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Summary record of the 109th 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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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.

CONTENTS

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.

formula proposed by Mr. Hudson, he would be rejecting that proposed by Mr. Scelle, or whether he could support both texts.

7. Mr. SANDSTRÖM asked whether Mr. Scelle proposed that the definition given in his memorandum be inserted as an article of the code.

8. Mr. SCELLE replied in the affirmative.

9. Mr. AMADO said that he did not fully understand the last phrase of the definition proposed by Mr. Scelle, in particular, the term "*ordre public*" (public peace). For all jurists who had specialized in criminal law or private international law, that term suggested the idea of a conflict of laws. Under existing systems, the public peace meant the external aspect of a country. If aggression were considered as an act designed to disturb the public peace, i.e., the *status quo*, it must be concluded that countries which had been brought against their will under the domination of a powerful neighbour would be committing aggression if they attempted to escape that domination, since they would be disturbing the public peace. Similarly, colonies which fought against the domination of a metropolitan country would also be disturbing the public peace.

10. Mr. EL KHOURY observed that the Commission was returning to the question of aggression and attempting to find a means of carrying out the task which the General Assembly had entrusted to it. Most of the members of the Commission had considered that it would be better not to enumerate offences against the peace and security of mankind, in view of the difficulty of doing so. But in an international criminal code it was essential to enumerate all the offences conceived to be punishable under international law.

11. All acts of aggression were punishable international crimes and should be included in the code. If it was desired that the code should cover all crimes under international law and be universally accepted, it was impossible not to include all forms of aggression. Hence it was necessary to work out a definition of aggression.

12. He referred to General Assembly resolution 378 B (V) on the question of aggression and emphasized its intimate connexion with the code under discussion and the formulation by the International Law Commission of the Nürnberg principles. He proposed that the following paragraph be added to article 1 of the code:

> "They also represent the various forms in which acts of aggression may be committed."

13. He pointed out that some of the offences mentioned in the different paragraphs of article 2 also constituted acts of aggression. Mr. Hudson's second alternative, which read: "Any act of aggression, including," was consequently not suitable, since it gave the impression that only the first paragraph referred to acts of aggression, whereas the formula he himself proposed also referred to the acts of aggression dealt with in the other paragraphs.

14. Mr. SPIROPOULOS thought that it would be better first to study Mr. Scelle's definition, which went further than Mr. Hudson's proposal. If the Commission did not wish to adopt the former, it could then turn to the two alternatives proposed by Mr. Hudson.

15. Mr. YEPES thought that the Commission should first settle the question whether the definition of aggression was to be included as a paragraph of the code or in the commentary.

16. Mr. SCELLE, replying to a question by the CHAIRMAN, again explained that he wished his definition to be included as a paragraph of the code.

17. Mr. ALFARO thought that Mr. Scelle's proposal and the two proposals submitted by Mr. Hudson could be considered simultaneously.

18. Mr. SCELLE pointed out that the second alternative proposed by Mr. Hudson was also intended for inclusion as a paragraph of the Code. He agreed with Mr. Hudson on that point, but would have some comments to make regarding that text. In his opinion the most important point was to insert the definition of aggression in the Code. He was prepared to amend his proposal in accordance with the suggestions of members of the Commission.

19. Mr. CORDOVA formally proposed that Mr. Scelle's proposal be considered first.

It was so decided.

20. Mr. ALFARO said that, with very slight amendment, the formula proposed by Mr. Scelle in his memorandum could provide a satisfactory solution of the problem under discussion. In his opinion Mr. Scelle had also been right in asking that his definition should be included as a separate paragraph of the code.

21. He pointed out that article 2 was divided into several paragraphs, some of which referred to various forms of aggression: paragraph 1 referred to the most usual form of aggression, paragraph 2 to the planning and preparation of aggression, paragraph 3 to incursion by armed bands, paragraph 4 to the fomenting of civil strife, paragraph 5 to terrorist activities, and paragraph 7 to annexation. All those acts constituted aggression, whereas strictly speaking, those referred to in the other paragraphs of article 2 did not.

