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Summary record of the 60th meeting

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

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60th MEETING

Tuesday, 4 July 1950, at 3 p.m.

CONTENTS

Chairman: Mr. Georges SCELLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L. 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. Ivan KERNO (Assistant Secretary-General for Legal Affairs); Mr. Yuan-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. IX

1. Mr. HUDSON considered that there was a logical case for the deletion of that defmition. The observance of the laws or customs of war was important after war had broken out but it made no contribution to the maintenance of peace and security.

2. Mr. BRIERLY, agreeing with that view, said that when the question had been discussed on the previous day he had understood Mr. Alfaro to suggest that to omit that definition would be to slur over the frightful character of the crimes in question. But the reason the Commission had not mentioned them was because it felt doubtful whether they should be included in the Code. If the Commission were drafting a general code, it would include such crimes, but he considered it inadvisable to include war crimes in a draft code of offences against the peace and security of mankind. Nevertheless, the Commission as a whole thought otherwise and he himself did not feel very strongly on the point, as it was chiefly a question of form.

2 a. When the draft was submitted to the General Assembly it would no doubt be accompanied by observations. If it were mentioned that certain members of the Commission had had misgivings because they considered it questionable whether, from a logical standpoint, such crimes should be placed among offences against peace, he would be satisfied.

3. Mr. HSU thought the reference to those crimes should be retained. Violations of the laws of war might ensue from a war of aggression or independently. In the former case they affected peace and security. If the North Korean forces violated the laws of war they should be punished for an offence against peace because such violation ensued from a war of aggression. A violation of the laws of war by the United Nations forces engaged in the Korean war would be a war crime, but not an offence against peace.

3 a. In his view, if genocide could at all times be regarded as an offence against peace and security, violations of the laws or customs of war were also offences against peace and security.

4. Mr. ALFARO thought that in defining crime No. IX Mr. Spiropoulos had had in mind the list of war crimes contained in the formulation of the Nürnberg Principles: "War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity." [1]

4 a. He thought the world and many jurists would be astonished not to find that list in the Commission's draft code. The effect produced would be disastrous. The Commission should concern itself not only with the peace, but also with the security of mankind—a problem which still existed when the peace had been broken. Assuming that an international armed force were used in execution of a mandate of the United Nations, such a force, intervening on legitimate grounds, had to observe the laws of war; otherwise it would be guilty of an offence against the security of mankind. The deletion of that list would be a grave mistake.

5. Mr. SPIROPOULOS drew the Commission's attention to the second sentence of paragraph 1 of the commentary on Crime No. IX (A/CN.4/25, para. 67). "In reality it does not affect the peace and security of mankind and, consequently, from a purely theoretical point of view, it should have no place in the draft code." In his report to President Truman, Judge Biddle had stated that he "felt that the time seemed opportune for advancing the proposal that the United Nations reaffirm the principles of the Nürnberg Charter in the context of a general codification of offences against the peace and security of mankind." The proposal submitted by the United States delegation had recommended that the General Assembly should direct "the Assembly Committee on the Codification of International Law... to treat as a matter of primary importance the formulation of the principles of the Charter of the Nürnberg Tribunal and of the Tribunal's judg-

[1] A/CN.4/22, Appendix.

ment in the context of a general codification of offences against the peace and security of mankind . . .".[2]

5 a. It was quite clear from the discussions on that proposal that the Nürnberg Principles should be inserted in the draft code, quite apart from whether they were related to offences against the peace and security of mankind or not. That was also the tenor of the last decision adopted by the General Assembly on the matter (resolution 177 (II)).

6. Mr. AMADO said that, whereas statesmen usually referred in broad general terms to the aspirations of their countries—a habit explained by their everyday activities—jurists concerned with the formulation of fixed principles had to work within narrower limits. So far as the crimes in question were concerned, the Commission had before it the arguments presented by the Rapporteur, who was a meticulous man and who stated that, from the theoretical point of view, Crime No. IX should have no place in the draft code. An examination of the question from a practical standpoint showed that further precision was impossible. When the Nürnberg Tribunal was trying to solve that problem, reference had been made to the dynamic and unstable nature of custom and of international law: " This law is not static, but by continual adaption follows the needs of a changing world. "[3]

6 a. The problem was how to fix custom. The principle involved was not that of *nullem crimen,* which was not a principle of Roman Law, despite its Latin name. He wondered what place could be found for such a definition in a code designed to safeguard peace and security. He could see no reason for running counter to all theory and practice by inserting those crimes in the code, and would therefore oppose their inclusion.

7. Mr. FRANÇOIS, supporting Mr. Alfaro's view, favoured a bread interpretation of the Commission's task in that respect. The Commission was in no way obliged to exclude war crimes. Item 21 of the list compiled by the " Commission on the Responsibility of the Authors of the War and the Enforcement of Penalties ", created in 1919, showed that it was often a case of the security of mankind: that item was " Destruction of merchant ships and passenger vessels without warning and without provision for the safety of passengers and crew ".[4] Whether all war crimes should be specified was another question. He himself thought that was inadvisable, but he favoured the insertion of definition No. IX in the draft code.

8. Mr. SANDSTRÖM also supported the retention of war crimes in the list given, since they were so closely linked with offences against peace that they should, on logical and practical grounds, be punished concurrently with them.

9. Mr. YEPES also supported the retention of the violation of the laws or customs of war in the list of crimes set forth in the draft code. Apart from the question of the mandate given by the General Assembly, it would be scandalous for the code not to mention those violations.

