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**A/CN.4/SR.58**

# Summary record of the 58th meeting

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

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the territory of a State C. He hoped that the Rapporteur would take account of the example he had just quoted, together with article 3 of the Convention on Terrorism, and the problem of jurisdictions arising out of it.

61. Mr. SPIROPOULOS begged the Commission not to expect the impossible of him. He was asked not only to take account of opinions expressed in the course of discussion and of the decisions taken by the Commission, but also to take into consideration the provisions of the Convention on Terrorism. It seemed to him that that Convention laid down certain rules which went less far than the principles or the ideas formulated by the Commission. He therefore requested the Commission to leave him free to draft his report bearing in mind solely the views and opinions which had emerged during the Commission's discussions.

*The meeting rose at 1 p.m.*

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## 58th MEETING

*Friday, 30 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 J. BRIERLY, 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)*

1 - 3. Mr. SPIROPOULOS said that in his report he had confined himself to enumerating a certain number of crimes; there might, of course, be others. He had received from Mr. Pella a memorandum on the question before the Commission. In Part III of that memorandum (A/CN.4/39) was enumerated a list of crimes, which would enable them to decide whether further crimes should be added to the list contained in the draft Code.

4. The CHAIRMAN approved of that suggestion, since it would enable the Commission to distinguish between crimes under international law and crimes under municipal law. He believed that all the members of the Commission had received a letter from the United Nations Educational, Scientific and Cultural Organization requesting that the destruction of works of art, historic monuments etc. should he included among international crimes. The Secretariat would draw up a list of all the possible crimes and the Commission would then take a decision.

5. Mr. HSU thought that subversive activities should be added to the list of crimes; they might be sub-divided into three categories:

1. The fact of a State carrying on subversive propaganda against another State or encouraging or tolerating such activities in its territory.
2. The fact of a State giving moral, political or economic support to subversive elements in another State or encouraging or tolerating such activities in its territory.
3. The fact of a State maintaining, in another State, agents instructed to overthrow the established order.

The meaning of the word "subversive" would, of course, have to be defined.

5 a. He had not accepted the proposal to add to the text submitted for Crime No. I the threat of the use of armed force; that was not because he was fundamentally opposed to the suggestion, but because of the manner in which it had been presented. He proposed the words: "The fact of a State applying measures of psychological or economic coercion in respect of another State."

5 b. The preparation of plans for a war of aggression was not mentioned in the report. Mr. Spiropoulos had told him that that was a kind of preparatory act, and that such acts came under Defimition No. X. He considered that the preparation of plans was distinct from material preparation. It should therefore be given a separate place. For Crime No. V he proposed the words: "The fact of a State planning a war of aggression."

6. The CHAIRMAN observed that that proposal was in conformity with Mr. Spiropoulos' suggestion that a certain number of crimes not included in his report should be enumerated.

CRIME No. V [1]

7. Mr. SPIROPOULOS pointed out that the manufacture of weapons was generally carried on by private enterprises and that the same problem again arose: should the directors of the factories concerned be held responsible, or State officials? The idea underlying the draft was that a crime was involved and that any person whatever, whether an official or not, might be responsible for it.

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

8. Mr, BRIERLY observed that the text did not refer to the use of prohibited weapons, which was a war crime, but to their manufacture. He thought it highly dangerous to treat the manufacture, trafficking and possession of such weapons as crimes. Indeed, as long as war remained a possible danger, a State should be in a position to take counter-measures against any violations that might be committed by another State. During the last world war, the Nazis had not used war gases because they knew that the Allies had stocks which would be used if they themselves began to make use of gas. Would it be a crime to be prepared for counter-measures against a possible violation of a convention?

9. Mr. HUDSON had before him a list of international agreements prohibiting the use of certain weapons. The question of gas had been dealt with in the Geneva Protocol of 1925,[2] which, he observed, had been ratified by over 25 States. A further example was the St. Petersburg Declaration of 1868,[3] prohibiting the use of the dum-dum bullet, which had been followed by The Hague Conventions of 29 July 1899 and 18 October 1907.

9 a. He agreed with Mr. Brierly that the definition of Crime No. V was contrary to existing practice which only prohibited the use of certain weapons. Under Crime No. V, however, the manufacture, trafficking and possession of those weapons was prohibited. But many States wished to be in a position to use those weapons if they were used by another State. Several States had made reservations to the 1925 Protocol. The French Republic, for instance, had declared that the Protocol was only binding in respect of States which had ratified it. On the basis of the international agreements at present in force it was not possible to say that the manufacture of weapons the use of which was prohibited was an international crime, even if it were encouraged by the State.

10. Mr. FRANÇOIS agreed with Mr. Brierly and Mr. Hudson. The prohibition in the draft went too far. No Government could accept it. It was the use, not the manufacture, of chemical gases which was forbidden. States wished to be able to take counter-measures against any possible violation of the agreements concluded. Besides, chemical gases could be used for lawful purposes. As for the atomic bomb, its manufacture and possession could not possibly be prohibited until full control had been established. The prohibition of its use—but only its use—would in itself be an advance.

