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Summary record of the 56th meeting

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

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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.

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Chairman: Mr. Georges SCALLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. Roberto CORDOVA, 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. I¹ (*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 wording² 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.

¹ See A/CN.4/25, Appendix.

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

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.

³ *Ibid.*, para. 75.

5 b. As he had stated in paragraph 61 of his report, Crime No. I: "The text of Crime No. I envisages the case of a *State action* and, consequently, the criminal responsibility under international law of persons acting on behalf of the State. However, nothing excludes the responsibility of private persons if such a responsibility can be construed on the basis of the punishable acts mentioned in Section V below." Action might be taken against all persons who had participated in the crime on the ground that they had assisted the government. The records of the Nürnberg Trial and of all the trials by military tribunal in the various countries showed examples of individuals condemned for having assisted the government. Even though such terms were employed, it was only the individuals who were criminally responsible.

5 c. In the case of Crime No. II: "The invasion by armed gangs of the territory of another State", the position was different. In that case, the reference was to persons acting as members of a gang. In the first crime, the armed force of a State was involved, but in the second one, only acts of individuals.

6. Mr. SANDSTRÖM considered that the question raised by Mr. Hudson was also relevant to other crimes. He accordingly thought it desirable to consider it in connexion with Crime No. I.

7. The CHAIRMAN declared that the Commission, having adopted the text the day before, could not go back on it. The Rapporteur had given a very clear explanation but he (the Chairman) thought all the members of the Commission had already had in mind the ideas he had expressed. It was possible to talk of responsibility of individuals for the reason that those individuals were part of the government. He considered the discussion on the first point to be closed.

8. Mr. HUDSON remarked that the decision taken the day before referred only to the term "in violation of international law". He accepted the Chairman's ruling but the point he had mentioned had never been considered by the Commission. He considered that the Rapporteur had not made clear what was in his mind.

9. The CHAIRMAN remarked that the Commission would come up against the question again in connexion with the crimes to follow, where it was a case of individuals not forming part of the government.

10. Mr. HUDSON asked why there should be no stipulation to that effect in the actual definition of the crime.

11. The CHAIRMAN said he could only point out that the previous day seven members of the Commission had declared themselves satisfied with the text.

12. Mr. SPIROPOULOS thought that there was no real difference of opinion and added that in his new report he would take Mr. Hudson's observations into account and clearly define the terms used.

CRIME No. II⁴

13. Mr. ALFARO thought it would be advisable to

express the opinion enunciated under that heading in clearer terms. The aim and scope of the provision should be clearly stipulated. Furthermore, reference was made to another State, without any reference having been made to a first State.

14. Mr. HUDSON shared Mr. Alfaro's view and added that he felt somewhat uncertain as to the sense to be given to the English word "gang", though he found the French term "bande" very satisfactory.

15. Mr. SANDSTRÖM returned to the question raised by Mr. Hudson in connexion with Crime No. I, since it was also relevant to Crime No. II. There was no clear indication of the conditions under which the crime must be committed in order to constitute a crime under international law. Paragraph 35 of the report stated the following: "The above-mentioned declarations, discussions, resolutions, facts and considerations lead to the *positive* conclusion that the 'code of offences against the peace and security of mankind' is intended to refer to acts which, if committed or tolerated by a State, would constitute violations of international law and involve international responsibility." That thought did not however find expression in the text of the draft Code. The boundary line separating a crime under international law from a crime under municipal law needed to be fixed.

16. Mr. SPIROPOULOS stated that it would be sufficient to add to the text the words: "committed or tolerated by a State".

17. Mr. SANDSTRÖM pointed out that the only word defining the crime was the term "invasion", which was a rather vague one. Would, for instance, an invasion by a gang of smugglers come under the provisions of the text?

18. Mr. SPIROPOULOS replied that, should the State tolerate such an invasion, it would thereby incur international responsibility.

19. The CHAIRMAN asked what was the position in cases where such acts were committed in spite of the State.

20. Mr. SPIROPOULOS considered that, in such cases, the State was only under the obligation of punishing the offenders.

21. The CHAIRMAN thought it would be advisable clearly to state whether the fact of a member of an armed gang penetrating the territory of another State was considered as a crime in international law.

22. Mr. SPIROPOULOS recalled that in paragraph 62 of his report under Crime No. II he had stated: "Whereas, under Crime No. I, a soldier, when employed in a military action, is exempted from criminal responsibility under international law (it is in this way that the various military tribunals, including the Nürnberg Tribunal, have interpreted the 'crime against peace'), according to the definition of Crime No. II, *any person*, member of an armed gang, shall be considered as criminally responsible and consequently punished."