10. Mr. el-KHOURY pointed out that the laws of war bulked large in international law. A perusal of the list quoted in paragraph 69 of the report, of crimes committed in violation of the laws or customs of war showed them to be crimes which were very dangerous to the security of mankind. Hence the Commission could not omit them from the code which it was drafting.

11. The CHAIRMAN noted that most of the members of the Commission considered that crime No. IX should be retained in draft code, and he himself shared that view. To his surprise Mr. Brierly had for once given the Commission a lesson in logic. But logic was not everything in international affairs. An attempt had been made before the Peace Conference of 1907 to define the laws of war in order to prevent new wars. But much ground had been covered since then and the expression " laws of war " was out of date, because war itself had become a crime. The term should be the " laws governing the use of force ", and those were also applicable to an international police force. In the case of self-defence, the war in question being a defensive war, which was not a crime, the authority waging the war was not entitled to act as it chose. An international police force did not stand above all law. Otherwise the signing of the Geneva Conventions of 1949 would have been pointless.

11 a. Regulations applicable to an international police force were a guarantee of peace and security. The Commission, which had to discuss rules for safeguarding peace and security, must establish rules for the use of such a force. The crimes in question, which might be called violations of the laws or customs governing the normal and legitimate use of force, must be incorporated in the draft code, since they were committed by individuals representative of the United Nations as a whole. Having in mind legitimate warfare, which should be governed by certain rules a breach of which was a crime, he favoured the retention of definition No. IX.

12. Mr. HUDSON thought the discussion as to whether the Commission should retain that definition was concluded and suggested, so far as the actual text was concerned, that all violations of the laws of war need not be included in the draft code. Some violations were of minor importance and were left by the armed forces to the Courts Martial. The Geneva Conventions of 12 August 1949 corroborated the rapporteur's statement in paragraph 68 of the report that " serious difficulties arise with regard to the definition of this crime. (a) The *first* problem which has to be solved in this connexion is whether *every* violation of the laws or customs of war is to be considered as a crime under the code or whether only acts of a certain *gravity* should be classified as such ". The Commission might consider including in the definition only acts of a certain gravity, which was the procedure adopted in drafting the 1949 Conventions.

12 a. Furthermore, the formulation of the Nürnberg Principles referred only to the " killing of hostages ",

[2] *Ibid.,* para. 11.

[3] *Trial of the Major War Criminals,* Nürnberg, 1947, vol. I, p. 221.

[4] See A/CN.4/25, para. 69.

whereas he believed the Commission agreed that the expression used should be the " taking of hostages ".[5] He also proposed that the last part of the list contained in paragraph b of section B of the text of the Nürnberg Principles [6] be amended to include the destruction of historic monuments, by substituting for the words " or devastation " the phrase " or historic monuments or other acts of devastation (not justified by military necessity) ".

13. Mr. SPIROPOULOS explained that it was a question of method. There were two separate problems: (1) whether all violations of the laws of war or only violations of a certain gravity were international crimes, and (2) whether all violations of the laws of war which were crimes in international law should be enumerated, or only a general definition given together with a list of certain crimes. In his view every violation of the laws of war should be regarded as a crime in international law irrespective of the gravity of the infringement. The Nürnberg Tribunal's reference to violations of the laws or customs of war appeared to cover any law or custom of war. Of course the Commission might confine itself to specifying certain acts of particular gravity. As to who would assess the gravity, that would doubtless be a matter for the competent tribunal.

14. The CHAIRMAN observed that some violations of the laws of war were offences while others were crimes. It was not necessary for the code to lay down a scale of penalties.

15. Mr. SPIROPOULOS regarded every violation of the laws of war as a crime, though others might of course take a different view. The Commission, if it so desired, might refer to acts of a certain gravity; but in that case either such acts must be enumerated or it must be left to the judges to decide.

16. Mr. HUDSON pointed out that the text of the Nürnberg Principles contained many terms which called for an appraisal of the facts by the judges, for example the term " ill-treatment ". He referred the Commission to article 130 of the 1949 Convention concerning the treatment of prisoners of war and to article 147 of the Convention concerning the protection of civilians in time of war, which mentioned serious violations.

17. Mr. SANDSTRÖM agreed with Mr. Spiropoulos that all war crimes were crimes in international law. Mr. Hudson's suggestion could be taken up when the Commission came to examine the question of the competence of the courts. The International Court would deal only with serious crimes. He thought that all crimes should be included in the code but that no attempt should be made to define every violation. The best procedure was the one proposed by the French Government in paragraph (3) of its reply (A/CN.4/R.2): " With regard to war crimes, to attach penal sanctions to the provisions of international agreements regulating land, sea and air warfare and to undertake the unification of the various codes of military law ".

18. Supporting that view, Mr. FRANÇOIS said that the code must not be confined to serious violations since such a distinction would be impossible in practice. It should be realized that the Commission could not prepare a code of the laws of war without exceeding its competence. In the previous year it had examined the question and several objections had been tabled to a proposal that the Commission should examine the laws of war. Apart from the objections or principle raised, Mr. Brierly had then stated that the Commission was not competent to do so. In point of fact, consultations between experts would not suffice. In his view the question of war crimes should be dealt with at an *ad hoc* diplomatic conference. It was outside the province of the Red Cross and within the purview of The Hague Conferences.

18 a. Before the Red Cross examined the questions taken up in 1949, there had been consultations between the Governments of the Swiss Confederation and the Netherlands, which had agreed to define the tasks of the 1949 Conference and had shared the view that the laws of war, which were the subject of The Hague Convention of 1907, were outside the competence of the Red Cross and that the initiative in that particular field lay with the Netherlands Government.

