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Summary record of the 61st meeting

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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 uni-

form, 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.

61st MEETING

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

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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."

Chairman: Mr. Georges SCELLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

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

Secretariat: Mr. Ivan KERNO (Assistant Secretary-General in charge of the Legal Department); Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Letter from the Vice-President of the International Red Cross Committee

1. The CHAIRMAN stated that he had received a letter from Mr. Léopold Boissier, Vice-President of the International Red Cross Committee, to the effect that the members of the Commission would receive individual invitations for a reception to be held on Thursday, 13 July. Mr. Boissier hoped that this meeting would provide an opportunity for an entirely unofficial exchange of views on subjects of common interest to the Commission and the International Red Cross Committee and, in particular, for a fruitful discussion of ways and means of bringing the proposals studied by the Commission and the Geneva Conventions of 1949 into harmony. He would be glad to know in advance what subjects the Commission would like to discuss.

1 a. He proposed that to initiate this brief discussion, which should not take more than an hour, Mr. Spiropoulos should make a short statement on the Commission's method of work, after which the members of the International Red Cross Committee could ask questions.

2. Mr. HUDSON considered that the discussion should be kept on an unofficial basis. Mr. Huber wished to know what the members of the Commission thought. He might be told that the draft code of offences against the peace and security of mankind would not be finished until next year and that, for the final draft, the Commission would take into consideration the four Geneva Conventions and, in particular, the penalties provided for therein.¹

3. The CHAIRMAN agreed with this standpoint, and thought it probable that the members of the International Red Cross Committee would adopt the method of asking questions. In his opinion, it would not be possible to introduce the four Conventions into the draft code. The conversations would be of an unofficial and informal nature. Mr. Huber would probably preside over the discussion.

¹ See International Committee of the Red Cross, *The Geneva Conventions of August 12, 1949*, second revised edition, Geneva, 1950.

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 of the agenda) (A/CN.4/25) (continued)

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

(a) *Proposals by Mr. HSU (continued)*²

4. Mr. HSU remarked that, in his statement on aggression against Southern Korea, President Truman had used the word "subversion". "The attack on Korea," he said "makes it plain beyond all doubt that the Communists have passed beyond the use of subversion to conquer independent nations and will now use armed invasion and war." These words showed that subversion was a crime that could be committed independently of the use of armed forces or of war. The objection had been raised that it was redundant to include this new crime, as it had already been provided for by other definitions. He had, however, studied the list of crimes so far agreed upon, and had found that the addition of this crime was really necessary. What had been provided for so far in this connexion was inadequate, as it did not answer to the existing situation. It was true that the fomenting of civil strife and of terrorist activities was covered by the text he proposed, but this text had a far wider application than definitions Nos. III and IV. Conquest was not the direct object of civil war or of terrorist activities, but it was the object of subversive activities.

4 a. He was prepared to submit his proposal in the form of a single item to be worded as follows: "The use of subversion, including subversive propaganda, aid given to subversive elements, and maintenance of subversive agents in another State".

5. Mr. el-KHOURY suggested that as Mr. Hsu was pressing for the inclusion of subversive activities in the draft code, it should be left to the Drafting Committee to decide on the place in the code where these activities should appear.

6. Mr. HSU considered that this suggestion did not meet the case. Subversive activities were too important to be included amongst minor provisions. They should be dealt with in a principal clause to which other questions should be related.

7. Mr. el-KHOURY thought that subversive activities could be related to the fomenting of civil strife.

8. The CHAIRMAN asked whether the Commission wished to list these activities as a separate crime.

9. Mr. HUDSON wished to know whether Mr. Hsu could reply to the very pertinent question put to him by Mr. François on the preceding day.

10. Mr. FRANÇOIS repeated his question. He asked whether this item could not equally be applied to anti-Communist propaganda. If so, the Pope had rendered himself guilty of this crime, as he indulged in anti-Communist propaganda. His aim was the abolition of the Communist regime. That was subversive activity di-

² See summary record of the 60th meeting, footnote 15.

rected against the regime existing in some countries. He considered that the proposed text went too far.

11. Mr. HSU replied that that was a very important question. Obviously, propaganda did not in itself constitute the whole of the problem. But it might be said that in the same way as there was at times legitimate occasion for the use of force, there could be good propaganda. Therefore, if the Pope indulged in propaganda, it might be considered that it was good. A distinction must be made between good and subversive propaganda, and he did not see why the Holy See's propaganda should be regarded as subversive.