10 a. With regard to the arms traffic, the Commission might be guided by the 1925 Convention on the international trade in arms.[4] That was what the Netherlands Government had done in its reply to the questionnaire addressed to governments (A/CN.4/19/Add.1). He pointed out that so far the Commission had not considered the replies from governments to the questionnaire that had been sent to them.

10 b. Article 4 of the draft code appearing in the reply from the Netherlands Government defined the following crime:

(a) " The transfer, sale or distribution of arms, munitions or explosives to any person who does not hold such licence or make such declaration as may be required by domestic legislation;

(b) " Exportation of arms, munitions or explosives without such licence as may be required by domestic legislation. "

That clause might be discussed when the Commission considered the list of crimes to be drawn up in accordance with Mr. Spiropoulos' proposal.

11. Mr. YEPES supported the views of Mr. Brierly, Mr. Hudson and Mr. François. That article might indeed be a hindrance to the preparation of legitimate defence measures. Moreover, he did not think that the article should be adopted until control of all armaments had been established. An article of that nature might be an encouragement to ill-intentioned States.

12. Mr. SPIROPOULOS remarked that in principle the majority of the Commission was opposed to the article. Although members of the Commission considered the article dangerous, he would like to point out that he took the opposite view; the article appeared in the Pella draft prepared for the International Association of Penal Law.

12 a. At first sight, he had taken the same view as Mr. Brierly, Mr. Hudson, Mr. François and Mr. Yepes; but he had then seen that there was a reason for the article. If the Convention were to be applied, it did not present any danger; indeed, if a Government manufactured or possessed weapons once the Convention entered into force, it would be committing a violation and other Governments would also have the right to manufacture them.

13. Mr. FRANÇOIS pointed out that it would then be too late.

14. Mr. SPIROPOULOS thought that if States were aware of a violation of the Convention at the time of signature, they would not destroy the weapons in their possession. It was nowhere stated that previous control should not be established. In theory, the crime in question should be included in a Convention postulating international control. In his opinion, the committing of one of the crimes by a signatory would release the other signatories. In the chapter devoted to reprisals it could be seen that the latter were still provided for. The Convention must be applied within the framework of all other international conventions. If the members of the Commission believed that the article was dangerous and should be deleted, he would not oppose them.

15. Mr. FRANÇOIS was not satisfied with the explanations given by the Rapporteur. It was, of course, evident that if one party did not fulfil its obligations the other party was released, but, he repeated, it would then be too late.

[2] Protocol of 17 June 1925 for the prohibition of the use in war of asphyxiating, poisonous or other gases, and of bacteriological methods of warefare.

[3] Declaration of 11 December 1868 prohibiting the use of explosive bullets in war.

[4] Geneva Convention of 17 June 1925 on the control of the international trade in arms, ammunition and implements of war.

16. Mr. ALFARO believed that nearly all the members of the Commission were in favour of deleting the article. It was known that the only reason why the discussions on the atomic bomb had been unsuccessful was that the Soviet Union had refused to submit to international control. At the present stage of the atomic bomb question, the article might be considered as showing disapproval with regard to the Western States. The Commission should not attempt to adopt a text which gave the impression that it had the atomic bomb in mind.

17. Mr. SANDSTRÖM favoured the deletion of the article.

18. Mr. el-KHOURY proposed limiting the text to the words: " The use of weapons prohibited by international agreements "; the use of weapons should remain a crime, but he did not believe that manufacture, trafficking or possession should be regarded as such.

19. The CHAIRMAN explained that use of such weapons would come under war crimes.

*The Commission unanimously decided to delete Crime No. V.*

CRIME No. VI [5]

20. Mr. SPIROPOULOS said that he had nowhere discovered any definition of that crime. He had based his text both on recent and on remote experience. He had had in mind the rearmament of Germany after the First Word War. At that time troops had been raised and trained in a demilitarized zone. He had thought it useful to include a provision on that subject in the draft, since such measures constituted a danger to peace.

21. Mr. HUDSON wondered who would be the authors of the violations mentioned. He supposed that the intervention of a State would be necessary. If it were desired to include the persons responsible for the action of the State, that must be stipulated. The term " international treaties " was very general; if there were a treaty between two States, was its violation necessarily a crime against international peace and security? Moreover, the article appeared to refer to the provisions of various peace treaties. But such treaties were frequently imposed, and thus sometimes contained permanent provisions which it was known in advance would not be permanent. In the case of a treaty other than a peace treaty, or of a general treaty to which a large number of States had acceded, the crimes referred to must be defined. But the attempt made in 1933 had been unsuccessful and he did not see how it could be repeated in the present world situation.