18 b. He had received no instruction from his Government in that connexion; but if, after including those crimes in the draft code, the Commission drew attention to the advisability of convening a diplomatic conference, the Netherlands Government would doubtless consult with other governments on the matter. War crimes should, he considered, be mentioned in the code in order to meet certain objections.

19. Mr. HUDSON asked whether it was proposed that the text of definition No. IX should be retained.

20. Mr. FRANÇOIS replied that that definition might be retained or the Nürnberg text adopted. On the other hand, any modification of the Nürnberg text would involve many difficulties.

21. Mr. HUDSON understood that certain members of the Commission wished to incorporate the text of the Nürnberg Charter in the draft code; but he, for his part, thought that definition No. IX was sufficient. Nevertheless, he maintained his proposal that the word " serious " should be inserted before the word " violations " if the Commission decided to keep to the text of the report.

22. Mr. SPIROPOULOS observed that the problem had been described in paragraph 82 of his report, which contained the following passage:

> " In our opinion the codification of the rules of war constitutes *an undertaking per se* which cannot be entered upon *within the framework* of the code of offences against the peace and security of mankind. To embark on such a venture now will render the attainment of our present goal, namely, the drafting and adoption by the governments of such a code in the near future, illusory. What the Commission can do, in our opinion, is to adopt a general definition of the above crimes, leaving to the judge the task of

[5] See summary records of the 49th meeting, paras. 2 and 8 *et seq.*

[6] See in vol. 2, Report of the Commission, para. 118 (*b*) *War Crimes.*

investigating whether, in the light of the recent development of the laws of war, he is in the presence of 'war crimes'. However, we do not object to adding a list of violations of the rules of war to the general definition, provided, however, that this list does not exhaust the acts to be considered as 'war crimes'."

22 a. He was opposed to the inclusion of a list on the ground that the position with regard to certain crimes had evolved since the Nürnberg Charter was drawn up. While, for example, the Charter had referred only to the killing of hostages, the mere taking of hostages was prohibited under the latest Geneva Conventions. He therefore thought there should be no mention of any specific crime.

23. Mr. AMADO would have preferred to see no mention of war crimes in the draft code. If, however, Crime No. IX was approved by the Commission it must be included without a list, since certain crimes might be omitted from any list and such omissions would create an unfortunate impression. With regard to the addition of the adjective "serious", it was a principle in penal law that the assessment of degree in crime was a matter for the courts.

24. Mr. ALFARO said he realized that the main weakness of a list lay in the impossibility of enumerating all violations of the laws of war. But he thought it was bad technique to refer to a type of crime without trying to define it. Furthermore, the General Assembly had requested the Commission to indicate clearly the place to be accorded to the Nürnberg Principles in the draft code. If the Commission included the Nürnberg Principle concerning war crimes in the code, specific crimes could be mentioned. The danger entailed in a list was carefully avoided in the Charter by the use of the phrase: "Such violations shall include, but not be limited to...". The draft code should contain the general principle of Crime No. IX and the gist of the Nürnberg Principles as drafted by the Commission together with a statement that the list was not exhaustive. That would be an indication of the place accorded to the Nürnberg Principles in the code.

25. The CHAIRMAN thought the various views had been very clearly put. The Commission had to decide, first, whether Crime No. IX should be retained and, secondly, whether the formulation of the Nürnberg Principles should be adopted or whether the crime should merely be defined without the addition of a list. He himself thought that the method of including a list with a statement to the effect that it was not exhaustive should give complete satisfaction. The destruction of historic monuments appeared to be covered by the Nürnberg Principles, which would meet the wishes expressed by UNESCO.

26. Mr. SPIROPOULOS said that the Nürnberg Principles contained no reference to such destruction.

27. Mr. SANDSTRÖM thought it was covered by the words "plunder of public or private property".

28. The CHAIRMAN thought that was a minor question which could be examined later by the Commission.

The Commission decided by 7 votes to 4 not to add a list to the definition of Crime No. IX.

29. Mr. el-KHOURY said that his vote was intended to convey that the task of deciding which violations of the laws of war would be considered as crimes in international law should be left to the judge, but that the latter should be given a basis on which to come to a decision. He would like to ask those of his colleagues who had opposed the inclusion of a list in the definition of Crime No. IX what they understood by the laws of war.

29 a. The Nürnberg Tribunal had had as a guide the indications contained in the Charter. If those indications were excluded from the code, how was the judge to ascertain the laws of war? Would he be obliged to refer to the innumerable works on the subject? Paragraph 69 of the report contained a list of crimes. The Commission might discuss each of them in turn and decide whether it was a war crime, while regarding the list as enunciatory and not exhaustive. He would repeat that the judge should be given some guidance.

30. The CHAIRMAN, while deeply regretting with Mr. el-Khoury the deletion of the list, said that the Commission had made up its mind. The code adopted would be a mere skeleton code.

31. Mr. HUDSON requested a vote by the Commission on his proposal to insert the word "serious" before the word "violations" and observed that the 1949 Conventions all used the expression "serious infringements".

32. Mr. SANDSTRÖM, referring to Mr. Hudson's amendment, pointed out that the Geneva Conventions contained many provisions concerning the treatment of prisoners of war, etc., and, therefore, naturally distinguished between serious and less serious infringements. The distinction was not so important in the case of the draft code.

Mr. Hudson's proposal was rejected.

The Commission adopted the text of definition No. IX.

