

Document:-  
**A/CN.4/SR.107**

**Summary record of the 107th meeting**

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

Extract from the Yearbook of the International Law Commission:-  
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151. The CHAIRMAN pointed out that the acts listed in the various paragraphs of article 2 of the draft code constituted to some extent examples of offences against the peace and security of mankind. Those paragraphs, however, did not contain a definition.

152. Mr. AMADO considered that the addition proposed by Mr. Scelle would be more appropriately discussed in connexion with the Commission's report on the definition of aggression.

153. Mr. SCELLE supported that point of view and said that he was not proposing to offer an amendment to the text of the draft code. He could submit his definition of aggression at the next meeting.

*Paragraph (1) of article 2 was adopted without amendment.*<sup>17</sup>

*First paragraph of the comment*<sup>18</sup>

154. Mr. YEPES pointed out that in using the words "armed force" in article 2, paragraph 1, as well as in the comment in that paragraph, the Commission was restricting the scope of the article, seeing that Article 2, paragraph 2, of the Charter of the United Nations simply spoke of the use of "force". He therefore proposed the deletion of the word "armed", so as to bring the paragraph into line with the United Nations Charter.

155. The CHAIRMAN pointed out that the Commission had already discussed that point at length.

156. Mr. ALFARO said that that discussion had taken place in connexion with the definition of aggression. He saw some reason for using the term "armed force", but he was, in principle, always in favour of using the terms of the United Nations Charter. It would do no harm to delete the word "armed".

*It was decided by 8 votes to 4 to retain the term "armed force".*

157. Taking up a suggestion by Mr. SPIROPOULOS, the CHAIRMAN proposed the substitution in article 2, paragraph 1 of the wording: "It is to be noted that Article 2, paragraph 4, of the United Nations Charter binds all members . . ." for "this is in conformity with Article 2, paragraph 4 of the Charter of the United Nations . . ."

*It was so decided.*

<sup>17</sup> The original text of paragraph (1) opened with the following phrase: "(1) The employment, or threat of employment, by the authorities of a State, . . .". See also, summary record of the 108th meeting, paras. 115-155.

<sup>18</sup> The first paragraph read as follows: "In prohibiting the employment of armed force (except under certain specified conditions), this paragraph incorporates in substance that part of Article 6, paragraph (a), of the charter of the Nürnberg Tribunal, which defines as 'crimes against peace' *inter alia* the 'initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances . . .'. In addition, the present paragraph includes the threat of employment of armed force as an offence. This is in conformity with Article 2, paragraph 4, of the Charter of the United Nations which binds all Members 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'."

158. Mr. YEPES stressed the importance of the draft code which the Commission was preparing and earnestly requested that, whenever the latter departed from the text of the Charter, it should state its reasons for so doing. He considered that it was advisable to say "this provision is not in conformity with the Charter".

159. Mr. AMADO pointed out that the Charter was concerned with the acts of States, so no confusion was possible. Further, it could not be maintained that the violation of every obligation laid down in the Charter constituted an offence under international law, involving criminal responsibility.

160. Mr. YEPES asked that the Commission vote on this suggestion.

*Mr. Yepes' suggestion was rejected by 6 votes to 3.*

The meeting rose at 1 p.m.

## 107th MEETING

*Wednesday, 20 June 1951, at 9.45 a.m.*

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*Chairman:* Mr. James L. BRIERLY

*Rapporteur:* Mr. Roberto CORDOVA

*Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

*Secretariat:* Mr. Ivan KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. Yuen-li LIANG, Director of the Division for the Development and Codification of International Law, and Secretary to the Commission.

**Preparation of a draft code of offences against the peace and security of mankind: report by Mr. Spiropoulos (item 2 (a) of the agenda) (A/CN.4/L.15)<sup>1</sup> (continued)**

TEXT OF THE DRAFT CODE

ARTICLE 2 (continued)

Paragraph (1)

*Second paragraph of the comment*<sup>2</sup>

1. The CHAIRMAN read out the text of the second paragraph.

2. Mr. HUDSON, supported by Mr. SPIROPOULOS, suggested that it might not be advisable to refer to the draft Declaration on Rights and Duties of States, in view of the reception given to that draft by the General Assembly. He recognized, however, that the draft was of some importance as a document on the subject. He explained that, if the Declaration had been adopted by the General Assembly, it would have had an authority independent of that of the Commission; but it had no such independent authority as yet.

3. Mr. ALFARO pointed out that the Assembly had not yet taken any decision regarding the Declaration.

4. The CHAIRMAN observed that the Assembly had transmitted it to Member States.

5. Mr. ALFARO thought that, until a decision had been taken, it was preferable to retain that paragraph in order to show that the Commission was systematic and referred to its previous work.

6. The CHAIRMAN read out part of General Assembly resolution 375 (IV), of 6 December 1949, on the draft Declaration:

“The General Assembly . . .

“2. Deems the draft Declaration a notable and substantial contribution towards the progressive development of international law and its codification and as such commends it to the continuing attention of Member States and of jurists of all nations;

“3. Resolves to transmit to Member States, for consideration, the draft Declaration . . .”

