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Summary record of the 108th meeting

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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.¹⁴

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.¹⁵ 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.¹⁶

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,

¹⁴ See summary record of the 108th meeting, para. 97.

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

¹⁶ 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."

Assistant Secretary-General in charge of the Department of Conference and General Services, informing him that he (Mr. Lall) considered it definitely preferable that the 1952 session of the International Law Commission should be held at United Nations Headquarters at New York, where all facilities in the matter of staff, conference rooms etc. would be available next year and where also it would cost less to hold the session. In the latter connexion Mr. Lall pointed out that in the present year the travel expenses and living allowances of the Secretariat would amount to \$16,200, and that such expenditure could be avoided if next year the Commission met at New York.

2. Mr. HUDSON asked whether the cost of bringing members of the Secretariat to Geneva would not be offset by the saving on the travel expenses of members of the Commission, most of whom resided in Europe. He hoped the Assistant Secretary-General would look into that point.

3. Mr. KERNO (Assistant Secretary-General) said that while he was not in a position to give an immediate reply to Mr. Hudson's question, he would point out that it was not only on budgetary grounds that Mr. Lall considered it preferable to hold the next session at New York.

4. Mr. HUDSON replied that, although he himself would have preferred the next session to be held at New York, he thought that the Geneva atmosphere was more appropriate to the work of the Commission. The General Assembly had urged the International Law Commission to conduct its proceedings in such a way as to produce quick results.

5. Mr. SPIROPOULOS mentioned that he intended, when the Commission came to discuss the question of amendments to its Statute, to move that Geneva be selected as the headquarters of the Commission. That was clearly a question to be decided by the General Assembly; but several members of the Commission could not possibly travel to New York in summer, while if the session was to be held in April, some members would be prevented by their professorial duties from attending.

6. Mr. SCELLE agreed with Mr. Spiropoulos that it was not only a question of the place, but also of the date.

7. Mr. AMADO also considered that the Commission could get through more work and in better conditions at Geneva than at New York. Working conditions at Geneva were more conducive to an effective contribution by the Commission to the task with which the General Assembly had entrusted it, a task which was very different from those assigned to other United Nations commissions.

8. Mr. KERNO (Assistant Secretary-General) thought it was an exaggeration to state that it was impossible for members of the Commission to meet at New York in summer. The Secretariat worked throughout the summer and there was a full programme of sessions and meetings. He thought he would be in a position to supply the information requested by Mr. Hudson in a few days.

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, A/CN.4/L.19)¹
(continued)

TEXT OF THE DRAFT CODE

ARTICLE 2 (continued)

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

Comment²

9. Mr. HUDSON observed that the comment on paragraph 8, unlike those on the preceding paragraphs, did not state by what particular category of persons the offence in question might be committed.

10. Mr. SANDSTRÖM pointed out that the information was contained in the actual text of the paragraph.

11. Mr. SPIROPOULOS thought that, even so, it should be mentioned in the comment.

Paragraph (9) (paragraph 10 in the text of the "Report")³

12. Mr. HUDSON thought that paragraph 9 went rather too far, particularly in including political and cultural grounds.

13. The CHAIRMAN pointed out that the paragraph required that such acts be "inhuman acts". In reply to a further observation by Mr. Hudson, he explained that the Commission had decided to delete the word "mass" before the word "murder".⁴

14. Mr. ALFARO pointed out that, although the deletion had been made in the English text, in the French text the expression "*l'assassinat en masse*" had been retained.

15. Mr. SCELLE said that the French text needed to be redrafted.⁵ The expression "*toute population civile*", for example, was not correct French and should be replaced by some such expression as "*des éléments de la population civile*". The French wording of the last part of the sentence was also faulty; the phrase "*à l'occasion des*" should certainly be replaced by the words "*en relation avec les*".

16. The CHAIRMAN promised that the French translation would be revised.

17. Mr. SPIROPOULOS pointed out that the French Government had submitted its observations on the draft

¹ See summary record of the 106th meeting, footnote 8.

² The comment read as follows: "This paragraph is, in substance, similar to Article II of the Convention on the Prevention and Punishment of the Crime of Genocide which article defines the crime of genocide."

³ The end of paragraph 9 read as follows: "... defined in the present article".

⁴ See summary record of the 90th meeting, para. 112.

⁵ The French text read as follows: "9. *Les actes inhumains commis par les autorités d'un Etat ou par des particuliers contre toute population civile, tels que l'assassinat en masse, l'extermination, la réduction en esclavage, la déportation ou les persécutions pour des motifs politiques, raciaux ou religieux, lorsque ces actes sont commis au cours de l'exécution ou à l'occasion des crimes définis dans le présent article.*"

code (A/CN.4/45/Add.2) and had noted, *inter alia*, that the term "opinion" had unfortunately disappeared from the definition of genocide as given in the 1948 Convention.