33. Mr. KERNO (Assistant Secretary-General for Legal Affairs), referring to the Commission's decision not to add a list to definition No. IX, said that the Commission had been requested under General Assembly resolution 177(II) to formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and to indicate the place to be accorded to the latter in the draft code. He did not think the Commission's decision conflicted with that of the General Assembly. The Nürnberg Principles represented the minimum, but not necessarily the maximum, to be contained in the code. By deciding to include violations of the laws of war in the code, the Commission had accorded a place to the crimes mentioned in article 6 (b) of the Nürnberg Charter. The Commission had deleted the list because it regarded it as imperfect and incomplete. The place accorded to Crime 6 (b) of the Charter in the code was under Crime No. IX.

34. The CHAIRMAN agreed with the Assistant Secretary-General's able interpretation, but he was

doubtful whether it expressed the sense of the Commission's decision.

35. Mr. ALFARO said he intended, when referring in his report to the place accorded in the code to the war crimes listed in the Nürnberg Principles, to state that they came under Crime No. IX. If the Commission disagreed he would like to be so informed.

35 a. Several members expressed their approval of the interpretation supplied by Mr. Kerno and supported by Mr. Alfaro.

36. The CHAIRMAN said the Commission would have to take a decision on the matter at the conclusion of its session when the general rapporteur submitted his report.

CRIME No. VIII (*resumed from the 59th meeting*)

Paragraph 2

37. Mr. HUDSON recalled that the Commission had implicitly decided on the previous day that paragraph 2 should be retained in the draft code if Crime No. IX was retained. He suggested, in view of the very thorough discussion of that text at the previous day's meeting, that the analysis of the arguments submitted should be left to the rapporteur and that the Commission, if it shared his opinion, should proceed to consider Crime No. X.

38. The CHAIRMAN asked whether the crime of genocide committed in time of peace should not be regarder as an offence against the peace and security of mankind.

39. Mr. SPIROPOULOS replied that all the other members of the Commission thought that it should not be so regarded.

40. The CHAIRMAN said that, if that were so, such a horrible violation of human and civic rights would not be regarded as jeopardizing peace.

41. Mr. SPIROPOULOS requested the Chairman to bear in mind that, so far as the punishment of offences against humanity was concerned, the provisions of the Convention on Genocide represented the maximum that could be expected at that stage. With regard to the other crimes the text of the Nürnberg Charter must be retained; otherwise the Commission's proposal would not be adopted.

42. The CHAIRMAN considered that the Commission was not concerned only with what the Sixth Committee and the General Assembly would accept. The Commission had to draft a code. Could it really produce a text to the effect that no matter how serious the violation of human rights, it could not endanger security and constitute an offence against the peace and security of mankind in the sense of the draft code? If a rational view were taken of the Commission's work that was a serious matter. He was aware of the viewpoint the Commission tended to favour but considered it regrettable.

43. Mr. SPIROPOULOS said that the General Assembly was not the only United Nations organ dealing with such questions as the protection of minorities, etc.

44. The CHAIRMAN agreed, but thought that the Commission's task was to enumerate all offences against the peace and security of mankind and not only those to be found in the draft code prepared by Mr. Spiropoulos. The Commission would have to consider the other crimes specified in the list prepared by Mr. Pella and in the proposals of Mr. Hsu, Mr. Sandström and Mr. Yepes. He saw no reason for restricting the list of offences, as proposed.

45. Mr. SPIROPOULOS pointed out that on the previous day the Commission had discussed the question whether the code should mention the destruction of political groups. Concepts of international law naturally evolved. If a commission had been instructed twenty years earlier to prepare a draft code of offences against the peace and security of mankind, it would never have thought of including a reference to political groups. Had it done so, it would have considered itself guilty of interference in the internal affairs of States. But the primary consideration to be borne in mind by the Commission was the likelihood or otherwise of its draft code being adopted by the General Assembly. It should, therefore, include in the draft code such provisions as the General Assembly would be prepared to accept and as States would be willing to accept later in the event of a convention being subsequently drawn up based on the draft code.

46. The CHAIRMAN pointed out that Mr. Kerno who had recently returned from The Hague could certainly confirm the desire in circles close to the International Court of Justice for progress in the matter of international law. The Commission had been asked to prepare a draft code of offences against the peace and security of mankind. In his view the draft should include all conceivable offences, even it that entailed innovations in international law. That was his position, although, of course, it might not be that of the Commission.

47. Mr. AMADO pointed out that that question was not under discussion and that it was the Chairman who had raised it again. He thought it would be very difficult to reach a solution satisfactory to all the members of the Commission, including the Chairman. Even among jurists there were wide divergencies of view with regard to the definition of offences against the peace and security of mankind. As was well known, the Nürnberg Tribunal had declared that acts coming under the definition of offences against humanty always affected the rights of other States. It was stated on page 72 of " The Charter and Judgment of the Nürnberg Tribunal ",[7] that " These acts may then be said to be of international concern and a justification is given for taking them out of the exclusive jurisdiction of the State without abandoning the principle that treatment of nationals is normally a matter of domestic jurisdiction." On the other hand, Mr. Kelsen had stated in a study on the Draft Declaration on Rights and Duties of States, published in the April 1950 issue of *The American Journal of International Law* that article 6 of the Draft Declaration had no foundation in general international law which, at all events left the treatment of the citizens of

[7] United Nations publication, Sales No.: 1949.V.7.

a State to the discretion of that State. Nor had article 6 any foundation in the Charter of the United Nations which did not impose on Member States the duty to treat all persons under their jurisdiction with respect for human rights and fundamental freedoms, without distinction as to race, sex, language or religion.

47 a. The CHAIRMAN took a diametrically opposite view to Mr. Kelsen. But, although the jurists disagreed, the Commission itself must agree on the acts it intended to include among offences against the peace and security of mankind. It must decide which acts were to come under that heading. He himself did not think that the assassination of Gandhi, for example, was an offence against the peace and security of mankind.

