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A/CN.4/SR.110

Summary record of the 110th 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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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.

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. 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) [1] *(continued)*

TEXT OF THE DRAFT CODE

ARTICLE 3

1. The CHAIRMAN observed that he did not quite understand why the idea of attenuating circumstances had been introduced into that article when, on the contrary, the fact of having acted as Head of State or responsible government official should be an aggravating circumstance.[2] He pointed out that the tenor of article 3 was entirely different from that of article 4, and proposed that the last phrase of the article, from the words " but may be taken into consideration ", be deleted.

2. Obviously, if the Commission decided to delete the last phrase of the article, it would be necessary to recast the whole of the relevant commentary.

3. Mr. ALFARO remarked that article 3 did not conform to the Commission's formulation of the Nürnberg Principles.[3]

4. Mr. HUDSON wondered whether it would not be possible to replace the last phrase of the article by a text based on the last part of article 7 of the Nürnberg Charter.[4] The text of the relevant article of the Nürnberg Charter, which was reproduced in the first paragraph of the comment on article 3 of the draft Code, said exactly the opposite to that article.

5. Mr. ALFARO pointed out that, in formulating the third of the Nürnberg Principles, the Commission had not retained the phrase in article 7 of the Charter which prohibited the Tribunal from taking attenuating circumstances into consideration.

It was decided to delete the words " but may be taken into consideration in mitigation of punishment if justice so requires ".

6. Mr. HUDSON proposed that, in the English text, the words " the present " (Code) be replaced by the word " this ".

It was so decided.

Comment

7. Mr. HUDSON, supported by Mr. YEPES and Mr. SCELLE, pointed out that the second, third and fourth paragraphs of the commentary did not form a coherent whole. He suggested that the second and third paragraphs be transposed; in fact, he wondered whether it would not be better to delete the third paragraph; moreover, since the Commission had just decided not to retain the idea of mitigation of punishment in article 3, there was no further justification for the fourth paragraph, which would be more appropriate in the comment on article 4.

8. Mr. ALFARO considered that the third paragraph had only one point of interest: that was the reference to paragraphs 103 and 104 of the Commission's report on its second session.

9. Mr. CORDOVA thought that the Commission had not given a satisfactory reason for its decision not to retain, in its formulation of Principle III, the words " or mitigating punishment ", which appeared at the end of article 7 of the Nürnberg Charter.

10. Mr. HUDSON proposed that the second and third paragraphs of the comment be replaced by the following text: " The concluding phrase of article 7 of the Charter of Nürnberg is omitted here as it was omitted in Principle III of the Commission's formulation of the Nürnberg Principles which reads: 'The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law' ".

11. Mr. ALFARO thought it should be pointed out in the comment, that, at its second session, the Commission had not retained the idea of mitigation of punishment, for the reason stated in paragraph 104 of the report on its second session. He also considered that it would be advisable to state that the Commission now adopted the same attitude with regard to the draft code, since the fact of having acted as Head of State or responsible government official in fact constituted an aggravating circumstance.

12. The CHAIRMAN pointed out that the Nürnberg Principles did not go so far as that.

13. Mr. YEPES and Mr. CORDOVA thought it essential for article 3 to be followed by a comment explaining why the Commission had departed from the provisions of article 7 of the Nürnberg Charter; otherwise the deletion of the phrase in question might be interpreted as permitting the tribunal to take the fact that an accused person had been Head of State or a responsible government official into consideration in mitigation of punishment.

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

[2] The end of article 3 read as follows: ". . . defined in the present Code, but may be taken into consideration in mitigation of punishment if justice so requires . . .".

[3] *Report of the International Law Commission covering its second session*, Part II, Principle III, in *Official Records of the General Assembly, Fifth Session, Supplement No. 12 (A/1316)*. Also in *Yearbook of the International Law Commission 1950*, vol. II.

[4] Article 7 of the Nürnberg Charter read as follows: "The official position of defendants, whether as Heads of State or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment."

14. Mr. SANDSTRÖM read out paragraph 104 of the Commission's report on its second session. He thought that, by stating the view that mitigation of punishment was a matter for the competent court to decide, the Commission had given sufficient reason for its decision not to retain the last phrase of article 7 of the Nürnberg Charter in its formulation of Principle III.

15. Mr. HUDSON said that the decision just taken by the Commission was easily explained by the fact that it did not wish to go back on its formulation of the Nürnberg Principles.

16. Mr. FRANÇOIS observed that there was yet another reason for deleting the phrase in question, namely that, as the Chairman had said, it would be entirely illogical to assume that the fact of being Head of State could be taken into consideration in mitigation of punishment.

17. Mr. HUDSON pointed out that the General Assembly by its resolution 488 (V) of 1 December 1950 had invited Governments to furnish their observations on the formulation of the Nürnberg Principles, and had requested the International Law Commission, in preparing the draft Code of offences against the peace and security of mankind, to take account of the observations made. He himself considered that the Commission should not go back on the decision it had taken at the last session, but that there was no need to restate the inadequate reason it had given on that occasion.