22. Mr. Scelle wished to supplement article 2 by the definition of aggression he had proposed, namely, that aggression consisted of "any resort to force contrary to the provisions of the Charter of the United Nations, the purpose or effect of which is to modify the state of positive international law in force and to disturb public peace". In his (Mr. Alfaro's) opinion that definition differed from the formula adopted for article 2, paragraph 1, which referred to the employment or threat of employment of force, in particular, of armed force.

23. Various members of the Commission had pointed out that there might be aggression by forces which were not armed. Hence he believed that it would be better to retain the first paragraph of article 2 in its present form and add a paragraph based on Mr. Scelle's text. The task entrusted to the Commission by the General Assembly would thus be accomplished, since the definition of aggression would be included in the code of offences against the peace and security of mankind.

24. Moreover, he considered that Mr. Hudson's formula did not contribute anything new to the definition of aggression.

25. He himself would prefer article 2, paragraph 1, to be retained, with the insertion, at the beginning, of a definition of aggression based on that proposed by Mr. Scelle.

26. Mr. SANDSTRÖM pointed out that the authors of ordinary criminal codes attempted to define precise and concrete acts; the formula proposed by Mr. Scelle proceeded entirely otherwise, since its author made use of concepts which were neither concrete nor precise, but extremely vague. He referred to the United Nations Charter, which was a most uncertain factor in that context, and then to the concepts of positive international law and public peace, which were even broader. Criminal codes certainly made violence an element in the definition of specific crimes, but they did not make it a crime in itself.

27. He did not think it possible to use such a definition in a criminal code.

28. Mr. SCELLE admitted that his definition contained terms which were rather too abstract.

29. He believed that the expression " positive international law ", to which Mr. Yepes had referred, was correct. By it, he meant to convey that there was aggression whenever there was recourse to force in violation of the essential obligations imposed by the Charter, which prohibited resort to force to change an established legal situation, even in order to enforce a right.

30. That, precisely, was the great progress which the Charter represented. He wondered how a meeting of jurists could overlook the opportunity to emphasize the enormous progress represented by the absolute prohibition of resort to force in order to change a legal situation, even if the change were legitimate.

31. Mr. Amado had raised the question of the position of colonies. Although he was certainly not a colonialist, he (Mr. Scelle) emphasized that anything established by law could only be changed by law. He was sure that Mr. Amado would agree with him on that point.

32. Any employment of force, even in a just cause, constituted aggression. That was why he had used the words " any resort to force contrary to the provisions of the Charter of the United Nations ". The Charter prescribed legal procedure for all cases in which a State might be tempted to resort to force; even for extreme cases, such as that referred to in Article 94, paragraph 2. Attempts to establish that very system on the international level had been continuing for decades. He could not understand how jurists could hesitate to introduce that idea into the code of offences against the peace and security of mankind.

33. He had no objection to Mr. Alfaro's proposal which, incidentally, followed the lines of his own; he pointed out that in his definition he had endeavoured to avoid enumeration.

34. As regards the term " *ordre public* " (public peace), with which Mr. Amado had said that he was not satisfied, he was prepared to replace that expression by the word " *la paix* " (peace), which was used in the Charter itself, or to be more explicit by saying " *l'ordre public international* " (international public peace).

35. Mr. AMADO observed that the order established by Fascism and Nazism was " *l'ordre public* " (the public peace).

36. Mr. SCELLE replied that internal revolution in a State did not become aggression until it disturbed international public peace.

37. The criticisms brought by Mr. Sandström against his proposal could be applied to any definition of any offence whatever. Mr. Sandström confused the definition of the crime with the determination of the criminal. No definition, whether of murder, theft, fraud, misrepresentation, bankruptcy, etc. could include all the elements, otherwise there would be no further need for courts of law. The function of the code was to define the crime and that of the judge to determine the criminal. For instance a code could not be expected to define negligence or attenuating circumstances, but the court had to apply those concepts.

38. The Commission's great mistake in seeking to establish a definition of aggression was that it had never established a clear distinction between definition of aggression and determination of the aggressor.