*The second paragraph was adopted.*

7. Mr. YEPES observed that the second paragraph just adopted was in conflict with the first paragraph approved the previous day. The first paragraph referred to “armed force”, whereas article 9 of the draft Declaration referred to the use of “force”. If armed force only were referred to, the scope of the definition would be restricted.

8. Mr. ALFARO said that the problem did not arise, since one document was a declaration and the other concerned offences.

<sup>1</sup> See summary record of the 106th meeting, footnote 8.

<sup>2</sup> The second paragraph read as follows: “This paragraph is also in consonance with the draft Declaration on Rights and Duties of States, prepared by the International Law Commission which, in Article 9, provides: ‘Every State has the duty to refrain from resorting to war as an instrument of national policy, and to refrain from the threat or use of force against the territorial integrity or political independence of another State, or in any other manner inconsistent with international law and order’.”

9. Mr. YEPES still maintained that there was a contradiction and that it would be preferable to refer to the employment of force without adding any qualification.

*Third and last paragraph of the comment*<sup>3</sup>

10. The CHAIRMAN reminded Mr. Yepes of the decision taken at the previous meeting. He read out the last paragraph of the comment.

*The third and last paragraph was adopted.*

*Paragraph (2) (paragraph (3) in the text of the “Report”)*

11. Mr. HUDSON asked whether it would not be possible to follow the terms of the Charter and use the words “individual self-defence”.

12. Mr. SPIROPOULOS pointed out that those words had originally been used but that the word “national” had been substituted for “individual”.

13. Mr. YEPES thought it preferable to follow the text of the Charter. He proposed the words “individual or collective”.

14. The CHAIRMAN pointed out that the same objection applied to article 2, paragraph 1.

15. Mr. HUDSON said that after reflection he thought it better to retain the word “national”, since, in the case of self-defence carried out by individuals, the words “by the authorities of the State” could not be used.

16. The CHAIRMAN also preferred the word “national”; he found the word “individual” entirely unsuitable.

17. Mr. EL KHOURY thought that the wording should be “The planning and preparation, by the authorities of a State”, rather than “The planning or preparation”, since the mere fact of planning to use force was not an international crime unless followed by preparation for the use of force. If the word “planning” was to be retained, it must be “preparation and planning”.

18. The CHAIRMAN did not see why the mere fact of planning could not be a crime; the article was intended to cover conspiracy.

19. Mr. ALFARO considered that planning and preparation were two different offences: planning meant drawing up a general plan, and preparation meant the execution of that plan, for which a physical act was required. Hence the wording should be “either planning or preparation”.

20. Mr. SPIROPOULOS reminded the Commission that the Nürnberg Charter referred to the planning, preparation, initiation or waging of a war of aggression as different crimes.

21. Mr. CORDOVA asked Mr. Spiropoulos whether, under the charter and judgment of the Nürnberg Tribunal, it was the attitude of mind or the planning that had been taken into consideration with regard to plans.

22. Mr. SPIROPOULOS pointed out that some Germans had been punished for preparing plans, while others

<sup>3</sup> The third paragraph read as follows: “The offence defined in this paragraph, by its nature, can only be committed by the authorities of a State. A criminal responsibility of private individuals may, however, arise under the provisions of paragraph 11 of the present article.”

were preparing for war. Besides conspiracy there was also mere planning.

23. Mr. YEPES observed that the English text of the comment referred to "planning and preparation".

24. Mr. EL KHOURY thought that the paragraph and the comment should be drafted in similar terms.

*It was decided by 7 votes to 2 to retain the text of paragraph 2.*

25. Mr. AMADO explained that he had been in favour of retaining the wording of the Nürnberg Charter.

26. Mr. SCELLE said that he had voted against the text because, from the French point of view, planning could not be considered an offence;<sup>4</sup> there must be a beginning of execution. A mere plan was not a crime. It was only an evil intention.

27. Mr. SPIROPOULOS observed that the French translation was incorrect.

28. Mr. CORDOVA explained that it was because of that error in translation that he had asked the Rapporteur for an explanation. Planning was not a mental attitude, it was an act.

29. The CHAIRMAN agreed with that interpretation.

30. Mr. YEPES believed that the misunderstanding was due to the fact that the English text of paragraph 2 referred to "planning or preparation", whereas the comment said "planning and preparation". He asked the Commission to take another vote.

31. The CHAIRMAN agreed that the French translation was bad, since the French word "*projeter*" was not the equivalent of the English word "planning".

32. Mr. SCELLE said that that was why he had been in favour of replacing the word "or" by the word "and".

33. Mr. CORDOVA said that he had voted for the retention of the word "or"; there were in fact two offences, planning and preparation.