18. The CHAIRMAN pointed out that article 7 of the Nürnberg Charter stated that " the official position of defendants ... shall not be considered as ... mitigating punishment ", and asked why the Commission should not retain that idea in the draft code.

19. Mr. KERNO (Assistant Secretary-General) said that all members of the Commission were certainly agreed that the fact of having acted as Head of State or responsible government official was not an attenuating circumstance; moreover, that was precisely what the Nürnberg Charter stated. In addition, in the report on its second session the Commission had explained why it had not retained the last phrase of article 7 of the Nürnberg Charter in its formulation of the Nürnberg Principles. But his impression was that there had been some hesitation by various members of the Commission regarding the constitutional position of Heads of State.

20. Mr. HUDSON proposed another formula for the comment. It might, for instance, be worded as follows: " It seems unnecessary to retain the last phrase of article 7 of the Nürnberg Charter, as the fact that a person who committed an act which constituted a crime under international law acted as Head of State or responsible government official would seem to be related to aggravation rather than mitigation."

21. Mr. CORDOVA said that that would be going back on the decision taken by the Commission the previous year. As the Assistant Secretary-General had said, it seemed to him that certain members of the Commission had raised the question of the position of a Head of State who had declared war merely in obedience to a decision of Parliament. He read out various remarks reported in the summary record of the 46th meeting, including his own statement in paragraph 86.

22. Mr. YEPES proposed that the third paragraph of the comment on article 3 be reworded as follows: " The last phrase of article 7 of the Nürnberg Charter was not retained because the Commission considered that the fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official is not a sufficient basis for mitigating punishment."

23. Mr. SANDSTRÖM wondered whether the last paragraph of the comment on article 3 did not contain an argument justifying the omission of the relevant phrase in article 7 of the Nürnberg Charter. It would, perhaps, be equitable not to mitigate punishment for Heads of State and responsible government officials, but it might be otherwise in the case of less highly placed officials. He felt, however, that it would be better not to raise that question in the comment.

24. Mr. CORDOVA thought it would be advisable to make a brief reference in the comment to the decision taken by the Commission at the previous session regarding the formulation of the Nürnberg Principles. It seemed to him that the formula proposed by Mr. Yepes would be suitable for the purpose.

25. Mr. KERNO (Assistant Secretary-General) thought that if the Commission confined itself to recalling its decision not to retain, in Principle III of its formulation of the Nürnberg Principles, the last phrase of article 7 of the Nürnberg Charter, that would imply that it considered the same reason as being still valid and that it thought that the question of mitigating punishment was for the competent court to decide.

26. Mr. HUDSON said that the reason given the previous year for omitting the phrase in question had been valid because neither Principle III nor Principle IV referred to mitigation of punishment. But, as it stood, article 4 of the draft code reintroduced that idea.

27. Mr. CORDOVA observed that that idea was perfectly appropriate in article 4, which dealt with orders from a superior.

28. Mr. HUDSON said that the Commission might perhaps decide, when it examined article 4, to delete the phrase relating to " mitigation of punishment ". He hoped that Mr. Yepes would not press his proposal and that, in that case, the Commission could take a decision on the Chairman's suggestion.

29. The CHAIRMAN thought it would certainly be wiser to examine article 4 first and to return to the comment on article 3 after the Commission had taken a decision on article 4.

It was so decided.[5]

ARTICLE 4 [6]

30. Mr. SCELLE observed that the words " *moyen de défense* ", used in the French text of article 4, were a bad

[5] For the continuation of the discussion on the comment on article 3, see below, para. 77 *et seq.*

[6] Article 4 read as follows: " The fact that a person charged with an offence defined in this Code acted pursuant to order of his

translation of the English word " defence ". The correct term was " *excuse absolutoire* ".

It was decided to amend the French text of article 4 accordingly.

31. Mr. HUDSON, supported by the CHAIRMAN, proposed the deletion of the words " either . . . or in mitigation of punishment ", so that the text would then read: " The fact that a person charged with an offence defined in this code acted pursuant to order of his Government or of a superior may be taken into consideration as a defence."

32. Mr. YEPES asked why Mr. Hudson proposed the deletion of the words " or in mitigation of punishment". If the fact that a defendant acted pursuant to order of his Government or of a superior could be taken into consideration as a defence, there was all the more reason why it should be taken into consideration in mitigation of punishment.

33. Mr. HUDSON thought that the court could always decide to reduce the penalty, but that it was not for the Commission to introduce that idea into the code.

34. Mr. AMADO said that the idea of attenuating circumstances was no part of the definition of offences.

35. Mr. SCELLE asked whether a judge could take account of attenuating circumstances if the code did not refer to them. In France, at any rate, special legislation had been required to introduce the idea of attenuating circumstances into the penal code.

36. Mr. HUDSON replied in the affirmative. He added that, in the Code, the Commission was only dealing with the question of responsibility.

37. Mr. EL KHOURY thought it necessary to introduce that idea into the code; he even thought it would be advisable to draft a special article on the subject.