39. Self-defence was not a crime, although it could combine all the material conditions of aggression. Only a judge or a competent body could determine that a particular case was really one of self-defence.

40. Thus any definition of aggression would have the same legal value as any definition of crime, but it would translate the spirit of the Charter into normative language.

41. The Commission consisted of jurists and had been instructed to prepare a criminal code which was to define the main offences against the peace and security of mankind; the whole world was watching the Commission and would not understand its failure to define aggression.

42. Mr. KERNO (Assistant Secretary-General) emphasized that the discussion which was taking place was of great importance, but was complicated by the fact that the Commission wished to arrive at a definition of aggression and include that definition in the code of offences against the peace and security of mankind.

43. Unanimity had, however, been reached on a number of substantive points; for instance, there was agreement that any act of aggression was an offence against peace and against mankind and that the Charter provided that the employment of force, even in a just cause, was prohibited; but from those premises different conclusions were drawn and that was where complications set in.

44. The authors of the Charter had not overlooked the difficulties raised by the definition of aggression; the question had been discussed at length at San Francisco, and many delegations had urged that the Charter should contain a definition of aggression. But in the Charter, " aggression " and " the employment of force ", and " aggression " and " a breach of the peace " were not synonymous. Thus Article 1 of the Charter stated that one of the purposes of the United Nations was the " suppression of acts of aggression or other breaches of the peace " while Article 39 stated that " The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression . . .".

45. He, too, had been struck by the term " *ordre public* " (public peace), which was used in Mr. Scelle's definition. When Hitler had invaded first the Sudetenland and later the whole of Czechoslovakia, he had claimed that it was to preserve the public peace (" *l'ordre public* "). The effect of any definition might be that an aggressor, acting in bad faith, could claim that his actions did not constitute aggression.

46. He well understood that a competent body would have to decide whether such a claim was justified. But that would only complicate the task of such bodies.

47. In reply to Mr. Scelle, who had pointed out that his memorandum explained the sense of the terms used in the definition, he recalled that the International Court of Justice only allowed the interpretation of texts in the light of preparatory work if those texts were obscure.

48. He stressed that he had only wished to draw attention to the difficulties which might arise in applying Mr. Scelle's definition.

49. Mr. HUDSON pointed out that the first sentence of the text proposed by Mr. Scelle: " Aggression is an offence against the peace and security of mankind ", could not be inserted in the introductory sentence of article 2. Mr. Scelle had no very definite views on where his definition should be inserted in the code; it would, however, be well for him to explain where he wished it to appear.

50. Moreover, he could not accept the second sentence of the definition, since it did not condemn all resort to force contrary to the provisions of the United Nations Charter, but only resort to force with a particular purpose or effect. In his opinion that weakened the effect of the Charter.

51. He also wondered what was to be understood by " to modify the state of positive international law ". As for the words " disturb the public peace ", they added absolutely nothing to what every one understood by aggression.

52. Mr. SCELLE said that he was willing to replace the words " state of positive international law in force " by some such expression as " an existing legal situation ". He had already said that he was prepared to replace the words " *ordre public* " (public peace) by the words " *la paix* " (peace).

53. Mr. FRANÇOIS said that he had been one of the three members of the Commission who had been in favour of the definition of aggression which the Commission had rejected.[2] He preferred that definition to the one proposed by Mr. Scelle; the latter certainly seemed to have the defect of weakening the Charter. In particular, it would be desirable to delete the end of the definition, from the words " the purpose or effect . . .".

54. He raised the same objections as several other members of the Commission to the words " the state of positive international law in force " and " *ordre public* " (public peace).

55. He asked whether Mr. Scelle could not support the definition accepted by the minority of the Commission, which contained everything he desired and was less open to criticism. Moreover, he thought that the Commission was going about the insertion of the definition of aggression in the code in a rather unsatisfactory manner. He found Mr. el Khoury's formula the best.