34. Mr. ALFARO thought it advisable to clarify the point on which the Commission was to vote. He had assumed that according to Mr. el Khoury's proposal, planning and preparation were two separate offences. Mr. Scelle seemed to be troubled by the fact that planning was not an offence in itself; he agreed with that view so far as the French word "*projeter*" was concerned. The paragraph referred to acts constituting conspiracy to commit aggression. For instance, Hitler had summoned his generals, declared his intention of committing aggression against Poland, and asked them to prepare a plan. There had therefore been a group of generals who had prepared the plans, and another group who had taken the necessary measures for their execution. The first group had conspired with Hitler. He thought that the word "or" should be retained for that reason. Planning must be considered as one offence, and preparation for the employment of armed force as another.

35. Mr. EL KHOURY thought that another explanation was required. He would take Mr. Alfaro's example and assume that a group of experts drew up plans which were

carried out by another group; if the stage of "execution" were never reached, would the planning be an offence? Under ordinary criminal law, such groups of experts would be considered as accomplices if a crime were committed, but if no crime were committed, they would not be prosecuted. That was why he had proposed saying "planning and preparation". He was not proposing that the word "planning" be deleted, but that it be linked with the second stage, namely, preparation for the employment of armed force.

36. Mr. KERNO (Assistant Secretary-General) observed that the French text of paragraph 2 contained an error. In the French text of the Nürnberg Charter (article 6 (a)) the word "planning" was translated by "*direction*" and not by "*projeter*". The previous year the Commission had found the word "*direction*" unsatisfactory;<sup>5</sup> if it now rejected the word "*projeter*", were the words "*préparer des plans*" to be considered preferable?

37. Moreover, there was a discrepancy between the French and English texts: the English text of the definition in paragraph 2 used the words "planning or preparation" whereas the comment said "planning and preparation", which might perhaps be correct; the French text, on the other hand, used the word "or" in both cases.

38. Mr. AMADO said that the word "planning", in that definition, included the element of premeditation. When Hitler had drawn up his plan for the conquest for Czechoslovakia, he had committed an act which the Nürnberg judges had considered as being part of his plan to destroy the Czechoslovak State. The word "planning" enabled the judge to define the elements of the crime; the Nürnberg Charter spoke of the planning, preparation and waging of a war of aggression. Planning was not only a work of imagination, it included acts of war which the judges had recognized. Criminal law, of course, referred to acts; he did not see how execution could be brought in, in that particular case, since it came into another category. The word "planning" referred to organization and preparation; the conception of plans was not sufficient. The intention of the Nürnberg Charter was to apply the word "planning" to the positive element in the preparation of the crime, hence, the element constituting premeditation.

39. Mr. SPIROPOULOS recalled that the previous year Mr. Pella had criticized the text of the draft Code for referring to "planning" in paragraph 2, whereas paragraph 11 spoke of "conspiracy", and had declared that conspiracy meant the drawing-up of plans. He himself had made no comment, since the text had been prepared by the drafting Sub-Committee. He proposed that the word "planning" be deleted, because "conspiracy" certainly meant drawing up plans for the preparation of war.

40. Mr. SANDSTRÖM thought that the word "planning" implied a project which had been externalized, while "preparation" was the beginning of execution. Planning could be a separate offence from preparation. He was in favour of retaining the text as it stood.

<sup>4</sup> The French text read as follows: "*Le fait, pour les autorités d'un Etat, de projeter ou de préparer l'emploi de la force armée*".

<sup>5</sup> *Yearbook of the International Law Commission 1950*, vol. I, summary record of the 48th meeting, paras. 2-6.

41. Mr. SPIROPOULOS pointed out that he had said that it would be advisable to refer to the word "conspiracy" in paragraph 11.

42. Mr. SANDSTRÖM replied that although "planning" nearly always implied "conspiracy", it did not necessarily do so. A dictator might prepare his own plans.

43. Mr. AMADO urged the Commission to study the question carefully. If the idea of planning were withdrawn from the comment accompanying the text, that decision would have far-reaching consequences. If in future the head of a State made plans for a war of aggression and subsequently suffered defeat, he would maintain that he had confined himself to planning, which was not an offence, since the International Law Commission had withdrawn it from the draft code and the Rapporteur had associated planning with conspiracy; but he, the head of the State, had not conspired. He was in favour of retaining the word "planning".

44. Mr. SCALLE saw no objection to keeping the English word "planning". It was the French word "*projeter*" which he criticized. If the words "*faire un projet*" were substituted, the text became intelligible. The word "*projeter*" was ambiguous.

45. Mr. CORDOVA noted that all members of the Commission were in agreement. If planning were to be punishable, it must come within the realm of fact, and it then became preparation. The word "planning" could be deleted since a "conspiracy" was referred to in paragraph 11. When Hitler had written his book *Mein Kampf*, he had been making plans, which was not a punishable offence without preparation. He believed that the Rapporteur was right and that the word "planning" should be deleted from paragraph 2.

46. Mr. ALFARO read the following passage from "*The Charter and judgment of the Nürnberg Tribunal*":

"Military planning and preparation was considered criminal in so far as it was undertaken by persons in influential positions. Such military leaders as Goering, Keitel, Raeder and Jodl were found guilty of this crime. On the other hand, the Court said of Doenitz that, although he built and trained the German U-boat arm, the evidence did not show that he prepared aggressive wars. 'He was a line officer performing strictly tactical duties. He was not present at the important conferences when plans for aggressive wars were announced, and there is no evidence he was informed about the decisions reached there.' As a pre-requisite for criminal military planning the Court therefore seems to have required knowledge of the aggressive purpose of the planning. Such knowledge, however, might, apparently, not only be proved directly by showing that the defendant was informed in fact, but also be inferred from the position he held."<sup>6</sup>

Hence planning was a separate offence.