38. Mr. CORDOVA agreed that the words " in mitigation of punishment " should be retained. In his opinion the distinction between defence and attenuating circumstances was only a matter of degree. If defence were mentioned, there must also be a reference to attenuating circumstances.

39. Mr. KERNO (Assistant Secretary-General) pointed out that article 4 of the draft Code stated that the fact of having acted pursuant to order of a Government or of a superior could be taken into consideration " if justice so requires ", whereas Principle IV of the formulation of the Nürnberg Principles provided that " The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him."

40. Moreover, there was no doubt that the words " in mitigation of punishment " could be omitted, since it was clear that a judge could always reduce the penalty, especially if the fact of having acted pursuant to order of a Government or of a superior were taken into consideration as a defence. He was not sure, however, that the same applied to the case referred to in article 3.

41. Mr. SCELLE observed that the draft code of offences against the peace and the security of mankind did not prescribe penalties, whereas many codes did so. In France, the penal code often provided maximum and minimum penalties. The question therefore arose whether, when there were attenuating circumstances, the judge would be entitled to reduce the penalty below the minimum or whether it must remain between the minimum and the maximum? He thought it might be advisable to retain the words " in mitigation of punishment ".

42. Mr. SANDSTRÖM pointed out that in Sweden the code always provided a minimum penalty. If there were attenuating circumstances the judge was sometimes permitted to reduce the penalty below that minimum; for such cases, either no limit was set or else another minimum was stipulated.

43. The CHAIRMAN said that English law, on the other hand, did not provide minimum penalties, but only maximum penalties. In his opinion it would be dangerous to introduce the idea of a minimum penalty into an international code.

44. Mr. AMADO stressed that the offences referred to in the draft Code were too great for mitigation and were beyond any conceivable penalty.

45. Mr. HUDSON proposed that the Commission adopt the first part of article 4 in the following form: " The fact that a person charged with an offence defined in this Code acted pursuant to order of his Government or of a superior may be taken into consideration as a defence." Thus the clause regarding mitigation of punishment would be omitted.

46. Mr. YEPES said that he would vote for retention of the text as it appeared in Mr. Spiropoulos' Report.

Mr Hudson's proposal was adopted by 6 votes to 5.

47. With regard to the last phrase of article 4, Mr. HUDSON asked why the Rapporteur had introduced the word " only ", which had not been included in the preliminary draft of the Code.[7]

48. Mr. SCELLE found that the addition of the word " only " made the text much more explicit.

49. The CHAIRMAN thought, on the contrary, that the original formula had been very satisfactory.

50. Mr. HUDSON proposed that the words " only if justice so requires " be replaced by the words " only if a moral choice was not in fact possible to him ", following the lines of Principle IV of the Nürnberg Principles, as formulated by the Commission.

51. Mr. AMADO pointed out that, in the Sixth Committee, several delegations had not approved of that phrase.[8]

52. Mr. CORDOVA thought that it should be left to the judge to decide whether the fact of having acted pursuant to order of a Government or of a superior could be considered as a defence.

53. Mr. KERNO (Assistant Secretary General) thought that that proposal would entail an important change in

Government or of a superior may be taken into consideration either as a defence or in mitigation of punishment, only if justice so requires."

[7] See A/CN.4/25, Appendix, Basis of discussion No. 3.

[8] See *Official Records of the General Assembly, fifth session, Sixth Committee*, 231st and 239th meetings.

article 4. In his opinion it would be well to give guidance to judges.

54. Mr. AMADO, supported by the CHAIRMAN and Mr. SCELLE, proposed that the wording of Principle IV of the Nürnberg Principles be adopted.

55. Mr. HUDSON supported that proposal and suggested that article 4 be replaced by the following text:

> "The fact that a person charged with an offence defined in this code acted pursuant to order of his Government or of a superior does not relieve him from responsibility if a moral choice was in fact possible to him."

Article 4, as amended in accordance with Mr. Hudson's proposal, was adopted by 9 votes to 2.

Comment [9]

56. The CHAIRMAN thought it would be sufficient to point out in the comment that the text of the article reproduced the substance of Principle IV of the formulation of the Nürnberg Principles.

57. Mr. KERNO (Assistant Secretary-General) agreed that that should certainly be pointed out, but wondered whether it would not be advisable to add that the Commission had examined the objections to Principle IV raised at the fifth session of the General Assembly, but had considered that formula the best.

58. He also thought it would be advisable to explain in the comment that the idea of mitigation of punishment had not been retained in article 4, because the Commission considered that a judge could always reduce the penalty.

59. Mr. FRANÇOIS observed that the Commission had not refuted the criticisms of Principle IV made at the fifth session of the General Assembly, and asked what they had been.

60. Mr. KERNO (Assistant Secretary-General) replied that a number of representatives had stated in the Sixth Committee that the idea expressed by the words " a moral choice was in fact possible " was too vague and lacked clarity.

61. Mr. ALFARO thought that the comment should mention that the idea of moral choice had been used by the Nürnberg Tribunal, from which the Commission had taken it. In his view, that idea simply meant that it had been possible for the author of an act to choose the course that was considered morally good.