22. Mr. el-KHOURY thought that Crime No. VI would arise only in the case of defeated nations on which a treaty was imposed. In those circumstances the implementation of the treaty was imposed by force. The existence of such a crime under international law would only encourage the law of force at the expense of the force of law. Where a stronger State had imposed a treaty limiting the forces authorized in the territory of the weaker State, it was for the victor to see that the treaty remained in force, but he must not be given another weapon based on international law with which to maintain the vanquished in a state of subjection. He did not think it would be wise to retain that crime on the list of international crimes. There was no natural law obliging a weak State always to remain weak. He was opposed to the inclusion of Crime No. VI.

23. Mr. YEPES agreed with Mr. el-Khoury. But if the crime were included, it should not be limited to the cases enumerated; there might, indeed, be other cases such as the violation of clauses concerning demilitarized zones.

24. Mr. SPIROPOULOS said that he had relied on existing practice. The Treaty of Versailles contained provisions of that nature. At the present time, according to the international law deriving from the United Nations Charter, if it were desired to amend a treaty the approval of the States concerned was required. Unilateral amendment of a treaty was not admissible under international law. Bulgaria had wished to denounce the Peace Treaty, but the matter had been brought before the General Assembly and the International Court of Justice at The Hague. He did not see how it could be maintained that the rearmament of Germany, for instance, had not affected peace. The war of aggression in 1939 had resulted from that violation of the Treaty of Versailles. The definition he proposed was very broad and included neutralized territories. If the Commission thought that that crime did not affect peace or did not wish to retain it for other reasons, he would not press the point.

25. Mr. SANDSTRÖM considered that in view of the very rapid changes in the world political situation, what now appeared to be an attempt against the peace might tomorrow appear to be the contrary. It would be dangerous to make crimes of the acts enumerated in the definition of Crime No. VI.

26. Mr. HUDSON pointed out, as an example, that the United States was a party to an international agreement providing for the absence of fortifications along its frontier with Canada, which had been concluded in 1817.[6] That agreement had always been observed by both parties and was not a peace treaty that had been imposed. If one of the States concerned thought that it should fortify its frontier, it must first obtain amendment of the 1817 Agreement. That agreement had already been amended on several occasions. If it were not possible to amend it, he did not think it could be said that the construction of fortifications would be an international crime. It might be a serious matter if there had been no previous agreement, but the violation of an international agreement was not necessarily a crime under international law.

27. Mr. SPIROPOULOS pointed out that if the works were carried out with a view to an attack, and if that attack took place, it would be preparation for a war of aggression and the provision would be useless, since

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

[6] By exchange of notes at Washington on 28 and 29 April 1817.

the act committed would come under the definition of Crime No. I. But a State might rapidly increase its forces and another State might feel itself in danger. That was what the definition of Crime No. VI provided against. If the Commission believed that definition to be unnecessary he would not press the point.

28. Mr. el-KHOURY proposed that in the definition the words " international treaties defining the war potential " should be replaced by the words " conventions on disarmament which may be concluded by the United Nations to regulate armaments ". The violation of such agreements might then be considered as an international crime, but there must be no general reference to treaties, because the object of some of them might be to humiliate one of the parties.

29. Mr. SPIROPOULOS thought he should recall that the rearmament of Germany had created a threat to the peace and security of mankind.

30. The CHAIRMAN thought there was no doubt that violation of a treaty was an international offence and might, if it disturbed the peace, become an international crime. It was on the basis of such charges that most of the sentences had been pronounced at Nürnberg. If the Commission did not include such acts in the list, that would not mean that it did not consider them as crimes. They must not give the impression of reverting to pre-Nürnberg doctrine. The violation of a treaty was at least an offence and in certain cases it was a crime under international law.

31. Mr. el-KHOURY thought that that problem could be considered when the Commission studied the validity of treaties, particularly treaties imposed by force. He observed that it was a matter of particularly grave violations, which were offences against the peace and security of mankind; the matter deserved some consideration.

32. Mr. AMADO was in favour of the definition of Crime No. VI, and wished to explain that if he had not been momentarily absent, he would have voted for the definition of Crime No. V, since he had not been convinced by the arguments advanced for its deletion.

32 a. As it was a matter of international agreements—i.e., of instruments establishing a rule of law on the political level—the violation of a treaty should be transferred from the political level to that of international crimes. Fortification works might be a threat to peace and security. The Commission had received its terms of reference from the General Assembly at a time when it was thought that the world was moving towards peace. There had therefore been a desire to establish rules to prevent a recurrence of war. He would vote in favour of Definition No. VI.

33. Mr. ALFARO agreed with the Chairman and Mr. Amado. The Commission had met to consider offences against peace and security, but objections might be raised against the text of the definition. It should be stated that " the violation of a treaty on the limitation of armaments or of any other treaty concluded with a view to ensuring international peace and security " was an international crime. Greater precision would entail a danger of some omission.