23. Mr. SANDSTRÖM pointed out that nothing of what had just been said figured in the draft Code and

⁴ See A/CN.4/25, Appendix.

that it would be necessary to include an adequate definition of the crime in the latter.

24. Mr. SPIROPOULOS asked for a concrete proposal to be submitted.

25. The CHAIRMAN observed that, in the case of a gang of individuals committing depredations on the territory of a neighbouring State, the crime involved was one under municipal law not covered by the provisions of the definition of Crime No. II.

26. Mr. CORDOVA quoted the example of the Mexican bandit, Villa, who had attacked the village of Columbus in the United States. The Mexican Government had not tolerated that action and it had therefore been a private crime. Crime No. II, however, concerned the criminal responsibility or organs of the State. The definition should begin with the words: "The fomenting or toleration of . . ." as in that of Crime No. III.

27. Mr. YEPES thought that the doubts expressed were all due to the text's lack of clarity. He proposed the following wording: "The invasion of the territory of a State by armed gangs with a view to disturbing international peace or internal order, in cases where the State, in which the gang was organized, authorized or tolerated the invasion".

28. Mr. SPIROPOULOS accepted that proposal.

29. Mr. HUDSON expressed agreement with Mr. Yepes and Mr. Sandström. To talk of invasion of a territory was not enough. The aim of the invasion should be specified. When Villa invaded the village of Columbus it was simply in order to pillage it. The Commission had in mind a political aim.

29 a. Crime No. II must be distinguished from Crime No. I and that could be done by amending the wording of definition No. I so as to run: "The use of the armed force of a State against another State . . ." He considered the French word "emploi" more appropriate than the English word "use". The amendment clearly brought out the distinction between the two crimes.

29 b. Furthermore, it was essential to add to the definition of Crime No. II a phrase making it clear that the invasion must have a political end and he would accordingly suggest the following text: "The invasion of the territory of a State for a political end by armed gangs based on the territory of another State".

30. Mr. SPIROPOULOS found that text acceptable.

31. The CHAIRMAN said he was not quite satisfied, since the element constituting an international crime was not the end pursued but the fact that the State had tolerated the act.

32. Mr. HUDSON replied that, in that case, it would be necessary to punish the individuals forming the governments which had tolerated the act. When General Villa had invaded New Mexico, he had done so to bring back plunder and had not thereby committed an international crime against peace and security. If he had been captured in the United States he would have been tried there and the same would have been true had he been taken in Mexico. If it was considered that the crime consisted in the encouragement or toleration by a State of incursions into the territory of another State

by armed bands based on the first State, the text would need recasting.

33. Mr. YEPES reminded the Commission of the proposal he had made on those lines.

34. Mr. SPIROPOULOS explained that, in the case of the first crime, an act of the State was involved; it was the State which despatched its forces. In the second case, the responsibility of the members of the gang was involved. When there was action by a State, the ordinary soldier was not responsible, whereas in the case of Crime No. II, all the members of the gang were responsible because they had themselves banded together to form the organization. The responsibility of those forming the government could also be involved but that eventuality was provided for in Crime No. X (incitement and complicity: see paragraph 84 of the report).

34 a. It was for the Commission to judge whether it wished to attribute the responsibility for such acts to the members of the governments or to the members of the gang. He had been won over to the second view by consideration of the example of Greece. The persons who had invaded Greece had committed an international crime.

35. The CHAIRMAN considered that a band of criminals invading a State without the support of another State was committing a crime under municipal law. For a crime under international law to exist, either the complicity of the government or a political end was essential.

36. Mr. CORDOVA thought that a very clear distinction must be made between the two crimes. If a gang crossed the frontier in search of plunder, the conclusion would have to be that the crime committed was one under municipal law. There could, of course, be a question of international responsibility if the government of the country from which the gang came had neglected its duty to see that the latter did not cross the frontier. That, however, was a civil responsibility of the State. In the case he had quoted, the United States of America might have claimed compensation from Mexico for its neglect but the criminal responsibility of the members of the Mexican Government would not have been involved. The case would have been quite different if the latter had tolerated, encouraged or ordered an invasion for a political end. In that case, the criterion would be the fact that international peace and order were at stake, and the act would thereby become a crime under international law. The particular crime in question was covered by the definition of Crime No. III.

37. Mr. SPIROPOULOS said that Crime No. III was the fomenting of civil strife. If, however, the State encouraged the formation of gangs to invade a small country; if, for example, North Korea sent gangs into South Korea to overthrow the Government, it would not be a case of civil strife in Southern Korea and such an act would accordingly not come under the heading of Crime No. III. He had himself wondered whether it would be advisable to establish the responsibility of the members of a gang. If the Commission, on the other hand, preferred simply to attribute responsibility to the members of the government which had tolerated the activity of the gang, he was prepared to accept the

Commission's decision. The whole question was a matter of taste.