62. Mr. HUDSON considered that a statement on those lines in the comment would to some extent answer the criticisms made in the General Assembly.

63. The CHAIRMAN remarked that the passage in question had been quoted in the Commission's report on its second session. The Rapporteur could be instructed to draft a suitable paragraph for insertion in the comment.

64. Mr. HUDSON proposed that, after the words " moral choice ", at the end of the second paragraph of the comment on article 4, the words " which was criticized as lacking in clarity " be deleted and the following words added: " The concluding phrase of this article is based on the passage of the Tribunal's judgment which states that the true test ' is not the existence of the order, but whether moral choice was in fact possible ' ".[10]

65. Mr. ALFARO observed that the French text of that passage of the Nürnberg judgment was much clearer than the English.

66. Mr. KERNO (Assistant Secretary-General) agreed that that passage of the Nürnberg Judgment gave a very clear explanation of the problem; but the judgment had been quoted the previous year and had been criticized in the General Assembly. If the Commission reverted to the text of the Nürnberg Principle, it would have to state that the criticisms made in the General Assembly had not convinced it and that it preferred the opinion of the Nürnberg Tribunal.

67. Mr. ALFARO saw no reason why the Commission should not quote Principle IV of the Nürnberg Principles in the comment.

68. Mr. HUDSON pointed out that the Commission had never yet been cited in the comment on the articles of the Code.

69. Mr. AMADO said that it was not for the Commission to engage in polemics with the General Assembly but to state its opinion; consequently it need only re-state the view expressed the previous year.

70. The CHAIRMAN thought that, if the comment referred to criticisms made by the General Assembly, it would be necessary to say why the Commission had not accepted them.

71. Mr. SCELLE thought that the Commission might express regret that it was not in agreement with the General Assembly.

72. Mr. CORDOVA considered that, as a subsidiary organ of the General Assembly, the Commission should at least take account of the Assembly's comments.

73. Mr. HUDSON referred to the comments made in the Sixth Committee of the General Assembly by the representatives of Belgium, Brazil, China, Poland, and the United Kingdom,[11] but added that he had not been at all convinced by the criticisms of Principle IV.

74. The CHAIRMAN thought the Commission could state that it had not been convinced by the views expressed in the Sixth Committee. He pointed out, moreover, that it was only a matter of opinion and not of a decision by the General Assembly.

75. Mr. KERNO (Assistant Secretary-General) thought it would be possible to introduce that idea into the comment in an impersonal form, for instance as follows: " It is true that criticisms were made during the fifth

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[9] The first paragraph of the comment was unchanged. It was followed originally by two paragraphs reading as follows:

> " In drafting the present article, account has been taken of certain observations made on the above-quoted principle during the fifth session of the General Assembly, especially those referring to the concept of " moral choice " which was criticized as lacking in clarity.
>
> " The words ' either as a defence ' are used as meaning that ' superior order ' may constitute a ground for relieving responsibility if justice so requires."

[10] See *The Charter and Judgment of the Nürnberg Tribunal*, United Nations publication, sales No.: 1949.V.7, p. 42.

[11] See A/CN.4/44, paras. 88–98.

session of the General Assembly, but they did not convince the Commission ".

76. Mr. HUDSON pointed out that the final paragraph of the comment should be deleted.[12]

The first paragraph of the comment was adopted.

ARTICLE 3 (*resumed*)

Comment (resumed from paragraph 29)

77. Mr. HUDSON said that he wished to revert to the comment made by Mr. Yepes on the third paragraph of the commentary on article 3.[13] He thought that Mr. Yepes had been right, but now that the Commission had decided not to refer to mitigation of punishment in article 4, it was no longer necessary to insert the passage proposed by Mr. Yepes.

78. Mr. YEPES agreed with Mr. Hudson regarding his proposal. Since the words " or in mitigation of punishment " had been deleted, there was no need to add a paragraph to the comment on article 3.

79. Mr. HSU considered that neither too much nor too little attention should be paid to the discussions of the Sixth Committee. The members of that Committee frequently made unconsidered statements. Moreover, no decision had been taken.

80. In the Sixth Committee he had adopted an attitude similar to that of Mr. Spiropoulos, but it had been based on practical considerations. He had thought that the introduction of the idea of moral choice might weaken the Nürnberg Principle. But he approved of its insertion in the draft code.

81. Mr. HUDSON said that he could accept the third paragraph of the comment on article 3, provided the reference to the Commission's report were deleted.

82. The CHAIRMAN observed that the first three paragraphs of the commentary *were consequently adopted, subject to the deletion of the words in brackets at the end of the third paragraph, and the fourth paragraph deleted.*[14]

ARTICLE 5[15]

83. Mr. HUDSON said that he would prefer the first line to be deleted and the following words to be inserted in the commentary: " The international criminal court does not now exist ".

84. The CHAIRMAN agreed with Mr. Hudson. He stressed that the legislation would be permanent and would not be applied merely pending the establishment of an international criminal court.