12. Mr. FRANÇOIS felt that the Pope's words might also be considered as offending against item 2, which spoke of "moral aid".

13. Mr. HSU did not attach particular importance to the word "moral". If the Pope's propaganda was good, it was not subversive.

14. The CHAIRMAN said that, if Mr. Hsu was agreeable, the Commission might adopt Mr. el-Khoury's suggestion and leave it to the Drafting Committee to decide what part of Mr. Hsu's proposal was of special importance and should therefore be included. In his opinion, it applied in particular to the practice of maintaining a fifth column.

15. Mr. HSU agreed to this suggestion on condition that the Drafting Committee gave careful consideration to this question which, in his opinion, was of the very greatest importance.

16. The CHAIRMAN thought that the acts to which the above items referred had already been dealt with in the draft Code. Item 4 also fell within the sphere of the use of force in the form of a blockade, which the Commission had decided not to include as a separate crime. Item 5 was covered by the terms of Crime No. I.

17. Mr. el-KHOURY considered that the proposals went too far. According to item 4, a blockade and the breaking off of economic relations constituted international crimes. He was unable to share this view.

18. Mr. HSU did not feel so strongly about this crime as about the others, but he pointed out that they did not involve the use of force. A country could be brought to heel solely by an interruption of economic relations. Small countries were always vulnerable to measures of coercion. Nevertheless, he would not press for the adoption of item 4.

19. Mr. SPIROPOULOS pointed out that as far as item 5 was concerned, the Commission had already decided to deal separately with the act of preparing for an aggressive war in the definition of Crime No. I.³

20. Mr. HSU agreed to the elimination of item 5.

(b) *Proposal by Mr. Sandström*⁴

21. Mr. SANDSTRÖM pointed out that a State might indulge in the destruction of property in the territory of another State for a political purpose. Obviously, the

value of the Code did not depend on the number of crimes listed therein. Did any of his colleagues think there were good reasons for inserting this provision in the draft?

22. The CHAIRMAN remarked that there was a connexion between Mr. Sandström's and Mr. Hsu's proposals.

23. Mr. SANDSTRÖM pointed out that Mr. Hsu's proposal was mainly concerned with propaganda. The acts to which his own proposal referred were perhaps related to those which Mr. Hsu had in mind, but they would have a physical effect.

24. The CHAIRMAN asked Mr. Sandström whether he desired the inclusion in the Code of a special article defining the crime which he had in mind.

25. Mr. SPIROPOULOS considered that, generally speaking, the crimes listed in the draft Code consisted of concrete acts as, for instance, invasion. Other actions, such as those to which Mr. Hsu's and Mr. Sandström's proposals referred, were less serious. It was a very delicate matter to decide whether they constituted crimes under international law. The question of propaganda had been discussed when the Convention on Genocide was being drawn up. At that time it was considered that the term was too vague. Sabotage or propaganda were not sufficiently concrete acts to be considered as constituting international crimes. Nevertheless, he would not oppose the proposal.

26. Mr. SANDSTRÖM felt that acts of sabotage were quite sufficiently concrete. However, the point at issue was whether they were sufficiently important to constitute international crimes. It was on this point that he wished to have his colleagues' opinions.

27. Mr. ALFARO considered that the Commission should approve Mr. Sandström's proposal. There could be no doubt that the citizens of certain countries were at the present time fanatically attached to an ideology, and were prepared to use all weapons against countries which did not adhere to it. He recalled the acts of sabotage committed by the Germans in the United States during the First World War. Sabotage and the activities of a fifth column were crimes of which the Commission should take account, even though the agents employed therein were natives. Sabotage differed from the crimes which had been dealt with so far, and should be included in the Code.

28. Mr. KERN (Assistant Secretary-General) was doubtful whether it were possible to define sabotage. In all penal codes, crimes were precisely defined. He was aware that it was not possible to achieve the same degree of precision in international law. But where should the line be drawn as regards sabotage? Must it be committed with a certain intention? Must it be bound up with preparations for war? If sabotage could be defined with a certain amount of precision, which he doubted, he thought that it could be brought into the Code.

29. Mr. el-KHOURY proposed to speak about sabotage in time of peace, as it was permissible for belligerents to practise it in time of war. He could not see any difference between sabotage in time of peace and

³ See *ibid.*, paras. 80 and 81.