18. The CHAIRMAN said that the communication from the French Government contained a number of interesting suggestions which merited study; but he did not consider that the disappearance of the word "opinion" affected paragraph 9, which the Commission was then discussing. The Commission, he would repeat, was not concerned with the Convention on Genocide.

19. Mr. ALFARO wondered whether the words "political . . . grounds", as used in paragraph 9, did not cover what might be understood by the term "opinion".

20. As to acts of violence to life and person and outrages on personal dignity, as referred to in the Geneva Convention of 12 August 1949, which the French Government thought should be mentioned, he saw no objection to their inclusion in the text of paragraph 9.

21. Mr. KERNO (Assistant Secretary-General) wondered whether the concept "opinion" could be clearly defined. Before such a word, with its many possible meanings, was adopted agreement should be reached on the precise meaning to be attributed to it.

22. Mr. SCALLE thought that what was mainly implied was political opinions; but the word was certainly capable of a wide variety of meanings.

23. Mr. ALFARO pointed out that, when the draft Convention on Genocide had been discussed at the third session of the General Assembly, some members of the Sixth Committee had objected to the use, in the convention, of the expression "political opinion", on the ground that a political party which had suffered for its opinions might, in that case, appeal to the United Nations as a victim of genocide. However, the words could be used in the definition of the crime covered by paragraph 9.

24. Mr. SPIROPOULOS did not consider that the Commission need include those words in the draft code; but the question should be examined and a decision taken.

25. The French Government mentioned the question under the heading of "Crimes against humanity", which was precisely the type of crime covered by paragraph 9.

26. Perhaps the words "or for reasons of their opinion" could be added after the words "on political, racial, religious or cultural grounds".

27. Mr. SANDSTRÖM thought the text of paragraph 9 already covered all cases that should be included and that it was unnecessary to insert the word "opinion", the meaning of which was too general.

28. Mr. ALFARO thought that the Commission might direct the special Rapporteur to draft a short commentary noting the views of the French Government and stating that the term "opinion" referred to political, religious and cultural opinions.

29. In the view of Mr. SPIROPOULOS, supported by the Chairman, any reference in the comment to the reply of one government would set a regrettable precedent. Governments could obtain sufficient information from the summary records.

30. He wondered whether the acts of violence to life and person and outrages on personal dignity, referred to in the Geneva Convention of 12 August 1949, and which the French Government wished to have mentioned, were not war crimes. If so, they would come under paragraph 10 which concerned war crimes.

31. Furthermore, in its communication the French Government stated that the text adopted by the International Law Commission preserved the link established by the Nürnberg judgment, in accordance with the London Charter, between the punishment of crimes against humanity and the punishment of war crimes, and that there was no reason why that link should be maintained.

32. Mr. SANDSTRÖM said that he had already raised that question and that it had been discussed by the Commission, but that the Commission had rejected his view, which had coincided with that of the French Government.

33. The CHAIRMAN thought that the Commission had not preserved the link.

34. Mr. SANDSTRÖM observed that the French Government's objection concerned the limitation contained in the last phrase of paragraph 9, namely "when such acts are committed in execution of or in connexion with other offences defined in the present article".

35. Mr. SPIROPOULOS said that the French Government referred to the formulation of the Nürnberg principles, but would like the draft code also to cover offences against humanity committed in time of peace.

36. The draft code went much further than the Nürnberg principles, although it did not quite meet the wishes of the French Government, which would like the definition of offences against humanity to be so framed that certain acts would not be classified both as war crimes and as offences against humanity or, conversely, that certain obviously criminal acts would not be removed from both lists.

37. The CHAIRMAN considered that some overlapping was inevitable.

38. Mr. ALFARO thought that a differentiation had actually been achieved, since, under the draft code, acts in violation of the laws or customs of war were war crimes.

39. Mr. SPIROPOULOS thought that the dividing line was very difficult to draw, except as he had drawn it in his first report.

Paragraph 9 was adopted.

Comment

40. Mr. HUDSON proposed the deletion of the word "paragraph" in lines 1-2 of the comment and the substitution of the word "detrimental" for "offensive" in line 5.

41. He also pointed out that the comment on paragraph 9 did not specify by whom the crimes in question might be committed.⁶

⁶ The second paragraph of the comment did not exist in the original text.

Mr. Hudson's amendments were adopted.

*Paragraph (10) (paragraph 11 in the text of the " Report ")
Paragraph 10 was adopted without discussion.*

Comment ⁷

42. Mr. HUDSON said that there was a large number of works on the subject of the destruction of historic monuments and such like, referred to in the second paragraph of the comment, though he personally was not familiar with them. If paragraph 10 referred to destruction of that kind, a more detailed comment should perhaps be given.

43. He wished, at all events, to state that he had a fundamental objection to paragraph 10 as a whole and to the comment on it. The phrase " laws or customs of war " was there used as though its meaning were well-established. But the laws and customs of war were, in fact, a very uncertain quantity, and the provisions of the Hague Conventions of 1907 concerning them seemed to have been completely forgotten.