85. Mr. KERNO (Assistant Secretary-General) thought that all reference to the possibility of an international criminal jurisdiction being established in the future should not be deleted. If the present formula was unsatisfactory, the Commission might seek a formula similar to that used in the Convention on Genocide (article VI) and say that States undertook to bring the authors of the offences in question to trial before their national courts and to punish them under their national laws, and subsequently to bring the guilty persons before the international court, when the latter was established.

86. The international criminal court had given rise to great hopes; he agreed that they were remote enough, but the court should nevertheless be mentioned in the draft code of offences against the peace and security of mankind.

87. Mr. YEPES agreed with Mr. Kerno, but thought that the place to mention those hopes was not the article itself, but the commentary.

88. Mr. CORDOVA asked whether States would not have to bring the criminals before the international criminal court when it was established. He feared that if the criminals were made subject to national laws there would be no consistency in the penalties applied.

89. The CHAIRMAN observed that the word " pending " was misleading.

90. Mr. HUDSON said that a State might adopt the code without ever becoming a party to the Convention establishing the international criminal court.

91. Mr. CORDOVA said that, if one State held that a Mexican should be tried in Mexico and another held that he should be tried in France, there would be a conflict of laws; that was a point which must not be overlooked.

92. Mr. HUDSON did not consider that the Commission should deal with that question. States adopting the code must have jurisdiction over an offender under general legislation.

93. Mr. AMADO objected that, even when the code was in force, jurisdiction in criminal cases would continue to be territorial. If the international criminal court were set up the position would change.

94. Mr. HUDSON said that he would prefer to see the article remodelled on the basis of article VI of the Convention on Genocide — the drafting of which, incidentally, he did not approve — so as to meet the difficulty mentioned by Mr. Amado. That article provided that: " Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed . . .".

95. He agreed with Mr. Amado that it was unnecessary to make such an amendment, but in order to satisfy Mr. Córdova the Commission might say: " accused of committing, within their territory, any of the offences

[12] For the continuation of the discussion on the commentary on article 4 of the draft code, see below, para. 135 *et seq.*

[13] See para. 22 above.

[14] The fourth paragraph read as follows:

" In the present article, the notion of mitigation of punishment is included, not only for the sake of clarity, but primarily because it is thought that the present Code, designed as it is for general application in the future, rather than for specific application to some 'major war criminals' as was the case of the Nürnberg charter, should allow some flexibility."

[15] Article 5 read as follows:

" Pending the establishment of a competent international criminal court, the States which adopt this Code undertake to enact the necessary legislation for the trial and punishment of persons accused of committing any of the offences defined in this Code."

Its comment read as follows:

" Although the punishment by domestic courts of perpetrators of offences defined in this Code is not the ideal solution, it is, in the absence of an international criminal court, the only possible one."

defined . . .". Mr. Córdova's argument was as follows: Suppose an offence were committed against the peace — that would be an international crime — and a State adopted the code, under which international crimes were punishable, then it must be known whether there would be universal jurisdiction as there was, for instance, in the case of piracy.

96. Mr. LIANG (Secretary to the Commission) observed, with reference to Mr. Hudson's comment on the first line of article 5, that there would come a time when the Commission would have to decide whether the code it was drafting would be applied under national legislation and jurisdiction or under international legislation and jurisdiction. In its present form, the article was only a transitional provision. Although there seemed no reason to assume that the Court would be established in the near future, the possibility that it might soon be set up must not be excluded.

97. The question was whether the basis for application of the code would be national or international legislation. If the international criminal court were established, it would also be necessary to amend article 6.

98. Mr. ALFARO thought that there was complete similarity of purpose between the article under discussion by the Commission and article VI of the Convention on Genocide, although they were differently drafted. The latter article read as follows: " Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction ".

99. That wording had been criticized by Mr. Hudson, but an international crime should in any case be tried by an international tribunal. The activities of territorial tribunals had not been satisfactory. Out of 896 cases tried by the German territorial courts after the First World War, there had been 6 convictions. It could not be supposed that only 6 of the accused had been guilty.

100. He believed that both the General Assembly and the Commission considered that an international court should be set up; that was why the question of the possibility of establishing such a court was being examined.

101. He could only agree to the deletion of the first line of article 5 if the article were drafted on the same lines as article VI of the Convention on Genocide and provided that:

> " The States which adopt this instrument undertake to enact the necessary legislation for the trial and punishment of persons accused of any of the offences defined in this instrument, and to enforce this legislation until such time as a competent international criminal court has been established for the trial and punishment of the offences defined in this code."

102. Mr. HUDSON wondered whether the Commission was not going beyond its terms of reference. It was not drafting a convention to bring the code into force. The General Assembly had asked it to prepare a list of offences against peace and that had so far been the Commission's purpose. If the General Assembly found the Code satisfactory, it could choose between many different procedures for the adoption of the code by States. If it were assumed that the procedure adopted would be a convention, it would have to contain much more than articles 5 to 7.