34. The CHAIRMAN supported Mr. Alfaro's proposal. One of the purposes of the San Francisco Charter was the limitation and regulation of armaments and he quoted article 11, paragraph 1. If a general treaty were concluded, it would be a fundamental provision of the United Nations; any act in violation thereof would be an international crime. The best formula might still remain to be found, but the principle seemed obvious. International society was like national society; a time would come when the carrying of weapons would also be prohibited in international society. He thought it would be a retrograde step to omit the definition in question.

35. Mr. SANDSTRÖM believed that if a general convention on disarmament was envisaged, the insertion of a provision against violations could be left to the signatories.

36. Mr. FRANÇOIS remarked that the words " any other treaty ", proposed by Mr. ALFARO, were extremely vague.

37. The CHAIRMAN pressed the point, since the Commission had a certain responsibility before international public opinion as a whole. He considered it difficult to maintain that the violation of a treaty on disarmament was not an international crime.

38. Mr. FRANÇOIS observed that that was true of a general treaty but not of other treaties.

39. The CHAIRMAN recalled that people had been hanged for that crime at Nürnberg.

40. Mr. BRIERLY and Mr. HUDSON did not think that people had been hanged at Nürnberg for violating a disarmament treaty; they had been hanged for preparing and carrying out a war of aggression and that crime was already covered by definitions Nos. I and X.

41. Mr. SPIROPOULOS said that in his opinion Mr. el-Khoury had relied on a thesis which was incorrect in international law, namely, that a treaty imposed by force was not valid. It was the first time he had heard that view expressed. An imposed treaty was perfectly valid; the peace treaties were valid, although they were concluded under pressure. According to the principles of the United Nations Charter, a treaty could not be unilaterally amended.

41 a. They were speaking of violations which constituted a danger to peace and security. To take a concrete example, Hitler had formed an army and France had wished to intervene because that fact in itself, which was a violation of a treaty, constituted a danger for her. England had not permitted her to intervene and France had stated that she could not do so alone; the result had been the Second World War. A further example might be quoted: Bulgaria had violated the provisions and military clauses of the peace treaty. Was it believed that that was not a threat to Greece ? If Bulgaria were not behind the iron curtain, there would perhaps have been intervention. It was said that that was a matter between two States, but it affected the whole world. It was sufficient for a State to feel itself threatened, since if it felt itself threatened, the result might be war. Peace between two States was inter-

national peace. It was a mistake to believe that violation of the military clauses of a treaty did not affect the peace.

41 b. The re-militarization of demilitarized territories was a threat to peace. There was a tendency to say that the death of some people in a State would be a threat to peace if it were a case of genocide, whereas the invasion of a demilitarized territory would not. In the definition in question, he had brought together everything that could be included and he pointed out that the list was not exhaustive. The wording might be " the violation of military clauses . . . including clauses concerning:" If a State had no military forces it did not make war. Consequently, the constitution of such forces must be prevented.

42. Mr. YEPES said that at the start he had expressed an unfavourable opinion regarding the inclusion of Crime No. VI. But to show his goodwill he would vote for it in principle.

43 - 44. The CHAIRMAN thought it impossible to omit the principle concerned. He recognized that there might be drafting difficulties, but they did not seem to him to be insuperable. He therefore proposed that the Commission should suspend the meeting, as was usual in such cases, so as to allow time for consideration of generally acceptable means for reaching a solution of the difficulties which had arisen during the discussion.

45. Mr. SANDSTRÖM only wished to say a few words; Crime No. VI was intended to cover violations of the military clauses of international treaties, such violations being committed for the purpose of aggression and constituting an offence against the peace and security of mankind. He thought that the same result might be obtained without it being necessary to specify a particular crime under the terms of Crime No. X, which might be combined with Crime No. I. Crime No. X would thus cover the preparatory acts and Crime No. I the act itself.

46. Mr. HUDSON thought that the Rapporteur had wished to include in the Code a principle applying specially to the violation of military clauses of international treaties. He had tried to determine which treaties the Rapporteur was referring to, but had been unable to reach any conclusion. He wondered whether such a principle was appropriate in the Code, and suggested that the Commission should instruct the Rapporteur to study the matter further and perhaps clarify his idea.

47. Mr. HSU approved of Mr. Hudson's suggestion, which he considered an excellent one. He thought it difficult to take a decision on Crime No. VI as at present drafted, although he approved of the principle.

48. Mr. ALFARO proposed that the definition of Crime No. VI should be drafted as follows:

" The violation to the military clauses of any treaty or agreement designed to ensure international peace and security; such clauses including, but not being limited to, those concerning:

(a) The strength of land, sea and air forces;

(b) Armaments, munitions and war material in general;

(c) Presence of land, sea and air forces, armaments, munitions and war material;

(d) Recruiting and military training;

(e) Fortifications. "

He thought that the text he had suggested might serve as a basis for discussion.