44. He asked whether paragraph 10 covered any violation whatsoever of the laws and customs of war.

45. Mr. EL KHOURY was convinced that acts in violation of the laws or customs of war could not be omitted from the code of offences against the peace and security of mankind. It was true that the laws and customs of war were not clearly defined at the international level, and for that reason he thought that the International Law Commission should take up the study of the question at the earliest possible moment. The code should be supplemented by a report on the question of the laws and customs of war.

46. Mr. HSU thought the question could be covered in the commentary on paragraph 10, where it might also be suggested that the codification of the laws and customs of war be undertaken.

47. Mr. FRANÇOIS pointed out that, at the first session of the Commission, he had proposed the inclusion of the laws and customs of war among the topics to be dealt with by the Commission, but his suggestion had been rejected by a large majority.⁸

⁷ The comment read as follows: "[First paragraph as in the " Report "].

...

"The United Nations Educational, Scientific and Cultural Organization has urged that wanton destruction of historical monuments, historical documents, works of art or any other cultural objects should be considered as a crime punishable under international law. It is understood that such destruction comes within the purview of the present paragraph.

"This paragraph applies to any and all acts committed in violation of the laws or customs of war, whatever the degree of gravity of such acts.

"This paragraph applies to all cases of declared war or of any other armed conflict which may arise between two or more States, even if the state of war is not recognized by one of them. It also applies to all cases of partial or total occupation of the territory of a State, even if the said occupation meets with no armed resistance."

⁸ See " Report of the International Law Commission covering its first session," para.18, in *Official Records of the General Assembly, Fourth Session, Supplement No. 10 (A/925)*; also in *Yearbook of the International Law Commission, 1949, Part II*.

48. The Netherlands Government had held the view that the laws and customs of war might be reviewed, but not before the findings of the Geneva Diplomatic Conference of 1949 were known. It was common knowledge that, as a result of that Conference, many of the laws and customs of war had been codified in four Conventions.

49. The thorny question of prohibited weapons was, however, still outstanding. The Netherlands Government was therefore rather chary of tackling the subject, particularly so long as the question of atomic weapons had not been settled, since it considered that a conference on the regulation of the laws and customs of war would be more or less pointless if the question of prohibited weapons was to be shelved.

50. However, the Netherlands Government would certainly welcome a decision by the Commission to undertake a study on the laws and customs of war also, although such a study would undoubtedly be fraught with difficulty. He was therefore reluctant to support Mr. el Khoury's proposal.

51. Mr. SPIROPOULOS said that he had outlined, in his first report, the grounds for the inclusion in the code of the crime concerned. That crime was the subject of article 6 (b) of the Nürnberg Charter. It did not, in fact, violate the peace and security of mankind and, accordingly, from the purely theoretical point of view, should have no place in the draft code; but he had proposed its inclusion because it was among the crimes enumerated in the Nürnberg Charter.

52. There was no specific definition of that crime; but the Commission had discussed the problem and adopted a decision, and he wondered whether it could now reverse its decision.

53. Mr. SCELLE stressed the extreme importance of the point raised. The request by the United Nations Educational, Scientific and Cultural Organization (UNESCO) showed conclusively that it was impossible to define all war crimes. Mr. Georges Berlia had submitted a very full report on the question to UNESCO which was anxious to have the backing of the draft code prepared by the International Law Commission in deciding whether the wanton destruction of historic monuments etc. should be included in the definition of war crimes.⁹ In fact, the question was one of principle.

54. UNESCO was preparing an extremely detailed draft convention, in connexion with which it had requested the assistance of a large number of architects, museum curators, etc., who had been asked for their technical advice on the best method of ensuring the protection of historic monuments.

55. In his view, the Commission could and should meet the needs of that Organization by specifying that the wanton destruction of historic monuments etc. could be classified as a crime against peace. All that was required was the inclusion of a statement to that effect in the commentary on paragraph 10.

⁹ " Report on the international protection of cultural property, by penal measures, in the event of armed conflict." 5c/PRG/6 Annex I, UNESCO/MUS/Conf.1/20 (rev.).

