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Summary record of the 268th 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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67. Mr. LIANG, Secretary to the Commission, while appreciating the force of Mr. Córdova's remarks, said it would be difficult to specify in the draft Code which tribunal would be competent. Preferably the Commission should revert to the original draft of article 1, which allowed for some latitude of interpretation. The draft adopted by the Commission at its previous meeting could only be interpreted as meaning that the international criminal court would have exclusive jurisdiction over the offences concerned.

68. Faris Bey el-KHOURI said that the Commission could not strip the national tribunals of the jurisdiction which they in any case possessed. He preferred the draft adopted by the Commission in 1951 which contained no reference to any international criminal court.

69. Mr. PAL said he had not taken part in the discussion and had abstained from the vote because the draft articles had been originally adopted as early as 1951 before he became a member of the Commission, and had since been submitted for consideration to governments. He did not wish at the present stage to raise questions which might jeopardize the final adoption of the draft Code, but he, personally, was fundamentally opposed to the introduction of criminal liability which in the present stage of international development would not give the accused fair treatment.

70. Referring to the subject under discussion he pointed out that a national court could only deal with an act punishable under the draft Code if that act was also a criminal offence under the municipal criminal law of the country in which the Court was constituted.

71. Mr. SCELLE agreed that article 1 as adopted by the Commission at its previous meeting was defective for it seemed to stipulate that the offences mentioned in the draft Code could not be tried by any court whatsoever so long as an international criminal court did not exist. Yet those acts were undeniably within the jurisdiction of the national courts, not only of the country in which they had been committed, but also of the country which succeeded in arresting the alleged offender. If the Commission's draft Code were adopted by the States, it would become an integral part of the municipal law of all the parties, and the tribunals of all those countries would hence be competent to try the offences mentioned in that Code. The Code should state expressly that the offences covered by it came within the jurisdiction of the national courts pending the establishment of an international criminal court, and would, after the latter had been established, come within its jurisdiction.

72. Mr. CÓRDOVA agreed that article 1 should be redrafted; at the very least, the remarks of the Secretary and of Mr. Scelle should be mentioned in the comments. At the same time, the Commission should add in the comment that it considered the establishment of an international criminal court essential.

73. Mr. SPIROPOULOS, Special Rapporteur, pointed out that the establishment of an international criminal court and its procedure were the subject of two reports submitted to the General Assembly by special committees.[16] At the moment the Commission should merely define the offences to which the draft Code under discussion was to relate.

74. Mr. ZOUREK said that not inconceivably the draft Code could become operative even if an international criminal court was not established. He pointed out that the establishment of an international criminal court and its effective operation would entail the abandonment by States of important sovereign powers. That was the main reason why he considered it impossible to establish a permanent criminal court. At the moment, however, the question of an international criminal court should not be discussed, for it was on the provisional agenda of the General Assembly's ninth session.

75. Mr. SCELLE said the international criminal court had to be mentioned in article 1.

76. The CHAIRMAN put the question to the vote.

By 8 votes to none, with 2 abstentions, it was decided that the words "by an international court" should be deleted from article 1 as adopted at the previous meeting.

The meeting rose at 1 p.m.

[16] *Official Records of the General Assembly, Seventh Session, Supplement No. 11* (A/2136), and *Ninth Session, Supplement No. 12* (A/2645).

268th MEETING

Thursday, 15 July, 1954, at 9.45 a.m.

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Chairman: Mr. A. E. F. SANDSTRÖM

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. G. AMADO, Mr. R. CÓRDOVA, Mr. D. L. EDMONDS, Faris Bey el-KHOURI, Mr. F. GARCÍA-AMADOR, Mr. S. HSU, Mr. R. PAL, Mr. C. SALAMANCA, Mr. G. SCELLE, Mr. J. SPIROPOULOS, Mr. J. ZOUREK.