56. Mr. EL KHOURY observed that, when the General Assembly had instructed the International Law Commission to draw up a definition of aggression, it had not expected such an abstract formula as that proposed by Mr. Scelle. He thought that the Commission must either draw up a concrete definition or no definition at all. In any case, if an abstract definition were adopted, it must be accompanied by concrete examples and he would like his own proposal to be added.

57. Mr. HUDSON said that Mr. el Khoury's suggestion could be followed by amending the first sentence of article 2 to read as follows:

> " The acts set forth in the following paragraphs of this article are offences against the peace and security of mankind. They include all acts of aggression, by whatever means and in whatever manner they may be committed."

58. Mr. SANDSTRÖM said that he had not criticized Mr. Scelle's definition because it failed to include all the necessary elements, but because the criteria on which it was based were too abstract and too general.

59. Mr. YEPES observed that it would be possible to avoid all the difficulties raised by Mr. Scelle's definition if the final passage of his text were deleted, as from the words " the purpose or effect ".

60. Mr. SPIROPOULOS thought that the discussion was sufficiently far advanced for the Commission to arrive at a definite conclusion. Mr. Scelle's definition contained precise elements; Mr. Alfaro's views were in general agreement with that definition; the Commission also had before it several variants proposed by Mr. Hudson and an important proposal by Mr. el Khoury.

61. He thought that members of the Commission were agreed that Mr. Hudson's last proposal, in which all acts of aggression were mentioned, did justice to all the previous proposals and reflected the general feeling of the Commission.

62. Mr. SCELLE considered that the essential point was that the Code should contain a special article on aggression, which should be specifically mentioned. He would not attempt to impose his own definition on the Commission, but the draft code should contain the statement that aggression constituted an international crime.

63. In the second alternative proposed by Mr. Hudson he could not accept the words " threat of employment . . . of armed force ", since he must take self-defence into account; the words " by the authorities of the State " were not satisfactory either, since aggression could, for instance, be carried out by volunteers. Finally, he thought that such an enumeration as that contained in the text was dangerous.

64. The CHAIRMAN asked whether Mr. Scelle withdrew his proposal in favour of one of the variants suggested by Mr. Hudson.

[2] See summary record of the 96th meeting, para. 73.

65. Mr. SCELLE replied that he was prepared to do so, provided that whichever of Mr. Hudson's proposals were adopted, it was included as a separate paragraph and not adopted as it stood.

66. Mr. ALFARO thought that the Commission should first decide whether it accepted Mr. Scelle's definition or not. If that definition were not accepted it could then take up Mr. Hudson's proposals.

67. He pointed out that he had explained the reasons why, in his opinion, the Commission should adopt Mr. Scelle's definition, with certain drafting amendments; he did not consider that the formula proposed by Mr. Hudson provided a complete definition of aggression.

68. Mr. SCELLE said that, whatever definition the Commission decided to adopt, the crime of aggression must be mentioned among the international crimes covered by the code. The text proposed by Mr. Hudson, however, was not especially concerned with aggression, being intended to replace a former text.

69. Mr. CORDOVA did not consider that Mr. Hudson's second alternative provided a definition of aggression. In his opinion an abstract definition should be included in the code. The terms of the definition proposed by Mr. Scelle had been discussed at length; only the basic idea should be retained, namely that aggression must be defined as a crime.

70. Mr. AMADO thought that the time for noble sentiments was past.

71. He had studied that problem and submitted a memorandum on it (A/CN.4/L.6). In his opinion, it was not possible to attempt to define aggression in other than very broad and general terms. All acts of violence other than the exercise of self-defence or the execution of a measure decided upon by the Security Council must be considered as aggression. He had referred to Article 42 of the Charter. Mr. Alfaro had then submitted a proposal, without success. The Commission now had before it the proposal of Mr. Scelle, who had made no clear statement of his wishes. He had, in fact, said that any definition would be acceptable to him; that attitude placed the Commission in a difficult position. Mr. Scelle should withdraw his proposal or submit a more precise draft. How could he (Mr. Amado), with his modest learning, assert that aggression was any act which constituted a negation of positive international law in force? Who could say what was the positive law in force? And what about custom? Was not that in force? Was not that positive law? Had not positive law often been modified to bring it into line with what Mr. Scelle in his book described as objective law?