56. On the main question he agreed with Mr. François. Since war was now regarded as a crime, general regulations governing the use of force, including even the legitimate use of force, must be framed. For there were certain uses of force which did not constitute war, for example its use in self-defence and the coercive measures referred to in Chapter VII of the Charter. But the legitimate use of force did not justify the commission of any and every kind of act; any more than it did at the national level, where a police officer who committed an illegal act in the performance of his duties was liable to be, and in fact frequently was, tried and convicted.
57. He therefore considered that the category of acts under discussion could not be omitted from a code of offences against the peace and security of mankind, although an effort should be made to find another expression for "acts in violation of the laws or customs of war". He was consequently strongly in favour of the retention of paragraph 10, just as he considered that aggression and annexation should be mentioned in the draft code.
58. Mr. EL KHOURY suggested that the General Assembly be recommended to authorize the Commission to give the question of the laws and customs of war priority in the agenda for its next session. He had, however, no objection to the text of paragraph 10.
59. Mr. CORDOVA said he was concerned at the statement by Mr. Hudson, who seemed to consider that very many acts in violation of the laws or customs of war should not be included in the category of war crimes. Could Mr. Hudson explain what he had in mind?
60. Mr. HUDSON said that in the Geneva Convention of 1949 a distinction had been drawn between serious violations of the laws and customs of war and other violations.
61. Mr. CORDOVA asked whether Mr. Hudson wished the code to deal with all aspects of the question.
62. Mr. HUDSON replied in the affirmative; he thought the code would then be more acceptable.
63. Mr. ALFARO was of the opinion that the draft code should not go further than the Geneva Conventions. If the acts referred to by UNESCO were not covered by the Hague Convention of 1907, they should be included in the Code.
64. Mr. HUDSON presumed that the request submitted by UNESCO referred only to the wanton destruction of historical monuments, etc., during hostilities.
65. Mr. SPIROPOULOS observed that the crime would then be a war crime.
66. The CHAIRMAN asked whether the Commission wished to limit criminal liability to certain serious violations of the laws or customs of war, or whether it agreed to leave paragraph 10 as it stood.
67. Mr. CORDOVA thought that the Special Rapporteur might make a detailed statement on the question, indicating which acts were included in, and which were excluded from, the definition.
68. Mr. SPIROPOULOS said that the Nürnberg Charter referred to violation of the laws or customs of war without drawing any distinction.
69. Mr. HUDSON observed that the Nürnberg Tribunal had nevertheless drawn a distinction.
70. Mr. SPIROPOULOS disagreed. He thought that no doubt was possible and that no distinction could be drawn.
71. Some members of the Commission seemed to believe that, for there to be a violation of the laws or customs of war, some dreadful crime had to be committed. But even a minor violation of the laws or customs of war could very well constitute an international crime. What mattered was that such crimes should be tried by an international court.
72. Mr. AMADO drew the attention of the Commission to a passage in the memorandum submitted by the Secretary-General on war crimes as violations of the laws or customs of war.¹⁰
73. In the passage in question the Secretary-General did not attack the problem squarely, because he realized that no conclusion could be reached so long as the laws and customs of war were not clearly defined. But those laws and customs were continually evolving.
74. He thought that there should be a reference, at least in the comment on paragraph 10, to the Hague Convention of 1907 and to the Geneva Conventions of 1929 and 1949. The laws and customs of war were not the same in the twentieth century as in earlier centuries, having acquired a complexity typical of our age. Such a subject was extremely difficult to define. Many experts had acknowledged the impossibility of enumerating all war crimes that were violations of the laws or customs of war. He was accordingly prepared to accept paragraph 10 either as it stood or with the addition of a reference to the Hague and Geneva Conventions.
75. Mr. CORDOVA said that, if Mr. Spiropoulos' view was the correct one, it would be for the judges to determine the gravity of the crime. There were, however, acts in violation of the laws or customs of war which were harmless. He thought that it should perhaps be stated briefly in the commentary that the application of the general rule might be limited.
76. Mr. EL KHOURY observed that the comment on paragraph 10 contained no mention of the authorities in which the laws and customs of war were specified, whereas other paragraphs referred to the texts on which they were based. That omission must be remedied and it should also be stated whether such authorities as existed were reliable.
77. Mr. LIANG (Secretary to the Commission) thought that the enumeration of acts in violation of the laws or customs of war would be a long, difficult and complicated task. The War Crimes Commission, which had sat in London and of which he had been a member, had endeavoured to draw up such a list, but had been obliged to admit defeat.

¹⁰ *The Charter and Judgment of the Nürnberg Tribunal*, United Nations Publication, Sales No. : 1949.V.7., p. 62.

78. He considered that the purposes of the draft code were not the same as those of the Geneva Conventions and that the inclusion in it of a list of war crimes as violations of the laws or customs of war might cause confusion, the more so since the list contained in the Geneva Conventions was the same as the list of inhuman acts given in paragraph 9 of the code.

79. Furthermore, he did not think that it could be stated in the code that only serious violations would be punishable. The Geneva Conventions, which depended on domestic legislation for their implementation, did not serve the same purpose as the code.

80. Again, no penal code made acts punishable on the ground of their gravity, that element being taken into account only in determining the penalty.

81. He disagreed with Mr. EL KHOURY so far as concerned the difficulty of determining what constituted violation of the laws or customs of war. Treaties were not the only sources where a definition of the laws and customs of war could be found. That had been explicitly stated by the Nürnberg Tribunal.¹¹

82. He himself could see no reason why paragraph 10 should not be accepted as it stood. The Court would judge borderline cases in the normal course of its judicial duties.

It was decided to retain the text of paragraph 10.