49. Mr. BRIERLY observed that Mr. Alfaro's text provided no criterion for defining or determining the treaties or agreements in question. In those circumstances how could a distinction be made between the treaties and agreements referred to, and any other treaties and agreements ? And in that case how could it be determined that an offence had been committed against the peace and security of mankind ?

50. The CHAIRMAN replied that it would be for the courts responsible for judging cases to decide whether a crime had been committed under the terms of the code.

51. Mr. BRIERLY considered that that was a most dangerous view. The judge could not be left to determine whether a particular treaty or agreement had been violated under the terms of Crime No. VI.

52. Mr. HUDSON agreed that Mr. Alfaro's text was not sufficiently precise.

53. Mr. ALFARO replied that in his opinion the military clauses contained in treaties and agreements were sufficiently clear in themselves. For example, if a treaty provided that a certain State was forbidden to build fortifications, with a view to preventing any danger of aggression by that State, and if it nevertheless built fortifications, then there was clearly a violation. In his view the criterion was merely as follows: If a treaty contained clauses prohibiting a particular class of weapon or limiting the military forces of a State, that State violated the provisions as soon as it failed to respect them. From that moment, there was a violation under the terms of Crime No. VI.

54. The CHAIRMAN recalled that a court had always to decide the purpose and the result of an act. If the purpose of the act could not be clearly determined and the judge remained in doubt, he must pronounce an acquittal. He thought it difficult always to determine the purpose of an act. From that point of view Mr. Alfaro's proposal seemed to him to lack precision. The court's task would be difficult, but it would be carried out.

55. Mr. HSU asked Mr. Alfaro if his proposal also referred to disarmament treaties.

56. Mr. ALFARO replied in the affirmative.

57. Mr. HSU asked why Mr. Alfaro had not made that clear.

58. Mr. ALFARO thought it evident that disarmament treaties also came within the scope of his proposal. Moreover, he thought that the code should include a provision to the effect that violation of any prohibitions or limitations of armaments included in treaties constituted an offence against the peace and

security of mankind. In reply to a further question by Mr. HSU he said that his text referred not only to multilateral, but also to bilateral treaties.

59. Mr. HSU replied that the principle of Crime No. VI was a sound one but he feared that there would be very serious difficulties when it came to practical application. In the case of a bilateral treaty, for instance, could the code be applied and would Crime No. VI be committed if a violation of the treaty by one or other of the contracting parties did not constitute a threat to the peace and security of mankind? He considered that the definition of Crime No. VI should be rather more accurately drafted in that respect.

60. Mr. BRIERLY asked the Commission to imagine that the Treaty of Brest-Litovsk was still in force. If a violation of the terms of that Treaty were now committed, could it be considered as a violation under the text of Mr. Alfaro's proposal?

61. The CHAIRMAN doubted whether the Treaty of Brest-Litovsk had been valid. He did not think that the distinction made by Mr. HSU between bilateral and multilateral treaties, with regard to the application of Crime No. VI, was relevant. Moreover, he reminded Mr. Hsu that the United Nations Charter made no distinction between multilateral and bilateral treaties and that in the case being considered by the Commission no such distinction could be made either. In the matter of violation of military clauses, as in all other matters, peace was indivisible.

62. Mr. SPIROPOULOS said that if members began to quote examples, as certain statements seemed to suggest, there would be no end to it, since an infinite number of examples might be given. He wished to quote one: The Convention on Genocide referred among other things to the killings of members of a national, ethnical, racial or religious group. Suppose that 3 German-Swiss were killed by French-Swiss. If the 3 German-Swiss were not killed because they belonged to a group, it was murder under ordinary law; but if they were killed as members of a group it was a case of genocide. How was it possible to determine whether it was a common crime or a crime under the terms of the Convention on Genocide?

63. The CHAIRMAN said that it was undoubtedly genocide if the 3 German-Swiss were killed because they belonged to a group. The question whether it was murder in the form of genocide or murder under ordinary law was for the judge to decide. All crimes raised the same problem for judges, even on the national level.

64. Mr. HUDSON said that reference had just been made to the United Nations Charter. Chapter VII of the Charter contained no provision relating to the violation of treaties. That Chapter dealt with action with respect to threats to the peace, breaches of the peace and acts of aggression. He added that there were very many other treaties which contained no provisions regarding violation.

65. The CHAIRMAN observed that every violation of a treaty was not a threat to the peace and security of mankind. But a violation such as that of the Treaty of Versailles committed by Hitler in occupying the left bank of the Rhine would, in his opinion, come under the provisions of Chapter VII of the United Nations Charter. If the Charter had then been in existence, the Security Council would have been able to intervene. Another example was the recent one of the invasion of Southern Korea. In that case there was violation of the undertaking establishing the line of demarcation along the 38th parallel. That violation was an offence against the peace and security of mankind. The United Nations had recognized it as such, and the United States of America had intervened in pursuance of a resolution adopted by the Security Council.

It seemed to him essential that some provision such as Crime No. VI should be incorporated in the draft Code before the Commission.