72. Mr. SCELLE and Mr. CORDOVA pointed out that it must never be modified by force.

73. Mr. AMADO repeated that any act of violence for purposes other than self-defence or the implementation of enforcement measures decided upon by the Security Council could be aggression. It was not a question of a strict definition but he would be compelled, to his great regret, to abandon Mr. Scelle's formula and vote in favour of the text proposed by Mr. Hudson, in which the element of uncertainty was less.

74. Mr. HSU said that he had endeavoured to persuade Mr. Scelle to submit a definition; he regretted that the latter said that he wished a formula to be adopted without explaining what he wished it to include. In those circumstances he thought it advisable to take up one of Mr. Hudson's suggestions; but he proposed that before doing so the meeting should be suspended so that Mr. Scelle could submit to the Commission the new draft that he had in mind. When the meeting was resumed, the Commission would examine that draft and, if it decided not to adopt it, could then consider Mr. Hudson's proposal. He did not think that the Commission should reject Mr. Scelle's proposal at that stage.

75. Mr. HUDSON observed that if the Commission adopted his second alternative, Mr. Scelle would have achieved success. Acts of aggression would thus be included at the very beginning of the enumeration of offences.

76. Mr. SCELLE agreed to consult with Mr. Hudson, the Rapporteur-General and Mr. Alfaro with a view to arriving at a joint text.

77. After a short intermission the CHAIRMAN announced that he had received the joint text, accepted by various members of the Commission.

78. The text, which differed slightly from Mr. Hudson's second alternative,[3] was a substitute for Mr. Scelle's proposal. It differed from Mr. Hudson's proposal in that the words " or threat of employment " and the word " armed " had been deleted. He thought that the text should be substituted for article 2, paragraph 1.

79. Mr. SANDSTRÖM asked how the question of threats was to be dealt with.

80. Mr. HSU asked whether the text took account of the possibility of force being employed openly or otherwise.

81. Mr. HUDSON explained that the text was the same as Mr. Spiropoulos' original proposal (A/CN.4/44, Text of the draft code, article 1) except for the opening words and the two deletions which had been made.

82. Mr. HSU was not satisfied and felt bound to say so. As he had repeated on several occasions, the definition was only important because of its practical purpose, which was to assist the international community. The indirect employment of force was also aggression. That was a point which could not be overlooked.

83. Mr. HUDSON replied that the text did not prevent the Security Council from dealing with such acts; but the code concerned offences which would be tried by a Court.

84. The CHAIRMAN added that the text was only a substitute for the definition given in article 2, paragraph 1, which did not take account of indirect aggression.

85. Mr. HSU repeated that he was anxious to solve the practical problems which might arise. The Commission should endeavour to show that indirect aggression was also covered by its text. If the words " whether openly or otherwise " were added to the proposed text, he would be satisfied. Indirect aggression would thus be covered. He had not wished to press the point so strongly, but a

[3] See para. 1 above.

definition of aggression which did not cover indirect aggression would be incomplete.

Mr. Hsu's proposal was rejected by 6 votes to 5.

86. Mr. EL KHOURY explained that he had voted against the addition of the words " whether openly or otherwise " because, in his opinion, force could only be employed openly.

87. Mr. SPIROPOULOS drew the Commission's attention to the fact that the text began with the words " Any act of aggression, including the employment . . . of armed force ". That meant that the definition referred to all acts of aggression; hence the acts defined in paragraphs 3 and 4 could not be considered as acts of aggression in the strict sense of the term. He found the text unsatisfactory, but nevertheless would not propose any amendment.

88. Mr. HUDSON admitted that the criticism made by Mr. Spiropoulos was entirely justified. He thought a comment should be added to the text.

89. Mr. CORDOVA, on the other hand, did not think Mr. Spiropoulos' criticism justified. The paragraph stated that all acts of aggression were crimes. There were other paragraphs which referred to particular cases of aggression. Thus the procedure followed was that used in criminal codes when referring to homicide and parricide. What the Commission intended was to include all acts of aggression among the offences.