83. Mr. HUDSON pointed out that the word "or" in the English text meant "and/or".

84. Mr. SPIROPOULOS thought that the original wording of the Hague Convention should be preserved, that was to say, the word "or" should be used. For the benefit of Mr. Alfaro he would read article 56, paragraph 2, of the regulations annexed to the Hague Convention IV, of 18 October 1907, concerning the laws and customs of war on land, which ran:

"All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings."

First paragraph of the comment

85. The CHAIRMAN noted that the Commission had already discussed most of the commentary on paragraph 10.

The first paragraph of the comment was adopted.

Second paragraph of the comment

86. Mr. HUDSON thought that a reference to article 56 of the regulations annexed to the Hague Convention IV of 1907 might be inserted at the end of the second paragraph of the comment in some such words as: "This, in fact, follows from article 56 of etc."

The second paragraph of the comment was adopted as amended.

Third paragraph of the comment

87. Mr. SCALLE said that not every act in violation of the laws or customs of war was a crime. The stealing of a chicken was forbidden by the laws of war, but was not

a crime. He did not see why the word "crimes" should not be used instead of the word "acts". The paragraph included the phrase "whatever the degree of gravity". A theft was not a crime, it was often a petty offence.

88. Mr. SANDSTRÖM asked whether that was not a question to be settled by the judges.

89. The CHAIRMAN recalled that the Commission had agreed that such a distinction was impracticable.

90. Mr. SPIROPOULOS, supported by the CHAIRMAN and Mr. AMADO, suggested as a solution that the paragraph be deleted.

91. Mr. CORDOVA pointed out that, even if the Commission deleted the paragraph, the general terms used to define the crime would leave matters as they stood, unless the definition were changed. The Commission had considered that every violation of the laws or customs of war was an international crime and that the judges would have to take the gravity of the offence into account.

92. Mr. SCALLE said that, if that were so, there was no need for the phrase "whatever the degree of gravity".

93. The CHAIRMAN pointed out that Mr. Spiropoulos had stated in his first report that the Commission must decide whether every violation of the laws or customs of war was to be considered as a crime under the code or whether only acts of a certain gravity should be so classified.¹² The Commission had decided in favour of the first alternative. He suggested that it be stated that the Commission had decided against the second alternative because no distinction could be drawn.

It was decided to substitute for the third paragraph of the comment the relevant passage from the first report by Mr. Spiropoulos.

Fourth paragraph of the comment

94. The CHAIRMAN pointed out that, at the time of the Sino-Japanese "incident", neither of the two parties had recognized that there was a state of war.

95. Mr. HUDSON asked whether the second sentence of the paragraph was applicable and whether a war crime existed where there was no resistance.

96. The CHAIRMAN confessed that he was not very clear as to the connotation of the sentence.

It was decided to delete the second sentence of the fourth paragraph.

Paragraph (7) (paragraph 8 in the text of the "Report")

*Comment*¹³ (resumed from the 107th meeting)

97. The CHAIRMAN read out the following text which he suggested ought to be added as the first paragraph of the comment:

"Annexation of territory in violation of international law constitutes a distinct offence, within the purview of the present article, because it presents a particularly lasting danger to the peace and security of mankind.

¹² See *Yearbook of the International Law Commission 1950*, vol. II, doc. A/CN.4/25, Crime No. IX.

¹³ The original comment to paragraph 7 was identical to the last paragraph of the comment to paragraph 8 in the text of the "Report".

¹¹ *Ibid.*, p. 64.

The Covenant of the League of Nations, in article 10, provided that 'Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League'. The Charter of the United Nations, in Article 2, paragraph 4, stipulates that 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State . . .' Illegal annexation may, however, be achieved without overt use of force, for instance, by the threat of force or by economic coercion. For this reason the element of force is not deemed to be requisite. It is conceivable that illegal annexation may be accomplished through one or more of the acts defined in the other paragraphs of the present article. In that case, the offender will have been guilty of those offences as well.

"The term 'territory under an international régime' envisages territories under the international trusteeship system of the United Nations as well as those under any other form of international control, permanent or temporary."

First paragraph

First three sentences

The CHAIRMAN invited the Commission to consider the first three sentences of the above text.

98. Mr. HUDSON proposed the deletion of the phrase "within the purview of the present article".

It was so agreed.

Fourth sentence

99. The CHAIRMAN read out the fourth sentence and pointed out that the threat of force was covered by article 1.

100. Mr. KERNO (Assistant Secretary-General) said that the word "however", which appeared in the fourth sentence, always implied a contrast; but the preceding sentence contained a quotation from the Charter of the United Nations in which there was also a reference to the threat or use of force, so that the word "however" was inappropriate.

101. Mr. LIANG (Secretary to the Commission) pointed out that force was a normal aspect of annexation, but the point should be stressed that annexation could be accomplished without overt use of force. He suggested the deletion of the end of the sentence beginning with the words "for instance . . .".

It was so agreed.

102. The CHAIRMAN observed that the examples quoted in the sentence demonstrated the weakness of the sentence as a whole.