66. Mr. HSU remarked that all violations of multilateral treaties which endangered the peace and security of mankind were crimes. But he insisted that the matter took on quite a different aspect in the case of bilateral treaties, and in spite of all the explanations given he still wondered whether the principles of Crime No. VI could be applied to bilateral treaties. He therefore asked that the definition of that crime should be amended.

67. The CHAIRMAN pointed out to Mr. Hsu that for the time being the Commission was not concerned with the drafting of texts, but with principles to be inserted in the Code. He thought it necessary to say if the Commission did not retain Crime No. VI in its Code, it would surprise the world, which would not understand the reasons for that omission. Violations of treaties were extremely numerous. He recognized that there were limits which might be set with regard to violations of the military clauses of a treaty. It was true that it would be difficult to define them with all the requisite precision; but there would always be difficulties of that nature and if the Commission were going to reject article after article merely because of drafting difficulties, it would do better not to consider the preparation of a code. He asked the Commission to have confidence in the Rapporteur, who would certainly find a formula that took account of the views expressed during the discussion.

68. Mr. HSU supported the proposal to instruct the Rapporteur to re-examine his text.

69. The CHAIRMAN asked the Commission to decide whether it intended to retain Crime No. VI in the Code or not.

70. Mr. HUDSON thought that the discussion had not been sufficiently clear for directives to be given to the Rapporteur, who had heard extremely divergent opinions. He did not, however, think it necessary to take a vote. A vote always meant isolation and he, for instance, did not wish to be isolated from the other members of the Commission by a vote. He hoped that the Rapporteur would succeed in finding a formula that was satisfactory to all members.

71. The CHAIRMAN said that in asking the Commission to take a decision he had not intended to isolate Mr. Hudson. He might equally well say that if a vote were taken he himself would be in danger of being in the minority and consequently isolated. Therefore he

did not insist on a vote and he asked the Rapporteur whether the discussion had been sufficiently clear for him to reconsider the draft and reach conclusions taking account of the views expressed.

72. Mr. SPIROPOULOS replied that the discussion, though somewhat confused, would enable him to draft his report.

CRIME No. VII [7]

73. The CHAIRMAN thought that after that exchange of views the Commission could pass on to the examination of Crime No. VII: " The annexation of territories in violation of international law ".

74. Mr. HUDSON said that on reading the definition of Crime No. VII he had thought that it would give rise to great difficulties. First of all, he thought he must state that in his opinion the annexation of territories in violation of international law constituted a crime which could only be committed by a Government; but in addition, he wondered whether there were clear and easily applicable principles regarding the annexation of territories. Annexations varied very greatly between one case and another. Did the definition of Crime No. VII as at present drafted apply, for instance, to the case of a group of citizens of country B preparing, in country A, the annexation of that country to their own ? Were there any precise rules which could be applied to the case referred to under Crime No. VII ?

75. Mr. FRANÇOIS said that he felt the same doubts as Mr. Hudson. Up to the present there was no international rule excepting that which prohibited any premature annexation, i.e., any annexation made before the conclusion of a peace treaty as, for example, the annexation of the Transvaal. That rule was not sufficiently clear and precise for incorporation in the Code. There were no rules of international law prohibiting any annexation without the consent of the population. In his opinion it would be dangerous to include Crime No. VII in the Code.

76. Mr. BRIERLY thought that the wording of the text was too general and too vague. Would it apply, for instance, to the annexation of a part of Greenland to Norway ? At the time it had arisen, that case had been brought before the Permanent Court of International Justice, which had carefully examined it and declared that the annexation was contrary to the laws and agreements in force.[8]

No one, however, could say that the Norwegian authorities had committed a crime under international law.

77. Mr. YEPES said that he wished to make a general statement on the subject. First of all, he wished to recall that the United Nations Charter provided in Article 2, paragraph 4, that Members of the United Nations should refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations. That was a rule which invalidated the argument advanced by certain members of the Commission that no international rules existed.

77 a. But there were other rules. The principle of prohibiting any annexation of territories in violation of international law was a principle of inter-American law which had always been affirmed by the Pan-American Conferences since 1889 and which the American States adhered to in their mutual relations. That principle was one of the main pillars of Pan-Americanism. If the American States had succeeded in making America the continent of peace, that was largely due to the express condemnation of conquest of territories and to the non-recognition of territorial advantages acquired by force. The American States had always hoped to see that inter-American principle universally applied. He had therefore been pleased to see the principle included in the draft Code. But in its present form the text was inadequate. It did not cover annexations such as those made by certain modern States by means more subtle than force. He recalled the *Anschluss* of Austria to Germany, which had been formally condemned by the Permanent Court of International Justice (Advisory opinion on the Austro-German Customs Regime established by the Protocol of 19 March 1931).[9] Real annexations were continually taking place under cover of so-called customs unions or the establishment of puppet governments, whose mission was to obey the orders of a foreign Power. The technique of modern imperialist States had made great progress in devising methods of camouflaged annexation, which left a semblance of national sovereignty and territorial integrity to a small State, though constituring mere annexation in the full sense of that term.

