definitions

of aggression, drawn up in connexion with the attempts made under the League of Nations to define aggression, usually confined themselves to mentioning *positive* State acts (invasion of a territory by the armed forces of another State, bombing by the armed forces of a State, and so forth, as constituting "aggression", the "Politis" definition introduces into the said notion a new act of aggression: *the support given by a State to armed bands invading the territory of another State*. Thus, the *complicity* of a State in violence committed by *third parties* is made an integral part of a legal definition of aggression.

159. It is easy to imagine other cases which, under the present conditions, governments would consider as cases of aggression. One example in this connexion may be the following: According to international law, no State is obliged to prevent its nationals from joining as volunteers, the army of a belligerent. But what about a State which would allow a very important portion of its male population to enter the territory of a belligerent State in order to serve in the army of that State as volunteers? (We do not refer to the participation of Chinese troops in the Korean war since the situation there is somewhat different). Could one say that a State which, in the above case, would allow its nationals to join a belligerent army would not be an "aggressor" according to the general feeling of our time? A definition of aggression like that adopted by the Treaties of London would for instance leave the above case of aggression uncovered.

160. *Secondly*: The definitions of aggression, drawn up in connexion with the work of the League of Nations, do not, in principle, take into consideration the subjective element of the notion of aggression, i.e., the "aggressive intention", which, viewed from international practice, appears defective. The same criticism applies to the definition of aggression submitted by the Soviet delegation to the fifth session of the General Assembly of the United Nations. This latter text, stating that in an international conflict, that State shall be declared the attacker which *first* commits one of the following acts:

(a) Declaration of war against another State.

(b) Invasion by its armed forces, even without a declaration of war of the territory of another State.

(c) Bombardment by its land, sea or air forces of the territory of another State or the carrying out of deliberate attack on the ships or aircraft of the latter;

(d) The landing or leading of its land, sea or air forces inside the boundaries of another State without the permission of the Government of the latter, or the violation of the conditions of such permission particularly as regards the length of their stay or the extent of the area of the coasts or ports of another State.

Continues by saying that attacks such as these referred to above "may not be justified by any argument of a political, strategical or economic nature, etc."

161. The above clause forbidding to take into consideration, for instance, strategical arguments, applied

in concrete cases of armed conflicts, may result in characterizing as aggressor a State which, according to the "natural" notion of aggression, would never be considered as such. Thus, to give an example, if a State, animated by aggressive intention, is on the point of launching an attack on another State and if the State so threatened attacks *first*, in order to be in a better position to defend itself against the expected aggression, the State acting first would be considered, according to the general feeling, as acting *in defence* and not as an aggressor, since its initiative was not due to "aggressive intention".

162. It is in the same order of ideas that the statement of the League of Nations' *Permanent Advisory Commission* (Opinion of the Belgian, Brazilian, French and Swedish delegations) says in connexion with the invasion of a territory as a test of aggression:

"Moreover, the passage of the frontier by the troops of another country does not always mean that the latter country is the aggressor. Particularly in the case of small States, the object of such action may be to establish an initial position which shall be as advantageous as possible for the defending country, and to do so before the adversary has had time to mass his superior forces. A military offensive of as rapid a character as possible may therefore be a means, and perhaps the only means, whereby the weaker party can defend itself against the stronger. It is also conceivable that a small nation might be compelled to make use of its air forces in order to forestall the superior forces of the enemy and take what advantage was possible from such action."

163. Besides, it is not conceivable to look in every armed conflict for an "aggressor". There may be armed conflicts, where, according to the "feeling" of governments, none of the engaged parties can be considered as "aggressor". In a case when, through a series of misunderstandings, two States are finally driven into an armed conflict, there is no aggressor, unless it is demonstrated that one of the States concerned had *aggressive intention* while the other State was acting in defence.

164. Besides, if both States concerned *pursue* an armed conflict in order to solve their differences in this way, none of them could be considered as the aggressor since aggression, according to the sense generally accepted, pre-supposes that one of the parties involved, as subject of attack, must act in defence.

D. Conclusion as to the possibility and desirability of a legal definition of aggression

165. Bearing in mind the preceding remarks, our conclusion is that the notion of aggression is a notion *per se*, a primary notion, which, by its very essence,

is not susceptible of definition. To the same practical result came both the League of Nations' *Permanent Advisory Commission* (opinion of the Belgian, Brazilian, French and Swedish delegations) which stated that "under the conditions of modern warfare, it would seem impossible to decide, even in theory, what constitutes an act of aggression," and the League of Nations' *Special Committee of the Temporary Mixed Commission* which expressed the following view: "It is clear . . . that no simple definition of aggression can be drawn up, and that no simple test of when an act of aggression has actually taken place can be devised."

166. A "legal" definition of aggression would be an *artificial construction* which, applied to concrete cases, could easily lead to conclusions which might be contrary to the "natural" notion of aggression, which is the test adopted by international law for the determination of aggression.

167. *Firstly* it is, both theoretically and physically, impossible to determine, *a priori*, which behaviour of a State may be considered as "aggression under international law".

168. *Secondly* it is inadmissible to judge on the existence or non-existence of "aggression" on the basis of the concrete behaviour of a State only, without taking simultaneously into consideration the objective element of the concept of aggression: the "aggressive intention".

(b) But even if the definition of aggression were theoretically possible, it would not be desirable, for practical reasons, to draw up such a definition.

169. In complicated cases—and it is only in such cases that a definition of aggression would have any practical value at all—the difficulties of determining the aggressor would be so great that the existence of a definition of aggression would appear a rather unimportant, in some cases even a disturbing, factor. Thus, for instance, in the case of an armed conflict between States or among a group of States, preceded by a period of misunderstandings, political tension, general armament, mobilization, etc., the fact that there is a definition of aggression enumerating acts to be considered as test of aggression, would scarcely have any practical importance.

170. It is in the same order of ideas that the League of Nations' *Permanent Advisory Commission* (opinion of the Belgian, Brazilian, French and Swedish delegations) made the following statement with regard to the virtue of tests of aggression: "In the absence of any indisputable test, governments can only judge by an *impression* upon the most various factors, such as the political attitude of the possible aggressor, his propaganda, the attitude of his press and population, and his policy on the international market, etc."