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Summary record of the 55th 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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crimes, not criminally. If the Commission were considering the guilt of highly placed persons who had committed crimes, it was, in his opinion, still a matter of the criminal responsibility of individuals.

88. The CHAIRMAN noted that in French law a distinction was made between a delict committed in the course of duty and a personal delict committed by an official. If it were a case of a delict committed on duty, the State was responsible. On the other hand, if it were a personal delict the State could not be held responsible. French law did not recognize, for example, offences committed by communes, but the representative of a commune could commit an offence such as a breach of trust. In such a case the commune would be financially liable for the offence committed in its name by its official, while the offender could also be prosecuted criminally for the breach of trust. Corporate bodies, however, such as the communes, were never criminally responsible for a crime committed by their officials or representatives.

89. Mr. BRIERLY thought he must emphasize that it had never been stated that the Commission should examine the criminal responsibility of States. The Commission was in the process of examining a code, which was concerned only with individuals rendering themselves guilty of a crime and becoming criminally responsible. It could be decided to deal with individual responsibility only in the code. Clearly that influenced the definition of the crimes it might be desired to include in the code. The question would require examination in respect of each and every act. How, for example, could it be said that an individual could annex a territory and be held responsible for that action ? He suggested therefore that the Commission should confine itself provisionally to the examination of the criminal responsibility of individuals.

90. Mr. ALFARO accepted the view expressed by Mr. Spiropoulos. He would add that it seemed clear to him that crimes could be committed by States and that they could be held responsible.

91. Mr. SPIROPOULOS thanked Mr. Brierly for his contribution to the debate. By confining itself to the examination of the criminal responsibility of individuals, the Commission was embarking upon the only path which could ensure reasonably brief discussion. The point raised by Mr. Hudson was an important one, there was no doubt of that. In drawing up his report, however, he had not been able to examine the responsibility of States or of groups. He asked the Commission to restrict itself for the time being to the question of the responsibility of individuals, which alone had been provided for in his report. He asked the Commission that the passage " General Rules of Responsibility " of his report (para. 86) should be read: It dealt with the responsibility of the State and formed an essential part of his report, setting out the reasons why he had confined himself exclusively to the examination of the responsibility of individuals.

92. Mr. ALFARO read out that passage of the report.

93. Mr. SPIROPOULOS considered that the Commission could, by studying that passage, ascertain the kind of responsibility he had wished to examine: Responsibility, for example, for the conduct of war, in other words, the responsibility devolving upon those in whose hands lay the conduct of war—i.e., the governments, the foreign ministers and so on. As for the fomenting of civil strife, he recalled the example of the assistance given by Albania to the Greek guerrillas. In that case the responsibility of the Albanian Government and even the responsibility of private persons was involved: the responsibility of Albania for the commission of an international crime, and also the responsibility of the individuals who had been accessories to that crime. To take another example, in the case of an annexation it was not the State as a whole that could be held responsible, but rather those who had taken part in the annexation, the government, the ministers and also those who had assisted the government to make preparations for the annexation (as for example Schacht in Germany). In that case the situation was the same as that contemplated by the Nürnberg Tribunal.

94. Mr. CÓRDOVA asked that a vote be taken on the proposal of the Rapporteur that the draft code deal only with the criminal responsibility of individuals.

The CHAIRMAN thought it possible to vote without prejudicing in any way any possible opinion that the Commission might come to later on the responsibility of States. He did not think, however, that it was necessary to vote, as the Commission seemed to be in agreement for the time being not to consider more than the criminal responsibility of individuals in the draft code.

95. Mr. SANDSTRÖM believed it necessary also to take into account the responsibility of groups. He agreed, however, with the view of Mr. Spiropoulos that such responsibility might conceivably be equated with complicity. He did not wish therefore to press the point.

96. The CHAIRMAN made it clear that the Commission's decision to begin by examining the responsibility of individuals was only a provisional one.

The meeting rose at 6 p.m.

55th MEETING

Tuesday, 27 June 1950, at 10 a.m.

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Chairman: Mr. Georges SCELLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L.

BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris el-KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: 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 (General Assembly Resolution 177 (II) (Item 3 (b) of the agenda) (A/CN.4/25) *(continued)*

NATURE OF THE TEXT SUGGESTED AS A WORKING PAPER FOR THE INTERNATIONAL LAW COMMISSION (APPENDIX TO THE REPORT)

1. The CHAIRMAN stated that the draft code constituted the most important part of the Commission's work on the present item. The Commission had to decide what was the nature of that text. It was the text of a draft code, but the opening words in the French were " Les parties au code ". He did not know if the English version, " The parties to the code ", meant anything, but in French the expression was absurd. If it was a code it was not a convention. A code applied to all; it was not a text in which one could speak of parties.

2. Mr. HUDSON agreed with the Chairman. If the Commission was trying to draw up a draft code, it need not concern itself with the way in which the code would be implemented. He noted in the bases of discussion a number of questions which would have to be examined if the Commission drew up the convention for enforcing the code. He suggested that the Commission should not concern itself with the instrument for enforcing the code, but confine itself to carrying out the task assigned to it by the General Assembly, which was to draw up a draft code of offences against the peace and security of mankind.

2 a. He suggested the deletion of the first two lines of basis of discussion No. 1:

" The parties to the code declare that the acts mentioned below are crimes under international law which they undertake to prevent and punish."

3. Mr. ALFARO reminded the Commission that on the previous day he had expressed the opinion that the Commission was drafting an international code of offences for use in international criminal law. He therefore entirely agreed with Mr. Scelle and Mr. Hudson that it was not desirable for the Commission to draft the code in the form of a convention. It ought to draft the code, and the code ought to be universally applicable.

3 a. He did not think it was necessary to delete altogether the words serving as introduction to basis of discussion No. 1. He proposed that the words, " the acts mentioned below are crimes under international law ", be retained. The words, " which they undertake to prevent and punish ", were only in place in a convention; they came, moreover, from the Genocide Convention. His proposal was compatible with the drafting of an international criminal code if that code were put into force by an international convention. The code could be incorporated in a convention as a separate instrument.