47. Mr. EL KHOURY said that he agreed with that interpretation, provided that planning was followed by preparation. He proposed that the word "planning" be deleted.

48. Mr. CORDOVA suggested that the commentary state that planning was included in preparation.

49. Mr. YEPES opposed the deletion of the word "planning", since if planning were omitted, many offences against peace would be left out of account. Planning for aggression was a punishable offence.

*It was decided, by 7 votes to 5, to delete the words "planning or" in the first line of paragraph 2.*

*First paragraph of the comment*

50. The CHAIRMAN observed that, as a result of the Commission's vote, the word "planning" must be deleted from the first line of the comment which read "In prohibiting the planning and preparation for the employment of armed forces...".

51. Mr. HUDSON thought that the text should be worded as follows: "Planning, preparation, initiation or waging...". The word "or" was to be understood as being repeated between each of those words.

52. Mr. SANDSTRÖM did not consider that all those words could be included.

53. Mr. HUDSON admitted that the initiation and waging of war could not be included in the text; it must be limited to the planning or preparation of a war of aggression. By using the word "preparation", the Commission had explained that it meant planning to be understood as included in that term.

54. Mr. SPIROPOULOS observed that that was certainly the sense of the Nürnberg Charter.

55. Mr. ALFARO emphasized that the Commission had decided that the idea of planning was included in the word "preparation", in spite of the fact that the Nürnberg Charter referred to planning as a crime.

56. The CHAIRMAN asked the Commission if it intended to stipulate that preparation included planning.

57. Mr. CORDOVA replied in the affirmative; the word "planning" was included in the Nürnberg principles, and it must be explained why the Commission had deleted it.

58. Mr. EL KHOURY stressed the danger of inserting the word "or" between the words "planning" and "preparation".

59. The CHAIRMAN, supported by Mr. ALFARO, proposed the following wording: "The Commission was of the opinion that preparation included planning".

60. Mr. CORDOVA suggested that the statement should be less concise.

61. Mr. HUDSON proposed the following wording: "As used in the text, the term preparation includes planning".

62. Mr. ALFARO thought it advisable to emphasize that planning and preparation were different offences, although guilt by reason of planning could not be established unless there had been preparation.

63. Mr. SPIROPOULOS advised leaving that question to judges.

64. Mr. ALFARO thought that suggestion justified, and proposed saying that planning was a separate offence from preparation.

<sup>6</sup> United Nations Publication, Sales No. 1949.V.7, pp. 56-57.

65. The CHAIRMAN, Mr. HUDSON and Mr. SPIROPOULOS pointed out that that wording was inconsistent with the decision just taken by the Commission.

66. Mr. ALFARO explained that, when a State decided to commit aggression and entrusted the planning to one group of generals and the preparation and execution to second and third groups, all three groups were guilty of a crime. It was not necessary for the first group to prepare and carry out the aggression. It was committing a separate offence. Of course, if the Commission considered that the man conceiving the idea of aggression was not committing an offence, that was another matter. The question must be made very clear; that was an important part of the Nürnberg Charter.

67. Mr. AMADO considered the case of two political leaders of a State who planned a war. One of them might, for instance, have written such a work as *Mein Kampf*. There was no conspiracy, but the planning included organization of the scheme. The two statesmen summoned their generals and instructed them to prepare a war of aggression. He thought that the Commission had made a mistake in deleting the word "planning".

68. Mr. EL KHOURY asked whether the preparation of plans which were subsequently shelved would constitute a crime. It was clear that if the plans were subsequently put into effect, their author would be found guilty.

69. The CHAIRMAN reminded the Commission that it had decided to delete the words "planning or". He asked whether it intended to reconsider that decision. If not, it must bring the comment into line with the text.

70. Mr. AMADO was convinced that the decision was a mistake, though that, of course, was only his opinion.

71. Mr. HSU thought that the word "planning" should be deleted. Preparation included the preparation of plans. Consequently there was no reason to include planning in the text. Moreover, the arguments for retaining that idea had not convinced him.

72. The CHAIRMAN thought that it should be explained in the comment that preparation included planning.

73. Mr. ALFARO suggested the following wording: "Planning as a separate crime is included in the word preparation".

74. Mr. SPIROPOULOS observed that members of the Commission were in general agreement.

75. The CHAIRMAN proposed the adoption of Mr. Hudson's text.

*The first paragraph of the commentary was adopted, with the amendment proposed by Mr. Hudson.*

*Second paragraph of the comment*

76. The CHAIRMAN read out the second paragraph of the comment.

77. Mr. EL KHOURY asked why that paragraph was repeated there when it already appeared in the comment on the first paragraph, and applied to all the offences.