Secretariat: Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Draft Code of Offences against the Peace and Security of Mankind (item 4 of the agenda) (A/1858, A/2162 and Add. 1 and 2, A/CN.4/85) [1] *(continued)*

Article 2 (10)

(resumed from the 267th meeting) [2]

1. Mr. SCELLE said that without the words "when such acts are committed in execution of or in connexion with other offences defined in this article" paragraph 10 was unsatisfactory, for as it stood practically any offender could claim to have acted for political motives, a provision of which a criminal would not fail to take advantage. It should be left to the court in each particular case to decide if the crime was subject to municipal criminal law or if it came within the category of crimes against humanity. As a general rule crimes against humanity were committed by the authorities of a State; where individuals were concerned the situation was more complex and he therefore proposed that the following sentence should be added at the end of the paragraph: "If such acts are committed by private persons the court competent to impose the penalty shall decide whether they constitute crimes against humanity or crimes under ordinary criminal law."

2. Mr. SPIROPOULOS, Special Rapporteur, agreed that Mr. Scelle's proposal contained a valuable idea although he did not think it should be included in the paragraph under consideration; it would make it unnecessarily cumbersome. He preferred paragraph 10 as it stood. International crimes would be dealt with by an international court. The Nürnberg Tribunal had made no distinction between the various crimes, considering as war crimes all those committed in connexion with the war.

3. Mr. CÓRDOVA thought the Commission had been mistaken in deleting the last phrase of the paragraph. Mr. Scelle's proposal, however, did not solve the problem either, because it left unanswered the question which court was competent to try a particular offence. The Commission had to provide a criterion enabling the court to distinguish ordinary from international offences. It was not enough to say that the court should make such a distinction. He proposed that the Commission should reconsider its decision regarding the deletion of the last phrase of the paragraph and should agree to certain drafting changes.

4. Mr. PAL gathered that the Commission regretted its earlier decision to delete the last phrase of paragraph 10. If it wished to repair the damage done, it should do so directly by restoring the phrase in question.

5. Mr. FRANÇOIS agreed with Mr. Pal. The paragraph as adopted at the previous meeting had become meaningless. He approved Mr. Scelle's proposed addition but agreed with Mr. Córdova that it did not entirely solve the problem. It was important to specify to which court offenders would be subject, but that was not easy because everything hinged on the question whether a particular act was an ordinary or an international offence. A common criminal should not be given the possibility of applying to an international court and thereby availing himself of certain privileges and advantages. He agreed with the Special Rapporteur that the paragraph should be adopted as drafted at the third session and not as modified by the Commission at the 267th meeting.

6. Faris Bey el-KHOURI thought Mr. Scelle's proposal added nothing to the paragraph. Every court determined its own competence. If a court considered that paragraph 10 was applicable to a particular offence, the latter would be an international crime; if not, it would be treated as an ordinary offence. He was in favour of retaining the text of the paragraph as drafted at the third session.

7. Mr. HSU asked whether it was proposed to revise the substance or merely the wording of paragraph 10. The text was not perfect but that was hardly a reason for a complete revision of the paragraph. He pointed out that paragraph 9 provided for punishment in the case of the destruction of a minority group, while paragraph 10, if the deleted phrases were restored, would not be applicable in the case of the mass annihilation of a larger group. He would not oppose any attempt to improve the text, but he hoped that the Commission would not overrule its earlier decision to delete the last phrase of the paragraph as drafted in 1951.

8. Mr. GARCÍA-AMADOR agreed with Mr. Hsu. The General Assembly had not specified in the Genocide Convention that genocide had to be committed in connexion with another particular offence. The Commission should maintain its earlier decision to delete the last phrase of paragraph 10, so that that paragraph would cover all inhuman acts not already covered by paragraph 9. If the last phrase was restored these would be a contradiction between paragraphs 9 and 10.

9. Mr. SCELLE, replying to Mr. Córdova, said that, from a court's point of view, it would be insufficient if the paragraph referred merely to acts committed "in execution of or in connexion with other offences defined in this article". He pointed out that the analogy with the Nürnberg Tribunal was not a correct one, as the latter had tried offences which had already taken

[1] *Vide supra*, 266th meeting, para. 1 and footnotes.

[2] *Vide supra*, 267th meeting, paras. 40-63.

place, whereas the Commission was providing for the future. National courts should be empowered to try international crimes in accordance with the provisions of the draft Code until an international court was established.