4. Mr. SPIROPOULOS declared that when he was given the task of drafting the code he had not known what he ought to do. On reflection, he had decided that he ought to submit an instrument which could be enforced. The only means which suggested itself had been to give it the form of a convention. If for some reason that he failed to understand, the Commission wished to delete the words showing that his draft was drawn up in the form of a convention, and to confine itself to enumerating a certain number of acts, the General Assembly would be obliged to put back into the draft what the Commission had taken out. It was in reality a convention, although it had been called a code. A General Assembly resolution would not be sufficient to put the text into force.

4 a. In basis of discussion No. 7 the words, " The parties to the convention ", could be substituted for the words, " The parties to the code ". But they would still refer to the parties accepting the code. Mention had been made of the Genocide Convention. That was the first international criminal code, a code limited to a single offence. In drawing up the draft code now being examined by the Commission, he had extended the principles of that convention and set them out in greater detail, but he had followed the most recent practice of the United Nations.

5. Mr. CÓRDOVA was also of the opinion that there were no parties to a code; in the present case, however, the parties would be required by a convention to observe the code; that was what the Rapporteur had meant. Resolution 177 (II) had not instructed the Commission to consider the manner in which the Assembly might see fit to enforce the code; but article 23 of the Commission's Statute allowed it to recommend to the General Assembly what it considered to be the best method of enforcing it. Resolution 177 (II) implied that the code would be made binding on all States when it had been given an acceptable form. If there were a super-State able to enforce the code, there would be no need to consider a convention, but the General Assembly did not possess legislative powers. It was only through a convention signed by the States that the code could be made binding.

6. Mr. YEPES thought it was merely a question of wording. Whether it were called a code or a convention, the text that had been prepared would still constitute, at any rate, the first step towards an international criminal code. The sixth Conference of American States had encountered the same difficulty over the adoption of a code of private international law. It had had recourse to a convention declaring that effect should be given to the code of private international law it had drafted.

7. Mr. SANDSTRÖM believed that the Commission could take either course. If the General Assembly decided to enforce the code through a convention, it would not be difficult to change the draft code into a draft

convention. The General Assembly had assigned the Commission the task of preparing a draft code. He would like the terms of the General Assembly resolution to be observed.

8. The CHAIRMAN was also in favour of keeping to the wording of the resolution. The Commission could leave on one side for the time being the question of how the code was to be implemented. He said " for the time being " because it would be necessary to revert to the point. He thought that to draw up a draft code and say that it would only be applicable to the States signing it was an odd thing to do. What would have been the value of the Nürnberg Charter if it had only been applicable to the States signing it ? The legal basis of the Nürnberg Charter was not the Allies' victory.

9. Mr. SPIROPOULOS disagreed: he was certain that the Allies' victory was the basis of the Nürnberg Charter; if the Allies had been beaten they would have been tried by the Germans.

10. The CHAIRMAN thought that the legal basis of the Nürnberg Charter lay in the fact that those who had signed it were the strongest, and constituted a *de facto* government. Was it not the Commission's opinion that the Members of the United Nations constituted an international *de facto* government ? He read out Article 25 of the Charter of the United Nations. It might be assumed that the Security Council would adopt the draft code and declare it in force. A code was the expression of the will of society. If the Commission merely drafted a code applicable only to those who signed it, it would not have gone any further than the Genocide Convention, which might be called a hope, but was not a reality.

10 a. He saw no objection to the Commission examining each of the crimes mentioned in the draft, but since those crimes could only be committed by governments, he wondered what government would be eager to sign its own sentence in advance.

11. Mr. SPIROPOULOS reminded the Commission that Mr. Hudson had proposed the deletion of the first two lines of basis of discussion No. 1. He would like discussion of matter to be postponed.

12. The CHAIRMAN thought that it would be best to say: " The acts mentioned below are crimes under international law."

13. Mr. HUDSON felt that the title made those words superfluous.

14. The CHAIRMAN regarded it merely as a matter of wording.

15. Mr. SPIROPOULOS proposed that consideration of the matter be deferred until some of the articles had been examined. It would be best first to see what arose from discussion of those articles. He suggested therefore that the Commission begin by examining the substance of the draft.

It was so decided.

CRIME No. I

16. Mr. HUDSON thought that the English text should read " Offence " instead of " Crime ".

17. Mr. ALFARO proposed that the expression be omitted altogether, since the introductory sentence contained the words " the acts ". It would be sufficient therefore to give a list of definitions.

18. The CHAIRMAN did not see why the word " Offence " should not be used in English. But it would not be possible to use the word " Délit " in French, because a délit was a minor infraction of the law; the word had a special meaning not applicable to a crime.

19. Mr. AMADO was in favour of general ideas, with which the members of the Commission might be assumed to be familiar, being left out of the discussion. He read out the text of Crime No. 1. Precision was essential in criminal law. A criminal act must be clearly defined. It must not be left to the *ex post facto* decision of the judge. Supra-legal standards such as the ideas of Peace or Justice must not be relied on. The essential task of the Commission was to define acts punishable under international law. Evil in itself was not a conception that could be accepted in criminal law. All offences were *mala prohibita.* Exact delimitation of the act involving application of a penalty must be insisted on. He wondered whether definition No. I was sufficiently precise. The first part of it, " The use of armed force in violation of international law ", left the tribunal free to decide whether or not an act constituted a violation of international law.

19 a. Sir David Maxwell Fyfe had spoken as follows at the London Conference:

> " I want to make clear in this document what are the things for which the Tribunal can punish the defendants. I don't want it to be left to the Tribunal to interpret what are the principles of international law that it should apply.... Developing the same point, I am a little worried by the inclusion in (a) of ' in violation of the principles of international law and treaties ', because I would be afraid that that would start a discussion before the Tribunal as to what were the principles of international law. I should prefer it to be simply ' in violation of treaties, agreements, and assurances '." [1]

19 b. Sir David Maxwell Fyfe's formula seemed to him much less vague than the one used by Mr. Spiropoulos. He proposed that the first part of the text of Crime No. 1 read as follows: " The use of armed force in violation of international treaties, agreements or assurances ".

19 c. The second part of Mr. Spiropoulos' text read as follows: " ... and, in particular, the waging of aggressive war ". In paragraph 60 of his report, Mr. Spiropoulos said: " For the reasons offered by the Russian delegate at the London Conference we suggest that the International Law Commission abstain from any attempt at defining the notion of ' aggression '. Such an attempt would prove to be a pure waste of time."