103. He had at first thought that it would be easy to reply to Mr. Córdova's question, but the more he reflected the more difficult it appeared to be. There was no doubt that the Commission's task was not to draft a convention, but to enunciate offences against peace and security.

104. He had been struck by the comments of Mr. Liang and Mr. Alfaro regarding the question of international crimes. With all due deference to Mr. Amado he believed that it was no longer so important to deal with the question of the territory in which the offence was committed; the procedure applied to piracy should be followed and international jurisdiction recognized.

105. It might not be necessary to mention extradition requirements in article 6; that depended on how the Commission presented the code. If it decided to present it in the form of a Convention, not just a few articles but over 20 would be needed.

106. Mr. FRANÇOIS said that one thing was obvious, namely, that article 5 was not clear. He had understood that it dealt with an international crime and that jurisdiction was to be internationalized, as in the case of piracy. He still thought that the article required States to punish criminals found in their territory, whatever the place and where the crime had been committed, and that if the international court were already in existence States would bring the criminals before it; if extradition were not requested or granted, article 5 would be applied and States would be obliged to punish the authors of such crimes.

107. After the discussion he had been able to note that several of his colleagues had not interpreted the article in the same way and regarded it as recognizing the principle of *ratione loci*. The Commission must first decide what it intended to do.

108. Mr. KERNO (Assistant Secretary-General) pointed out that the previous year the Commission had stated that it was possible and desirable to establish an international criminal court. On the basis of that statement the General Assembly had set up a special committee of seventeen Members which was to meet at Geneva in the coming August.

109. Hence it would be impossible to adopt a code based exclusively on the jurisdiction of national courts. Articles 5 and 6 of the draft code provided that such courts should be competent during the transition period. That implied that the normal procedure would be for such offences to be punished on the international level and not on the national level, the action of national courts being supplementary. All that was perfectly possible, but the effect of Mr. Hudson's proposal to delete the first line of article 5 would be that the code would provide exclusively for the competence of national courts and make no mention of the establishment of an international court; such a course did not seem possible. The Commission

might not refer to any court at all, so that it could not be accused of eliminating the international court; but if article 5 were retained and the first line deleted, the idea of an international criminal court would be set aside, whereas the previous year the Commission had advocated the establishment of such a court and the General Assembly had not rejected the idea, but had set up a committee to examine it.

110. Mr. CORDOVA pointed out that the Commission had been instructed by the General Assembly to draft a code of offences, and not to deal with prevention and punishment or with jurisdiction. In the comment to be inserted in its general report, the Commission should state that it considered that question outside its terms of reference and that consequently it could not decide what courts should try the authors of the crimes.

111. Mr. SCELLE said that he was somewhat disturbed by the view he had just heard. He might be mistaken, but the Commission had finally defined international crimes and he thought that the essential principle relating to such crimes was the principle of universal jurisdiction. Any court of any State was competent, wherever the crime had been committed, if the authorities of that State could seize the criminal. It was the principle of Grotius, *aut punire aut dedere*. That was how he had understood article 5. He believed that, like article 6, article 5 provided that, pending the establishment of an international criminal court competent to try the authors of the crimes, States were required either to punish them or to extradite them and, in pursuance of article 6, not to refuse extradition on the ground that the offences were political crimes. That was the very essence of the international crime. In conclusion, States were required to punish the criminal or not to refuse to deliver him to the State requiring him for punishment, in other words, to apply article 6, the text of which was as follows: " As regards the offences defined in the present Code the States which adopt this Code undertake not to refuse extradition on the ground that they are political crimes."

ARTICLE 6 [16]

112. Mr. HUDSON pointed out that States might refuse extradition for other reasons. For instance, the United States and the United Kingdom could refuse it on the ground that there was no extradition treaty in respect of the offence with which the person it was desired to bring to trial had been charged.

113. Mr. SCELLE said that that view would have to change if the Code became a convention.

114. Mr. HUDSON accepted Mr. Scelle's conclusion, but did not think that it should be based on article 6. The Commission was required to enumerate the offences and nothing more. It could not deal in two or three articles with the extensive subject which had just been raised.

115. Mr. SCELLE agreed that if the Commission were not prepared to draw up a convention to ensure the punishment of the perpetrators of such crimes pending the establishment of an international criminal court, articles 5 and 6 must be deleted. On the other hand, he thought that article 7 should be retained.

116. Mr. CORDOVA also thought that article 6 meant that States could refuse extradition for other reasons, even in the case of an international crime. He did not think that article 6 could be retained without amendment.

117. Mr. AMADO said that a penal code contained a list of crimes and that in no country did the penal code include the offences enumerated in the draft code of offences against the peace and security of mankind. The purpose of article 5 of the draft was to ensure that those offences were included in national penal codes.

118. A decision should be taken on the question of jurisdiction. The characteristic feature of piracy was that it was subject to the principle of the universal right of punishment. He pointed out that Grotius had adopted the practice of Italian cities. If a murderer fled from Florence and was arrested at Siena, it was the authorities of the latter town which brought him to trial. Grotius had defended the principle of the freedom of the seas, because it was consistent with the interest of the Netherlands.