10. Mr. ZOUREK said there had been no difficulties until the Commission had included offences committed by individuals in the category of international offences. If an individual committed one of the acts enumerated in paragraphs 9 and 10, he would surely be an accomplice of the authorities of a State. The question which court was competent to try individuals would not be answered by restoring the phrase deleted earlier, while Mr. Scelle's proposed addition left that question to the court's discretion but did not say by what principles the court should be guided in deciding the issue.

11. The CHAIRMAN put to the vote the proposal that the Commission should reconsider its earlier decision relating to article 2, paragraph 10.

The proposal was adopted by 11 votes to none, with 2 abstentions.

12. The CHAIRMAN, at Mr. Hsu's suggestion, proposed that paragraph 10 should be referred to a small committee composed of Mr. Scelle, Mr. Pal and himself.

It was so agreed.[3]

Article 2 (11)[4]

13. Mr. ZOUREK noted that the Belgian Government had made an important comment on the definition of the term "war crime".[5] War crimes were by definition offences committed in the course of hostilities but it was wrong to say that in the absence of international conventions, belligerents had absolute freedom in their choice of the means of destruction. He pointed out that the belligerents were not absolutely free in the choice of means whereby to harm the enemy. That point was expressly stipulated in article 22 of The Hague Regulations respecting the laws and customs of war on land,[6] which had codified the established practice. Article 23 of the Regulations prohibited the use of poison or poisoned arms, as also of arms, projectiles or material of a nature to cause superfluous injury. Moreover, the preamble to the Fourth Hague Convention of 1907 respecting the laws and customs of war on land declared that in cases not included in the Regulations the inhabitants and belligerents remained under the protection and the rule of the principles of the law of nations, as they resulted from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience. That rule must be regarded as the expression of the customary law in effect at the time of The Hague Conferences. Under that rule, not only were acts committed in violation of its specific provisions to be regarded as war crimes, but also all acts, committed during hostilities, that violated the laws of humanity and the dictates of the public conscience. Among such international crimes was, first and foremost, the use of asphyxiating, poisonous or similar gases, liquids, material and other such means, as also bacteriological weapons, whether or not the Party at war was bound by the Geneva Protocol of 17 June 1925.[7] Another category of crimes that was prohibited by reason of the rule laid down in the preamble to the Fourth Hague Convention was the use of means of mass destruction, whatever their nature: atom bombs, hydrogen bombs or others. There could not be the shadow of a doubt that the use of such weapons, which could wipe out whole populations, was in flagrant opposition to the laws of humanity and was rejected by public opinion throughout the world. Any propaganda in favour of the use of asphyxiating, poisonous or similar gases, any incitement to the use of bacteriological or atomic weapons or other means of mass destruction was likewise an international crime in that it constituted a psychological and political preparation for war crimes.

14. He proposed that the idea should be stated more explicitly in the Code, by the following text:

"Acts in violation of the laws or customs of war, whether these are laid down in international conventions or follow from the laws of humanity or from the dictates of the public conscience."

15. Mr. FRANÇOIS thought that paragraph 11 as submitted covered the cases envisaged by Mr. Zourek. There already existed a protocol which dealt with poison gas. As for weapons of mass destruction, it was not for

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[3] *Vide supra*, 269th meeting, para. 17.

[4] The Commission's 1951 draft of article 2 (11) read:

"The following acts are offences against the peace and security of mankind:

...

"(11) Acts in violation of the laws or customs of war."

The Special Rapporteur did not propose any change.

[5] The Belgian Government proposed that war crimes should be defined as follows:

"A war crime is an act committed in violation of the laws and customs of war, and of the principles of the law of nations, derived not only from international conventions and the usages established among civilized peoples, but also from the laws of humanity and from the dictates of the public conscience."

This definition was accompanied by the following comment:

"In order to give [this definition] the widest possible scope, the Belgian Government suggests that it should be based on the last paragraph of the preamble of the fourth Hague Convention of 1907, so that the term 'war crime' should not be restricted to crimes defined by the international conventions and by custom as defined in those conventions but should also include all other acts which violate the laws of humanity and the dictates of the public conscience. The Belgian Government would rely on the competent courts to refrain from condemning as offences acts of lesser gravity which, although prohibited under the conventions, in reality are only offences against military criminal law or mere breaches of the military regulations in force in the States signatories to those conventions."