[1] *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945.* Department of State Publication 3080, Washington, D.C., 1949, p. 328.

19 d. General Nititchenko had made the following statement at the same session: " Apparently this is due to the fact that aggression has become a sort of formula in itself. Apparently, when people speak about ' aggression ', they know what that means, but, when they come to define it, they come up against difficulties which it has not been possible to overcome up to the present time." [2]

19 e. In other words, the concept of aggressive war was an incomprehensible enigma. Nevertheless, the problem which a commission like the International Law Commission composed of eminent jurists found to be insoluble, was to be settled by the tribunal that would have to try persons accused of Crime No. 1. Either an attempt must be made to define aggressive war or the expression be deleted from the code. One solution might be to say that any war not waged in exercise of the right of self-defence or in application of the provisions of Article 42 of the Charter of the United Nations was an aggressive war.

20. Mr. SANDSTRÖM wished to know whether the meaning of the words " in violation of international law " was regarded as wider than that of the words " in violation of international treaties, agreements or assurances " in the Nürnberg Charter.

21. Mr. SPIROPOULOS replied that the words quoted undoubtedly had a somewhat wider meaning; the Nürnberg Charter spoke of violation of treaties, agreements or assurances. What he had had in mind in his draft was international custom. That was why he had referred to any act contrary to international law, without making distinctions. The Nürnberg Charter only referred to a war of aggression. His draft was concerned with any act contrary to international law in general. That was why he had not made use of the expressions appearing in the Nürnberg Charter. It was not necessary to speak of an aggressive war, for the use of armed force in violation of international law included aggressive war. But he had mentioned it in order to bring that supreme crime into prominence.

22. Mr. SANDSTRÖM thought it would be preferable to retain the expression used in the Nürnberg Charter: ". . . in violation of international treaties " etc., and to go on to say: " and, in particular, the waging of aggressive war ".

23. Mr. CÓRDOVA felt that the Commission ought not to concern itself with how the Nürnberg Charter had defined crimes. By virtue of that Statute, those responsible for the war had been punished under the provisions of treaties, etc., because they had in fact violated treaties. The draft code contained general provisions to be applicable to acts that might be committed in the future. For example, armed intervention was forbidden by international law. A situation might arise in which no treaty existed. In such a case, the crime would be as serious as violation of a treaty. The Rapporteur had been very wise in saying " in violation of international law ". That was sufficient definition of a crime.

23 a. Stress must be laid on the " aggressive " aspect of the crime. To avoid any possible misunderstanding concerning aggressive war, it was necessary to follow the San Francisco Charter and say that the waging of any war which did not constitute exercise of the right of self-defence was the waging of aggressive war.

24. Mr. SPIROPOULOS had no objection to make.

25. Mr. HUDSON proposed that the Commission should begin by discussing the phrase: " The use of armed force in violation of international law " and afterwards consider the second phrase, " the waging of aggressive war ". It would be best to discuss the first phrase thoroughly without mentioning aggressive war. He was somewhat disconcerted by the expression, " The use of armed force ". Who would be responsible for its use: each individual composing the armed force, or the commander-in-chief, or the government—that is to say, the persons composing the government ? The Commission might perhaps be able to find a better form of words.

25 a. If the Commission kept the words " in violation of international law ", he would be asked what they meant and would have to reply that he did not know. If the Commission was to enumerate certain individual crimes, it must do so with sufficient precision for the reader to understand what it meant by them. What was involved was a crime against security, but nothing had been said to that effect. It was difficult to believe that any customary law covered the case. If such customary law did exist, however, it was necessary to mention its provisions and to indicate what use of armed force constituted a violation of it.

26. Mr. SPIROPOULOS wished to explain the history of the article. When he was considering what crimes ought to be included in the code, he had thought in the first place of the Nürnberg Charter. Clearly aggressive war was the first crime under international law. When the draft was in its initial form, he had written that aggressive war was forbidden. At first, he had thought that sufficient, then he felt it necessary to add a second definition, as follows: " any use of armed force contrary to international law, even if it does not constitute aggressive war ". Finally, he had asked himself why two crimes should be distinguished. A single crime was sufficient, since aggressive war was a violation of international law; hence any use of armed force was a violation of that law.

26 a. As to Mr. Hudson's criticism, he agreed that it was necessary to follow the text; he suggested that the members of the Commission should observe the rules of procedure and propose amendments. Mr. Amado had done so; that was the correct method. If a serious criticism was put forward, it was necessary to propose an amendment and to develop it.

26 b. He had referred to any act contrary to international law. Mr. Amado had quoted a passage from a speech made in London, but had any definition of that act been given at the London Conference ? All that had been done was to write " offences against the peace " and to give examples, but no definition of the offences had been provided. If they wished, the mem-

[2] *Ibid.*

bers of the Commission could try to produce a concrete proposal, but they would find it was impossible.

27. The CHAIRMAN remarked that the Commission had met to discuss freely and if each member had to be asked to propose an amendment in good and due form, all those who had nothing precise to propose would be prevented from speaking. Even if that was the rule, he would not apply it.

28. Mr. AMADO reminded Mr. Spiropoulos that in the report on the Nürnberg Principles, the Commission had been formulating principles—not drafting a code. Crime No. I read: " The use of armed force in violation of international law . . ." It was impossible to imagine a rule in a national criminal code which read: " in violation of national law ". Consequently, the text could not stop there and he had therefore proposed that the violation in question should be defined as follows: " in violation of international treaties, agreements or assurances ". That would make the text exact.

29. Mr. el-KHOURY reminded the Commission that when it had embarked on discussion of the Nürnberg Principles, and was considering the first of them, he had opposed the use of the words " international law ". The reply he had received was that it was a question of formulating the Nürnberg Principles and that there was no choice. but that when the code came to be discussed any provision thought suitable could be adopted.