78. Mr. SPIROPOULOS explained that certain crimes

could be committed by individuals, others by States and, finally, others by both States and individuals.

*The second paragraph of the commentary was adopted.*

*Paragraph (3) (paragraph (4) in the text of the "Report")*

79. Mr. HUDSON found the text unsatisfactory and proposed the following wording: "The incursion into the territory of a State from the territory of another State by armed bands acting for a political purpose" instead of "The incursion into the territory of a State by armed bands coming from the territory of another State and acting for a political purpose".

*Paragraph 3 was adopted, as amended.*

*Comment <sup>7</sup>*

80. Mr. HUDSON asked why a question already dealt with under article 1 was again taken up at that point.

81. The CHAIRMAN thought it unnecessary, and proposed that the words "who should be held individually responsible" be deleted.

82. Mr. AMADO said that his impression from the text was that each member of the armed band could be held responsible. He thought it should be pointed out that the comment took account of the fact that the offence was committed collectively, and that the individuals responsible for the acts were criminally responsible.

83. The CHAIRMAN said that that was already provided in article 1.

84. Mr. CORDOVA suggested the words "committed by members of armed bands", to show the individual nature of the responsibility.

85. Mr. SPIROPOULOS said that that meant "committed by some members of armed bands".

86. Mr. CORDOVA said that he was trying to prevent any false interpretation of the text, which was not clearly drafted. It was a question of the responsibility of the individuals forming the band.

87. Mr. SANDSTRÖM said that the offences were not committed by individuals as such, but by individuals forming a band.

88. Mr. AMADO saw no reason for making such trivial amendments to a text which the Commission had already adopted.

89. Mr. CORDOVA acknowledged the justification for that observation, but thought that the words should be deleted in view of the statement at the beginning of the code; he would not press the point, however.

90. Mr. AMADO said that article 1 established the principle that the offences to which it referred were not committed by the authorities as such, but by individuals. In article 2, paragraph 3, those individuals formed a band, but were not to be held responsible collectively. Nevertheless, there might be some confusion. Were there not certain criminal law theorists of extreme views who admitted that States might be considered as criminals?

<sup>7</sup> The first sentence read as follows: "The offence defined in this paragraph, by its nature, can be committed by individual members of armed bands, who should be held individually responsible."

The purpose of the commentary was to clarify that question and dispel all such confusion. Under article 1, individuals were responsible whether they were Heads of States, ministers or generals, but under article 2, paragraph 3, they would be responsible because they formed a band. He was in favour of retaining the commentary.

91. Mr. LIANG (Secretary to the Commission) did not see how the sentence could stand after the words "who should be held individually responsible" were deleted. Something would have to be added. The statement at the beginning of the comment was self-evident. He suggested the words "the offence defined in this paragraph . . . can only be committed by individual members . . .". That would exclude the idea of the offence being committed by an armed band as a group.

92. Mr. CORDOVA did not consider that the text of article 1 excluded the possibility of the offences being committed by bands. From the text of article 1 and of the paragraph under discussion, it might be thought that the offences could be committed by bands, and also that the individual members of such bands were punishable. He knew that that was not the intention of the Commission, but the meaning should be made clear. It was evident that individual members of the band were punishable, but the text did not exclude the possibility of the band itself being considered guilty of the offence. He proposed either retaining the first sentence of the comment or changing the text of the article.

93. Mr. HUDSON proposed that Mr. Liang's suggestion be adopted.

94. Mr. ALFARO wished to draw Mr. Córdova's attention to the fact that the responsibility of groups was also mentioned with reference to the other offences. If it were said that the offence "can only be committed by individual members", the meaning of the text would be clear.

*It was decided to retain the words "who should be held individually responsible".*

95. Mr. SCELLE said that he wished to make a comment on terminology. Each of the paragraphs included the words "*de par sa nature*" (by its nature) which had little meaning in French. Indeed, those words appeared to mean that there was no room for discussion, whereas the discussion which had just taken place between members of the Commission showed that the opposite was the case. It would be sufficient to say "the offence defined in this paragraph". He repeated that the words "*de par sa nature*" (by its nature) either had no meaning or else meant that no other interpretation was possible. But if that were so, there was no need to define the offence.

96. Mr. CORDOVA observed that Mr. Scelle's comment also applied to the Spanish and English texts. The words could therefore be deleted.

*It was decided to delete the words "by its nature" in the comments on paragraphs 1, 2 and 3.*

*Paragraph (4) (paragraph (5) in the text of the "Report")*

*Paragraph 4 was adopted without debate.*

#### *Comment*

97. Mr. HSU thought that the second paragraph of the comment on paragraph 4 could be deleted.<sup>8</sup> He would have preferred the idea of subversive acts to be included in the definition, but that short sentence did not express it satisfactorily. He would therefore prefer the paragraph to be deleted.

98. Mr. HUDSON and Mr. SCELLE agreed with that view.

*It was decided to delete the second paragraph of the comment on paragraph 4.*

99. Mr. YEPES considered the last paragraph of the comment superfluous, since the article itself already stated that, in order to constitute an offence, the act must be committed by the authorities of the State.