38. Mr. AMADO agreed in principle with the other members and particularly with Mr. Córdova. He felt that an international jurisdiction was not necessary for the repression of Crime No. II. National tribunals were quite adequate to deal with it. The invaded State could by virtue of its national legislation against illegal entry into the territory, violence etc., arrest, try and punish the authors of the invasion. It could furthermore claim compensation from the State whose nationals the invaders were on the grounds that the latter had not taken sufficient care to prevent the invasion. To call such an act an international crime would only complicate matters and result in the action of the national jurisdiction being hampered by a clash with international jurisdiction. If the crime was to be characterized as an international crime, the end pursued would have to be clearly stated.

39. Mr. el-KHOURY recalled that after the First World War d'Annunzio had occupied Fiume on his own initiative. He had been neither encouraged nor sent by the Italian Government. Although his act was an example of Crime No. II, neither he nor the Italian Government had been held responsible for a crime. On the contrary, his action had been confirmed by the Peace Conference. At the same period, the sheikh of a Syrian tribe had seized part of the Euphrates Valley belonging to Iraq and the Peace Treaty had subsequently confirmed that annexation. Both incidents came under the definition of Crime No. II and yet had not been regarded as international crimes, since it had been considered that the territories belonged by right to the State of which the invader was a national.

39 a. The question was thus a complicated one. It was not the mere fact of invasion which constituted the crime. The text was inadequate on that point and the Commission's discussions would serve as a guide to the Rapporteur for drawing up a new text. He believed he was right in saying that Mr. Spiropoulos did not regard the existing text as final and would have no objection to its being amended.

40. Mr. ALFARO thought that all the members of the Commission held the same view with regard to Crime No. II. They wished to avoid repetition of the crime committed in Colombia in 1932 (Leticia dispute), in Greece and at Fiume.

40 a. It could happen that a government tolerated the organization of an armed band so that the latter might bring about a situation desired by that government. As far as Peru was concerned, the Government of that country would never have invaded a territory recognized by treaty as Colombian, but someone no doubt thought that the creation of a *de facto* situation might enable the question to be reviewed.

40 b. The organization of gangs, the giving of encouragement to them and the toleration they enjoyed when invading the territory of another State for a political end were the things which the Commission was seeking to define. It had not in mind smugglers or

plunderers. He accordingly thought that the text might run:

“The invasion of the territory of a State by armed bands organized in another State which instigates, supports or tolerates the invasion.”

One might use the word “incursion” instead of “invasion” or even both terms at once.

41. The CHAIRMAN wished to add in support of what Mr. Alfaro had said that the Disarmament Conference had envisaged that the furnishing of support by any State to armed bands organized on its territory and invading the territory of another State or the refusal in spite of the request of the invaded State to take on its territory all the measures in its power to deprive the said bands of all help, might constitute an aggression (Fifth Fact constituting Aggression).⁵ The Commission was considering whether toleration by or assistance from a government should be regarded as a crime. It might be that the band itself could also be charged with an international crime if its aim was a political one. There could therefore be two crimes and a further article would need to be added.

42. Mr. SANDSTRÖM thought that if the responsibility of the members of the government was given first place, the members of the band could be charged under the heading of complicity. It was in conformity with natural order to give first place to the activities of the government.

43. Mr. HSU had desired some time back to suggest a text to replace that proposed in the report, but since that time certain members of the Commission had expressed the idea he had had in mind. The invasion by an armed band could be considered as an international crime but there were two sorts of invasion: invasion tolerated by the government or taking place at the order, whether explicit or implicit, public or secret, of the government; and secondly, invasion by independent bands receiving no orders or assistance from the government but hoping that their action would be confirmed if successful. It was difficult to draw up a text allowing for those two situations but he suggested the following:

“The invasion by armed bands of a neighbouring State on order of a government or independent of it.”

44. Mr. CORDOVA considered the distinction very important. Certain Mexican bandits who had plundered United States territory had sometimes enjoyed the toleration of Mexican frontier officials. When such was the case, and provided only plundering was involved, the State to whom the officials belonged should be liable only to pay compensation. However, in his opinion, there would be a case of crime under international law and the officials in question would be criminally responsible if the invasion had been carried out for political ends.