29 a. The code was to be implemented by a criminal tribunal. It was common knowledge that when a tribunal of that sort had a case before it, it had to apply an article of law in force. The international tribunal set up in accordance with the Commission's recommendation would have to apply the code under discussion. Supposing Mr. Spiropoulos were the judge on that tribunal, and counsel for the defence enquired what international law his client was accused of having broken and in what document or convention it appeared, it was difficult to imagine Mr. Spiropoulos' reply. Reference might be made to the works of Professor Scelle who said that such and such an act constituted an offence, but the tribunal had to have a text to base its judgments on. or it would be unable to specify the grounds for its decision. Mr. Spiropoulos had therefore been wise in asking that amendments be proposed in good and due form. Mr. Amado had done so. Mr. Córdova had drawn attention to the fact that cases had occurred in which there was no treaty. A concrete situation of the kind might indeed arise. In the case of Korea, for example, no violation of a treaty appeared to have occurred, unless there had been a violation of the Charter of the United Nations. Mr. Amado's amendment could, however, be accepted.

29 b. If the tribunal possessed no text laying down international law, what law would it apply ? It must be provided with a text showing what international law was. That was not an easy thing to do. Neither was it easy to say what offences should be punished. Principles of international law were known to exist, but that was not sufficient. They were principles, not laws. The Court of Justice would apply laws.

30. The CHAIRMAN referred to Chapter I, Article 2, paragraph 4 of the Charter, and stated that that was international law.

31. Mr. CÓRDOVA quoted article 9 of the Draft Declaration on Rights and Duties of States.

32. The CHAIRMAN, speaking as a member of the Commission, remarked that the formula used by Mr. Spiropoulos included those provisions. He thought that international law was easy to define in connexion with Crime No. I. The whole of it appeared in Article 2, paragraph 4, of the Charter.

33. Mr. YEPES observed that the Commission was discussing a text which read: " The use of armed force in violation of international law ". Thus, a violation of international law occurred when force was used to coerce a State. But there were other more dangerous ways of coercing a weak State. If the Commission was to deal with the question on a juridical basis, it must condemn as an offence under international law the use of any direct or indirect means of coercing a State, including, for example, economic pressure.

33 a. The previous year, when the Commission approved the draft Declaration on Rights and Duties of States, it had forbidden intervention in the internal or external affairs of any other State (article 3) when such intervention constituted a means of coercion. Why was the Commission not sufficiently courageous to condemn such intervention, which was more dangerous than armed intervention ? A State that had recourse to armed force laid itself open to intervention on the part of the United Nations; whereas, if it exerted economic pressure, it could achieve the same end without incurring the risk. He proposed that the text should read: " The use of violence in any form in violation of international law ".

34. Mr. HUDSON thought that the matter was one of the most difficult ones before the Commission. He hoped that the Commission would be able to make some contribution towards its settlement. He felt it would be hardly wise not to start with a thorough discussion. Could not the Commission adopt the same attitude as towards the law of treaties ? It would not be able to finish its task at the present session and the Rapporteur would take into consideration any suggestions that were made. It was not a question of adopting provisions, but of making a general study of the code for the guidance of the Rapporteur. If the Commission were to adopt that attitude, procedural matters ought not to present any difficulty.

35. Mr. HSU pointed out that the Nürnberg Charter had been drawn up to meet special circumstances. In drafting the code, the Commission need not follow it word for word. The previous year, the question of armed forces had been studied in connexion with the Declaration on Rights and Duties of States. It should be possible to make use of the results obtained. In order to avoid all the difficulties that had been raised, it might be possible to use the following form of words: " The use of armed force, except in the case of self-defence and execution of a mandate of the United Nations ".

36. Mr. SANDSTRÖM was much impressed by the argument against any reference to international law in the description of a crime. The same principle ought to be applied as in municipal law and the text should read: " in violation of the Principles of the Charter of the United Nations ".

37. Mr. SPIROPOULOS quite agreed with Mr. Hudson that the Commission would not finish dealing with the question that year, but pointed out that if it confined itself to a general discussion, and all the views expressed were different, its work would be very hard. To make it easier, an attempt should be made to find a more or less agreed definition. It was right to mention the Charter, but he had avoided doing so because the code was also to apply to non-member States. Should the Commission decide that the Charter ought to be mentioned—and it would be desirable to do so, since that would make the text more concrete—he would mention it.

38. Mr. SANDSTRÖM stated that the fact that the code was also to apply to non-member States was the reason why he had proposed the wording: " in violation of the *Principles* of the Charter ".

39. Mr. ALFARO observed that according to Mr. Spiropoulos, the words " international law " included customary international law and conventional international law. They therefore included the Nürnberg Principles. He did not think that point was made sufficiently clear in the text. He would prefer to give a list including the crimes mentioned in section B, paragraph (a), sub-paragraph (i), of the appendix to his first report (A/CN.4/22, Appendix). Those words would be sufficiently explicit.

39 a. There was, however, another point of great importance. If the principle *expresio unius est exclusio alterius* were applied, and the Commission's formulation of the Nürnberg Principles were borne in mind, the conclusion might be drawn, for example, that to prepare to use armed force in violation of international law was not an international crime, and that the only crime was the actual use of force. The point ought to be made clear, otherwise it might be thought that Hitler and Göring had not committed the crime in question because they had not actually flown an aeroplane. That was one of the difficulties resulting from the failure to use the wording of the Nürnberg Principles.

40. Mr. SPIROPOULOS pointed out that he had not used the same wording, because Crime No. X covered conspiracies, preparatory acts, attempt, etc. The code covered even more crimes than the Nürnberg Charter.

41. Mr. HUDSON thanked Mr. Córdova for quoting article 9 of the Declaration on Rights and Duties of States. The task in hand was, however, a different one. Article 9 read:

> " Every State has the duty . . . to refrain from the threat or use of force against the territorial integrity or political independence of another State, or in any other manner inconsistent with international law and order."

41 a. The declaration ouly dealt with the rights and duties of States, while the code dealt with individuals. The expression " or in any other manner inconsistent with international law and order " could not be used because it would be out of place in a criminal code. The Chairman had referred to Article 2, paragraph 4, of the Charter of the United Nations, which read: " or in any other manner inconsistent with the Purposes of the United Nations ". The phrase was the same and he had the same comment to make on it. He would like to know, besides, whether the Purposes mentioned were those referred to in Article 1 of the Charter. He had to admit that that was a formula he failed to understand.