[6] Scott: *The Hague Conventions and Declarations of 1899 and 1907*, p. 116.

[7] *League of Nations Treaty Series*, vol. 94, p. 65.

the Commission to prohibit their use. He proposed that the paragraph should be left as submitted and that its terms should, if desired, be interpreted in the comments.

16. Mr. ZOUREK agreed that the ideas that he had just expounded should be included in the comments.

Article 2 (11) as drafted at the third session, in 1951, was adopted unanimously.

Article 2 (12)[8]

17. Mr. PAL said he favoured the deletion of the paragraph altogether. National systems of criminal law admittedly provided for the punishment of conspiracy, but that was because there existed machinery within States to curb conspiracies. The provisions of the paragraphs were primarily aimed at preventing criminal designs; they, however, also showed difficulty of punishing mere intent. Indeed, in municipal law conspiracy was considered a crime only in so far as penalizing conspiracy provided the authorities with a practical possibility of obviating a potential danger. In the present stage of international development, however, there existed no means by which the international community could, by punishing intent, safeguard itself from such a danger.

18. The CHAIRMAN agreed that the best course was to delete paragraph 12.

19. Mr. ZOUREK said that most of the criticism that had been directed against the paragraph was unjustified and he would prefer to retain the paragraph as drafted at the third session. The gravity of the offences enumerated in paragraphs 1 to 11 made it essential that all forms of criminal activity should be punished, so as to strike at the very roots of aggression. It had been pointed out that it was difficult to conceive of an attempt to threaten aggression or an attempt to prepare for the employment of armed force against another State. Such cases, however, might well arise: for example, a plan to resort to the threat of aggression or to the employment of force had been thwarted at the very moment that an attempt was being made to prepare it. The only clarification that would be necessary would be to give a definition of such technical terms as conspiracy, attempt and complicity, which were not given the same meaning in different legislative systems.

20. Mr. SCELLE said the paragraph should stand. It would be for the competent court to overcome any difficulties by means of a reasonable interpretation.

21. Mr. AMADO agreed with Mr. Scelle; it was necessary to ensure that any accessory to the offence of aggression did not escape just punishment.

22. Mr. SPIROPOULOS, Special Rapporteur, said he had long hesitated between the four possible courses outlined in comments (i) to (iv) in his third report.[9] Although at first he had been inclined to prefer solution (iv), he would now propose that paragraph 12 should be retained as drafted at the third session.

23. The CHAIRMAN put to the vote the various clauses of paragraph 12 (A/1858).

Clause (i) was adopted by 10 votes to none, with 3 abstentions.

Clause (ii) was adopted by 9 votes to none, with 4 abstentions.

Clause (iii) was adopted by 7 votes to none, with 6 abstentions.

Clause (iv) was adopted by 10 votes to none, with 3 abstentions.

Article 2 (12) as drafted at the third session, in 1951, was adopted by 9 votes to none, with 4 abstentions.

Article 3[10]

24. Mr. SPIROPOULOS, Special Rapporteur, said that for the reasons given in his third report the redrafted article proposed therein contained no reference to Heads of State.

25. Mr. SCELLE said the Head of a State was surely a responsible government official. The case of Hitler was an obvious example.

26. Mr. SPIROPOULOS, Special Rapporteur, said that a Head of State was not responsible unless so declared by the constitution of his country.

27. The CHAIRMAN said that the Genocide Convention[11] referred to "constitutionally responsible rulers".

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[8] The Commission's 1951 draft of article 2 (12) read:

"The following acts are offences against the peace and security of mankind:

...

"(12) Acts which constitute:

(i) Conspiracy to commit any of the offences defined in the preceding paragraphs of this article; or

(ii) Direct incitement to commit any of the offences defined in the preceding paragraphs of this article; or

(iii) Attempts to commit any of the offences defined in the preceding paragraphs of this article; or

(iv) Complicity in the commission of any of the offences defined in the preceding paragraphs of this article."

Regarding the position taken by the Special Rapporteur, *vide infra*, para. 22.