He proposed the following text:

“The fomenting or tolerating by officials of a

⁵ See League of Nations Document: *Conference for the Reduction and Limitation of Armaments*, Conference Documents, vol. II (1935) IX. 4. p. 681 (Conf. D/C.G. 108) (L.o.N. P. (1935) IX. 4).

State of incursions from its territory into the territory of another State of armed bands with the intention to bring disorder in the latter State.”

45. Mr. SPIROPOULOS said he had put in a considerable amount of work on the text. All the provisions he proposed were mutually interconnected. Whereas the Disarmament Conference had approached the question from the standpoint of the responsibility of the State, the current viewpoint was different. As far as he was concerned there was only one question. His mind, however, was not made up as to whether, in order to constitute an international crime, an incursion must have a political end. He had thought that if an incursion was inspired by a political motive it was without doubt an international crime. If, however, it was decided to add the stipulation “for political ends” the question would then arise as to whether the Commission wished to make provision for the responsibility of the members of a gang or not. If a political crime were involved, in his opinion, the responsibility of the members of the gang would have to be established.

45 a. Basis of discussion No. 2, appearing in the Appendix to his report, ran as follows:

“Any person, acting in an official capacity or as a private individual, who commits any of the acts mentioned in Basis of discussion No. 1 shall be responsible therefor under international law and liable to punishment.”

The second paragraph of the same ran:

“Any person in an official position, whether civil or military” (hence even members of the government) “who fails to take the appropriate measures in his power and within his jurisdiction in order to prevent or repress acts punishable under this Code shall be responsible therefore under international law and liable to punishment.”

Those two provisions constituted a general rule applicable to all the crimes.

46. Mr. CÓRDOVA said he was aware of the text of paragraph 2. Nevertheless, for officials to be criminally responsible, they would have to have had knowledge of the political aim of the invasion, otherwise it would only be a case of a State failing through neglect to prevent a crime.

47. Mr. SPIROPOULOS replied that in the text in question criminal responsibility was involved. Care must be taken not to draft a bad text. It was clear that the civil responsibility of the State could also be involved.

48. The CHAIRMAN pointed out that the definition of Crime No. II spoke of an invasion by an armed gang. Such an invasion might take place for a political end or for purely private ends. The question of the responsibility of officials was dealt with in Basis of discussion No. 2.

49. Mr. YEPES thought that the discussion was getting out of hand. The Commission had begun by discussing Crime No. II but had switched over to Basis of discussion No. 2. He asked for his proposal to be put to the vote first. He was not opposed to amendments being made to it but, in accordance with the

rules of procedure, he would insist on its being put to the vote.

50. The CHAIRMAN did not consider that the discussion was lacking in coherence. The Commission had just heard an explanation by the Rapporteur on the way in which the texts he had proposed were mutually interconnected.

50 a. He declared the general discussion of Crime No. II to be closed.

51. Mr. YEPES affirmed his willingness to amend his original proposal.

52. Mr. HUDSON thought that Mr. Yepes might find the following wording acceptable: “The encouragement or toleration by a State of incursions by armed bands conducted from its territory into the territory of another State for political purposes”. Mr. Spiropoulos, he continued, would like it to be stipulated that the members of the gang itself, whether encouraged by the State or not, should be regarded as the authors of an international crime. On that point there was a difference of opinion with regard to which the Commission might take a decision. The question was whether the members of gangs committed an international crime when acting on their own behalf but for a political end, or whether an international crime was involved only when the members of a government tolerated or encouraged the activities of the gang.

53. Mr. YEPES accepted the wording proposed by Mr. Hudson.

54. Mr. CÓRDOVA thought it would be advisable first to decide whether the Commission wished to deal with the question of the individual responsibility of the members of the gang. The Commission could then pass on to the other points.

55. Mr. ALFARO felt that the Commission should bear in mind Mr. Sandström’s remark that, if encouragement by the State was regarded as the essential element of the crime, then the members of the gang could be charged only with complicity. The fact was, however, that the invaders were the principal authors, whether encouraged or not. The question of toleration was another matter.

56. Mr. HUDSON remarked in illustration that Villa had possessed an army. Was it the view of members of the Commission that all the soldiers of that army should have been punished? They had violated United States territory in order to take what they wanted for carrying on the struggle against the Mexican Government. They had been pursuing a political end, but only vis-à-vis the Mexican Government. Did members wish to rule that all those soldiers had been guilty persons?

57. The CHAIRMAN replied that such a case was a crime under municipal law which only became an international crime when, in the first place, a political end was involved and when, secondly, the crime was committed with the complicity of the government. In such a case, one had, on the one hand, the crime of the gang and, on the other, the crime of the government.