41 b. Article 1 read: " The Purposes of the United Nations are: " so that it was correct to assume that those were the Purposes referred to in Article 2. Purposes Nos. 3 and 4 did not apply to Crime No. I, since armed force could not be used in a manner inconsistent with the fulfilment of those Purposes; he was less sure about Purpose No. 2, because it might perhaps be possible to use force to prevent its fulfilment, while clearly the use of force could be inconsistent with Purpose No. 1; the meaning of Article 2, however, was not very clear.

41 c. The expression was evidently a political one which would not stand strict examination. Drafting the code was a different task from drafting the Charter or the draft Declaration on Rights and Duties of States. In the present case, it might be said—though he was still not certain of it—that the use of force was a violation of international law, but in that event it was necessary to define the meaning of the term for the purposes of the code.

42. Mr. CÓRDOVA said that the Commission was engaged in examining the draft Code of Offences against the Peace and Security of Mankind with a view to deciding upon certain acts contrary to international law. To establish rules of international law, it must consider what acts were to be regarded as offences under that law. It desired application of the principle, formulated in Article 33 of the Charter of the United Nations, that States should settle their disputes by peaceful means. It wished, therefore, to ban the use of armed force in violation of international law and, in particular, the waging of aggressive war. Such at least was the very wide formula appearing in Mr. Spiropoulos' report. There were, however, in his opinion, two exceptions in which the use of armed force was justified: self-defence, and the use of armed force in execution of a mandate of the United Nations. All wars not included in those two exceptions ought to be regarded as crimes.

42 a. The Commission intended to draw up a code which would protect future generations. It was not a code applying to a specific war. It was because the Charter of the Nürnberg Tribunal applied only to a specific war that he did not consider that Charter important as establishing a rule of international law. The draft Declaration on Rights and Duties of States in two places forbade the use of armed force. No mention was made there, however, of the two exceptions he had just mentioned, which in his opinion ought to be included in the text submitted by Mr. Spiropoulos.

42 b. He therefore supported Mr. Hsu's proposal that a provision be added to the definition of Crime No. I,

stating that use of armed force in self-defence or in execution of a mandate of the United Nations did not constitute a crime.

43. Mr. HUDSON wished it to be clearly stated what was meant by self-defence. All States declared that they were waging war in self-defence. Supposing there were a threat to peace in some part of the world, and a State thought that tranquillity could be restored by the dispatch of two warships, would it in that case be acting in self-defence ?

44. The CHAIRMAN asked whether the Commission would accept a general formula on the lines of that proposed by Mr. Spiropoulos in his draft of Crime No. I, or whether it wished to specify the cases in which use of armed force was to be regarded as a crime under international law. He proposed that the Commission vote on the matter not in order to produce an exact text, but so as to provide the Rapporteur with a directive for his report.

45. Mr. SPIROPOULOS observed that in asking the Commission to decide whether it would accept a general formula or wished for an exact definition of the acts constituting Crime No. I, the Chairman had not indicated the alternatives very clearly. In the first place, there had been a proposal—his own—and Mr. Hsu and Mr. Amado had asked that a provision be added to it covering the two exceptions of self-defence and execution of a mandate of the United Nations. There was also Mr. Hudson's proposal, a very pertinent one; but he thought it was practically impossible to make a satisfactory list of the acts to be regarded as crimes.

46. The CHAIRMAN asked Mr. Hsu, Mr. Córdova and Mr. Amado to agree among themselves on a formula which might serve as a directive for the Rapporteur. Mr. Hudson, it was true, had wished the Commission to go further; but he (the Chairman) agreed that it was extremely difficult to draw up a list of the kind Mr. Hudson had in mind. He remarked that not only the use of armed force, but the threat of it, constituted a crime according to the Principles of the Charter.

47. Mr. SPIROPOULOS replied that from the point of view he had adopted in his report, threat was not a crime.

48. Mr. CÓRDOVA repeated that the formula used by the Rapporteur was a very wide one. He pointed out that the Commission had three proposals before it: that of the Rapporteur; that of Mr. Hudson, which was very vague; and lastly that of Mr. Hsu, a proposal to clarify Mr. Spiropoulos' formula by negative definition—i.e., by specifying the cases in which use of armed force was not a crime. If Mr. Spiropoulos' general formula were not accepted, he wondered what formula could take its place. Mr. Spiropoulos' formula ought therefore to be accepted, with Mr. Hsu's proposed amendment.

49. The CHAIRMAN felt that Mr. Hsu's proposal was dangerous because it used the negative method of definition. In addition, he feared that a precise definition would enable many of those guilty of the acts in question to escape punishment.

50. Mr. el-KHOURY observed that the Commission was engaged in considering something entirely new. Hitherto, the custom had been to settle disputes by conferences, arbitration or peace negotiations. The Commission was now trying to establish a law for the settlement of disputes by drawing up a code which made war a crime under international law. But before it could determine what the crime was, the Commission had to know what international law was being applied. Up to the present, international law only existed in the provisions of the Charter of the United Nations and by virtue of treaties concluded between States. Definition of the crime appeared to him impossible before the international law under which war was a punishable offence came into existence. No tribunal or court would be able to apply or impose a punishment unless it had a legal text to refer to. The Commission was employing the expression " international law "; that was a very broad expression. He did not think it admissible for so general a term to be used until the Commission had defined what the law referred to was. He suggested that the expression used should be " in violation of treaties and the Charter of the United Nations ".

51. Mr. YEPES agreed that there was some truth in the statement made by Mr. el-KHOURY that no criminal international law yet existed, but thought that the value of what was known as customary law ought not to be underestimated. Moreover, articles 36 and 38 of the Statute of the International Court of Justice specified certain departments of international law which came within its jurisdiction. He thought Mr. Spiropoulos' formula a good one because it included conventional law and customary law.

52. The CHAIRMAN observed that three proposals were before the Commission: (1) Mr. Spiropoulos' formula, a very wide one which allowed all the latitude required. (2) The proposal just submitted by Mr. Hudson, which was supported by Mr. François, and read as follows:

> " The use or threat of armed force by a State against the territorial integrity or political independence of another State."

