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**Summary record of the 111th meeting**

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

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# 111th MEETING

*Tuesday, 26 June 1951, at 9.45 a.m.*

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

*Present:*

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

### ARTICLES 5, 6 (*resumed*) [2] AND ARTICLE 7 [3]

1. Mr. HUDSON proposed the deletion of articles 5, 6 and 7.

2. Mr. YEPES said he could not support Mr. Hudson's proposal and would like to know the grounds on which it was based. Article 5, in particular, was very important, since it was in a sense a reminder that the Commission had approved the principle of the establishment of an international criminal court and regarded the latter as not only possible but also desirable. It was to be hoped that an international criminal court would eventually be established before which States could bring criminals who violated international peace and security.

3. The CHAIRMAN said that, should the Commission decide not to retain articles 5, 6 and 7, the Commission's report to the General Assembly would contain an explanation of the decision.

4. Mr. KERNO (Assistant Secretary-General) pointed out that, at the previous meeting, Mr. Sandström had quoted paragraph 156 of the report of the International Law Commission covering its second session, in which it was stated that, pending the establishment of a competent international criminal court, implementation would have to be achieved through the enactment by the States adopting the code of the necessary legislation for the trial and punishment of persons charged with offences under the code. He presumed that, in the event of the Commission deciding in favour of Mr. Hudson's proposal, its finding of the previous year would still hold good.

5. Mr. SCELLE fully agreed with Mr. Yepes. Whenever the Commission reconsidered a question it reversed its decisions. It was caught in a vicious circle and the hesitancy it displayed was a confession of impotence. In its present form the draft code added little to the formulation of the Nürnberg Principles.

6. Mr. ALFARO, while agreeing with Mr. Yepes and Mr. Scelle, recognized that articles 5, 6 and 7 had no real place in a criminal code. Since a convention would have to be prepared in order to enable the draft code to be adopted, those three articles could be included in that convention. The Commission might explain in a comment that it had decided not to retain articles 5, 6 and 7 on the ground that they were more suitable for a convention.

7. Mr. FRANÇOIS, while emphasizing the importance of articles 5, 6 and 7, agreed with Mr. Alfaro that they were out of place in a criminal code and should be included in regulations governing criminal procedure, which would of course also contain many other articles.

8. Articles 5 and 6 were incomplete and defective; but that was a matter with which the Commission could not deal in detail at that stage. He supported Mr. Hudson's proposal that articles 5, 6 and 7 should be deleted, but thought that the grounds for the deletion should be explained in the commentary.

9. Mr. AMADO would have liked to support Mr. Scelle and Mr. Yepes in that particular case, but felt regretfully obliged to vote for Mr. Hudson's proposal.

10. The General Assembly had directed the Commission to prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the Nürnberg Principles in that draft code. The Commission had performed its task, except that it had not clearly indicated that place. It had endeavoured to frame the code of offences against the peace and security of mankind, defined those offences and stated that the code must be implemented. Weakness was the sole reason for its inclusion of articles 5, 6 and 7 in the draft code.

11. In short, the Commission had assumed a task which did not concern it when it began to study the question of the implementation of the draft code. The articles which specified the liability of the criminals

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

[2] *Ibid.*, 110th meeting, paras. 83–134.

[3] Article 7 read as follows:

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

certainly required expansion. But he thought that articles 5, 6 and 7 were out of place in the draft code.

12. He would be regretfully obliged to vote for the deletion of articles 5, 6 and 7, on the understanding that a comment on implementation would appear in the draft code.

13. Mr. YEPES said that the fact that the articles under discussion were certainly imperfect and in need of amendment was no reason for deleting them. It was obvious that the draft code would not be approved by governments in its existing form and should be incorporated in a convention, but he saw no reason why the articles under discussion should not be submitted to the General Assembly and to governments.

14. Mr. EL KHOURY considered that, properly speaking, articles 5 and 6 had no place in a criminal code, since they were administrative articles which would be more appropriate in a code of criminal procedure or a convention. It was understood that a convention would be required in order to enable the code to be implemented. The Commission had the necessary authority, under one of the articles of its statute, to prepare such a convention. Another article of its statute provided that the Commission might recommend the General Assembly to summon a conference to conclude a convention. He proposed that the Commission submit such a recommendation to the Assembly.

15. Mr. HSU favoured the retention of articles 5, 6 and 7. The difference between a code and a convention was only one of form. What mattered was the spirit informing the instrument. He was afraid that the deletion of articles 5 and 6 might be interpreted as evidence of a lack of faith in the establishment of the international criminal court and thus a retreat from the previous year's decision.

16. Mr. CORDOVA thought it preferable that articles 5, 6 and 7 should be included in a convention. He was afraid governments might have doubts as to their exact interpretation if they were included in a code.

17. Furthermore, it must not be overlooked that the draft code was incomplete; in his view, it should include a section on penalties, and the Commission could not recommend its adoption until it was complete. The result of leaving each government free to choose the penalties for the various crimes covered by the draft code was bound to be chaos.

18. When the Commission had completed the draft code it could communicate it to governments for their comments and follow the procedure set out in article 23 of its statute.

*It was decided, by 7 votes to 4, to delete articles 5, 6 and 7.*

### Preparation of a draft convention

19. Mr. EL KHOURY said that he had voted for the deletion of articles 5, 6 and 7 because he hoped for their incorporation in a convention. He would repeat that the Commission should examine the question of preparing a convention, without which the draft code would remain a dead letter. The appropriate procedure was stated in articles 15 and 23 of the Commission's statute.

20. Mr. YEPES said that it would, of course, be mentioned in the comments on the draft code submitted to the General Assembly that the deletion of article 5 did not represent a retreat by the Commission, which did not despair of the eventual establishment of an international criminal court.

21. Mr. ALFARO, agreeing with Mr. YEPES, said that articles 5, 6 and 7, which the Commission had just decided to delete, should be reproduced in the report of the Commission covering its third session. It should also be stated in the same report that those articles ought to be incorporated in a convention for the implementation of the draft code.