⁴ Additional crime proposed by Mr. A. E. F. Sandström (A/CN.4/R.1): "Acts of sabotage carried out by one State in the territory of another State."

subversive activities. The agents could be nationals of the State in which they operated or of the country which sent them. Subversive activities could take many different forms and sabotage was one of them. It might be carried out for a number of reasons, and it was not perhaps necessary to list it as a separate crime.

30. Mr. SPIROPOULOS was glad to see that Mr. Kerns shared his apprehensions and doubts. The primary consideration was that the act visualized should constitute a violation of international law. He was doubtful whether a fifth column really constituted such a violation. What the Germans had done was, he thought, legitimate. If there were traitors in a country, it was for that country to punish them. For an act to constitute an international crime it had to be contrary to international law.

31. Mr. SANDSTRÖM had not been thinking of fifth column activities. On this point, he was in agreement with Mr. Spiropoulos. What he had been thinking about was foreign agents sent in by a foreign government.

32. The CHAIRMAN remarked that a fifth column was very often composed of agents sent by a foreign government.

33. Mr. SANDSTRÖM thought that they sometimes consisted of citizens of the country in which they were operating. The agents of foreign governments who committed acts of sabotage were engaged in concrete acts of property destruction with a political object. However, he would not press his proposal if it were not generally supported by the members of the Commission.

34. Mr. CORDOVA considered that there was a difference between sabotage and propaganda. In democratic countries, propaganda was free by virtue of the principle of freedom of thought and speech. Such countries should defend themselves by democratic means and not by repressing ideas. If a foreign government sent agents into a country to destroy property, with a view to hampering that country's defence, such acts did not come within the definition of fomenting civil strife. He thought they should be provided for in another definition.

35. Mr. BRIERLY was more or less of the same opinion. The word "sabotage" had a sufficiently precise meaning. If the government of a State sent agents in time of peace to carry out sabotage in another State, that was an international crime.

36. Mr. ALFARO suggested that belligerents might commit sabotage in a neutral country.

37. Mr. BRIERLY replied that as far as the neutral country was concerned, it was peacetime.

38. The CHAIRMAN said that in saying that such action might be regarded as in conformity with international law, Mr. Spiropoulos had removed any doubt that he might have had. The Commission would no doubt remember the accidents to two French aeroplanes near Bahrein Island. If there was sabotage, due to the fact that the aircraft were carrying plenipotentiaries of the Indo-Chinese Union, would this not be a typical international crime committed in time of peace?

39. Mr. SPIROPOULOS was still hesitant. Conflicts

between States would always continue in one shape or another. However, he was not opposed to the proposal in principle. If the Commission approved Mr. Sandström's proposal, it might be referred to the Drafting Committee.

40. The CHAIRMAN also felt that it was not impossible to define sabotage.

41. Mr. SPIROPOULOS was of the same opinion, but considered that Mr. Sandström's proposal went rather far. It would be difficult to discover who was responsible.

42. Mr. BRIERLY remarked that that was true in regard to all the crimes which they had listed.

43. The CHAIRMAN asked the Commission whether it wished to consider such action as constituting a separate crime. They could decide next year on the final wording. In his opinion, they were dealing with a separate crime to which the ideas put forward by Mr. Hsu could be related.

44. Mr. HUDSON considered that in this connexion the responsibility of the governments of the States carrying out sabotage should be made clear.

45. The CHAIRMAN did not think that was necessary. For instance the destruction of the "Maine", which had started the Spanish-American war in 1898, might have been the work of a group of private individuals.

46. Mr. HUDSON and Mr. BRIERLY were of the opinion that in that case, it would be a case of an ordinary crime, and Mr. SANDSTRÖM added that, in his definition, he had only visualized acts of sabotage directed by one State against another.

47. Mr. SPIROPOULOS, on the other hand, considered that the application of the Code to private individuals in this connexion would be in conformity with the rule that had been adopted.

48. Mr. BRIERLY quoted as an example the efforts of Communists in France to prevent the arrival of arms sent under the Marshall Plan. Such actions were the concern of French municipal law and did not constitute an international crime.

49. The CHAIRMAN said that such activities certainly did not constitute an international crime, but in certain circumstances they might develop into one. It might be that Viet Minh had sabotaged the French aircraft which had been lost a little time ago near Bahrein, and Viet Minh was to some extent a *de facto* government. Obviously, it was difficult to define such acts, but they were certainly not covered by the definitions of crimes hitherto accepted.