77 b. To cover such cases he proposed the insertion of the words " direct or indirect " in the definition of Crime No. VII, which would then read as follows:

" The direct or indirect annexation of territories in violation of international law ".

78. Mr. ALFARO said that he doubted the accuracy of the recent statement to the effect that there was no rule prohibiting annexation. There were two kinds of territories: those which governed themselves and those which did not; for some of the latter the trusteeship system had been established under the United Nations Charter, it being understood that such territories would one day obtain their independence.

78 a. A very clear example of the view held in certain quarters with regard to non-self-governing territories was the attitude of the Union of South Africa towards South-West Africa. That was a case of disguised annexation. The General Assembly of the United Nations had affirmed that the era of annexations was past and that no annexation should be permitted in future except with the consent of the population. As early as 1889, the American Republics had adopted a resolution condemning all annexation and declaring null and void

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

[8] *Legal Status of Eastern Greenland,* 5 April 1933, Permanent Court of International Justice, Series A/B, Fascicle No. 53.

[9] *Customs Régime between Germany and Austria,* Advisory Opinion, Permanent Court of International Justice, Series A/B, Fascicle No. 41.

any cession of territory effected under the threat of war or the pressure of armed force. He thought that in view of the existing texts, the Commission should take the position that no annexation was permissible even if there was no direct use of force, and that any such annexation constituted a crime under international law, even if the definition of Crime No. VII had to be amended.

79. Mr. HSU was in favour of the principle of Crime No. VII and hoped that the Rapporteur would be able to clarify its terms.

80. Mr. SANDSTRÖM considered the formula used by the Rapporteur too vague, but he thought it difficult to find a more precise one. Such a formula might perhaps be found on the basis of the terms of articles 9 and 11 of the draft Declaration on Rights and Duties of States. It might be difficult to find an entirely satisfactory formula, but it was desirable that such a clause should be included in the Code to cover all cases of annexation of countries or territories, even without the use of force.

81. Mr. FRANÇOIS recalled that after the last war France, Belgium and the Netherlands had carried out frontier adjustments without consulting the populations. He wondered whether such adjustments would come under the term " annexation ".

82. Mr. YEPES did not think that the case mentioned by Mr. François constituted a violation of international law.

83. Mr. LIANG (Secretary to the Commission) thought that the definition itself might give rise to misunderstandings with regard to annexations that took place in time of peace. He thought it would be possible to remove that difficulty by establishing a close connexion between Crime No. VII and Crime No. I. If that connexion were established, the objections to the definition of Crime No. VII would be removed.

83 a. It might be suggested that in order to constitute a crime under international law an annexation must be carried out through the use of armed force, with a view to destroying the territorial integrity of another State. As he had pointed out at the 55th meeting (para. 68), Article 10 of the League of Nations Covenant had referred to such an attack against a State with a view to annexation of its territory. Annexations carried out in pursuance of the clauses of a peace treaty or frontier adjustments, would not in themselves constitute violations of the rules of international law. He therefore proposed that Crime No. VII should be so defined as clearly to show its connexion with Crime No. I.

84. Mr. HSU considered Mr. LIANG's proposal an excellent one; he suggested going even further and considering whether a connexion of that kind might not be established between Crime No. VII and Crimes Nos. II, III, IV and V. A territory could, indeed, be annexed without the use of force. Consequently it was not only a connexion with Crime No. I, which covered the use of armed force, that must be established.

85. Mr. AMADO thought that if a connexion was established between Crime No. VII and Crime No. I and if the use of force was the characteristic feature of Crime No. VII, then annexation by peaceful means would not be an offence against the peace and security of mankind. The question should be very carefully considered and the characteristics of annexation ascertained. They were not only the use of armed force, but also the use of other means. An annexation without the use of force was, in his opinion, as much an offence against the peace and security of mankind as an annexation undertaken by the use of force. Finally, he recalled that the possibilities of annexation without the use of force were extremely great, as examples in recent years had shown only too well.

86. Mr. el-KHOURY thought that annexations without the use of force were also violations of international law. As an example he recalled the events which had recently taken place in Azerbaijan, which was an integral part of Iran. In that province a movement had sprung up for annexation to the Soviet Union. The movement had been suppressed; but if Iran had not suppressed it, if Azerbaijan had been united with the Soviet Union, and if the latter had agreed to that union, would that disguised annexation, which had taken place without the use of force, have been considered as a crime under the terms of the Code ? Moreover, the Commission must consider whether to exclude cases of annexation without the use of force in which the populations were not consulted, and also cases in which the populations wished to be annexed to another territory. He recalled that in Macedonia the population was divided, one part desiring union with Yugoslavia and the other union with Bulgaria. Finally, in India, it could be seen that the governments of India and Pakistan had carried out annexations by government declaration and without consulting the populations. He wished the Commission to state clearly what it considered to be the essential elements of the crime, so that directives could be given to the Rapporteur.