103. Mr. HUDSON, while agreeing with Mr. Liang's proposal that the end of the sentence be deleted, thought that the word "however" or a word of equivalent meaning should be retained.

104. Mr. ALFARO proposed the insertion, immediately after the quotation from Article 2, paragraph 4, of the Charter, of the sentence: "Any annexation carried out

by threat or use of force is illegal according to the Charter."

105. Mr. KERNO (Assistant Secretary-General) thought that, since the Commission had decided to retain paragraph 7, it should explain its reason for doing so and not merely repeat article 1 of the draft code or quote Article 2, paragraph 4, of the Charter. Some such explanation was essential. So far as concerned the word "however", it was perhaps not indispensable. The sentence might begin with the words "Illegal annexation may be achieved . . .".

The following wording was adopted:

"Illegal annexation may also be achieved without overt use or threat of force, etc."

Fifth sentence

106. Mr. HUDSON thought that the fifth sentence should be worded as follows: "For this reason, the paragraph is not limited to annexation of territory achieved by force."

107. Mr. ALFARO proposed the addition of the words "use of" before the word "force".

108. Mr. HUDSON pointed out that, in that case, the word "threat" must also be added. He preferred his own wording but would not oppose Mr. Alfaro's suggestion, provided the word "threat" were added.

The fifth sentence was adopted as thus amended.

Sixth and seventh sentences

109. Mr. HUDSON proposed the deletion of the sixth and seventh sentences.

110. Mr. SCELLE thought that, while the first of those two sentences had a meaning, the second had none. It merely stated that annexation was covered by the other articles of the code.

111. The CHAIRMAN agreed that it was quite unnecessary to state that.

It was decided by 6 votes to 3 to retain the sixth sentence.

112. On the proposal of Mr. AMADO, supported by Messrs. HUDSON and SCELLE, it was decided, by 6 votes to none, to delete the seventh sentence.

113. On the proposal of the CHAIRMAN, it was decided to combine the fourth and sixth sentences into one, as follows:

"Illegal annexation may also be achieved without overt use or threat of force, or by one or more of the acts defined in the other paragraphs of the present article."

Second paragraph

114. Mr. HUDSON proposed the deletion of the words "permanent or temporary" and the substitution of the word "régime" for the word "control".

The second paragraph was adopted as amended.

Paragraph 1 (resumed from the 106th meeting)

115. Mr. YEPES asked whether it would not be as well at that stage to discuss Mr. Scelle's proposal concerning aggression against the peace and security of mankind (A/CN.4/L.19).

116. The CHAIRMAN pointed out that the Commission had decided to study that question when examining the general report.¹⁴

117. Mr. SCELLE said that he had not overlooked that fact, but he thought that the Commission might deal with aggression in the same way as it had just dealt with annexation. If a passage in almost the same terms were added to the first paragraph, that would not prevent the reopening of the question when the part of the general report devoted to aggression came up for consideration.

118. If annexation was held to be an international crime he asked whether there was any objection to stating in article 2, paragraph 1, that aggression was also an international crime covered by that and other paragraphs of the same article. The sentence "Illegal annexation may also be achieved without overt use or threat of force, or by one or more of the acts defined in the other paragraphs of the present article", was applicable, *mutatis mutandis*, to both aggression and annexation. The same paragraph could therefore be used with the substitution of "aggression" for "annexation".

119. He would not labour the point, because the question of the definition of aggression, which the Commission had been requested to supply, would come up again when the general report was examined: that the Commission had already decided.

120. He could not help thinking, however, that there was something lacking in a draft code in which the word "aggression" did not appear. Since it must be agreed that aggression was the gravest international crime, it should be mentioned in the first paragraph. That would be done, but only implicitly, whereas he would prefer an explicit reference.

121. The CHAIRMAN said that the Commission might reopen discussion on the first paragraph. Since that was the last opportunity which the Commission would have of discussing the proposal, the matter had best be dealt with then and there.

122. Mr. HUDSON thought that, in view of the absence of Mr. Scelle from the meeting at which the Commission had abandoned the attempt to define aggression,¹⁵ the Commission might reconsider the commentary on the first paragraph of article 2. He called the Commission's attention to the operative part of General Assembly resolution 378 B (V), the text of which ran as follows:

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

123. He saw no objection to stating in the first paragraph of the comment on article 2, paragraph 1, that:

"The acts mentioned in this paragraph are included in the general concept of acts of aggression referred to in Article 1, paragraph 1, of the Charter of the United Nations; but that concept may also be applied to other paragraphs of this article."

¹⁴ See summary record of the 96th meeting, para. 106.

¹⁵ *Ibid.*, para. 86.

124. That would meet Mr. Scelle's request for the inclusion in the list of acts which were offences against the peace and security of mankind of a passage concerning aggression, and the Commission could report to the General Assembly that the latter's resolution had been taken into consideration. That would be one way of resolving the deadlock. The Commission would be explaining the paragraph even though the word "aggression" were not used in the paragraph itself. It would be sheltering under the "umbrella" of acts of aggression and saying that the latter also covered paragraph 1.