22. The CHAIRMAN pointed out that the question of the implementation of the draft code pending the establishment of an international jurisdiction was dealt with in paragraph 6 (*d*) of the introduction to document A/CN.4/L.15.[4] But the report would, of course, contain a more detailed explanation.

23. Mr. KERNO (Assistant Secretary-General) thought the Commission should next decide whether it would submit the draft code to governments or to the General Assembly. The Commission's report to the General Assembly should include comments and, among them, one emphasizing the deletion of articles 5, 6 and 7.

24. Although the Commission's present task might be regard as a special one, he himself thought that the procedure set forth in article 16, sub-paragraphs (*g*) and (*h*), of the Commission's statute should be followed, namely, that " when the Commission considers a draft to be satisfactory, it shall request the Secretary-General to issue it as a Commission document " and " shall invite the Governments to submit their comments on this document within a reasonable time."

25. Mr. LIANG (Secretary to the Commission) said that he had discussed the matter in the previous year with the Special Rapporteur, who had agreed with Mr. Kerno and himself that the preparation of a draft code of offences against the peace and security of mankind was an aspect of the " progressive development of international law ", in that it concerned a subject on which the " law had not yet been sufficiently developed in the practice of States ". The question was therefore not one of codification, although the word " code " had been used. There being no general agreement that the Commission was engaged on a special task, in performing which it need not follow the procedures set forth in its Statute, article 16 of the Commission's statute ought to apply. But account must also be taken of article 15 since, as Mr. el Khoury had said, the draft code could only be implemented by means of a convention.

26. Without articles 5, 6 and 7, the draft code would be neither a convention nor a code, but a skeleton. A large number of additional articles was required and the instrument would have to take the form of a convention. It would therefore be illogical to follow the procedure set forth in article 16 of the statute and at the same time to disregard the provisions of article 15.

[4] See text in summary record of the 106th meeting, footnote 15.

27. Mr. HUDSON considered that the preparation of a draft code was, in the General Assembly's view, a special task comparable to the formulation of the Nürnberg Principles. The Commission had therefore no justification for not dealing with both in the same way. That was why he thought that the practical solution would be to report to the General Assembly, which could submit the draft code to governments if it so desired.

28. He agreed that a fuller comment on implementation was needed than that contained in paragraph 6 (*d*) of the introduction to document A/CN.4/L.15. He read out a text[5] which might be substituted for paragraph 6 (*d*). His proposal might not fully meet the Commission's requirements; but he was prepared to amend it where necessary.

29. Mr. ALFARO thought that the text proposed by Mr. Hudson, although not quite satisfactory, might be adopted in default of a better. But he was glad that Mr. Liang had drawn the Commission's attention to the fact that article 15 of the statute provided for the preparation of a draft convention. He himself had always been, and still was, in favour of the preparation of a convention for the draft code of offences against the peace and security of mankind. He might add that he had discussed the matter with Mr. Spiropoulos. He was convinced that the document submitted by the Commission to the General Assembly would be much more complete if it took the form of a convention incorporating the draft code.

30. He did not think that in preparing a convention the Commission would be competing with the Committee on International Criminal Jurisdiction, which was to meet at Geneva in August. He therefore considered that the Commission might explore the possibility of preparing a draft convention in accordance with the provisions of article 15 of its statute.

31. Mr. SCELLE, supporting Mr. Alfaro and Mr. Liang, said that in his view the Commission should not leave to the Committee on International Criminal Jurisdiction the task with which it had been entrusted by the General Assembly. The function of that Committee was to establish the international criminal court, that was to say, a purely administrative function. He himself was convinced that the Commission should submit a draft convention to the General Assembly.

32. He also thought that the Rapporteur should state in the report of the Commission covering its third session that the deletion of articles 5 and 6 was in no sense an encouragement to potential criminals to indulge with impunity in all sorts of crimes pending the establishment of a competent international court.

33. He regretted that Mr. Spiropoulos had been unable to attend that day's meeting to defend the draft code which he had prepared.

34. Mr. SANDSTRÖM said that, since he had voted for the deletion of articles 5, 6 and 7, under the impression that they would appear in the report of the Commission, he considered the text proposed by Mr. Hudson somewhat unsatisfactory. There was no reason to fear that the Commission might be encroaching on the territory of the Committee on International Criminal Jurisdiction. The danger was greater with respect to the conference which might be called to prepare the convention for the implementation of the code. But there was nothing to prevent the Commission stating its views on certain principles for incorporation in the convention. It could very well undertake such preparatory work. Indeed, article 15 of its statute instructed it to do so.

35. Mr. HUDSON thought that article 5 of the draft code was purely illusory, since not a single State would ever undertake to enact the necessary legislation for the trial and punishment of any of its authorities charged with offences under the code.

36. The solution recommended by Mr. Alfaro struck him as premature. Since there were no means of knowing what the findings of the Committee on International Criminal Jurisdiction would be, the preparation of a convention at that juncture was a practical impossibility, since any convention prepared might have no application. The Commission should therefore avoid taking such a step. The establishment of the Committee on International Criminal Jurisdiction had brought the Commission's efforts in that direction to a halt.

37. Mr. KERNO (Assistant Secretary-General) thought that the Commission should next decide whether the draft code would be submitted to governments or to the General Assembly, that was to say, whether or not the procedure set forth in articles 15 and 16 of its Statute should be applied.

38. He fully shared Mr. Hudson's views as to the purely illusory character of article 5 of the draft code. In practice it was inconceivable that courts would punish their own nationals as international criminals; or if they did do so — for example, in the event of a complete change of government — it would be not in the interest of justice, but for partisan reasons.