100. Mr. SPIROPOULOS pointed out that he had provided each paragraph with a comment of that nature at the request of Mr. Yepes himself. He certainly realized that the distinction drawn between offences which could be committed by individuals and those which could only be committed by the authorities of the State was arbitrary, and even incorrect; in his opinion only offences committed by individuals should be included, since there was no criterion for determining that an offence was committed by a State. Nevertheless, that distinction was part of the very foundation of the draft code; once accepted it must be maintained.

101. Mr. YEPES said that he had no amendment to propose.

*The comment was adopted as amended.<sup>8a</sup>*

*Paragraph (5) (paragraph (6) in the text of the "Report")*

102. Mr. SCELLE pointed out that, in the third line of the French text, the word "*terroristes*" before the word "*organisées*" should be deleted.

*Paragraph 5 was adopted.<sup>8b</sup>*

#### *Comment*

103. Mr. HUDSON pointed out that the Convention for the Prevention and Punishment of Terrorism referred to in the first paragraph of the comment had never entered into force. Hence that paragraph went too far in saying that the encouragement of terrorist activities was "prohibited" by article 1.

104. Mr. ALFARO thought it advisable to retain the reference to that convention; although it had never entered into force, it nevertheless expressed the views of 40 States which had thought it necessary to take measures against terrorist activities.

105. Mr. HSU considered that the terrorist activities referred to in paragraph 5 were a rather unimportant offence compared with those referred to in the other paragraphs. What the authorities of a State attempted to bring about in another State was subversion. That

<sup>8</sup> It read as follows: "The term 'foment' is used to include the meaning of 'aid and abet'."

<sup>8a</sup> See summary record of the 109th meeting, para. 119.

<sup>8b</sup> *Ibid.*, paras. 120-125.

being so, he wondered whether it would not be better to delete the whole of paragraph 5.

106. After a discussion on how the reference to article 1 of the Convention on Terrorism should be worded in order to avoid giving the false impression that the provisions of that article were an existing rule of law, it was decided to re-word the first paragraph of the comment as follows:

“Article 1 of the Convention for the Prevention and Punishment of Terrorism, of 16 November 1937, contained a prohibition of the encouragement of terrorist activities.”<sup>9</sup>

The second paragraph of the comment was adopted without debate.

Paragraph (6)<sup>10</sup> (paragraph (7) in the text of the “Report”)

107. Mr. FRANÇOIS pointed out that the Commission had adopted an amendment, proposed by Mr. Sandström, changing the text of paragraph 6 to read: “*y compris . . . les obligations d'un traité établissant des restrictions concernant*”,<sup>11</sup> which did not appear in the present French text of the draft code.

108. Mr. KERNO (Assistant Secretary-General) observed that the amendment was correctly included in the English text.

109. Mr. SCALLE said that in the French text the sentence would have no meaning. The words “*obligations d'un traité établissant des restrictions concernant: i) le caractère . . . d'armements*” did not convey anything.

110. Mr. CORDOVA proposed that the words “*y compris sans que cette énumération soit limitative*” should be replaced by the word “*notamment*”.

111. Mr. HUDSON thought that the paragraph should be deleted. He wondered whether, in the case of a treaty on arbitration, which was clearly “designed to ensure international peace and security”, the refusal by the authorities of a State to submit a dispute to arbitration would be an offence under international law. The definition in paragraph 6 included such acts.

112. Mr. YEPES asked whether the text of the paragraph meant that any violation of treaty obligations constituted an offence against peace. For instance, the Atlantic Pact fulfilled all the conditions stipulated in paragraph 6. Would a trivial and involuntary violation, such as might arise, be an offence against peace?

113. Mr. ALFARO announced that, after an exchange of views with several members of the Commission, he had

prepared the following new text to replace paragraph 6:

“Acts by the authorities of a State in violation of its obligations under treaty which is designed to ensure international peace and security by means of restrictions or limitations on armaments, or on military training, or on fortifications, or other restrictions of the same character.”

114. Mr. HUDSON proposed that the words “by means of restrictions” be replaced by the words “by placing restrictions”.

115. Mr. EL KHOURY had prepared another text, which he read out, and which was very similar to that proposed by Mr. Alfaro. He nevertheless supported the latter's proposal.

116. Mr. SCALLE did not think it advisable to include the enumeration contained in Mr. Alfaro's text. Any enumeration was dangerous and might even become a restriction. He proposed merely saying “international treaty obligations designed to ensure international peace and security by the limitation or reduction of armaments”.

117. Mr. SPIROPOULOS could not agree to those amendments. He emphasized that nearly all treaties contained enumerations. That was why he had thought it advisable to include one in his text. Moreover, it was not merely a question of reducing armaments.

118. He pointed out that Mr. Alfaro had not retained the location of armed forces or armaments in his amendment. That was a most important point, since it might be said that the Second World War had broken out for reasons of that kind. He thought it absolutely essential to retain the detailed enumeration.