125. Mr. SPIROPOULOS fully agreed with Mr. Hudson's proposal.

126. Mr. SCELLE gratefully accepted Mr. Hudson's proposal; but, being obstinate, he was not satisfied so far as concerned the definition of aggression which the Commission had been asked by the General Assembly to supply. That was another question, which would come up again when the Commission examined the general report. It was some satisfaction to him that the concept of aggression was to be mentioned in the commentary. But he would point out, in all fairness, that he could not accept Mr. Hudson's proposal without reservation.

127. Mr. HUDSON was still of the opinion that the General Assembly resolution had not asked the Commission to define aggression; but the point would be raised again when the general report was examined.

128. Mr. CORDOVA thought that the general report should be drafted in the light of the discussion. If the decision on Mr. Scelle's proposal were postponed until the general report was discussed, the whole report might have to be changed. He therefore thought it preferable, if the question of aggression was to be re-opened, to discuss Mr. Scelle's view and, if it was adopted, to amend the text of the draft report accordingly, rather than to draft the report first and have to change it subsequently.

129. Mr. ALFARO said that Mr. Hudson had, of course, suggested a very happy solution which would enable the Commission to escape from the dilemma in which it found itself. He proposed the addition of a passage to article 2, whereby aggression would be included among the crimes which the Commission had in mind. It might be disconcerting for a reader seeking a definition of the concept of aggression not to find a paragraph on the subject. He proposed that article 2 begin with the words: "The following acts, or any of them, are offences against the peace and security of mankind: 1. aggression contrary to the Charter of the United Nations . . .".

130. He thought that the Commission ought to consider Mr. Hudson's proposal and decide whether it should not be inserted at the beginning of article 2. If that were done, the reader would learn what was meant by "aggression".

131. The CHAIRMAN said that that was a different proposal from Mr. Hudson's.

132. Mr. HUDSON pointed out that Mr. Scelle had accepted his proposal.

133. Mr. SCELLE said that he had accepted Mr. Hudson's proposal, but with reservations, and that he also accepted, *a fortiori*, Mr. Alfaro's proposal. He thought the Commission might finish with the question

of aggression. It would be more logical and also simpler from the point of view of the preparation of the general report. The Commission was not obliged to adhere strictly to the Nürnberg Principles. It had just drafted a paragraph on annexation. Why should it not draft one on aggression?

134. Mr. HUDSON pointed out that his suggestion did not depart from the lines which many members of the Commission thought should be followed. It was a matter of the addition of a new paragraph to the commentary on article 2, paragraph 1, to be worded as follows :

“ The employment or threat of employment of armed force, as envisaged in this paragraph, is included in the general concept of “ acts of aggression ” as that term is used in Article 1 (1) of the Charter of the United Nations. That general concept also includes some of the acts described in other paragraphs of this article.”

135. The advantage of that solution was that, while no attempt was made to set any limits to the concept of aggression, the Commission could reply to the General Assembly that it had examined the question when studying the draft code of offences against the peace and security of mankind.

136. Mr. CORDOVA thought that in view of the importance of Mr. Hudson's proposal, he should be requested to transmit it in writing to the Secretariat. There were two proposals before the Commission, Mr. Scelle's, which was the more ambitious, and Mr. Hudson's. The Commission should first examine the former, since its adoption would dispense with the need to discuss the latter. On the other hand, if the Commission rejected Mr. Scelle's proposal it would have to examine Mr. Hudson's. He proposed that Mr. Scelle's formula (A/CN.4/L.19) be examined first.

137. Mr. SCELLE explained that the question to be decided at that stage was whether it was easier to insert a definition of aggression at the end of article 7, or to revert to the comment on article 2, paragraph 1, and take shelter under the “ umbrella ” to which Mr. Hudson had referred.

138. The CHAIRMAN pointed out that the Commission had not defined annexation.

139. Mr. HSU said that Mr. Hudson's proposal was attractive and sound. It should appear in the draft code independently of whether the Commission defined aggression, so that the reader might not be surprised to find that the code contained no provision concerning aggression. At the same time he agreed with Mr. Hudson that the General Assembly had perhaps not requested the Commission to define aggression. But the Commission, having already taken up the question, should do its utmost to define aggression, since it had already made an unsuccessful attempt to do so, and that might adversely affect its reputation.

140. Mr. AMADO thought that the question should be thoroughly examined. Mr. Hudson's proposal disposed of the problem in a comment on one paragraph. That method did not satisfy Mr. Scelle and other members of the Commission who wished to define aggression. The question was whether the Commission intended to attempt

to define aggression in the terms proposed by Mr. Scelle or to dispose of the question by adding the “ umbrella ” clause suggested by Mr. Hudson. He himself was prepared to consider either solution.

141. One thing was certain : if the Commission accepted Mr. Hudson's proposal, it would mean that it was not defining aggression and that it considered the question of minor importance.