58. Mr. HUDSON put forward the hypothesis that Villa had hoped his incursion into United States ter-

ritory would provoke war between the United States and Mexico and thereby bring about the fall of the government he was fighting. In that case, a political end would exist.

58 a. Mr. AMADO thought that great caution should be exercised on the question and that the Commission should carefully consider whether the amendment submitted by Mr. Yepes should be incorporated in the wording of the formula to be found in the report.

59. The CHAIRMAN stated that the Commission had before it two amendments: one submitted by Mr. Yepes and the other by Mr. Hudson. In his opinion, the two texts were very similar in content.

60. Mr. CORDOVA was of the opinion that the Commission could not continue the discussion unless it took a decision on the question put to it by Mr. Spiropoulos; namely whether the Commission wished to consider the problem of the criminal responsibility of the individuals forming a gang. If the Commission decided that it did not wish to do so, then and then only could it proceed to consider the various amendments submitted.

61. Mr. HUDSON thought that Mr. Yepes' amendment could, with some slight modification, prove satisfactory to Mr. Córdova.

62. The CHAIRMAN read out the amendment submitted by Mr. Yepes which was as follows: "The invasion of the territory of a State by armed gangs with a view to disturbing international peace or internal order, in cases where the State, in which the gang was organized, authorized or tolerated the invasion".

62 a. The amendment implied that the crimes would be committed by reason of the fact that the State had authorized them. In his view, that excluded the individual responsibility of the members of the gang.

63. Mr. HUDSON suggested that neither Mr. Yepes' amendment nor his own in any way ruled out the criminal responsibility of individual members of an armed gang.

64. Mr. YEPES stated that his proposal was intended to apply to crimes committed by the State itself, but he certainly did not rule out the criminal responsibility of individual members of an armed gang which involved complicity or connivance on the part of the State to which the gang belonged.

65. Mr. HSU proposed suspending the meeting to enable the various amendments submitted in the course of the meeting to be distributed. He found it impossible to continue the discussion without having before him the exact text of all the amendments.

66. The CHAIRMAN agreed. Before suspending the meeting, he would, however, read out the text of Mr. Hudson's amendment which ran as follows:

"The encouragement or toleration by a State of incursions by armed bands conducted from its territory into the territory of another State for political purposes."

and of an amendment submitted by Mr. Alfaro:

"The invasion of a territory of a State by armed bands organized in another State which instigates, supports or tolerates the invasion."

67. Mr. HUDSON asked the Chairman whether it would not be better to put to the vote first the preliminary question raised by Mr. Córdova as to whether the Commission wished to envisage in the draft code the criminal responsibility of members of armed bands.

68. The CHAIRMAN announced that the text of the preliminary question relating to Crime No. II formulated by Mr. Hudson and the text of the amendments⁶ to the wording of Crime No. II as drawn up by Mr. Spiropoulos, had just been distributed. He requested the Commission to take a decision in the first place on the preliminary question whether the Commission wished to envisage the criminal responsibility of members of armed gangs. It was essential for the Commission to come to a definite decision as to whether it wished, in the draft Code, to envisage the individual criminal responsibility of the members of a gang under international law.

The Commission decided by 8 votes to 4 to envisage the individual criminal responsibility of members of armed gangs.

69. The CHAIRMAN said that the Commission had still to determine the conditions required for a crime under international law to be considered as committed.

70. Mr. SPIROPOULOS considered that all the amendments submitted to the Commission referred to governments and not to individuals.

71. Mr. HUDSON said that after the recent vote, he saw no further point in maintaining his amendment.

72. The CHAIRMAN said that the Commission had just discussed the question of the personal responsibility of the members of an armed gang and it was on that preliminary point that the vote had been taken. The text of the amendments, on the contrary, referred exclusively to States and their responsibility for the activities of the gangs. The question of the responsibility of the armed gang as a whole remained open.

73. Mr. YEPES thought that although the Commission should consider the question of the responsibility of the gangs as a whole he would like first of all to consider the question of the responsibility of States.

74. The CHAIRMAN said that the next point on which the Commission would need to take a decision was that of whether an armed gang committed a crime under international law when invading the territory of another State for a political end or with the intention of creating disorder.

75. Mr. YEPES observed that the question was a very difficult one to decide and would require careful examination. He accordingly suggested appointing a drafting committee to study the problem and to report to the Commission at its next meeting.

76. The CHAIRMAN was not in favour of the suggestion which would, he thought, result in further loss of time. In any case, at that stage the matter before the

⁶ See paras. 42, 43, 51 and 62 *supra*.

Commission was not a question of drafting but a decision of principle.