119. Mr. HUDSON did not consider that Mr. Alfaro's amendment omitted anything.

120. Mr. SCALLE observed that Mr. Alfaro's text did not cover the case of a treaty stipulating that a State undertook not to require military service for a longer period than one year.

121. Mr. ALFARO pointed out that the case was covered by the words “military training”, which were included in his text.

122. The CHAIRMAN asked whether Mr. Alfaro's text provided for the case of demilitarized zones.

123. Mr. EL KHOURY, supported by Mr. SPIROPOULOS, thought that the last phrase of Mr. Alfaro's text could include demilitarized zones established under a treaty between two parties.

124. Mr. ALFARO pointed out that the last phrase of his text made it possible to avoid the danger of an enumeration.

*Mr. Alfaro's amendment to paragraph 6 was adopted.*

#### *Comment*

125. Following a remark by Mr. HUDSON, the CHAIRMAN announced that the Secretariat would revise the reference to League of Nations publications.

*The comment on paragraph 6 was adopted.*

<sup>9</sup> Instead of “The encouragement of terrorists activities is prohibited by Article 1 of the Convention for the Prevention and Punishment of Terrorism of 16 November 1937”.

<sup>10</sup> Paragraph 6 read as follows: “6. Acts by the authorities of a State in violation of obligations of a treaty which is designed to ensure international peace and security, including but not limited to acts in violation of treaty restrictions as to:

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

“(ii) The training for service in armed forces; or

“(iii) The maintenance of fortifications.”

<sup>11</sup> See summary record of the 89th meeting, paras. 125–127.

*Paragraph (7)*<sup>12</sup> (*paragraph (8) in the text of the "Report"*)

126. Mr. KERNO (Assistant Secretary-General) regretted that paragraph 7 was not accompanied by any comment other than the paragraph indicating who could commit the offence (last paragraph of the comment in the text of the "Report").

127. Mr. SANDSTRÖM thought that the text of that paragraph was taken from the draft Declaration on Rights and Duties of States.<sup>13</sup>

128. Mr. YEPES asked if the paragraph also referred to territories placed under the authority of a State. He wished to know, for instance, whether annexation of a zone on the frontier between two States, which was in dispute, was a danger to international peace and constituted an international offence, as in the case of annexation of territory belonging to another State.

129. The CHAIRMAN, supported by Mr. SPIROPOULOS, thought that the paragraph should be deleted. The acts referred to would always come within the scope of the definition in article 2, paragraph 1.

130. Mr. KERNO (Assistant Secretary-General) emphasized that the reason why he had regretted the absence of a comment on that paragraph was that he thought that a similar idea was to be found in the Briand-Kellogg Pact, the United Nations Charter and articles 9 and 11 of the Declaration on Rights and Duties of States. He was, however, prepared to admit that the offence referred to in paragraph 7 was already covered by article 2, paragraph 1.

131. Mr. ALFARO also considered that the paragraph should be deleted.

132. Mr. YEPES was opposed to the deletion of paragraph 7, since that would amount to indirect approval of annexation. It would be a grave error not to consider annexation as an international offence.

*It was decided, by 7 votes to 5, to retain paragraph 7, subject to drafting changes.*

133. Mr. CORDOVA also thought that the paragraph should be retained. The Tribunal would decide whether any particular act came within the definition or not.

134. He thought that the words "or directed toward" could be deleted.

*It was so decided.*

135. Mr. EL KHOURY proposed deleting the passage beginning with the words "or of territory under an international régime" down to the end of the paragraph.

136. Mr. FRANÇOIS pointed out that if that were done, even annexation under a treaty would be an offence.

137. Mr. EL KHOURY agreed to limit the proposed deletion to the words "or of territory under an international régime".

138. Mr. HSU asked whether the deletion proposed by Mr. EL KHOURY implied that annexation of territory

<sup>12</sup> Paragraph 7 read as follows: "7. Acts by authorities of a State resulting in or directed toward the annexation of territory belonging to another State or of territory under an international regime, contrary to international law or to the Purposes and Principles of the United Nations."

<sup>13</sup> See General Assembly resolution 375 (IV) of 6 September 1949, annex, articles 9 and 11.

under an international régime would not be regarded as an offence.

*Mr. el Khoury's amendment was rejected by 6 votes to 4.*

*It was decided, by 8 votes to 1, to delete the words "or to the Purposes and Principles of the United Nations".*

139. Mr. EL KHOURY observed that it would be preferable for the words "contrary to international law" to be placed after the word "annexation".

*It was so decided.*

140. Mr. YEPES, supported by Mr. ALFARO, proposed that, after the words "belonging to another State", the words "or placed under the authority of another State" be inserted. He was thinking of the case of disputed sovereignty over a territory situated on the frontier between two adjoining States.

141. Mr. CORDOVA pointed out that Mr. YEPES' proposal meant applying the principle that no man could be a judge in his own cause.