87. Mr. LIANG (Secretary to the Commission) wished to supplement his previous remarks. When he had first spoken he had not wished to suggest that Crime No. I should be brought into line with Crime No. VII. He had merely wished to suggest that Crime No. VII should be maintained in its present form and a connexion established with Crime No. I. He seriously doubted whether an annexation without the use of force or without the threat of such use could be considered as a crime under international law. It was very difficult to stipulate the cases in which annexation constituted a threat to peace and security of mankind. It was true that in certain cases it might constitute a violation of the right of self-determination of peoples. He thought that Mr. Hsu's proposal also to establish a connexion between Crime No. VII and Crimes Nos. II to V went rather too far.

88. Mr. HSU thought that there was no essential difference between Mr. Liang's views and his own. He was convinced that the use of force and threats must be covered by the Code, but if the other means of annexation were also to be included, he did not believe it would be sufficient to establish a connexion only between Crime No. VII and Crime No. I. The instances mentioned by Mr. el-Khoury strengthened his con-

viction that even cases in which there was no use of force should be condemned.

89. Mr. SANDSTRÖM proposed the following text: " The annexation of territories by the threat or use of force for an aggressive purpose, or otherwise, in a manner incompatible with the right of a State to independence ".

90. Mr. YEPES recalled that he had also proposed an amendment (para 77 b, *supra*).

91. The CHAIRMAN thought that the situation was similar to that which the Commission had discussed in connexion with Crime No. VI. There was no doubt that certain annexations, with or without the use of force, were contrary to international law. He recalled the doctrine enunciated in 1932 by Mr. Stimson, the American Secretary of State, according to which any annexation by force was a violation of international law and such annexations should not be recognized. The difficulty was to determine whether or not there was an offence against the peace and security of mankind. He reminded the Commission that the principle of the right of self-determination of peoples was finding increasing acceptance in international law and was invoked by certain governments when they were about to violate it. That had been the case when Sudetenland had been annexed by Hitler. He thought it would be useful to insert the words " direct or indirect " in the definition of Crime No. VII, as proposed by Mr. Yepes. It was the duty of the Commission to state that there were cases in which annexation was a crime, whether it was carried out directly or indirectly or even in a disguised form. A decision must be taken; but in any case he thought it inadmissible for the Commission not to state that annexation was a crime. The Stimson doctrine did not make annexation a crime. The Commission should state that any annexation which was a threat to the peace and security of mankind was a crime under international law.

92. Mr. BRIERLY thought that the Commission was in general agreement on that point and that it was now only a question of drafting. Mr. Sandström's proposal should be taken into consideration by the Commission, which should ask the Rapporteur to take account of it and to prepare a new draft. The Rapporteur should also take account of Mr. Liang's proposal to establish a connexion between Crime No. VII and Crime No. I.

93. Mr. ALFARO approved of Mr. Brierly's proposal and the text submitted by Mr. Sandström. He merely wished to add the following words: " or against the will of the inhabitants of the territory ".

94. The CHAIRMAN did not think it necessary to take a vote. The Commission had aceepted the principle formulated in Mr. Sandström's text, as amended by Mr. Alfaro. It had also heard the proposal of Mr. Yepes. The Commission could rely on its Rapporteur to prepare a new draft.

95. Mr. SPIROPOULOS thought that the discussion had again been rather confused for the preparation of a new draft. He requested the appointment of a small sub-committee consisting of Mr. Hudson, Mr. Alfaro and himself. That would facilitate the preparation of a text reflecting all the views expressed, and which would be more easily acceptable by the Commission.

96. There being no objection, the CHAIRMAN declared the proposal adopted.

CRIME No. VIII [10]

97. The CHAIRMAN asked the Commission to turn to the consideration of Crime No. VIII. He thought that crime should also be examined in connexion with cultural genocide.

98. Mr. ALFARO said that the question of cultural genocide had been discussed at length by the Sixth Committee of the General Assembly and by the General Assembly itself. It had been decided that it was a very dangerous problem and that it was almost impossible to determine the conditions in which cultural genocide took place. Consequently, the two bodies had decided not to include cultural genocide in the text of the Convention.

99. The CHAIRMAN announced that the Commission would begin to consider that question at its next meeting.

*The meeting rose at 12.55 p.m.*

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

## 59th MEETING

*Monday, 3 July 1950, at 3 p.m.*

CONTENTS



*Chairman:* Mr. Georges SCELLE.

*Rapporteur:* Mr. Ricardo J. ALFARO.

*Present:*

*Members:* Mr. Gilberto AMADO, Mr. James J. BRIERLY, 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. VIII [1] (*continued*)

1. Mr. SPIROPOULOS had considered that genocide,

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