48. The CHAIRMAN said that the Commission seemed on the point of asserting that acts which were crimes in international law if committed in time of war were no longer crimes in international law if committed in time of peace. That struck him as completely irrational from the juridical standpoint and he requested the Commission to give some thought to the matter in order to reach a conclusion when the meeting was resumed.

49. Mr. BRIERLY said that the extent of the divergencies of opinion within the Commission should not be exaggerated. He thought it was essential to distinguish two categories of offences against mankind since some were a threat to the peace and security while others were not. Unless the Commission inserted some qualification the conclusion might be drawn that it considered all murders at all times as offences against peace and security. He thought the Chairman was inclined to go too far, but it should be possible to find a middle way. He proposed that a small drafting committee be set up to establish the distinction between crimes which were offences against the peace and security of mankind and those that were not. The drafting committee would assuredly be able to find a formula satisfactory to the Commission as a whole.

50. The CHAIRMAN asked Mr. Spiropoulos whether he thought he could prepare such a formula with the help of a small drafting committee.

51. Mr. SPIROPOULOS replied in the affirmative, provided the committee did not consist of more than three persons; for if there were more there would again be too many divergencies of view among the members.

52. The CHAIRMAN then requested the small drafting committee to meet and prepare a text to be examined by the Commission during the discussion of its report.

53. Mr. ALFARO drew the Commission's attention to the decision adopted at its previous meeting to replace paragraph 1 of Crime No. VIII by the single word " Genocide ". Crime No. VIII contained a paragraph 2 dealing with crimes not mentioned in the Genocide Convention, which meant that the same article referred to two types of crime: (1) " genocide ", in the sense in which the term was used in the Genocide Convention and (2) the crimes listed in article 6, paragraph (c) of the Nürnberg Charter. He thought it was inadvisable for two different types of crime to be covered by the same text.

54. The CHAIRMAN agreed that paragraph 1 of Crime No. VIII concerned genocide while paragraph 2 referred to other crimes.

55. Mr. ALFARO proposed that the two paragraphs should be separated and that Crime No. VIII should consist merely of the original paragraph 1, while paragraph 2 would become Crime No. IX. The original Crime No. IX would then become Crime No. X, and so on.

56. The CHAIRMAN pointed out that the characteristic feature of genocide was its aim, namely the destruction of a national, ethnic, racial or religious group. The provisions of paragraph 2 were of a much wider and more general character. For example, the Genocide Convention did not include crimes against political parties; but paragraph 2 mentioned persecutions on political grounds. If, for instance, the French Government were to intern all Communists in concentration camps, that would not represent a case of genocide under the Genocide Convention. It had struck him that paragraph 2 represented an extension of the conception of genocide. On three occasions the Security Council had decided that the persecution of its own nationals by a State was a crime because it was a threat to peace. The Spanish Civil War might be mentioned as an example, since in several ways it had represented a serious threat to international peace.

57. Mr. ALFARO urged that the two paragraphs under Crime No. VIII should be separated and set down as two different crimes.

58. Mr. BRIERLY and Mr. HUDSON supported that proposal.

59. Mr. HUDSON requested the deletion of the words " on political, racial or religious grounds " from the defimition of the new Crime No. IX (formerly paragraph 2 of Crime No. VIII). He thought that while the use of those words in the Genocide Convention was justified there was no need to repeat them in the code.

60. Mr. YEPES pointed out that the Genocide Convention made no mention of political groups, but only of national, ethnic, racial or religious groups.

61. Mr. HUDSON withdrew his proposal.

61 a. Mr. KERNO (Assistant Secretary-General for Legal Affairs) said that the two paragraphs of Crime No. VIII nevertheless contained certain common features and to divide them into two separate crimes would weaken that connexion. He disagreed with the Chairman's view that paragraph 2 referred to the rights of the individual. The rights referred to were those of the civil population.

62. Mr. HUDSON agreed with Mr. Kerno and said that the first sentence of paragraph 2 of Crime No. VIII contained the very important words " insofar as they are not covered by the foregoing paragraph ". If paragraph 2 were to form the subject of a new crime that phrase should be retained with the necessary formal changes.

63. Mr. AMADO said there was a difference of sub-

stance between the two paragraphs. " Genocide ", which was the subject of paragraph 1, might equally well be committed in time of peace as in time of war, whereas paragraph 2 covered acts or persecutions committed in execution of or in connexion with any offence against peace or any war crime. Persecution on political grounds, in particular, normally arose in connexion with a war.

64. Mr. SANDSTRÖM thought that persecutions of a political, racial or religious character were often committed without the intention of destroying national, ethnic, racial or religious groups.

65. Mr. SPIROPOULOS recalled his statement at the previous meeting that paragraph 2 under Crime No. VIII would doubtless give rise to a very involved discussion. He had placed paragraphs 1 and 2 under the same Crime No. VIII because there was a connexion between the crimes mentioned in each of those paragraphs. The Commission would note, from paragraphs 65-66 of his report, that he himself had been aware that the two paragraphs overlapped so far as certain acts were concerned. His purpose in including in the first sentence of paragraph 2 the words: " insofar as they are not covered by the foregoing paragraph " had been to obviate misunderstandings due to overlapping. Nevertheless there were crimes mentioned in paragraph 2 which were not covered by paragraph 1. He would repeat that he had drafted the text of Crime No. VIII in the form in which he had submitted it to the Commission for the sake of completeness. But he had no objection to the subdivision of Crime No. VIII into two crimes.