119. When the international code of offences against the peace and security of mankind had been adopted, States which accepted it would be required, under article 5, to do their utmost to ensure that their penal code included such crimes, which would have to be punished in accordance with the general rules of criminal law, and hence in accordance with the principle of territoriality of criminal law.

120. Once published and promulgated, the convention containing the code would become the law of the land. Article 5 required States to enact legislation under which the offences enumerated in the code would be considered as crimes.

121. Mr. CORDOVA said that it was necessary for the offences to be included in national codes, but that each country would prescribe different penalties, and that would raise another difficulty. Moreover, should the Commission adopt the principle of Grotius, the principle of jurisdiction of the country where the crime was committed, or that of international jurisdiction?

122. Mr. AMADO observed that, although article 6 provided that States undertook not to refuse extradition for the offences defined in the code on the ground that they were political crimes, that did not exclude other possibilities. For instance, Brazil did not recognize capital punishment. Consequently she would not extradite a person who might be condemned to death under the laws of the country applying for extradition. In general, a country would not extradite a person who might be condemned to a more severe penalty than that prescribed in its own penal code.

[16] Article 6 read as follows:

" As regards the offences defined in the present Code, the States which adopt this Code undertake not to refuse extradition on the ground that they are political crimes."

Its comment read as follows:

" Extradition laws and treaties usually contain provisions designed to prevent extradition of persons charged with political crimes. This article is intended to exclude the possibility of States invoking such provisions with respect to persons accused of offences defined in the Code."

123. The article under consideration showed that there was not much confidence in establishing of an international criminal court or at any rate that the idea of its establishment was not generally accepted. If it were accepted that the court should be set up, the provisions were unnecessary.

124. The CHAIRMAN observed that the Commission had before it a proposal to delete articles 5 and 6. He thought it advisable to settle that question of principle before proceeding to consider how it should be explained in the general report that the Commission did not believe that question to be within its terms of reference.

125. Mr. EL KHOURY pointed out that Mr. Hudson had said that the question could not be dealt with in a single article; but all the offences referred to in the code were dealt with in article 2, whereas a separate article should be devoted to each offence, not merely a separate paragraph. Why should the Commission adopt a different presentation from that of all other codes?

126. The CHAIRMAN thought it was only a question of style.

127. Mr. HUDSON explained that his idea that articles 5 and 6 should be deleted was the result of the discussion which had just taken place. He suggested waiting till the following day to consider the matter. If the Commission decided that it had not been requested to prepare a convention to bring the code into force, a decision could be taken at once; but if, on the contrary, it considered that it had been requested to prepare a convention, Mr. François' comment on article 6 should be taken into account, and time for consideration would be necessary for that purpose.

128. The CHAIRMAN thought that the Commission could defer its decision till the following day.

129. Mr. SANDSTRÖM pointed out that, in the report covering its second session, the Commission had included the following paragraph:

> " 156. Another problem considered by the Commission was the implementation of the Code. The Commission concluded that, pending the establishment of a competent international criminal court, such implementation would have to be achieved through the enactment by the States adopting the code . . ."

130. He had quoted that passage from the previous year's report because he considered that the Commission could not leave the question entirely aside after having made such a statement; but it could, of course, be discussed apart from the code.

131. The CHAIRMAN observed that the solution proposed by Mr. Córdova was to deal with it in the general report.

132. Mr. ALFARO pointed out that the code would have to be adopted by means of a Convention. Whether that convention would be separate from the code or would contain it was a matter of secondary importance. But the Commission must not lose sight of the fact that, if it deleted the two articles in question, it would have to state in its general report that the convention bringing the code into force must contain those two articles. Hence he considered that the Commission could not confine itself to deleting the articles.

133. Mr. HSU also thought that it would be wise to take time to consider the matter.

134. There was a difference between a code and a convention. Nevertheless that difference was mainly a matter of form, as could be seen from the Convention on Genocide. Some changes in presentation would be necessary. With slight amendments, the code drafted by the Commission could become a convention. Even if it were decided to delete the articles in question, time must be taken for consideration.

It was decided to defer a decision on articles 5 and 6 until the next meeting.

ARTICLE 4 (*resumed*)

Comment (resumed from paragraph 76)

135. The CHAIRMAN read out the text proposed by Mr. Hudson for the second paragraph of the comment on article 4:

> " The criticisms of Principle IV voiced in the General Assembly during its fifth session have been carefully studied, but in view of the fact that it is based on a clear enunciation by the Nürnberg Tribunal, no substantial modification has been made in the drafting of this article of the code."

136. Mr. HSU considered that the paragraph was satisfactory and could be adopted, but he wondered whether it was necessary to attach so much importance to the opinions expressed in the Sixth Committee, which were not always carefully weighed and approved by governments, and which had not led to any action. It was the formulation of the Nürnberg Principles which had been criticized, not the drafting of the code. A text might raise objections in one instance and be approved in another. He would abstain from voting.