39. On the other hand, he did not share Mr. Hudson's view that the findings of the Committee on International Criminal Jurisdiction should be awaited before a convention was prepared. Reversing that argument, it might be claimed that an international criminal court could not be set up so long as no code existed. That had, in fact, been the argument used during the discussions preceding the adoption of resolution 360 B (III).[6] It might perhaps be preferable that the International Law Commission and the Committee on International Criminal Jurisdiction should work along parallel lines.

40. Mr. HUDSON thought that the Commission had already achieved substantial results, since it had prepared a draft code of offences against the peace and security of mankind comprising 4 articles. The situation would be clearer when the Committee on International Criminal Jurisdiction had completed its work.

41. Mr. ALFARO thought that there was nothing in

[5] See para. 69 below.

[6] See *Historical survey of the question of an international criminal jurisdiction*, United Nations publication, sales No.: 1949.V.8, pp. 36–38.

common between the task with which the Committee on International Criminal Jurisdiction had been entrusted and the preparation of a convention concerning the implementation of the draft code. There were excellent reasons for the preparation of a convention by the Commission. The Committee had been set up because the International Law Commission had replied in the affirmative to the twofold question whether the establishment of an international criminal court was desirable and possible. The Committee's effort to establish such a court might fail, in which case the Commission would be justified in preparing a draft convention to complete the task which fell to it under resolution 177 (II) of the General Assembly.

42. Mr. CORDOVA thought that it might perhaps be advisable to state in the report of the Commission in its third session that the Commission remained convinced of the desirability of establishing an international criminal court. The Commission might also express the hope that the Committee on International Criminal Jurisdiction would define the competence of such an international criminal court. But provision should be made against the possibility that the Committee on International Criminal Jurisdiction might fail to reach agreement on the establishment of a court. The International Law Commission would then reserve the right to study the question of jurisdiction in order to facilitate the implementation of the draft code.

43. In his view, it was too early for the Commission to consider the question of preparing a convention. All that was required was that the Commission should reserve the right to review the question should the Committee on International Criminal Jurisdiction fail to complete its task.

44. Mr. EL KHOURY pointed out once more that the Commission could follow either the procedure set forth in article 15 of its statute, or that set forth in articles 22 and 23. If the preparation of a Convention could not be considered at that stage, the Commission might at least recommend the General Assembly to convene a conference to conclude a convention, as provided in article 23, paragraph 1 (*d*).

45. Mr. KERNO (Assistant Secretary-General) pointed out to Mr. el Khoury that article 23 concerned procedure for the codification of international law. Before that procedure could be applied, it was necessary first to apply article 21, whose provisions were roughly the same as those of article 16 (*g*) concerning the progressive development of international law.

46. In the progressive development of international law the instrument must necessarily take the form of a convention, whereas the procedure applicable to codification was more flexible.

47. Mr. FRANÇOIS shared the doubts of Mr. Hudson, Mr. Kerno and Mr. Córdova as to the possibility of implementing the draft code before an international penal code had been established. Mr. Kerno had pointed to the dangers involved in implementing the code so long as no international criminal court existed. Once the establishment of the latter had been decided, the implementation of the draft code would depend on the form of the court. Should the efforts to establish the court fail, procedure for implementing the code would have to be examined. In the meantime it could only be hoped that the court would be established. The Commission's time might therefore be more usefully employed than in protracted discussion of the implementation of the code.

48. Mr. SANDSTRÖM said that he had been much impressed by the very forceful arguments of Mr. Hudson.

49. Mr. ALFARO said that the question had merited the thorough study which it had just received. It was clear that the majority of the members of the Commission did not think it feasible to submit the draft code of offences against the peace and security of mankind in the form of a convention. He himself did not share that view; but he would fall in with the wishes of the majority, although still convinced that the document submitted by the Commission to the General Assembly would be unsatisfactory.

50. Mr. AMADO was surprised to hear the international criminal court referred to as it if were shortly to become a reality, which, to him, was inconceivable. After reading out the list of the members comprising the special committee, in accordance with resolution 489 (V) of the General Assembly, he pointed out that certain States had refused to be represented on the Committee.[7] If the Committee was successful in its task and a court was established, the co-operation of countries which were at present deliberately standing aloof from the efforts to create such a court would have to be assured before the court could usefully function.

51. Since it might be several years before an international criminal court was established, the main point was that the members of the Commission should agree to be satisfied with what they had accomplished. He could not believe that the mere addition of four of five articles to the draft code would mean that an important contribution had been made to the progressive development of international law.

52. Nor did he consider that the question before the Commission related to the codification of international law. It was, in fact, an entirely new problem. The article of the statute which applied was therefore article 16.

53. Mr. YEPES regretted that Mr. Alfaro was not pressing a formal proposal that the Commission proceed to prepare a convention. He himself did not wish to submit such a proposal, but was sorry that the Commission was missing an opportunity to take a step forward.

54. Mr. EL KHOURY thought that, from the point of view of the practice of States, since the States Members of the United Nations had confirmed the Nürnberg Principles,[8] the Commission's task might be regarded as relating to the codification of international law, so that the Commission might follow the procedure set forth in article 23 of its statute.

55. The CHAIRMAN thought that a decision on the question was unimportant, since, at all events, the draft

[7] See *Official Records of the General Assembly, Fifth Session, Sixth Committee*, 246th meeting, paras. 1-29.

[8] General Assembly resolution 95 (1), of 11 December 1946.

code must be communicated to States, either under article 16 (*h*) or under article 21.

56. Mr. HUDSON said that the formulation of the Nürnberg Principles had not been communicated to States. The Commission could follow the same procedure with the draft code.

57. Mr. CORDOVA pointed out that, by resolution 177 (II), the General Assembly had directed the Commission to formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal and to prepare a draft code of offences against the peace and security of mankind. It would therefore appear that the same procedure should be followed in regard to the draft code as in regard to the formulation of the Nürnberg Principles.

58. Should the Commission consider that the question was one relating to the progressive development of international law, the article of its statute which was applicable was clearly article 16. But in that case the Commission had not observed the terms of article 16 (*c*), in that it had not circulated a questionnaire to governments and had not invited them to supply data and information.