77. Mr. SPIROPOULOS said that, since the principle had been laid down by the Commission, he would suggest that he himself should draft the text.

78. The CHAIRMAN recalled the fact that the Commission had decided that the head of an armed gang and all the members of that gang should be considered as criminally responsible in the case of an invasion of the territory of another State. The question of aim or motive remained open.

79. Mr. ALFARO thought that the Commission should take a decision on two further points. In the first place, it should decide whether the responsibility under international criminal law of the members of the armed gang was dependent or not on the fact that the invasion had been tolerated by the State from whose territory the invasion was conducted. Secondly, it should decide on the question of the responsibility of the State itself in the event of such an invasion.

80. The CHAIRMAN declared that he did not follow the first point raised by Mr. Alfaro. It seemed quite clear to him that the criminal responsibility of the members of an armed gang was in no way dependent on the question whether the State tolerated the invasion or not.

81. Mr. HUDSON remarked that there were, in fact, two distinct cases: an invasion made with the authorization of the State and that made without such authorization. In both those cases, however, the criminal responsibility of the members of the armed gang was involved.

82. The CHAIRMAN agreed with the distinction drawn by Mr. Hudson. In his opinion, the Commission had already decided in the affirmative that the international criminal responsibility of members of an armed gang was involved when the State authorized the invasion. It remained to take a vote on the question whether such responsibility was involved even when the State had not consented to the invasion.

The Commission decided by 7 votes to 4, with 1 abstention, that the criminal responsibility of members of an armed gang was involved, even when the State had not consented to the invasion.

83. The CHAIRMAN said that one last question remained to be decided in connexion with the crime, namely, the conditions to be fulfilled for the responsibility of the members of the gang to be involved. He would put to the vote the question whether such responsibility existed only when the invasion had a political end.

The Commission decided by 11 votes, with 1 abstention, that the criminal responsibility of the members of an armed gang existed only when the invasion had a political end.

84. The CHAIRMAN stated that, by its last vote, the Commission had decided that it considered that a crime under international law on the part of the members of an armed gang could be said to exist only when the invasion had a political end. He wondered whether

it would not be a good idea to add the provision that the end might be that of disturbing the peace.

85. Mr. ALFARO thought it was sufficient to say that the invasion should "have a political end".

86. The CHAIRMAN, agreeing with Mr. Alfaro, proposed that the Commission should consider the texts relating to the responsibility of the State and laying down the criminal responsibility of the government, as for example in the amendment proposed by Mr. Córdova relating to the responsibility of the officials of a State fomenting or tolerating an invasion conducted from the territory of that State against the territory of another State by an armed gang with the intention of bringing about disorder in the latter State.

87. Mr. HUDSON did not think that the Commission could consider the amendment at that stage. It covered the same facts as those dealt with in Basis of discussion No. 2, paragraph 2 (A/CN.4/25, Appendix), which was due to be studied by the Commission later.

88. Mr. YEPES did not agree with Mr. Hudson. Basis of discussion No. 2 concerned the responsibility of persons in an official position, whether civil or military, but not that of the State. It referred therefore to complicity but not to the direct and immediate responsibility of the State, which was the question that the Commission should consider.

89. Mr. SPIROPOULOS explained that the question of complicity was catered for under Crime No. X.

90. The CHAIRMAN thought the Commission was faced with a question of principle—namely, should a provision be inserted in the code "specifying that the State which authorizes or tolerates an invasion is guilty of a crime". The Commission had already decided that, for the purposes of the code, the responsibility of the State meant the responsibility of those taking part in the government.

91. Mr. AMADO thought that the question of the complicity and responsibility of persons in official positions should be discussed when the Commission came to consider Basis of discussion No. 2. He proposed that they should pass to the consideration of Crime No. III.

92. Mr. CÓRDOVA said he would like to explain why he had voted as he had. When the preliminary question had been put, he had voted against the members of an armed gang being regarded, in the draft code, as criminally responsible under international law. As the majority of the Commission had voted in favour, however, he had then voted for the limitation stipulating that in order to constitute a crime under international law the invasion must have a political end.

93. Mr. HUDSON and Mr. BRIERLY announced that they had voted in the same manner.

94. The CHAIRMAN asked the Commission whether it wished to pass forthwith to the consideration of Crime No. III or whether it wished to introduce into the draft code a new crime relating to the complicity of the State.

The Commission decided by 11 votes to proceed to consider Crime No. III.