142. Mr. SPIROPOULOS said that the Commission had discussed the question of aggression and had reached a certain conclusion. Now that Mr. Scelle was proposing a new definition, must the question be re-opened? At all events there must be no confusion between the present task of the Commission and the definition of aggression. Mr. Hudson had proposed referring to aggression in one of the comments on the code. Quite apart from Mr. Scelle's proposal, it would be a good thing to mention aggression in one of the comments. Absence of such a reference would be a weakness in the code. But it remained to be seen whether Mr. Hudson's formula was the best. He did not think so.

143. The question raised by Mr. Scelle was different and would be discussed separately. But, as Mr. Córdova had said, it could not be discussed during the examination of the general report.

144. The Commission must meanwhile complete its consideration of Mr. Hudson's proposal and decide whether to adopt that proposal as it stood or in some amended form. It was generally agreed that the code should contain a reference to aggression, but the question was to find a suitable formula.

145. Mr. SCELLE said that, as Mr. Amado had so well explained, what had then to be decided was whether a paragraph on aggression could be added to the commentary on article 2, paragraph 1, or whether a special article on aggression, matching the article on annexation, should be inserted in the code.

146. The CHAIRMAN thought it preferable to wait until Mr. Hudson's proposal was communicated in writing to the Commission.

147. Mr. EL KHOURY still held the view that he had held from the outset, namely, that while aggression should not be defined it could be mentioned at that point. The list of international crimes which appeared in article 2 covered all forms of aggression. It would therefore be convenient to add after the word “ mankind ” at the beginning of article 2 the words “ the various forms in which an act of aggression can be committed are also enumerated in this article ”. That would meet the request of the General Assembly.

148. Mr. SCELLE was by no means convinced that all forms of aggression were covered by the various paragraphs of article 2. Far from it. For example, a government which had a verdict in its favour and wished to execute it by force would be committing an act of aggression not covered by article 2.

149. Mr. HUDSON said that he had submitted his proposal in order to reconcile the various views ; but he did not intend to press it.

150. The CHAIRMAN pointed out that Mr. Hudson's proposal was acceptable in substance to the Commission; the only question was how, precisely, it should be worded.

151. Mr. CORDOVA said that the part of the general report which concerned aggression was ready and that he intended to circulate it to his colleagues for their information. He thought that if Mr. Scelle's proposal were discussed, the discussion should be provisional until such time as the relevant passages of the general report on aggression were known.

152. Mr. SCELLE said that he would much prefer the definition of aggression to follow that of annexation in the draft Code.

153. The CHAIRMAN thought that that would be somewhat illogical.

154. Mr. HUDSON proposed that article 2 begin as follows:

"1. Any act of aggression, including 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 in pursuance of a decision or recommendation by a competent organ of the United Nations."

155. Mr. SCELLE pointed out that Mr. Hudson's proposal was not a definition of aggression.

The meeting rose at 1 p.m.

109th MEETING

Friday, 22 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, A/CN.4/L.19) (*continued*)

TEXT OF THE DRAFT CODE

ARTICLE 2 (*continued*)

Paragraph (1) (*continued*)

1. The CHAIRMAN proposed that the Commission examine the two alternative amendments to article 2, paragraph 1, proposed by Mr. Hudson, which had just been distributed to members of the Commission. The first alternative called for the addition of the following paragraph to the comment on paragraph 1:

"The employment or threat of employment of armed force, as envisaged in this paragraph, is included in the general concept of 'acts of aggression' as that term is used in Article 1, paragraph 1, of the Charter of the United Nations. That general concept also includes some of the acts described in other paragraphs of this article."

The second alternative called for the addition, at the beginning of paragraph 1, of the following words: "Any act of aggression, including"¹

2. Mr. HSU said that, although both proposals were very interesting, he himself preferred the first alternative. The second did not appear to meet the objections raised during the discussion at the previous meeting. The first alternative only expressed some of the ideas put forward by members of the Commission and he would prefer the idea of indirect aggression to be included also. He thought the first alternative entirely suitable for inclusion in a comment.

3. Mr. YEPES still favoured an independent definition of aggression. But the discussion the previous day had convinced him that it was preferable to include the definition of aggression in the code of offences against the peace and security of mankind. The question arose, however, whether that definition should be included in one of the articles of the code or in the comment on one of those articles.

4. He could not support the first alternative proposed by Mr. Hudson; to insert the definition of aggression in a comment would be to minimize the importance of the problem, which was considerable. Was not aggression the greatest offence against the peace and security of mankind and the common denominator of all the other offences to be defined in the code? That was why he considered that a special article should be devoted to its definition.

5. He found the second alternative preferable, but thought that the definition proposed by Mr. Scelle in his memorandum (A/CN.4/L.19) was acceptable. Nevertheless, he did not approve of the words "positive international law in force" and would prefer "international public peace".

6. Mr. AMADO asked whether, if he accepted the

¹ See summary record of the 108th meeting, para. 154.