59. The CHAIRMAN said that governments had been invited to transmit their comments on a draft code. Furthermore, he thought it would be illogical if the Commission did not regard the preparation of a draft code as a special task with which it had been entrusted, as it had done in the case of the formulation of the Nürnberg Principles, since it had been requested to carry out both tasks by one and the same resolution of the General Assembly.

60. Mr. AMADO said that, although only a few governments had transmitted their comments, the information they had supplied was at any rate full of interest.

61. Mr. YEPES was in favour of communicating the draft code to governments; he thought that the provisions of article 16 must be applied, although that would not prevent the Commission from communicating the draft code to the General Assembly.

62. Mr. HUDSON thought that the draft code would, at all events, be communicated to governments.

63. Mr. LIANG (Secretary to the Commission) considered that the formulation of the Nürnberg Principles, which had already been confirmed by the General Assembly, was a question relating to the codification of international law. On the other hand, the purpose of preparing a draft code was to produce an instrument which would impose obligations on the States accepting it, so that it might be considered as a question relating to the progressive development of international law, the more so since the General Assembly had adopted no formal decision on the Nürnberg Principles, but was awaiting the findings of the Commission in regard to the draft code. He could see nothing illogical in dealing differently with the two questions.

64. The CHAIRMAN said that the practical effect of any differences was almost nil, except that the transmission of the draft code to States rather than to the General Assembly would delay its possible adoption.

65. Mr. HUDSON inferred that the question would remain on the agenda for another year.

66. The CHAIRMAN asked the Commission to decide whether the draft code should be sent to States or to the General Assembly.

67. Mr. HUDSON moved that it be transmitted to the General Assembly.

*By 10 votes to none with 1 abstention, it was so agreed.*

68. Mr. YEPES said that, although he had abstained from voting, he had also requested in his proposal that the draft code be sent to the General Assembly.

INTRODUCTION (*resumed from the 106th meeting*)

PARAGRAPH 6 (*d*) (A/CN.4/L.15) (*paragraph 58* (d) *of the "Report"*) (*resumed from the 106th meeting*)

69. Mr. HUDSON proposed the substitution of the following text for paragraph 6 (*d*) of the introduction to document A/CN.4/L.15: [9]

> "In the preparation of this draft code, the Commission has not considered itself called upon to deal with the various methods by which it may be given binding force. It has therefore refrained from drafting an instrument for implementing a code. The offences set forth are characterized in article 1 as international crimes. Hence, the Commission has envisaged the possibility of an international tribunal for the trial and punishment of persons committing such offences. As the General Assembly has set up a special committee to prepare draft conventions and proposals relating to the establishment of an international criminal court, the Commission has refrained from anticipating the work of that committee.
>
> "Pending the establishment of a competent international criminal court, a transitional measure might be adopted providing for the application of the code by national courts. Such a measure would doubtless be considered in drafting the instrument by which the code would be put into force."

70. Mr. ALFARO, paying tribute to the excellence of Mr. Hudson's proposal, suggested that the concluding words of the first paragraph of the proposal be amended to read: "... the Commission has sought to avoid anticipating the work of that committee." He thought that there could be no question of anticipating the work of the committee. The tasks of the Commission and the committee were different.

71. He might add that he considered it preferable to state that the Commission "has considered it advisable before taking any further action on this subject to await the results of the work of that committee."

72. Mr. HUDSON said that Mr. Alfaro's proposal seemed to suggest that the Commission would review the question. He himself had sought to avoid explaining why the Commission could not include in the code a provision concerning the international criminal court.

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[9] See para. 28 above.

73. Mr. HSU asked whether there was any objection to the deletion of the last sentence of the first paragraph of Mr. Hudson's proposal.

74. Mr. HUDSON proposed as an alternative:

"Note has been taken by the Commission of the General Assembly's decision to set up this committee."

75. Mr. CORDOVA thought Mr. Hudson's alternative proposal would give the impression that the committee was to settle the problem. If it did not do so he wondered what steps the Commission would take to implement the code. He suggested a statement to the effect that the Commission reserved the right to review the question. A text on the lines of that proposed by Mr. Alfaro could be added.

76. Mr. HUDSON thought that the problem should be left to the General Assembly, to which it had been submitted, until such time as the Assembly decided to refer it to the Commission.

77. Mr. KERNO (Assistant Secretary-General) said that a minor amendment to the text proposed by Mr. Alfaro might cover the point raised by Mr. Hudson. The sentence might run:

"The Commission thinks it advisable to await the results of the work of that committee before any action is envisaged."

78. Mr. CORDOVA said that the Commission was actually telling the committee that the latter should do the work.

79. Mr. EL KHOURY said that the task was one for the Commission, which should ignore the existence of the committee. The establishment of implementation procedure was linked with the drafting of the code. The adoption of the text proposed would mean that the Commission was depending on the committee to give the code binding force. He thought that the Commission should perform its task and not make it dependent upon the work of the committee.

80. At the request of Mr. HSU, Mr. HUDSON read out the following amendment which he proposed to the last sentence of the first paragraph of his original proposal.

"The Commission has taken note of the action of the General Assembly in setting up a special committee to prepare draft conventions and proposals relating to the establishment of an international criminal court."

81. The CHAIRMAN explained that the second paragraph of Mr. Hudson's proposal remained unchanged.

*The redraft proposed by Mr. Hudson was adopted as amended.*

82. Mr. YEPES asked why the text adopted referred only to the "possibility" of setting up the international criminal court when the Commission had considered its establishment as both possible and desirable.

83. The CHAIRMAN replied that only the possibility of its establishment should be mentioned in that paragraph.

84. Mr. HUDSON explained that he had intended to state that the crimes enumerated in article 1 were international crimes, which explained the proposal to set up an international court. That was a logical sequence.