CRIME No. III⁷

95. Mr. HUDSON thought that the formulation of the crime in the draft code was too vague. To illustrate why he thought that the text should be more clearly worded, he would give a few examples. Let it be supposed that during a period of political unrest and uncertainty in France, he made a public speech in New York in which he expressed the hope that a particular party would win the elections, adding that, if it did not, he hoped that the party would seize power by force. Let it further be supposed that he had a large number of friends in France who gave wide publicity to the speech. In such a case, he might be said to be engaged in fomenting civil strife in France. On the other hand, he would be speaking in a country which guaranteed all its citizens freedom of speech and of expression of thought, rights which he wished to exercise. Thus, in speaking in New York, he was acting perfectly in accordance with the laws of his own country. However, the draft Declaration on Rights and Duties of States stipulated in article 4 that it was the duty of every State to prevent the organization within its territory of activities calculated to foment civil strife in the territory of another State. He thought that, having spoken in a personal capacity, he could not be accused of having organized an activity of that kind.

95 a. To give a further example: let it be supposed that he wrote 100,000 letters to persons residing in France whose addresses he had been able to obtain, suggesting that they should take part in a particular seditious movement. There again he would be acting in a personal capacity and, once more, his right to freedom of expression would have to be taken into consideration. In the United States of America, there was very strong opposition to the thesis that such individual activity could be regarded as involving the personal responsibility of the author of the letter.

95 b. He thought that the Commission should decide to clarify the wording of Crime No. III in order clearly to determine the cases of responsibility under international law which could be covered by the code. Accordingly, he would like to propose the following definition for Crime No. III: "The encouragement or toleration by officials of a State of the organization within its territory of activities calculated to foment civil strife in the territory of another State."

96. Mr. SPIROPOULOS remarked that Mr. Hudson had raised a number of problems relating to the fomenting of civil strife in another State and had drawn certain conclusions from the draft Declaration on Rights and Duties of States which he had then applied to the case of an individual. The draft Declaration, however, applied only to States and had been drawn up with sole regard to States. If the Commission wished to know how he, as Rapporteur, had approached the question of the fomenting of civil strife in another State it would need to look at the code as a whole. He had based his code not only on the draft Declaration on Rights and Duties of States but also on the Convention on the Prevention

and Punishment of the Crime of Genocide and had, in fact, modelled his formulation of Crime No. VIII on the actual wording of article II of the said Convention. The case of all the crimes to be found in his code had already been discussed at length by the General Assembly during consideration of the Convention on Genocide and of the draft Declaration on Rights and Duties of States, and he had drawn upon that discussion in his draft code, which dealt with the criminal responsibility of individuals.

96 a. As for the examples quoted by Mr. Hudson, a letter written in a personal capacity to a very large number of friends should not be regarded as an incitement to an international crime. On the other hand, were Mr. Hudson to publish an article in a newspaper calling for help to be given to a particular seditious movement in another country that would, he thought, constitute an incitement to international crime. The Convention on the Prevention and Punishment of the Crime of Genocide, in article IV, paragraph (c) described direct incitement in public as a punishable act. If Mr. Hudson, therefore, published such an article he became liable to legal action. Even in countries where freedom of speech and thought existed, there was, he felt, a limit placed on the expression of thought.

96 b. With regard to persons guilty of fomenting civil strife, he would ask the Commission to refer to paragraph 1 of the commentary given in his report on the definition of Crime No. III (A/CN.4/25, para. 63) and which ran as follows: "As a rule, fomenting of civil strife in another State is carried out through State action. In that case, the State officials connected with such fomenting shall be considered responsible. If, on the other hand, the fomenting be due to private activities, the responsibility of the State officials of the State from which those private activities emanated will result from their *failure* to prevent or repress such fomenting." He accordingly considered that, according to his formulation of Crime No. III, the crime of fomenting civil strife could perfectly well be committed by a private individual.

97. Mr. AMADO regretted that Mr. Spiropoulos had not included the question of propaganda among his Bases of discussion. If it were possible to include such activity amongst those constituting a crime, the cases quoted by Mr. Hudson could be covered. The question of propaganda had been amply discussed during the drafting of the Convention on Genocide and it would, he thought, be possible to introduce that idea into the draft code, among the provisions of Crime No. X for instance. It might perhaps also be possible to formulate a clearer definition of Crime No. III. However, if the Commission did not share that view, he was prepared to accept the existing definition of Crime No. III with the addition of a specific reference to the provisions relating to Crime No. X.

98. Mr. HUDSON confessed that he had not been greatly impressed by the explanations given by Mr. Spiropoulos in connexion with the Convention on Genocide. Genocide was a crime under international law wherever it was committed. Civil strife or warfare

⁷ See A/CN.4/25, Appendix.

carried out within a State, on the other hand, was not a crime under international law and was a by no means uncommon occurrence. Paragraph 1 of the commentary to Crime No. III, which Mr. Spiropoulos had just quoted, had nothing to do with the case of private individuals acting in a personal capacity. He still could not help thinking that the definition given by Mr. Spiropoulos of Crime No. III was too general and too vague and for that reason he had submitted a more precise text.