[9] A/CN.4/85 in *Yearbook of the International Law Commission, 1954*, vol. II.

[10] The Commission's 1951 draft of article 3 read:

"The fact that a person acted as Head of State or as responsible government official does not relieve him from responsibility for committing any of the offences defined in this Code."

The Special Rapporteur, in A/CN.4/85, proposed the following text:

"The fact that the author of one of the offences defined in this Code acted as a responsible government official does not relieve him of his responsibility under international law."

[11] Article IV of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, *Official Records of the General Assembly, Third Session, Part I, Resolutions*, p. 175.

28. Mr. SPIROPOULOS, Special Rapporteur, said that those terms had been substituted at the request of the Swedish delegation to the third session of the General Assembly for the reference to Heads of State in the original draft of the Genocide Convention.

29. The CHAIRMAN said that the Belgian Government's comments contained an interesting reference to *"les gouvernants constitutionnellement ou effectivement responsables"*.

30. Mr. AMADO said that whether a Head of State was to be held responsible or not was a question that could safely be left to the competent court. In the American Republic, the President was the effective and responsible head of the government. On the other hand, a constitutional monarch could hardly be said to have any share in shaping the decisions of his government.

31. Mr. CÓRDOVA said that the case of Hitler was not an argument in favour of retaining the reference to a Head of State, for Hitler had certainly been the responsible and not merely the nominal ruler of Germany.

32. Mr. PAL said that there was no need to delete the reference to a "Head of State". The paragraph only applied to a person who committed an offence; such a person, if his offence were proved, would not be able to escape punishment merely because he was the Head of a State. But, naturally, the competent court would first have to decide that the Head of State concerned had committed an offence—something which it would not say if the person concerned had had no real authority and had played no part in shaping the criminal decision.

33. Mr. ZOUREK said that a ruler might not be politically responsible under the constitution of his country. That did not mean, however, that such a Head of State was exonerated from liability under criminal law if he committed a criminal offence. In fact, some constitutions even laid down the procedure to be followed for the trial of the Head of a State.

34. He would go further than article 3 as drafted at the third session. He proposed that a phrase should be added providing that the official position of the offender should not be considered either as exoneration, or even in mitigation of punishment. That had been specified in the charter of the Nürnberg Tribunal.[12]

35. Mr. SCELLE said that the Head of a State was not immune under municipal criminal law. Nor should he enjoy immunity under international criminal law. Indeed, to admit such an immunity would hamper the progress of international law as a whole.

36. Mr. SPIROPOULOS, Special Rapporteur, said that, in the light of the discussion, he had decided to withdraw his proposed redraft. He would propose the adoption of article 3 as drafted at the third session, in 1951.

37. The CHAIRMAN put to the vote Mr. Zourek's proposal for adding the words: "nor shall it be considered as grounds for mitigating the penalty".

The proposal was rejected by 7 votes to 1, with 5 abstentions.

38. The CHAIRMAN put to the vote article 3 as drafted at the third session.

Article 3 as drafted at the third session, in 1951, was adopted by 11 votes to none, with 2 abstentions.

Article 4 [13]

39. Mr. SPIROPOULOS, Special Rapporteur, referred to the article 4 proposed in his third report. Since writing that report he had read the Belgian comments. His new proposed wording would, he thought, satisfy the requirements of the various governments.

40. Mr. ZOUREK said he would prefer the wording of the article to be identical with that of article 8 of the charter of the Nürnberg Tribunal,[14] which the latter had found no difficulty in applying.

41. Mr. AMADO said that the Commission had to make allowance for human weakness. It was a very difficult question to decide how far a person could be expected to resist an order from a superior to commit an offence.

42. Mr. SALAMANCA favoured the Special Rapporteur's proposal because it would not be reasonable to expect officials to be fully aware of the rules of international law.

43. The CHAIRMAN put to the vote the Special Rapporteur's proposal that the words "provided a moral choice..." in the 1951 text should be replaced by "if, in the circumstances at the time, it was possible for him not to comply with such order".

The proposal was adopted by 8 votes to none, with 5 abstentions.