The joint text based on Mr. Hudson's proposal was adopted by 7 votes to 1.

90. Mr. SPIROPOULOS said that he had abstained from voting not because he was opposed to the idea, but because the definition might lead to misunderstanding.

91. The CHAIRMAN pointed out that the text would be substituted for the definition of the offence dealt with in article 2, paragraph 1.

92. He announced that the Commission had before it Mr. Hudson's proposal to add the following comment in article 2, paragraph 1:

> " The General Assembly, by its resolution 380 (V) of 17 November 1950, solemnly reaffirmed that any aggression ' is the gravest of all crimes against peace and security throughout the world '."

Mr. Hudson's proposal was adopted, the text to be inserted at the beginning of the comment on article 2, paragraph 1.

93. Mr. SPIROPOULOS asked why the word " armed " was retained in paragraph 2 (*paragraph 3 in the text of the ' Report '*).

94. Mr. ALFARO said that the definition of the first-named offence gave a general idea of acts of aggression. Those could be committed by a force which was not armed; to take an example given by Mr. Spiropoulos, 500,000 unarmed Chinese might enter the territory of another country. Hence there could be aggression by a force which was not armed. Paragraph 2 referred to planning or military preparation. Thus there was no contradiction in referring to armed force in that paragraph.

95. Mr. LIANG (Secretary to the Commission) felt it would be difficult to justify such differences in wording. He thought there was a contradiction. An examination of paragraphs 1 and 2 showed that they were drafted on similar lines. They were identical except that paragraph 2 began with the words " The planning or preparation ". If the word " armed " were retained in paragraph 2, a comment would be necessary, since otherwise the reader would think that its inclusion was due to sheer carelessness.

96. Mr. SPIROPOULOS thought that the preparation of aggression by an armed force was certainly an offence. He pointed out that the two paragraphs had formed a single text, but that the Commission had decided to separate them. He added that he was not proposing the deletion of the word " armed " in the second paragraph.

97. Mr. HUDSON explained that the reason for retaining the word " armed " in the second paragraph was that it referred to the preparation of armed force with a view to its employment.

98. The CHAIRMAN thought it contradictory to refer to " armed force " in paragraph 2 and merely to " force " in paragraph 1. He did not see how the Rapporteur could explain that difference.

99. Mr. HUDSON suggested, after reflection, that the word " armed " in paragraph 2 be deleted.

100. Mr. HSU proposed that, instead, the word " armed " be restored in paragraph 1. The Commission had, in fact, made a mistake. It would be most unsatisfactory to say " armed force " in one of the paragraphs and merely " force " in the other.

Mr. Hsu's proposal was adopted by 7 votes to 3.

101. Mr. FRANÇOIS asked whether the formula adopted meant that the threat of employment of force would not be included among the offences.

102. Mr. SANDSTRÖM observed that the Charter referred to the threat and the use of force and asked why the threat should not be expressly mentioned.

103. Mr. HUDSON replied that the Charter did not specify aggression. Mr. Scelle and Mr. Alfaro had found it so difficult to accept threat as constituting aggression, that he had given way on that point. It was a matter of interpretation, which would have to be decided by judges. His own opinion was that the threat of force amounted to the employment of force.

104. It would be advisable to delete the second sentence of the first paragraph of the commentary which read: " In addition, the present paragraph includes the threat of employment of armed force as an offence." The threat was in fact no longer mentioned in the text.

105. Mr. SCELLE thought that, if the threat of employment of force was in itself aggression, a distinction could no longer be made between what was self-defence and what was not. It would be for judges to decide that question.

106. There followed an exchange of views between Mr. CORDOVA, Mr. HUDSON, Mr. ALFARO, Mr. HSU and Mr. EL KHOURY on the question whether it should be provided that the threat of employment of force constituted an offence, since the definition of the offence referred to in paragraph 1 was confined to acts of violence.

It was decided, by 10 votes to 1, that the threat of employment of force was an offence.

It was decided, by 6 votes to 4, that the threat of employment of force did not constitute aggression.