85. Mr. YEPES did not press his point.

TEXT OF THE DRAFT CODE (*resumed*)

ARTICLE ON PENALTIES (*article 5 in the text of the "Report"*)

86. Mr. SANDSTRÖM thought that an article on penalties, perhaps providing that the latter should be left to the discretion of the judge, ought to be added to the draft code, for psychological reasons.

87. Mr. ALFARO said that he was unreservedly in favour of Mr. Sandström's proposal. During the previous year he had more than once had occasion to draw the Commission's attention to a criticism levelled at the judgment of the Nürnberg Tribunal, namely, that it had violated the well-known principle of criminal law: *nulla poena nullum crimen sine lege*. He had already stated that there were several arguments in favour of the inclusion in the penal code of an article concerning penalties since a code was called "penal" because it laid down penalties for crimes. He thought that the Commission might at least fix a maximum penalty, for example, imprisonment for life, or use the phrase "any penalty awarded by the Court".

88. He would repeat that an international penal code should include the penalties applicable to international crimes.

89. Mr. EL KHOURY agreed. There could be no penalties without an appropriate text. If penalties were not provided, the court, if established, would be impotent. The Nürnberg Charter had authorized the Tribunal to fix penalties. The Commission might give the international court the same authority. A minor amendment, designed to remedy an omission, would suffice. A provision of that nature should be adopted, at least so far as concerned the main penalty provided by the Nürnberg Charter. In his view, a code that did not include penalties was incomplete.

90. Mr. FRANÇOIS thought that it would be extremely difficult to lay down the penalty for every crime. Mr. Sandström thought that the fixing of the penalty should be left to the judges. That was a question of principle, and it must be decided whether the intention was to allow the judges to fix the penalty in every case. Mr. Alfaro had said that not only should the maximum penalty be fixed, but that it should be stated that there could be no question of the death penalty. In his own view, the maximum penalty should be death, since the crimes concerned were so serious that death would not be too severe a punishment for them.

91. He wondered what point there was in stating that the death penalty was the maximum penalty. In order to fix the appropriate penalty for every offence it would be necessary to have the opinion of specialists in international penal law — and the Commission included only one in its number.

92. What had to be decided was whether there should be a penalty for each offence or whether the fixing of the penalty in each case should be left to the judges. If the latter alternative were adopted, he did not see how penalties could be included in the code.

93. Mr. CORDOVA proposed the following new article:

"The penalty corresponding to the offences enumerated in this code shall be determined by the court which shall have jurisdiction to try and condemn the individuals found guilty of having committed an international crime."

94. The article which he proposed therefore provided for punishment without stating its nature, which would be very difficult.

95. Mr. SANDSTRÖM read out article 27 of the Nürnberg Charter, as follows:

"The Tribunal shall have the right to impose upon a defendant, on conviction, death or such other punishment as shall be determined by it to be just."

96. Mr. SCELLE thought that penalties could not be omitted from a penal code. He was well aware of the current movement in favour of a return to the principle of *nulla poena sine lege*. That principle had not been followed at Nürnberg, nor could it have been followed, otherwise the guilty could never have been punished. A formula might be adopted pending the insertion in the draft Code of a more precise provision concerning the penalty for each crime. It might, for example, be stated that the international court could fix the penalty in each case.

97. He regarded the proposal submitted by Mr. Sandström, Mr. Alfaro and Mr. Córdova as logically defensible. The question was whether the Commission wished to produce a true code or merely to enunciate general principles.

98. Mr. HUDSON thought that a decision was difficult so long as the nature of the relevant provision in the statute of the international court was unknown. Furthermore, if national courts were competent, the question of the death penalty arose. Brazil, for example, had abolished capital punishment and refused to extradite a criminal to a country where it was in force. The proposed statement would therefore be valueless. He thought that the Commission ought not to touch the question of implementation of the code.

99. Mr. AMADO wished to point out since specialists in penal law had been mentioned, that none of them applied the same canons to political crimes as to other crimes. The principle of *nulla poena sine lege* applied to common law crimes. Nor should it be overlooked that the object of the penalty was not the same for political as for common law crimes. An anarchist or a communist could not be re-educated. That was why the statute of the French Supreme Court, which was a model of its type, stipulated no penalties, but left them to the appropriate court.

100. The crimes of the Nazis had exceeded the wildest imagination and ordinary penalties could not be applied to men committing such crimes.

101. He would suggest an attitude of extreme caution on the question. The Commission could await the establishment of the international criminal court or include in the draft code an article based on article 27 of the Nürnberg Charter, such as had been proposed by Mr. Córdova.

102. Mr. CORDOVA thought that there were two possibilities. International crimes would be punished either by an international court or by national law. It was impossible, in either case, to specify the penalties for such crimes. Capital punishment might be in force in one country, and not in another. It would be regrettable to draft a code and not to state that the fact that it ought to provide penalties had been considered by the Commission. Mr. Hudson's criticism was equally applicable to the enumeration of crimes. A penal code consisted of two main parts, namely, the definition of the crimes and the determination of the penalties. It would be pointless to enumerate crimes without mentioning penalties.

103. Mr. AMADO said that national laws which did not provide for the death penalty could be amended. He was convinced that, in view of the enormity of the crimes concerned, States would be prepared to provide the death penalty. For philosophical reasons connected with the concept of educative or corrective penalties, no State would refuse to incorporate the death penalty in its domestic legislation as a punishment for crimes of the character concerned.

104. The difficulty was to fix a penalty for the individual guilty of the crime. A uniform penalty without gradations was unthinkable. It would be very difficult to fix the penalty for invasion of the territory of a State or for fomenting civil war. He considered that it was too early at that stage to attempt to fix penalties; but the Commission could make a recommendation. Nor did he believe that the Commission should fix a maximum penalty. A provision similar to article 27 of the Nürnberg Charter might be acceptable.