142. The CHAIRMAN observed that that principle was already stated in article 1 of the draft code.

*Mr. Yepes' amendment was rejected by 6 votes to 3.*

143. Mr. KERNO (Assistant Secretary-General) still doubted whether paragraph 7 served any real purpose. It was clear that annexation by force was already covered by the definition of the offence referred to in the first paragraph of article 2. As the Commission had decided to retain paragraph 7, however, the need for a comment became all the more evident; it was necessary to state why annexation was to be described as an offence independent of that referred to in the first paragraph. He could not imagine that annexation could be carried out without the employment or threat of employment of force.

144. Mr. SPIROPOULOS agreed with Mr. Kerno's view regarding annexation. He added that writers who had studied the question declared that, without the employment of force or previous occupation, annexation was not valid and had no legal effect.

145. Mr. SCALLE considered that the Commission had been right in deciding to retain paragraph 7. A code of offences against the peace and security of mankind could not omit to mention annexation, which was the principal offence.

146. Moreover, something other than mere annexation could be imagined: for instance, blockade with a view to annexation. In that connexion he recalled the war between Austria-Hungary and Serbia, known as the "Pig War", during which Austria had closed her frontier in order to starve out Serbia, with a view to annexation. That blockade had been considered as an obvious legal abuse. The Commission had defined offences that were no more grave than starving out a country, which could be done without the employment of force.

147. Mr. HSU observed that there could be direct and indirect employment of force; he thought it well to clarify the matter.

148. Mr. AMADO pointed out that the argument that the subject was already covered by the first paragraph of article 2 could be applied to all the other paragraphs. Such an argument could not be accepted. In his opinion it was

necessary to give precise definitions of the offences against the peace and security of mankind, just as the general concept of homicide was defined by the terms parricide, infanticide, etc. That was why he had opposed the deletion of paragraph 7. It was a case of *dolus specialis*.

149. Mr. ALFARO proposed a slight drafting amendment, namely, that the words "contrary to international law" be replaced by the words "in violation of international law".

150. Mr. SPIROPOULOS undertook to draft a comment.<sup>14</sup>

*Paragraph (8) (paragraph 9 in the text of the "Report")*

151. The CHAIRMAN observed that that paragraph in fact related to crimes dealt with in the Convention on Genocide.

152. Mr. HUDSON wondered whether the paragraph as a whole was of any real value and whether the offences to which it referred were really offences against the peace and security of mankind. For instance, could it be said that the murder, by an individual, of a member of a national, ethnical, racial or religious group constituted an offence against peace?

153. Mr. AMADO emphasized the great importance attached to the definition of the crime of genocide by many people who had suffered much in the recent past from the sadism and brutality of certain men. The Convention on Genocide was, in the eyes of some, almost sacrosanct, owing to the conditions and the period in which it had been elaborated. A variety of intellectual and emotional factors had led jurists to bow to the sorrows of so many people and consequently to give the crime of genocide the place it occupied in the category of offences against mankind. For that reason he would vote for the retention of the paragraph.

154. Mr. SCALLE agreed with Mr. Amado. The characteristic feature of genocide was intent and the fact that it was committed with intent to harm a particular group. If a crime were committed by a single individual on a single occasion, but with the intent to harm a whole group of men, that was sufficient for it to take on the nature of genocide.

155. Mr. HUDSON pointed out that States which had not ratified the Convention on Genocide would nevertheless be required to respect the Code; he wondered whether that ought to be so.

156. Mr. SPIROPOULOS pointed out that States which did not accept the Convention on Genocide would probably not accept the draft Code either. At the second session the majority of members of the Commission had wished that offence to be included in the draft Code.<sup>15</sup> He himself did not insist upon it.

*It was decided, by 9 votes to 2, to retain paragraph 8.*

157. Mr. KERNO (Assistant Secretary-General) stressed the importance of the question of genocide. It was true that the murder of a single person could constitute

genocide, but only provided that the murderer had the intention not just to remove one member of a particular group, but also to destroy the group; it was for the judge to establish that intention.

158. Mr. ALFARO thought that, in the text of the commentary on paragraph 8, the words "in substance" should be deleted.<sup>16</sup>

159. Mr. HUDSON proposed that the commentary be replaced by the following text: "The text of this paragraph follows the definition of genocide given in article II of the Convention on the Prevention and Punishment of the Crime of Genocide."

*It was so decided.*

The meeting rose at 1 p.m.

## 108th MEETING

*Thursday, 21 June 1951, at 9.45 a.m.*

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*Chairman:* Mr. James L. BRIERLY  
*Rapporteur:* Mr. Roberto CORDOVA

*Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCALLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

*Secretariat:* Mr. Ivan KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. Yuen-li LIANG, Director of the Division for the Development and Codification of International Law, and Secretary to the Commission.

### Communication regarding the next session of the Commission

1. Mr. KERNO (Assistant Secretary-General) announced that he had received a telegram from Mr. Lall,

<sup>14</sup> See summary record of the 108th meeting, para. 97.

<sup>15</sup> See *Yearbook of the International Law Commission 1950*, vol. I, summary record of the 59th meeting, paras. 1-82.

<sup>16</sup> The comment read as follows: "The text of this paragraph follows the definition of the crime of genocide contained in article II of the Convention on the Prevention and Punishment of the Crime of Genocide."