107. The CHAIRMAN asked whether a separate paragraph should be devoted to the threat and whether the Commission wished to adopt the formula proposed by Mr. Córdova which read as follows:

" The threat of aggression should also be deemed to be an offence under this article."

108. Mr. ALFARO observed that Mr. Córdova had proposed that the Commission should merely state that the threat of aggression was an offence. The Commission had already voted that the threat of the employment of force was an offence, but did not constitute aggression. Hence it could not accept Mr. Córdova's proposal without reversing that vote.

109. He proposed drafting a new paragraph to follow that devoted to aggression. After the opening sentence of article 2 — " The following acts, or any of them, are offences against the peace and security of mankind " — the following text should be inserted:

" The threat of employment, by the authorities of the 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."

Thus the threat would be reintroduced into the code.

110. The CHAIRMAN considered that that text came to the same thing as Mr. Córdova's proposal.

111. Mr. CORDOVA explained that, in the paragraph already adopted by the Commission, it was stated that an act of aggression constituted an offence; the Commission now wished to say that the threat of aggression was also an offence. In his opinion the threat of any conceivable kind of aggression was an offence.

112. Mr. HUDSON suggested to Mr. Córdova a new paragraph of article 2 to read as follows:

" Any threat by the authorities of the State to use armed force . . ."

113. Mr. CORDOVA pointed out that that wording left any other threat of aggression out of account. He himself wished to include any threat of an act of violence.

114. Mr. LIANG (Secretary to the Commission) suggested to Mr. Córdova that the threat of aggression was not a separate offence. Aggression was a legal concept and it would be better to say " the threat of an act which amounts to aggression ", or " the threat of resort to acts which result in the juridical notion of aggression . . ."

115. After a discussion on the terms to be used for the final form of Mr. Córdova's proposal, Mr. HUDSON suggested the following wording:

" Any threat by the authorities of the State to resort to aggression against another state . . ."

Mr. Hudson's wording was adopted by 7 votes to 2.

116. Mr. EL KHOURY said that he had voted against the proposal and Mr. ALFARO explained that he had been unable to support it, since he did not wish to depart from the terms of the Charter, which did not refer to the " threat of acts of aggression ".

117. Mr. SANDSTRÖM asked whether it would not be advisable to make the text more specific; the previous text referring to the threat of employment of force had included the additional words " 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 ". It would not be possible to condemn every threat of the use of force. In cases where the use of force was permissible the threat must also be permitted.

118. The CHAIRMAN asked whether the existing comment was suitable for the offence referred to.

It was decided that the Special Rapporteur amend the comment in the light of the discussion.

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

Comment (resumed from the 107th meeting)

119. Mr. HUDSON pointed out that he had proposed the following text:

" In its resolution 380 (V) of 17 November, 1950, the General Assembly declared that ' fomenting civil strife in the interest of a foreign power ' was aggression."

The text was adopted.

Paragraph 5 (paragraph (6) in the text of the " Report ") (resumed from the 107th meeting)

120. Mr. EL KHOURY proposed that the latter part of the paragraph be deleted, beginning with the words " or the toleration ". He had in mind the case of the factory producing certain goods, which attempted to stop the production of competitors in another country; even though there were recourse to dumping, the authorities of the former country were not obliged to intervene.

121. The CHAIRMAN did not see how such acts could constitute terrorist activities.

122. Mr. HUDSON gave the following example: A State A produced certain goods and a State B placed a prohibitive tariff on those goods, which it had formerly imported in large quantities from State A. Would Mr. el Khoury consider that a case of terrorist activity? To do so would be going far beyond the scope of the text.

123. Mr. EL KHOURY did not wish mere toleration to be considered as an offence.

124. The CHAIRMAN pointed out that before the war Italy had tolerated the activities of Yugoslav terrorists.

125. Mr. AMADO considered that if a Government knew that an industrialist was producing bombs to be used against another State and did not intervene, it would be tolerating terrorist activities.

It was decided by 9 votes to 1 to retain paragraph 5 unamended.