105. Mr. YEPES said that the extreme delicacy of the problem was no reason for avoiding a decision. The work of the Commission would be incomplete if it were left as it stood. The Commission must state that the acts enumerated deserved punishment. While it was impossible to fix a penalty for every crime, the proposals submitted by Mr. Sandström and Mr. Córdova were acceptable. Mr. Hudson had objected that certain States had abolished capital punishment and refused to extradite criminals who were likely to be executed. Capital punishment had been abolished in Colombia on philosophical grounds, and if it was still in force in the State requesting extradition the latter was only granted on condition that the death penalty was commuted. In his view, that objection ought to be disregarded.

106. Mr. ALFARO agreed with Mr. Amado. The same canons could not be applied to political crimes as to common law crimes. In the case of political crimes the modern penologist's view that the aim of punishment was to rehabilitate the criminal could not be entertained. Citizens were entitled to defend themselves against dangerous individuals who committed political crimes. It was therefore natural for the State to impose a penalty which would eliminate such men and make it impossible for them to disturb international life.

107. For him the principle of *nulla poena sine lege*

remained applicable and it should not be disregarded in a penal code drafted by a Commission which numbered a distinguished penologist among its members. The omission of penalties from the code would be a retrograde step as compared with the Nürnberg Charter. Of course, in the cases tried at Nürnberg the penalty had not existed before the crimes; but it had been established. A decision could be taken subsequently as to whether the penalty should be the death penalty or imprisonment for life. A very flexible type of penalty should be established in order to enable the verdict of the court to be adjusted to the degree of guilt of each defendant.

108. If the Commission stated that the penalty for all such crimes would be the death penalty, or any lesser penalty that justice might require, the criminals would know that they were risking the death penalty, but the court would not be bound by a hard-and-fast provision. He thought the Commission would find itself in a very awkward position if it went back on the Nürnberg Charter and omitted all reference to penalties.

109. He did not much favour the idea that the court should decide the penalty, since that was an unusual provision in penal law. There should be a reasonable relationship between the penalty and the crime.

110. He thought that the Commission should agree in principle to adopt an article stipulating penalties. The choice between the death penalty and imprisonment for life could be made later. The penalty for a minor offence could be fixed by the court, since it would have the right to impose a lighter penalty.

111. Mr. SCELLE thought that Mr. Córdova's proposal should perhaps state that the solution recommended was provisional and would only apply pending the fixing of a penalty for each crime, because the principle of *nulla poena sine lege* was endorsed in the Universal Declaration of Human Rights. Consequently, if the proposal were adopted as it stood it would contradict the Declaration. An article was absolutely essential; for a code that enumerated crimes without providing penalties for them was purely theoretical.

*It was decided, by 8 votes to 2 with 1 abstention, that an article on penalties be included in the draft code.*

112. The CHAIRMAN then requested the Commission to decide what form the article should take and referred to the proposal submitted by Mr. Córdova.[10]

113. Mr. CORDOVA explained that the text he had proposed should appear as a separate article at the end of the code.

114. Mr. AMADO said that, if Mr. Córdova's text were adopted, the Commission would again have to face the problem which had arisen in connexion with article 5. Pending the establishment of an international criminal court the penalties for the crimes concerned would be those stipulated in national penal codes. Since the Commission had adopted the principle that penalties should be included in the draft code, the nature of the penalties must be stated.

115. Mr. CORDOVA said that the Commission should not make the mistake for which the Nürnberg Tribunal had been blamed.

116. Mr. AMADO replied that the code had not existed at the time of the Tribunal.

117. Mr. CORDOVA agreed that it should be left to judge to award a penalty commensurate with the gravity of the offence, which could be done by fixing a maximum penalty.

118. Mr. AMADO asked who would apply the penalty.

119. Mr. CORDOVA replied that it would be awarded by the international court, if competent, otherwise by the national court.

120. Mr. FRANÇOIS, referring to Mr. Córdova's remark that the Commission should not fall into the error committed at Nürnberg and ignore the principle of *nulla poena* . . . , pointed out that there was a cardinal distinction. The Commission had now established the law; what it had not yet done was to fix the penalties and delegate the task of awarding them. It would not be contrary to the principle of *nulla poena* . . . to adopt a rule of the type proposed by Mr. Córdova. He disagreed with Mr. Scelle's observation that the adoption of Mr. Córdova's proposal would be contrary to the Universal Declaration of Human Rights.

121. Mr. CORDOVA thought that, in fact, if the maximum penalty were fixed the principle of *nulla poena* . . . could not be invoked. The judge would adjust the penalty to the gravity of the crime.

122. Mr. SCELLE said that his opinion on Mr. Córdova's proposal had been expressed because the basic aim of the principle of *nulla poena* . . . was clearly to prevent the court fixing an arbitrary penalty. Once the code was adopted the principle of *nullum crimen sine lege* would be respected, but not so the principle of *nulla poena* . . .

123. He suggested the addition to the text proposed by Mr. Córdova of a reservation in the following terms:

> " Pending the inclusion in the code of a penalty for each crime the court shall be competent to choose the penalty."

124. The whole procedure would, of course, be provisional; but it had been followed already and could be followed again. If the principle of *nullum crimen* were strictly applied, a person convicted of a new crime could not be punished. The Nürnberg Tribunal had been obliged to adopt the decisions which it had adopted, because otherwise it would have been impossible to punish war crimes. He would welcome a provisional reservation on the matter. The objective was to ensure that there was a specific penalty for every crime. The Commission could not fix the penalties, because in doing so it would be exceeding its duty, and also because there was only one penologist in the Commission, namely, Mr. Amado. The adoption of the reservation which he proposed would meet the objection which had been raised.

125. Mr. SANDSTRÖM wondered whether it would actually meet every objection. The Commission would be blamed for not fixing penalties.

[10] See para. 93 above.

126. Mr. SCELLE explained that the reservation which he had in mind would state that, pending the inclusion in the code of a penalty for each crime, the Commission left to the court the task of fixing the penalty.