That proposal was very close to the terms of Article 2, paragraph 4 of the Charter of the United Nations and Article 10 of the Covenant of the League of Nations. (3) The proposal made by Mr. Hsu and Mr. Córdova, which read as follows:

> " The use of armed force for purposes other than those of self defence or execution of a mandate of the United Nations."

Such were the three proposals which the Commission had to consider.

53. Mr. YEPES repeated that he thought Mr. Spiropoulos' formula the best.

54. Mr. HUDSON observed that his own text also reproduced the terms of article 9 of the draft Declaration on Rights and Duties of States. It certainly included any aggressive war. He thought it was advisable for him at the same time to keep very closely to the wording of the provisions of the Charter, unless the Commission wished to give a list of the uses of armed force to be regarded as crimes under international law.

55. Mr. SPIROPOULOS stated that when drafting his text he had taken into account both the Charter and the draft Declaration on Rights and Duties of States. In his initial draft, he had confined himself to mentioning use of armed force against the territorial integrity of any other State, but he had rejected that text because it failed to cover use of armed force against the political independence of another State. He considered that he had gone much further in his present formula. It had been his intention also to cover cases in which no attack was made on the territorial integrity of another State in the strict sense of the term. If, for example, an aeroplane dropped a bomb on foreign territory, that did not constitute an attack on territorial integrity. It was simply the use of armed force without attack on that integrity. He feared that according to Mr. Hudson's proposal an attack on an ordinary ship might be assimilated to an attack on the territorial integrity of a State. The formula proposed by Mr. Hsu and Mr. Córdova was a good one, and undoubtedly covered the same acts and cases as his own, but he did not think its wording was strong enough.

56. Mr. CÓRDOVA said that the Commission was examining acts which could be regarded as crimes, and the conclusion arrived at by the Commission was that when a State made use of armed force it was guilty of a crime, whether or not it had broken a treaty: the State might not be a party to the Kellogg Pact. He thought that the provisions in article 9 of the draft Declaration on Rights and Duties of States, which were more or less the same as those occurring in Article 2, paragraph 4, of the Charter of the United Nations, were inadequate. In his opinion, any use of force that was not legal was a crime.

57. Mr. HSU, referring to Mr. Hudson's proposal, observed that the word " threat " of armed force ought not to be included in the formula adopted by the Commission for Crime No. I. Such a crime could be treated separately. He also pointed out that Mr. Hudson had omitted the second part of article 9 of the draft Declaration on Rights and Duties of States, which read: " or in any other manner inconsistent with international law and order ". He wondered why that phrase had been omitted.

58. Mr. HUDSON replied that he did not know what the phrase in question meant; the idea behind it seemed to him more political than legal.

59. Mr. HSU indicated that to his mind his own proposal ought to dispose of Mr. Hudson's objections to Mr. Spiropoulos' text. Mr. Hudson desired a positive list of crimes, while he himself desired a negative one. He still thought a negative one preferable.

60. Mr. SPIROPOULOS thought that the sense of his own formula was the same as that of the formula proposed by Mr. Hsu and Mr. Córdova; he was ready to accept their formula.

61. Mr. AMADO reminded the Commission that he had proposed an amendment,[3] but had not wished to press it. He asked Mr. Hudson whether he did not consider that the idea of a threat of armed force was referred to and covered by articles III, IV, V and VI of the draft code. He would have preferred the Commission to vote on his own amendment. But failing that, he preferred the text proposed by Mr. Hsu and Mr. Córdova.

62. Mr. HUDSON thought that the articles mentioned by Mr. Amado did not refer to the threat of armed force at all. He objected to the use of the expression " self-defence " because it was one that had constantly been abused. Every war was proclaimed to be a war of self-defence. Moreover, where did self-defence begin? Mention had been made of the case of an aeroplane dropping a bomb on foreign territory; would such an act enable the State on whose territory the bomb had been dropped to invoke self-defence ? The problem was becoming even more complicated now that advanced air bases were playing an important part. The United Kingdom Government had on one occasion declared that the Rhine was the frontier of the territory, attack upon which by another State would justify it in invoking self-defence. That raised not only the question of individual defence, but the question of collective defence, which the Commission should also consider. In any event, he thought it preferable to avoid using the term " self-defence " in the code.

63. Mr. BRIERLY remarked that a very large number of views had been expressed in the Commission, and the Rapporteur would be able to make use of them and mention them in his report. The Commission ought, however, to give further consideration to the particular point under discussion before coming to a decision. Many things could be said in favour of the three formulas before the Commission. The best thing to do would be to draw the Rapporteur's attention to them and ask him to draw whatever conclusions from them he thought fit.

64. The CHAIRMAN declared that it was necessary for the Commission to formulate directives; it must have something to bring to the next session of the General Assembly of the United Nations. It must adopt a final resolution indicating the trend it intended its work to take. The formula should, however, leave the General Assembly free to take the final decision. The question had been before the Commission for over a year, and it was inconceivable that its decisions should be deferred from session to session.

65. Mr. ALFARO thought it was best for the Commission not to attempt to reach final conclusions but to confine itself to a general decision on principle based on the views expressed. He was in favour of the formula proposed by Mr. Hsu. In his opinion, there were three things against Mr. Hudson's proposal: (1) Mr. Hudson's text was based on Article 2, paragraph 4 of the Charter of the United Nations; it was therefore very limited in scope, since it only referred to the territorial integrity and political independence of the State attacked. A large number of other cases might in fact arise which did not directly fall within those two categories. (2) Threat of armed force ought not to be regarded as an offence under international law. (3) Article

[3] See para. 28 *supra*.

2, paragraph 4, of the United Nations Charter only applied to States, not to persons, whereas the draft code submitted to the Commission referred exclusively to individuals.

65 a. Mr. Hsu's formula was a very wide one. According to it, use of armed force always constituted an offence, except in the two cases it mentioned. Mr. Hsu's proposal ought therefore to be accepted, since it could also be applied to individuals.

66. Mr. HUDSON, in reply to Mr. Alfaro's objection concerning the difficulty of applying his formula to individuals, stated that the difficulty would exist whatever formula the Commission might choose. Mr. Alfaro's argument appeared to be based on a misapprehension.