44. The CHAIRMAN put to the vote article 4 as a whole, as amended:

"The fact that a person charged with an offence defined in this Code acted pursuant to an order of his Government or of a superior does not relieve him of responsibility in international law if, in the circumstances at the time, it was possible for him not to comply with such order."

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[12] See *The Charter and Judgment of the Nürnberg Tribunal* (United Nations publication, Sales No. 1949.V.7).

[13] The Commission's 1951 draft of article 4 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 does not relieve him from responsibility, provided a moral choice was in fact possible to him."

The Special Rapporteur, in his third report (A/CN.4/85), proposed 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 in international law if, in the circumstances at the time, it was possible for him not to comply with such order."

[14] *Vide supra*, footnote 12.

Article 4 as amended was adopted by 11 votes to none, with 2 abstentions.

Article 5 [15]

45. Mr. SPIROPOULOS, Special Rapporteur, said that, as explained in his third report, he proposed, in deference to comments by Governments, that article 5 should be deleted altogether.

46. The CHAIRMAN said that the Belgian Government, in its comments, had proposed that a scale of penalties should be laid down.

47. Mr. SCELLE said that the rule *nulla poena sine lege* could only be applied in a society which had attained a very advanced stage of legal organization. The international community had not yet reached that stage. In a society which was only in the early stages of its organization, it was absolutely essential to give the court complete discretion in this respect. The general interest prevailed in that case over the interests of the defence of the accused. Historically, the judge had always come before the legislator, and in the early stages of the development of law, judges had to make their own laws.

48. Mr. ZOUREK said that the Nürnberg judgment had not transgressed the principle *nullum crimen sine lege* and had expressly stated that all the crimes tried by it, including aggression, constituted breaches of the international law in force at the time when the offences were committed. If the draft Code came to be adopted by the States, they would have to enact legislation laying down penalties for the international offences specified in that code, in so far as such penalties were not already laid down.

49. Mr. SPIROPOULOS, Special Rapporteur, said that there were two distinct problems: one was to define the crime, in keeping with the rule *nullum crimen sine lege*; that requirement was fully satisfied by the various paragraphs of article 2. The second problem was to provide for the penalty, in compliance with the rule *nulla poena sine lege*. If the Commission was not in a position to lay down a clearly defined scale of penalties, it would be preferable to say nothing at all on the question.

50. Mr. SALAMANCA agreed that article 5 was not technically indispensable. If the offences in question were to be tried by a national court, that court would necessarily have to apply penalties laid down in the particular State's criminal law. If an international court were to be set up, it would be unwise to give it the very wide power to determine the penalty to be applied to each crime. No doubt that problem would be dealt with when such a court came to be set up.

51. Mr. CÓRDOVA said that, while he favoured the deletion of article 5, he felt some reference should be made in the comment to the obligation of States to make provision for penalties in their municipal criminal law.

52. Mr. SCELLE said that to delete article 5 would be tantamount to saying that the offences in question would go unpunished. The Commission should say that the penalties laid down by municipal criminal legislation applied to those offences. That, however, would give rise to a serious difficulty; there was no real comparison between, say, kidnapping in ordinary criminal law, and the corresponding international offence of forcible removal of persons. If a corresponding municipal law crime had to be found in the case of each international offence, the result would be that the penalties would sometimes be too heavy and sometimes too light.

53. The CHAIRMAN put to the vote the Special Rapporteur's proposal that article 5 should be deleted.

The proposal was adopted by 6 votes to 3, with 2 abstentions.

54. The CHAIRMAN said that the report would contain a reference to the duty of States to make provision for penalties in their municipal law.

55. Mr. SCELLE said that the deletion of article 5 made the whole code illusory. The competent courts would find it impossible to determine what penalties were applicable. For that reason, he had voted against the proposal.

Proposals made by certain governments in their comments to insert additional provisions in the draft Code

56. The CHAIRMAN said that, since no member of the Commission had taken up the proposals in question, no vote would be taken on them.

Article 2: proposed new clause
(resumed from the 266th meeting) [16]

57. Mr. GARCÍA-AMADOR referred to the proposal he had made at the 266th meeting for the insertion of an additional paragraph to article 2 dealing with interventions.