127. Mr. CORDOVA said that the problem was to avoid coming into conflict with the principle of *nulla poena* . . . He proposed the addition of the following words to his text:

" according to the gravity of the criminal act and also taking into account that the maximum penalty to be imposed shall be the death penalty (or imprisonment for life)."

128. Failure to lay down the maximum penalty would contradict the principle of *nulla poena* . . .

129. Mr. EL KHOURY said that he was opposed to fixing either a maximum or a minimum penalty. He proposed the addition to the text proposed by Mr. Córdova of the following sentence:

" In determining the penalty the Court shall take into consideration the gravity of the crime and the corresponding national penal code in force."

130. The CHAIRMAN asked what was meant by the " corresponding . . . code ".

131. Mr. EL KHOURY replied that what was meant was the provisions of the code in respect of, for example, murder or arson.

132. Mr. AMADO said that Mr. Hudson had been good enough to put into English the proposal which he himself intended to submit, as follows:

" Pending the establishment of a competent international criminal court, the penalty for any offence defined in this code shall be that fixed by the national law applied ".

133. So far as concerned the principle of *nulla poena* — which had never been known in Rome, although stated in Latin — the crimes under consideration could not be punished in the various countries if it were applied. If armed bands killed someone their members could be punished for murder. That was a crime covered by the penal code; but certain political crimes were, of course, not covered by national codes, which showed the complexity of the question.

134. Mr. ALFARO proposed the substitution, for the words " by the national law applied " in Mr. Amado's proposal, of the words: " by the national penal code of the country in which the crime has been committed."

135. Mr. AMADO pointed out that in the case of genocide, which was an international crime, one article of the appropriate Convention provided that the person responsible would be punished by the national courts. The question was somewhat similar.

136. Mr. KERNO (Assistant Secretary-General) said that he was trying to imagine what penalty was prescribed in any national legislation for the international crime of annexation or the crime of preparing to use armed force. Genocide corresponded to murder; but national codes contained no provisions in respect of many other international crimes.

137. Mr. AMADO said he would point out to Mr. Kerno that the draft code contained a provision to the effect that States adopting the code should enact the necessary legislation.

138. Mr. HUDSON observed that, since the wording of the text must conform to that used elsewhere, it should be given careful study. He proposed the following amendment to the text submitted by Mr. Córdova:

" The penalty for any offence enumerated in this code shall be determined by the tribunal exercising jurisdiction over an individual accused of the offence ".

139. Mr. CORDOVA thought that the Commission should perhaps decide whether to mention the maximum penalty or not.

140. Mr. HUDSON suggested the following wording:

" . . . taking into account the gravity of the act and limiting the maximum penalty to death."

141. Mr. EL KHOURY said that no maximum penalty should be stated. The death penalty was essential in certain cases, but not so in others. He thought it should be left to the court to fix the penalty.

142. Mr. FRANÇOIS said that failure on the part of the Commission to prescribe the death penalty would suggest that it disapproved of the penalties imposed by the Nürnberg Tribunal.

143. The CHAIRMAN thought that the text should close with the words " taking into account the gravity of the act ".

144. Mr. ALFARO agreed with Mr. Scelle that to state that the court would fix the penalty would be a contradiction of the principle of *nulla poena*. If the Commission decided not to prescribe the maximum penalty, he would support Mr. Amado's proposal. He proposed the following text:

" For these crimes, pending the establishment of a competent international criminal court, the penalty shall be that set forth in the penal code of the territory where the crime has been committed."

145. Mr. AMADO thought that the members of the Commission would find it extremely difficult to justify, in the eyes of their fellow jurists, their rejection of the traditional principle, which was accepted both in theory and, in practice, that determination of the penalty should be left to the judge.

146. Mr. KERNO (Assistant Secretary-General) pointed out that the principle of *nulla poena* was best known in the legal systems of Continental Europe and Latin America, and less known in the Anglo-Saxon countries. The principle applied except where the law gave the judge the right to fix the penalty; that was an exception to the rule.

147. Mr. SCELLE pointed out that Mr. Amado had observed that it also applied to the Supreme Court in France.

148. Mr. HUDSON asked whether the principle was not *nullum crimen sine lege*.

149. The CHAIRMAN said that Mr. Scelle apparently drew a distinction. So far as he (the Chairman) was

concerned, he thought it was two ways of expressing the same idea.

150. Mr. HUDSON said that there could be no guilt if there were no law already in force which made commission of the act a crime. If that was the interpretation of the principle, the Commission had conformed to it by defining the crimes in article 2. The code constituted a basis in enabling persons who had committed certain acts to be tried. Having defined the crimes in the draft code, the Commission could stop there and claim that the principle had been applied.

151. Mr. SCELLE said that that was the French interpretation of the principle.

152. The CHAIRMAN drew attention to the following amendment to the end of Mr. Córdova's text, proposed by Mr. Hudson:

" ... exercising jurisdiction over the individual accused, taking into account the gravity of the offence ".

153. Mr. EL KHOURY reminded the Commission that he had proposed the addition of the words:

" and the corresponding national penal code in force ".

The code referred to was that of the country in which the crime had been committed.

154. Mr. HUDSON said that Mr. el Khoury's proposal would mean a return to the territorialization of crime.

155. Mr. SANDSTRÖM proposed the addition of the following words:

" Capital punishment may be imposed if the offence requires it ".

156. The CHAIRMAN said that such a provision would cause difficulties for countries which had abolished capital punishment.

*Mr. el Khoury's amendment was rejected.*

157. Mr. ALFARO said that he was in favour of the principle contained in Mr. el Khoury's amendment, but not of its wording.

*Mr. Sandström's amendment was rejected by 5 votes to 4.*

158. Mr. ALFARO proposed the addition of the following words to Mr. Córdova's text:

" The maximum penalty should be imprisonment for life ".