67. The CHAIRMAN reminded the Commission that it had decided that individuals should mean governments—that is to say, members of a government, ministers and other responsible highly placed officials.

68. Mr. LIANG (Secretary to the Commission) remarked that the Dumbarton Oaks text, which later became Article 2, paragraph 4 of the United Nations Charter, did not contain the words " territorial integrity and political independence of any State ". They had been introduced later, following the example of Article 10 of the Covenant of the League of Nations. The article in the Covenant, however, had been drafted in positive terms (" undertake to respect "), whereas Article 2, paragraph 4, of the Charter laid down negatively that " All members shall refrain . . . from the . . . use of force against . . ." etc. He doubted, for example, whether, applying case law and commentators' interpretations of Article 10 of the Covenant, the attack on Pearl Harbour could be regarded as an attack on the territorial integrity of the United States. There had, in fact, been a tendency to stress the word " integrity " at the expense of the word " territorial ".

68 a. To make good that omission, the insertion in paragraph 4 not only of attacks on the territorial or political independence of a State, but of a provision covering other cases had been decided upon. The provision was worded as follows: " or in any other manner inconsistent with the Purposes of the United Nations ". Those Purposes were defined in Article 1 of the Charter, paragraph 1 of which covered aggression. He thought that the formula proposed by Mr. Hudson was too narrow, and felt he ought to recommend that the Commission keep to Mr. Spiropoulos' text, supplemented, if necessary, by Mr. Hsu's proposal.

69. The CHAIRMAN desired to know which proposal the Commission meant to accept. He would begin by putting to the vote Mr. Hsu's proposal, which was wider and had Mr. Spiropoulos' support.

70. Mr. SPIROPOULOS pointed out that according to the rules of procedure of the General Assembly which the Commission applied to its own discussions, it was the Chairman's duty to put to the vote first the amendment furthest removed from the original text appearing in his report.

71. Mr. el-KHOURY suggested that the words " or threat " be deleted from Mr. Hudson's amendment.

72. Mr. HUDSON had no objection to make.

73. The CHAIRMAN took note of the fact that Mr. Hudson accepted Mr. el-Khoury's amendment, and put to the vote the amendment as amended.

The amendment was rejected, no vote being cast in its favour.

74. The CHAIRMAN put to the vote the formula proposed by Mr. Hsu, which added to Mr. Spiropoulos' formula the words " for purposes other than those of self-defence or execution of a mandate of the United Nations ". He remarked that the words " self-defence " included both individual and collective defence.

75. Mr. HSU accepted the Chairman's interpretation.

Mr. Hsu's amendment was adopted by 7 votes to 2, with 3 abstentions.

76. Mr. HUDSON would like it to be understood that the decision taken was only an unofficial expression of the Commission's views to guide the Rapporteur in his report, and in no way binding.

77. The CHAIRMAN stated that the Commission agreed that the decision was only an expression of its opinion, and that it did not bind the Rapporteur. It would, however, appear as such in the general report on the Commission's work during the current session.

78. Mr. HUDSON hoped that the decision would not be made known to the General Assembly. He thought it would be enough for the General Assembly to know that the question had been dealt with at length by the Commission and that the Commission had given certain directives to the Rapporteur, but that its conclusions were in no way final.

79. The CHAIRMAN disagreed. It had been stated that the Commission's report to be submitted to the General Assembly would contain all the views expressed by the Commission. Since some members appeared to be of a different opinion, he asked the Commission to come to a decision as to what its report was to contain.

80. Mr. HUDSON thought that on some items of its agenda the Commission had only succeeded in arriving at directives for the rapporteurs; on those points, it did not appear necessary to report to the General Assembly. On other points, however, definite decisions had been taken, and those ought to be the subject of reports to the General Assembly.

81. Mr. SANDSTRÖM felt that the Commission ought to submit reports to the General Assembly on all questions which it had finished examining. But it ought not to submit detailed reports covering each stage of its work.

82. The CHAIRMAN did not agree that the General Assembly should not receive a complete report on the Commission's work, and thought that the reports ought to contain conclusions or suggestions. It was not enough to tell the Assembly that the Commission had studied certain aspects of such and such a question, and reserved the right to examine them again.

83. Mr. FRANÇOIS supported the Chairman. He felt that the Commission would produce a lamentable impression on the General Assembly if the latter was forced to conclude that it had taken the Commission

months and months merely to examine certain items without even being able to arrive at conclusions or to make suggestions.

84. The CHAIRMAN agreed with Mr. François.

85. Mr. SPIROPOULOS thought on the other hand that the Commission was not required to submit reports to the General Assembly in all cases. Up to the present it had done so, but only in order to inform the General Assembly of the progress of its work. The previous year, the Commission had taken decisions, for example, in connexion with the Nürnberg Principles; and during the current year, it had examined them afresh and arrived in some cases at different decisions from those it had made the year before. In his opinion, there was much against the practice of accepting things provisionally and bringing provisional opinions to the attention of the General Assembly, only to reverse those decisions the following year and revise conclusions arrived at on particular items. Particularly in view of the General Assembly's probable reaction, the adoption of provisional conclusions appeared to him dangerous.

85 a. A middle way had to be found between the two extreme solutions of submitting reports or not submitting them. During the current year, the Commission had already taken decisions on three questions. On those questions, reports could be submitted to the General Assembly. It seemed preferable not to submit any report on the other questions which had not been settled, and not to inform the Assembly that the Commission had taken decisions of a provisional nature. That would be dangerous, and the Commission would run the risk of losing its freedom of action.

85 b. There was obviously, in his opinion, very much to be said for being able to submit reports to the General Assembly on the whole of the Commission's work, complete or incomplete. The General Assembly would be able to examine them, and in that way the Commission would learn the opinion of the representatives to the Assembly. But in view of the dangers to which he had drawn attention, he thought it better to adopt the middle-way solution he had mentioned.

86. Mr. ALFARO agreed with Mr. François. The Commission appeared to think it would be sufficient to give the Rapporteur directives for the report he would submit to the Commission for examination the following year. He did not think that was correct. He felt that it was the Commission's duty finally to settle the question of the draft code. It should therefore cut short its discussions and reach concrete conclusions. It ought not to imagine it had the right to leave the matter in abeyance.