65 a. He was of opinion that if the Commission continued to discuss that point it would never complete its work and he therefore requested the Commission to leave it to the small drafting commitee to prepare a text with due regard to the views expressed by the majority during the discussion namely—that the two paragraphs of Crime No. VIII should be divided into two separate crimes.

66. The CHAIRMAN thought the Commission could safely leave the matter to the small committee, but pointed out that the text submitted to the Commission in the report would not be final, so that the Commission would have a further opportunity of discussing it when the report came before it and of amending it, if it so desired.

It was so agreed.

CRIME NO. X [8]

67. The CHAIRMAN then invited observations on Crime No. X, which need not, he thought, give rise to lengthy discussion, since all that it contained was a list of concepts in penal law.

68. Mr. AMADO said he had no particular objection to the list under Crime No. X, but asked the rapporteur whether he thought the right place had been found for it. In domestic penal codes the acts covered by Crime No. X were enumerated in a general section preceding the other provisions of the code. In the draft code before the Commission Crimes I-IX referred to the acts themselves and were then followed by the list of preparatory acts etc. under Crime No. X. Perhaps Mr. Spiropoulos had regarded the acts mentioned under Crime No. X as specific crimes, although he (Mr. Amado) could not believe that. He therefore suggested that Crime No. X be placed in the general section at the beginning of the draft code, which would be in accordance with the almost universal practice.

69. Mr. HUDSON seconded that proposal.

70. Mr. SPIROPOULOS said he had no objection to that proposal. His intention had been merely to follow the practice adopted in the Genocide Convention, in which conspiracy, incitement, attempt and complicity were placed after the list of acts of genocide proper. The Genocide Convention was the first penal code in international law and the draft code now before the Commission would be the second. He had adopted the order of the Genocide Convention for the sake of maintaining technical uniformity between the two texts. He wondered what was meant by the " general section " of the code, to which Mr. Amado had referred, and what provisions the Commission intended to include in it. In his view the only provisions it could contain were those under Crime No. X.

71. Mr. KERNO (Assistant Secretary-General for Legal Affairs) agreed with that view and said that after lengthy discussion in the Sixth Committee and by the General Assembly at its third session (1948) during the preparation of the Genocide Convention it had been decided to adopt the technique employed in the present case by the Rapporteur. The provisions of article III of the Genocide Convention, which the Rapporteur had introduced under Crime No. X, had also been discussed at great length.

72. Mr. SANDSTRÖM thought that the example of the Genocide Convention was somewhat inconclusive, since the Convention referred to a single crime, whereas the code covered a whole series of crimes. He would also point out that when formulating the Nürnberg Principles the Commission had changed their order, particularly with regard to the special provisions on complicity.

73. The CHAIRMAN observed that the question of technique was of minor importance.

74. Mr. HUDSON thought that, from the point of view of substance, the preparatory acts mentioned in paragraph (c) of Crime No. X should not apply to all the provisions of the code. While it was true that the paragraph had a direct bearing on Crime No. I, so far as genocide was concerned, the Convention had not a word to say on the subject of preparatory acts. In his view, the provisions of paragraphs (a), (b), (c), (d) and (e) of Crime No. X were not applicable to all of the crimes, I-IX, in the code.

75. Mr. SPIROPOULOS, supporting that view, had thought at first that it might be better to mention the acts listed in Crime No. X under each of the crimes in the code to which such acts might apply. But he had

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

abandoned the idea for the sake of the practical presentation of the code.

76. Mr. BRIERLY thought that paragraph (c) of Crime No. X went too far. If he himself, for example, wished to commit a crime at Lausanne, he would have to carry out certain preparatory acts, such as purchasing a railway ticket etc. No such act could be criminal so long as he had not committed the crime, that was to say, performed the punishable act.

77. The CHAIRMAN observed that a preparatory act could not be a crime unless followed by the act.

78. Mr. SPIROPOULOS recalled that during consideration of the Genocide Convention the Czechoslovak Government had urged that preparatory acts should be punished even where the act was not performed. Perhaps he had had that request in mind in including paragraph (c.) At any rate he was ready to accept its deletion.

79. Mr. KERNO (Assistant Secretary-General for Legal Affairs) pointed out that the reference to preparatory acts had been deleted when the Genocide Convention was being drafted. It was true that one delegation had requested the insertion of a provision on preparatory acts; but the proposal had not been accepted. If the Commission decided to insert such a provision in the code, it would thereby extend the scope of the crimes as defined in the Genocide Convention.

80. Mr. ALFARO recalled that when the Commission had discussed Crime No. I, he had raised the question of preparatory acts and said that the code should contain such a provision applicable to Crime No. I and also to all other crimes the preparation of which might presumably be regarded as an offence against international peace and security. It had been said that Article X concerned preparatory acts. In his view a specific provision on preparatory acts should be retained in the code, but with an indication of the crimes to which it would apply, including Crime No. I.

81. The CHAIRMAN thought that all members of the Commission agreed with Mr. Alfaro on that point.

81 a. Mr. HSU observed that the question of preparatory acts as a proof of aggression might be discussed under paragraph 5 of his proposal (see below, para. 107).

82. Mr. HUDSON moved that the Rapporteur should delete the words " and public " from paragraph (b) of Crime No. X, since incitement to commit a crime might be private as well as public.

83. Mr. KERNO (Assistant Secretary-General for Legal Affairs) said that the phrase " direct and public incitement " had also been discussed during the drafting of the Genocide Convention. A request had then been made for the deletion of the term " public "; but the General Assembly had decided to retain both terms, " direct " and " public ".