*Mr. Alfaro's amendment was rejected by 8 votes to 1.*

159. Mr. AMADO recalled his proposal, as follows:

" Pending the establishment of a competent international criminal court, the penalty for any offence defined in this code shall be that fixed by the national law applied."

160. Mr. SANDSTRÖM asked what national law was meant.

161. Mr. AMADO explained that States accepting the convention would have to enact legislation in conformity with it. If the international criminal court was established it would apply the penalty prescribed in the amendments to the national codes.

162. Mr. HUDSON pointed out that adoption of Mr. Amado's text would entail the reinsertion of article 5 in the draft code. Mr. Amado's proposal was incomprehensible without article 5, which had been rejected.

163. Mr. YEPES supported the amendment proposed by Mr. Amado, since he had voted in favour of article 5, which, in his view, should have been adopted.

164. Mr. AMADO said he would not press his proposal to a vote.

165. The CHAIRMAN reminded the Commission of the amended text of Mr. Córdova's proposal:

" The penalty for any offence defined in this code shall be determined by the Court exercising jurisdiction over the individual accused, taking into account the gravity of the offence."

166. Mr. YEPES asked whether it was enough that an individual should be accused, and proposed the substitution for the word " accused " of the words " found guilty ".

167. The CHAIRMAN observed that the courts exercised jurisdiction, not over individuals found guilty, but over individuals accused. The words might be " individuals accused of a crime ".

168. Mr. HUDSON thought that the end of Mr. Córdova's proposal should read: " taking into account the gravity of the *act* ".

*Mr. Córdova's proposal, as amended, was adopted by 6 votes to 2 with 3 abstentions.*

169. The CHAIRMAN said that he had abstained from voting because he thought that the proposal was out of place at that point.

170. Messrs. HUDSON and AMADO explained that they were opposed to the text.

## INTRODUCTION (*resumed*)

### PARAGRAPH 1 OF THE INTRODUCTION (*resumed from the 106th meeting*)

171. The CHAIRMAN suggested that the Commission discuss the following redraft submitted by Mr. Hudson for paragraph 1 of the introduction:

" 1. By its resolution 177 (II), of 21 November 1947, the General Assembly decided

' To entrust the formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal to the International Law Commission, the members of which will, in accordance with resolution 174 (II), be elected at the next session of the General Assembly; '

and directed the Commission to:

' (*a*) Formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, and

' (*b*) Prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in sub-paragraph (*a*) above.'

" In 1950, the International Law Commission reported its formulation under (*a*) to the General Assembly. By its resolution 488 (V), of 12 December 1950, the General Assembly invited the Governments

of Member States to express their observations on the formulation, and requested the Commission

' In preparing the draft code of offences against the peace and security of mankind, to take account of the observations made on this formulation by delegations during the fifth session of the General Assembly and of any observations which may be made by governments.' "

172. Mr. HUDSON explained that he had become convinced during discussion of the need to quote the text of resolution 177 (II).

173. The CHAIRMAN agreed that it would be an improvement.

174. Mr. KERNO (Assistant Secretary-General) pointed out that the text proposed by Mr. Hudson was to replace only paragraph 1 of the introduction and he was surprised to find that paragraph 1 referred to the second session of the Commission while paragraph 2 referred to the first session.

175. Mr. HUDSON replied that the difference was admissible, since the two paragraphs did not refer to the same part of the General Assembly resolution.

176. The CHAIRMAN pointed out that paragraph 4 of the introduction would also have to be deleted.

*The redraft proposed by Mr. Hudson was adopted.*

177. The CHAIRMAN announced that, in view of the number of amendments to the draft code, voting must be delayed until all had been issued in documentary form by the Secretariat. There would be no further discussion on the text.

*The meeting rose at 1 p.m.*

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## 112th MEETING

*Wednesday, 27 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. Jesús María YEPES.

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

### Communication concerning the next session of the Commission

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16. The CHAIRMAN proposed that a reply be transmitted to Mr. Lall, Assistant Secretary-General in charge of the Department of Conference and General Services, informing him that, after considering his telegram, the Commission was still convinced that, in the interests of its work, its next session should be held at Geneva.

17. Mr. LIANG, Secretary to the Commission, suggested that a paragraph of the general report to the General Assembly be devoted to the subject.

*The Chairman's proposal was adopted unanimously.*

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### General Assembly resolution 484 (V) of 12 December 1950: Review by the International Law Commission of its Statute with the object of recommending revisions thereof to the General Assembly (item 1 of the agenda)

DRAFT REPORT TO THE GENERAL ASSEMBLY PROPOSED BY THE SUB-COMMITTEE (A/CN.4/L.21) [1]

22. Mr. HUDSON, Chairman of the sub-committee,[2] explained that the latter had considered that it had received a twofold instruction from the Commission. First, it had been directed to express the view that members of the Commission should devote their full time to its work; that was done in Part I of its report. Secondly, it was to consider the advisability of making certain amendments of detail to the present statute.

23. The sub-committee had carefully considered both questions and decided that the Commission would perhaps create a false impression if it assumed that the General Assembly would deal with amendments to the statute that year and with the question of full-time membership and with further amendments in the following year. The sub-committee had considered that the General Assembly might be disinclined to discuss those questions in two consecutive years. In addition, should the Assembly consider amendments to the statute that year and full-time membership of the Commission in the following year, its views might change in the interval. Such were the grounds on which the conclusion at the end of paragraph 12 in Part II of the report had been reached.

24. The sub-committee had dealt with a question which had not been mentioned during the general discussion, namely, the staggering of the terms of office of members of the Commission as a means of promoting continuity in its work. If, for example, the composition of the Commission were completely changed at the end of the five-year term of office the new members of the Commission

[1] Mimeographed document only, the text of which corresponds with drafting changes to chapter V of the *Report of the International Law Commission covering the work of its third session.* (See text in vol. II of the present publication.) The drafting changes are indicated in the present summary record.

[2] Set up at the 96th meeting. See summary record of that meeting, para. 148.