137. Mr. FRANÇOIS proposed certain amendments to Mr. Hudson's text. He was not very satisfied with the words " in view of the fact." It was not because the Nürnberg Tribunal had so expressed itself that the Commission had adopted that Principle. He asked whether Mr. Hudson would accept the following text:

> ". . . have been carefully studied; however, no substantial modification has been made in the drafting of this article of the Code, which is based on a clear enunciation by the Nürnberg Tribunal.

138. Mr. AMADO fully approved of that amendment, which Mr. Hudson accepted.

139. Mr. CORDOVA did not think it sufficient to say that the criticisms had not been accepted because the text was based on a clear enunciation. That would be giving the Tribunal undue authority. The Commission could depart from the decisions of the Tribunal, but he thought it necessary to give a reason, which Mr. François had not done.

140. Mr. FRANÇOIS considered that his text showed that the Commission adhered to its original formula.

141. Mr. CORDOVA thought that the Commission

should say why it rejected the criticisms made by the General Assembly.

142. Mr. EL KHOURY asked why criticisms were referred to. There had been a general discussion in the Assembly, and different opinions had been expressed.

143. Mr. AMADO did not approve of the word " criticisms ". He would prefer a reference to the " observations " made.

144. Mr. CORDOVA proposed saying that the observations made in the General Assembly had failed to convince the Commission.

145. Mr. AMADO repeated that it was not advisable to engage in polemics with the General Assembly. It would be sufficient to explain that, after studying the observations made by the latter on the subject, the Commission had thought it inadvisable to depart from the substance of the Nürnberg Principles. If it gave reasons for its decision, it should give scientific reasons, and that would take a considerable time. It would be sufficient for the Commission to state that it had seen no reason to change its opinion.

146. With regard to the words " a moral choice was in fact possible ", which had been criticized as lacking in clarity, Mr. ALFARO explained that, judging by the French text, that phrase meant that, if the accused had had the moral capacity to determine the criminal nature of the act and to decide whether to commit the act or not, he was responsible if he had decided to commit it. The Commission might explain why it had expressed itself in that manner.

147. The CHAIRMAN pointed out that other criticisms had been made. If one of them were to be examined in detail, the others would also have to be dealt with.

148. Mr. HUDSON read out the new draft of his text as amended by Mr. François:

> " The observations on Principle IV made in the General Assembly during its fifth session, have been carefully studied; however, no substantial modification has been made in the drafting of this article of the code, which is based on a clear enunciation of the Nürnberg Principles."

The amended text was adopted in substitution for the second paragraph of the comment.

The third paragraph of the comment was deleted.

COMPETENCE OF THE COMMITTEE ON INTERNATIONAL CRIMINAL JURISDICTION

149. Mr. SCELLE asked Mr. Kerno and Mr. Liang to be good enough to state their views on the respective competence of the Commission and of the committee which was to meet in August. That might help the Commission to take a decision regarding articles 5 and 6. If the committee which was to sit as from August took a decision on the competence of the future international criminal court, the Commission might come into conflict with it.

150. The CHAIRMAN pointed out that that question could not be considered in connexion with article 4; Mr. SCELLE agreed.

151. Mr. KERNO (Assistant Secretary-General) replied provisionally to Mr. Scelle's questions by saying that the idea of setting up an international criminal court went back to General Assembly resolution 260 B (III). When the Convention on Genocide was being drafted, the question of implementing that Convention had been considered. It had been held by some that genocide should be punished by an international court. When it had been pointed out that no such court existed, they had said that, pending its establishment, genocide should be punished by national courts. After long discussions, article VI of the Convention had been adopted, which provided that persons charged with genocide should be tried by a competent tribunal of the State in the territory of which the act was committed, or by the international criminal court if and when it was set up and if the States accepted its jurisdiction. There had been a compromise under which, at the same time, another resolution invited the International Law Commission to study the desirability and possibility of establishing an international criminal court. Thus partial satisfaction had been given to those who advocated the establishment of such a court, and the idea had not been abandoned. The Commission had expressed its opinion the previous year. The General Assembly had taken a decision and had referred the matter to a special committee of seventeen Members. The Commission must wait and see how that decision affected it.

152. Mr. SCELLE still wondered what a committee of seventeen Members could do with regard to the penalties to be applied. It might say that the court should apply whatever penalties it thought fit, as the Nürnberg Tribunal had done, and the Commission might have another opinion and prescribe a certain penalty for each offence. The text in question was only a beginning of codification.

153. Mr. HUDSON pointed out that the Commission had only been instructed to prepare a draft code of offences against the peace and security of mankind.

154. Mr. SCELLE went on to say that the penalties must be fixed. The Commission could not confine itself to a mere enumeration of the offences.

155. Mr. AMADO observed that the committee of seventeen would have a heavy task. The first essential was to know whether it would accomplish anything. In any case, it had wide terms of reference. It would have to prepare a draft and examine the possibilities of implementation.

156. The CHAIRMAN proposed that the Commission should state in its general report that it had refrained from trespassing on the committee's ground.

157. Mr. SCELLE advised postponing the question till the following day, for consideration.

The meeting rose at 6.15 p.m.