84. Mr. HUDSON did not regard the Commission as bound by decisions adopted previously by other organs.

85. Mr. BRIERLY, supporting that view, thought the term " direct " was quite sufficient.

86. Mr. SPIROPOULOS, disagreeing with the view expressed by Mr. Hudson and Mr. Brierly, said that in retaining the terms used in the Genocide Convention his aim had been to facilitate the adoption of the draft code by the General Assembly. To that end he had tried to respect the opinion of the majority, which had decided to include both terms in the Genocide Convention. Some governments had adopted a very definite attitude on the question and he thought that if the Commission wished to ensure the adoption of the draft code by the General Assembly it would be well advised to retain both terms.

87. Mr. BRIERLY thought the Commission was free to submit a text in whatever terms it thought fit to the General Assembly, which could always amend the text as it deemed necessary.

88. Mr. AMADO thought the term " public incitement " had its proper place in the Genocide Convention since, before an act of genocide was committed an atmosphere had to be created, for example throught the medium of the press, in order to obtain the approval of public opinion. But he did not think the term need be retained in the draft code, the phrase " direct incitement " being adequate to cover the crimes listed in the code.

The Commission decided to delete the words " and public " from paragraph (b) of Crime No. X.

89. The CHAIRMAN then invited the Commission's observations on Basis of Discussion No. 2.

BASIS OF DISCUSSION NO. 2 [9]

90. Mr. HUDSON pointed out that paragraph 2 of Basis of Discussion No. 2 represented a departure from the Nürnberg Principles, while paragraph 1 and Basis of Discussion No. 3 fell within the framework of the Nürnberg Principles as recently formulated by the Commission. He also suggested that the Rapporteur should re-draft paragraph 1 of Basis of Discussion No. 2 and Basis of Discussion No. 3 to bring them into line with the terms used by the Commission in the formulation of the Nürnberg Principles.

90 a. So far as paragraph 2 of Basis of Discussion No. 2 was concerned, it was expedient to include such provisions in the draft code and to link them with the provisions of paragraphs (a), (b), (d) and (e) of Crime No. X. He thought that should any of the persons referred to in paragraph 2 fail to take appropriate measures they would, in fact, be accomplices who should be punishable under international law.

91. Mr. YEPES thought it preferable not to consider Basis of Discussion No. 2 until the Commission had examined the list prepared by Mr. Pella [10] and the proposals submitted by Mr. Hsu,[11] Mr. Sandström [12] and himself [13] concerning the insertion of new crimes in the draft code.

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

[10] See A/CN.4/39, Part III.

[11] See para. 107, *infra.*

[12] See summary record of the 61st meeting, para. 21.

[13] *Ibid.*, para. 50.

92. The CHAIRMAN thought that the Commission might continue the examination of Basis of Discussion No. 2 and thereafter deal with the other proposals mentioned by Mr. Yepes.

93. Mr. SPIROPOULOS accepted Mr. Hudson's suggestion that Basis of Discussion No. 3 should be worded in accordance with the exact terms of the Nürnberg Principles as formulated by the Commission, although he considered the two texts substantially the same.

93 a. As regards paragraphs 2 of Basis of Discussion No. 2, his position was rather difficult. He had given much thought to the wording of that paragraph. The Commission had found that certain crimes might be committed solely by persons in an official position whereas others might also be committed by private individuals. The effect of that decision had been to modify the principle he had had in mind when drafting his text. Moreover, Mr. Hudson wished paragraph 2 of that Basis of Discussion to be linked with Crime No. X, so far as complicity was concerned, all of which made his position more and more difficult. With a view to finding a solution he requested the Commission to supply him with a text.

94. Mr. SANDSTRÖM failed to see how the omissions and negligence mentioned in paragraph 2 of Basis of Discussion No. 2 could be regarded as complicity. In his view, the failure of persons in an official position, whether civil or military, to take appropriate measures to prevent or repress punishable acts actually represented special ways of committing a criminal act, and that was not a mere act of complicity. He did not agree therefore that the Commission should link paragraph 2 of Basis of Discussion No. 2 with Crime No. X, which concerned complicity.

94 a. With regard to paragraph 1 of Basis of Discussion No. 2, he moved that it be more carefully worded to take account of the Commission's decision that certain acts would only be crimes in international law if committed by persons in an official position, while other acts would be crimes if committed by private individuals.

95. Mr. HUDSON seconded that proposal.

96. Mr. SPIROPOULOS also accepted Mr. Sandström's suggestions, agreeing that paragraph 1 should be reworded in the light of the Commission's decision limiting some of the crimes mentioned in the draft code to acts by persons in an official position.

97. Mr. HUDSON thought it should be made clear that the Commission did not have in mind the penal liability of the State, for example, by using, in paragraph 1, the expression " Any head of a State or Government ".

98. Mr. SPIROPOULOS agreed that that could be done, but said that all the elements of paragraph 1 must be preserved in order, in particular, to cover any cases arising in connexion with the crime of genocide and other crimes which might be committed by private individuals.

99. Mr. HUDSON felt confident that Mr. Spiropoulos would be able to find a formula which would take account of all the views expressed.

100. Mr. SANDSTRÖM thought that other questions remained to be settled by the Commission. Foremost among them was the need for a provision concerning persons who were not public officials but who acted as agents of a government. There were, for example, agents whose task it was to foment civil strife or create disturbances in a neighbouring State. Such agents should be mentioned in the code. They should also settle the question of the complicity of private individuals in crimes committed by rulers of States.

101. Mr. SPIROPOULOS thought that the code could hardly go into full details concerning agents. Complicity was an entirely different matter. It was an extremely serious problem and one which, he thought, should be left alone.