58. Mr. SPIROPOULOS, Special Rapporteur, said he did not approve of the proposal. Violent forms of intervention were covered by the various paragraphs of article 2 adopted by the Commission. It was uncommon for States to employ political and economic pressure in order to influence other States: it would be unrealistic to declare such action, however morally reprehensible, an offence in international law. Not every violation of international law was necessarily a criminal action.

59. Mr. PAL said that, although he did not support Mr. García-Amador's proposal, he would like to point out that in ordinary criminal law, extortion which

[15] The Commission's 1951 draft of article 5 read:

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

[16] *Vide supra*, 266th meeting, paras. 47-50.

meant obtaining an advantage by means of pressure was a punishable offence.

60. Mr. SALAMANCA said that the proposal was not concerned with peaceful intervention. It referred, for example, to the use of the financial resources of the government of one State for the purpose of overthrowing the government of another State.

61. Mr. ZOUREK said that under Article 2, paragraph 4, of the United Nations Charter, all Members of the United Nations were under a duty to refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. That was a very wide provision indeed, and the paragraphs of article 2 of the draft Code as adopted by the Commission did not cover every case in which the use of force was illegal. The United Nations Charter declared illegal the use of force in general, including not only military but also economic measures. He supported Mr. García-Amador's proposal, because it was in line with his own view that any use of force in violation of the Charter should be declared an international offence.

62. Mr. HSU said he would approve of Mr. García-Amador's proposal if it could be redrafted in less sweeping terms. The declaration that all forms of political or economic intervention were a crime needed some qualification.

63. Mr. GARCÍA-AMADOR, with reference to the Special Rapporteur's criticism, said he had little to add to his remarks at the 266th meeting. The paragraph he had drafted was directly based on articles 15 and 16 of the charter of the Organization of American States signed at Bogotá in 1948.

64. The CHAIRMAN put to the vote Mr. García-Amador's proposal for an additional paragraph to article 2, reading: "The intervention by the authorities of a State in the internal or external affairs of another State, by means of coercive measures of an economic or political character in order to force its will and obtain from it advantages of any kind."

The proposal was adopted by 6 votes to 4, with 2 abstentions.

The meeting rose at 1.20 p.m.

269th MEETING

Friday, 16 July 1954, at 9.30 a.m.

CONTENTS

Chairman: Mr. A. E. F. SANDSTRÖM

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. G. AMADO, Mr. R. CÓRDOVA, Mr. D. L. EDMONDS, Faris Bey el-KHOURI, Mr. F. GARCÍA-AMADOR, Mr. S. HSU, Mr. H. LAUTERPACHT, Mr. R. PAL, Mr. C. SALAMANCA, Mr. G. SCELLE, Mr. J. SPIROPOULOS, Mr. ZOUREK.

Secretariat: Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Draft Code of Offences against the Peace and Security of Mankind (item 4 of the agenda) (A/1858, A/2162 and Add. 1 and 2, A/CN.4/85) [1] (*continued*)

Article 2: proposed additional paragraph

1. Mr. HSU proposed that the following new paragraph should be added to article 2:

"The organization, or the encouragement or toleration of such organization, by the authorities of a State, of subversive activities in another State, or the support by the authorities of a State of organized subversive activities in another State." [2]

2. He attached particular importance to the reference to subversive activities. Whereas acts of terrorism, for example, might be committed by an individual against another individual, subversive activities imperilled the existence of the State against which they were directed and engaged the responsibility of the States by which they were organized, encouraged or tolerated; therefore such activities were more directly relevant to the subject under discussion. Subversive activities were particularly dangerous to countries with a régime of political freedom, in other words the great majority of the Members of the United Nations, including most of the great Powers. It was not without reason that the Government of the United States had enacted legislation to prevent and punish subversive activities. No clause in the paragraphs of article 2 already adopted covered such activities; they constituted a new factor in modern politics against which States needed protection. If the Commission wished international law to be truly effective, it should include such criminal activities in the enumeration contained in article 2.

3. Mr. FRANÇOIS thought the proposal was too sweeping. The expression "subversive activities" in

[1] *Vide supra*, 266th meeting, para. 1 and footnotes.

[2] Cf. *supra*, 267th meeting, paras. 4-29.