86 a. The Commission had only completed three tasks during the present session: its examination of the document submitted by Mr. Hudson on means of making available documentation on customary international law; its examination of Mr. Spiropoulos' report on formulation of the principles of international law recognized in the Charter and the judgment of the Nürnberg Tribunal; and its examination of the question of setting up an international legal body to try persons accused of genocide, etc. Those were very modest results, and it would be altogether contrary to custom and in particular to the Commission's terms of reference if it postponed its work on priority questions such as the one now before it, which had been entrusted to it by a resolution of 1947. It could not tell the General Assembly that it had merely discussed the question and as yet had been unable to reach final conlusions. The Commission must finish its work on the code, and not confine itself to giving directives to the Rapporteur for the report it would examine the following year. The same did not apply to the three other items which appeared on the agenda for the first time.

87. Mr. CÓRDOVA agreed with Mr. Alfaro. The Commission was under a moral obligation to give effect to the General Assembly resolution. Neither did he see that there were any difficulties in the way of the Commission completing its work on the code. If, against all expectation, it failed to do so, it would have to tell the General Assembly that it had been able to form an opinion and had drawn up directives for the rapporteurs, thus making considerable progress. That would show the Assembly that the Commission had at any rate not wasted its time.

88. Mr. LIANG (Secretary to the Commission) did not wish to give an opinion as to whether the Commission ought or ought not to complete its work. It depended on the time at the Commission's disposal. If it succeeded in completing its work on the code it must submit a final report to the General Assembly.

88 a. The view of Mr. Hudson and Mr. Spiropoulos that provisional reports on subjects not yet completed ought not to be submitted to the General Assembly was supported by the Statute of the Commission. The Assembly was entitled to receive a final report on completed work (see articles 16 and 22 of the Statute). The previous year, the Commission's report on the Nürnberg Principles had given an account of the progress of its work while mentioning that it had not yet been able to reach final conclusions, and that report had not contained provisional conclusions arrived at by the Commission. In the present year, the Commission had decided to submit a final report.

88 b. Summing up, he stated in his opinion only reports on completed work ought to be submitted to the Assembly. Interim or provisional reports containing decisions which might be altered at the next session were to be avoided. The records of the Commission's meetings would show, where necessary, the stage its discussions had reached on subjects not covered by reports. If the Commission did not finish considering the draft Code of Offences against the Peace and Security of Mankind it could submit a report on the subject similar to the one it had submitted the year before on the Nürnberg principles—i.e., one not mentioning provisional conclusions adopted.

89. Mr. SPIROPOULOS felt that all the members of the Commission were fundamentally in agreement about the presentation of the report. All that had to be done was to find a sufficiently flexible formula which would satisfy all members of the Commission, including Mr.

Hudson, and would enable the Commission to inform the Assembly that it had done effective work.

90. The CHAIRMAN said that the Commission would take a decision on the matter at the next meeting.

The meeting rose at 1.15 p.m.

56th MEETING

Wednesday, 28 June 1950, at 10 a.m.

CONTENTS

Chairman: Mr. Georges SCELLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris el-KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: 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 (General Assembly Resolution 177(II) (Item 3(b) of the agenda) (A/CN.4/25) (*continued*)

CRIME NO. I [1] (*continued*)

1. The CHAIRMAN considered, upon reflection, that the Commission should decide what was to figure in the general report when that subject came up for discussion. He reminded the Commission that it had taken a decision on the first point, namely the use of armed force.

2. Mr. YEPES said that he had voted for the proposed wording [2] for lack of a better alternative. He would, however, like a vote to be taken on his proposal which ran as follows: " Crime No. I: Resort to violence in any form in violation of international law, and, in particular, the waging of aggressive war. " The aim of his proposal was to make a unilateral and illegal intervention a crime in international law.

Mr. Yepes' proposal was rejected.

3. Mr. HUDSON was under the impression that the Chairman, at the previous meeting, had stated that at that stage the Commission was not engaged in drafting a text. If, however, it was intended that the text approved by the Commission should figure in its report to the General Assembly, it would be necessary for the wording to be reconsidered.

3 a. The expression " the use of armed force " would be sufficient if it was taken to mean the use of the armed force of a State, but the Commission's theory was that the case to be envisaged was that of individuals. A private person might use armed force in several ways; for example, he might attack a bank in order to rob it. It was not enough simply to include such a phrase. It needed to be placed in a certain context. The Commission had in mind the legitimate self-defence of one State against another. In view, however, of the theory that it was the criminal responsibility of individuals which was involved, the text adopted was perhaps rather too general.

3 b. Of course, if it was only a question of giving some guidance to the Rapporteur-General, there was no need to labour the point. On the other hand, if the idea was to be submitted to the General Assembly, he himself would hesitate to assume responsibility for transmitting to the latter a text which had not been very carefully examined from the standpoint he had just referred to.

4. The CHAIRMAN declared that they were dealing only with a general form of words and that the Commission would at a later stage decide what place it should occupy in the report. It was, in fact, simply an expression of the thought of the Commission and not a text. The Commission had taken a decision on the matter by 7 votes to 2 with 3 abstentions and could not re-open the question.[3] He himself, in any case, saw no point in re-opening the question.

5. Mr. SPIROPOULOS agreed with the Chairman that the question had already been settled. He thought it might be useful to give a certain amount of additional explanation but hoped that, after that, the Commission would pass on to the next point. The Commission had followed the example of the Nürnberg Charter and had adopted the principle of individual responsibility.

5 a. By " the use of armed force ", he had meant the official armed forces of a State. He had at first thought of using the phrase " military forces " but he had been told by an Englishman that it was customary to use the term " armed force ", meaning thereby the military forces of a State. It was for that reason that he had used the expression. The use of armed force implied that an order had been given to the latter to do something. That was what President Truman had done the day before and if his act were contrary to international law, he would be responsible for it. If the Commission considered the term incorrect, he would change it. The responsible person, in the words of the Nürnberg Tribunal, was the individual. Although the conduct of a war depended on the State, none the less only individuals had been regarded as responsible.

[1] See A/CN.4/25, Appendix.

[2] See Summary record of the 55th meeting, paras. 53 and 74.

[3] *Ibid.*, para. 75.