102. Mr. BRIERLY said that heads of States must be specifically mentioned, because it was the Commission's intention not to recognize their traditional immunity in the code. The immunity of heads of States had been a long established principle but it should no longer remain inviolate. In his view the code should contain a provision corresponding to Nürnberg Principle III. The code must give guidance in that matter.

103. Mr. SPIROPOULOS said that he had intentionally refrained from mentioning the subject in view of the discussions which had taken place in the Sixth Committee during consideration of the Genocide Convention. As a result of those very lively discussions the Sixth Committee had decided to omit all reference to the complicity of heads of States. The Swedish representative, among others, had stated that the immunity of the king's person was guaranteed by the Constitution. That objection had been met by using the expression " constitutionally responsible rulers " in article IV of the Convention.[14] In his view the decision in such a case must be left to the judges, although he agreed that it was a highly important problem.

104. Mr. BRIERLY thought that if the decision was left to the judges they would follow established custom and would not dare to run counter to tradition.

105. Mr. SANDSTRÖM, speaking in his private capacity as an expert in international law, considered that the draft code must contain a provision abolishing the immunity of heads of States in relation to crimes in international law. It was absolutely essential that that question should be settled.

106. Mr. HUDSON suggested that the task of redrafting Basis of Discussion Nos. 2 and 3 in the light of the various views expressed during the discussion should be left to the Rapporteur, and moved that the Commission proceed to examine Mr. Pella's list and the proposals submitted by Mr. Hsu, Mr. Sandström and Mr. Yepes.

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[14] See *Official Records of the General Assembly, Third Session, Sixth Committee*, 95th meeting, p. 343.

ADDITIONAL CRIMES PROPOSED BY MEMBERS OF THE COMMISSION FOR INCLUSION IN THE DRAFT CODE

Proposals submitted by Mr. Hsu. [15]

107. The CHAIRMAN, accepting that motion, invited observations on the proposals submitted by Mr. Hsu.

108. Mr. HSU suggested that the Commission should first examine proposals Nos. 1, 2 and 3 which referred to subversive activities. He had no objection to their incorporation in a single text, if that was the Commission's desire. At the same time he hoped that the draft code would take account of subversive activities as construed in his proposals.

109. Mr. HUDSON said he did not understand the meaning of the term " subversive ". If Mr. Hsu meant activities designed to overthrow a government, he thought they were already covered by the various crimes which had just been adopted by the Commission.

110. Mr. BRIERLY thought that those activities were identical with activities designed to provoke civil strife.

111. Mr. HSU disagreed, citing the example of the organization of fifth columns and their activities. None of the provisions so far adopted by the Commission covered those subversive activities and such provisions as might apply to them were not strict enough. The traditional terminology was inadequate to cover new acts.

112. Mr. YEPES, while agreeing with the principles stated in Mr. Hsu's proposals 1, 2 and 3, thought that the acts mentioned were already included under Crime No. III which concerned the fomenting of civil strife in another State. He was prepared to accept Mr. Hsu's proposals if Mr. Hsu could convince the Commission that they related to something new.

113. Mr. HSU replied that the Commission was continually using outmoded formulas, which should be modified and adapted to the new circumstances and new facts that had arisen. The draft code as it stood would be inadequate to punish the activities with which his proposals dealt.

114. The CHAIRMAN was convinced that there were new elements in Mr. Hsu's proposals. He agreed that fifth column activities were a new departure and might lead to civil strife, or even to war. For example, a military arsenal in France had had an overseer of German nationality, naturalized French. On the declaration of war that overseer had donned a German captain's uniform, stating that he was a German after all and it was his duty to behave as such. Such special cases, which Mr. Hsu seemed to have in mind, were frequent and might be connected with war preparations or subversive movements. Mr. François could undoubtedly supply many similar examples.

115. Mr. FRANÇOIS, confirming the Chairman's observation, agreed that reference should be made to such cases. But he pointed to the danger inherent in a principle which was not clearly expressed. For instance, what would be the position with regard to anti-Communist propaganda carried out by agents in Communist countries? Would such propaganda be subversive or not?

116. The CHAIRMAN moved the adjournment and proposed that the next meeting of the Commission should be devoted to the deletion from the draft code of all provisions which might be submitted in the form of a draft convention. He added that it was outside the Commission's competence to suggest the procedure to be adopted for putting the code into effect.

117. Mr. SPIROPOULOS thought that it lay with the Commission to define the tasks it had to perform. He himself had merely drawn up a list of crimes and bases of discussion. If the Commission's present intention was to prepare, not a draft convention, but only a list of crimes, he was inclined to believe that the General Assembly would be surprised to receive a text which it had itself to complete. A draft convention would be of value as the only practical means of applying the provisions contained in the draft code. At the same time the Commission, if it intended to prepare a draft convention, should confine itself to decisions of principle and not go into further details.

118. Mr. HUDSON thought it was no part of the Commission's functions to prepare a draft convention.

The meeting rose at 6.10 p.m.

[15] Additional crimes proposed by Mr. Hsu (A/CN.4/R.1):

" 1. The waging by a State of subversive propaganda against another State or the encouragement or toleration of such an activity within its territory.

2. The giving by a State of aid, moral, political and economic, to subversive elements in another State or the encouragement or toleration of such an activity within its territory.

3. The maintenance of subversive agents by a State in another State.

4. The application of coercion, psychological or economic, by a State against another State.

5. The planning by a State of an aggressive war against another State."

61st MEETING

Wednesday, 5 July 1950, at 10 a.m.

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