Paragraph 11 (paragraph 12 in the text of the " Report ")

Sub-paragraph (i)

126. The CHAIRMAN read out sub-paragraph (i).

Sub-paragraph (i) was adopted without comment.

Sub-paragraph (ii)

127. Mr. HUDSON proposed that the sub-paragraph be deleted; he did not see who the provision would apply to.

128. Mr. SPIROPOULOS pointed out that it would apply, for instance, to newspaper administrations.

129. Mr. HUDSON observed that if an individual, not necessarily the authorities of a State, published a seditious article in a newspaper, the authorities would have to intervene and punish the paper.

It was decided by 4 votes to 3 to retain sub-paragraph (ii).

Sub-paragraph (iii)

130. Mr. HUDSON proposed that the sub-paragraph be deleted.

131. Mr. EL KHOURY said that, since attempts were worse than incitement, he did not see how the sub-paragraph could be deleted.

It was decided by 7 votes to 1 to retain sub-paragraph (iii).

Sub-paragraph (iv)

132. Mr. HUDSON proposed that the sub-paragraph be deleted.

133. Mr. FRANÇOIS reminded the Commission that he had proposed a text to be added to the comment on paragraph 11. If that text were adopted, he would vote in favour of sub-paragraph (iv). He thought, moreover, that the Commission had already adopted the comment and that its omission from document A/CN.4/L.15 was an error.[4]

134. Mr. SPIROPOULOS said that he was willing to include the comment in paragraph 11.

135. The CHAIRMAN read out the amendment proposed by Mr. François, to add at the end of the commentary on article 2 the following:

> " In including ' complicity in the commission of any of the offences defined in the preceding paragraphs ' among the acts which are offences against peace and security, the Commission did not intend to stipulate that all those contributing, in the normal exercise of their duties, to the perpetration of crimes against peace and security could, on that ground alone, be considered as accomplices in such crimes. There can be no question of punishing, as accomplices in an offence against peace, all the members of the armed forces of a State which has been guilty of illegal warfare, or the workers in its war industries."

136. Mr. FRANÇOIS repeated that that text had already been adopted in principle and could be found in the summary records.

137. Mr. HUDSON wondered whether that comment was consistent with the text of the paragraph. If sub-paragraph (iv) were not deleted, he would vote in favour of Mr. François' amendment, subject to drafting changes.

138. Sub-paragraph (iv) did not apply to anything which was not already covered; he saw no difference between conspiracy and complicity.

It was decided, by 8 votes, to retain sub-paragraph (iv).

Comment

First paragraph

139. The CHAIRMAN read out the first paragraph of the comment on paragraph 11.

The first paragraph was adopted without comment.

Second paragraph

140. The CHAIRMAN asked whether national enactments should be mentioned.

141. Mr. SPIROPOULOS explained that national courts had applied rules similar to those laid down in paragraph 11.

The second paragraph was adopted with the substitution of the word " certain " for the word " several ".

Third paragraph [5]

142. Mr. HUDSON asked Mr. François whether he would accept the words " it is not intended " instead of the words " the Commission did not intend ", since the same text might be adopted by the General Assembly.

143. He also proposed that the word " all " in the last sentence of the text be deleted.

144. Mr. FRANÇOIS pointed out that Generals were also members of the armed forces and in certain cases it would be possible to punish them. The deletion of the word " all " would imply that no member of the armed forces of a State could be guilty of the complicity referred to in sub-paragraph (iv).

145. Mr. HUDSON said that he would not press the point. He proposed deleting the words " which has been guilty of illegal warfare " in the last sentence. The term " illegal warfare " was not included in the code.

146. The CHAIRMAN added that the code did not refer to the guilt of a State and agreed that the words " which has been guilty of illegal warfare " should be deleted.

147. Mr. FRANÇOIS accepted those amendments.

The proposal submitted by Mr. François was adopted unopposed.

The meeting rose at 1 p.m.

110th MEETING

Monday, 25 June 1951, at 3 p.m.

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[4] Summary record of the 91st meeting, paras. 105–111.

[5] See para. 135 above.