99. Mr. ALFARO declared himself in favour of Mr. Hudson's proposal. It would be very dangerous to draw up that article of the code in such a manner that it could be interpreted as attributing individual responsibility in cases of fomenting civil strife in another State. Individual acts, such as those quoted by Mr. Hudson, could not be considered as crimes under international law. Crime No. III referred solely to the responsibility of States. Mr. Hudson's proposal accordingly seemed quite satisfactory. There remained, however, the case of fomenting civil strife through the direct action of governments, of which there were numerous examples. The Commission could express its idea quite clearly by adding to Mr. Hudson's proposal a few words bringing in the notion of direct action. He wished to emphasize again the fact that it would be dangerous to talk of the responsibility of private persons in such a case, and that only the responsibility of States was involved.

100. Mr. SPIROPOULOS was sorry to hear members of the Commission using arguments which belonged to the pre-Nürnberg period. He thought that the Commission should decide that the fomenting by an individual of civil strife in another State was a crime to be included in the code. One often heard it alleged that a banker, general or industrialist bore no responsibility in the event of a civil war, but he felt obliged to point out that, in his opinion, such a view was outdated. He had before him the collection of judgments passed by tribunals in Germany on war criminals and on those who had participated in war crimes. Those regarded as having participated in crimes included officers, officials, industrialists, judges, doctors, hospital attendants, executioners etc. Two German industrialists—i.e., civilians—had, in fact, been tried and condemned to death for having supplied poison gas for extermination camps. Although the tribunal had realized that there was no question of the direct participation of those industrialists in the crime of extermination it had nevertheless considered the indictment and condemnation to death of the industrialists justified by the sole fact that the men had been aware of the purpose for which the gas they delivered to the camps was intended.

101. Mr. HUDSON thought that the examples given bore no relation to the case before the Commission.

102. Mr. SPIROPOULOS said that, on the contrary, the two cases were closely inter-related. If the acts in question were committed by States, the government and authorities of the State concerned were criminally responsible under international law and likewise, if the acts were committed by private individuals, those persons were responsible.

103. Mr. CORDOVA said he would like to ask Mr. Spiropoulos a question. If he himself, as a Mexican citizen, went to the United States and endeavoured to organize a revolution in Mexico, he would be endeavouring to disturb the peace in Mexico. Would that activity then come under the heading of an international crime? There was a difference between the two cases under discussion.

103 a. He would also like to remind the Commission, in that connexion, that the United Nations Charter was opposed to any intervention in cases of domestic conflict within a State.

104. Mr. AMADO pointed out that civil war could be fomented in another State by other means than direct acts of war. It could be done, for instance, by supplying one of the parties with arms or by carrying out propaganda on its behalf. There was a further case in which a political party organized action in support of its adherents in another State. He would like to know what were the cases in which fomenting of civil war could be said to exist within the meaning of the code. In that respect, it was unfortunate that no definition was given in the code of the term "fomenting". It seemed to him, therefore, that it was first necessary to consider and give a definition of the term "fomenting of civil strife" before the Commission could decide on the question of the responsibility of States or of individuals. The word "strife" was of primary importance in the definition of crime.

105. The CHAIRMAN inquired whether the Commission wished again to take a decision on the preliminary question whether individuals could be held responsible for the fomenting of civil strife.

106. Mr. HUDSON agreed that the Commission should be consulted on that point. Following Mr. Amado's remarks, he had compared the English and French texts and had observed that they did not seem to be identical. The English text spoke of "civil strife" which was not the same thing as the French phrase "guerre civile". A better expression must be found.

107. Mr. SPIROPOULOS, replying to Mr. Amado, thought that, when drawing up a code, one could not envisage extreme cases but only categories of cases. Undoubtedly extreme cases differed in a number of details, but one could not include them in a code. Such a code could be based only on a legally defined category or on a limited number of categories and it was for the judges to interpret the provisions of the code and to determine how and to what extent they were applicable to extreme cases.

108. The CHAIRMAN asked the Commission whether it wished to envisage drawing up a text defining the meaning of "fomenting civil strife".

109. Mr. HUDSON noted that not many members had so far expressed any views on the question of fomenting of civil strife. Before the Commission took a decision on that matter he would like to hear the view of other members.

110. The CHAIRMAN agreed.

The meeting rose at 1 p.m.