The Commission decided by 7 votes to nil, with 4 abstentions, to study the possibility of defining the crime of sabotage.

(c) *Proposal by Mr. Yepes*⁵

50. Mr. YEPES said that the definition he proposed should be read in conjunction with article 3 of the draft

⁵ Additional crime proposed by Mr. Yepes: "The unilateral and illegal intervention of a State or group of States in the internal or external affairs of another State or group of States."

Declaration on Rights and Duties of States drawn up by the Commission at its first session: "Every State has the duty to refrain from intervention in the internal or external affairs of any other State."

50 a. He had submitted his proposal because he considered that the problem of non-intervention was one of the most serious existing at the present time. If intervention by a State in the internal or external affairs of another State were outlawed, the international horizon would clear, and the state of apprehension in which the world was living would pass away. If article 3 were anything more than a purely theoretical statement, the logical conclusions should be drawn from it, and this great principle should be made one of the pillars of peace.

50 b. Article 9 of the Declaration read: "Every State has the duty to refrain from resorting to war as an instrument of international policy . . ." and the Commission had decided that any violation of that article should constitute an international crime subject to penalties. In the same way, it should rule that any violation of the principle of non-intervention was also an international crime susceptible to penalties. Legally speaking, unilateral intervention in the affairs of a State was no less a violation of international law than aggressive war itself. Very often, such intervention was one of the preliminaries of aggressive war, and in any case it sought to obtain, without a declaration of war, the results accruing from victory in the field.

50 c. As long as intervention was not outlawed in America, there was no peace in the New World, but when President Franklin Roosevelt's good-neighbour policy made it possible to proclaim the principle of non-intervention at the Seventh Conference of American States held at Montevideo in 1933, continental solidarity, good-neighbourly relations and reciprocal respect became the guiding principles of Pan-American policy. Peace had been solidly established in the Western Hemisphere because it rested on the principle of non-intervention. Could not what had been done in America on the continental scale be repeated on a world scale?

50 d. In his proposal, he had spoken of unilateral intervention to show that it was inspired by the self-interest of the intervening State. The word "illegal" showed that such action as that undertaken by the United States in Korea for the maintenance of international order did not come within the purview of the definition. In the preceding year, the Commission had adopted the draft Declaration on Rights and Duties of States, and had condemned intervention in the wider sense usually applied to the term. Unilateral and illegal intervention undoubtedly constituted a danger to peace and security. If there was anything—apart from aggressive war itself—which should be included amongst international crimes, it was certainly intervention in the sense which he had given it above.

50 e. The definition he had proposed was subject to modification, and he was prepared to accept such modification provided that it did not affect the basic principles of his proposal. Should the Commission not be prepared to accept his proposal immediately, it might

reserve it for further consideration between the two sessions and advise the General Assembly that it had the problem under consideration. The Assembly might be able to give the Commission valuable directives in the matter. He was convinced that at all events all the American countries, including the United States, would support his action, which conformed to one of their most cherished ideals. In order to dispel the existing anxiety, the level of international morality must be raised. The present time was similar to that between 1930 and 1939, when the peoples went in constant fear of awaking under bombardment. Care should be taken that history did not repeat itself.

51. Mr. FRANÇOIS had a great deal of sympathy with Mr. Yepes' idea, but was not sure whether it could be inserted in the Code as at present conceived. The fact that unilateral and illegal intervention could constitute a crime implied that legal intervention was permissible, but there was no definition as to when intervention was legal. It might be said that this was a matter for a judge's decision, but he could not accept that type of legislation. It represented a departure from the principle of *nullum crimen sine lege*; in other words, it would only be necessary to adopt a text to the effect that illegal acts were prohibited, and say that there was a law and that it was for the judge to interpret it. But the individual was entitled to know in advance what was prohibited. Mr. Yepes' definition was silent on that point, and he could not see his way to accept it in the absence of clarification on this matter.

52. Mr. YEPES replied that by the word "illegal" he had intended to convey that the definition in question was not applicable to action undertaken by a State on behalf of the international community. Collective or individual action on behalf of the community as a whole was legal. Intervention by a State on its own account was contrary to the principles of the Charter, and was therefore illegal.

53. Mr. BRIERLY shared Mr. François' doubts, and furthermore, he foresaw some difficulties as regards the word "intervention". The political meaning of the word was easily understandable, but it would be difficult to define it sufficiently precisely in a penal code. If intervention did not take one of the extreme forms specified in the definitions already adopted, he was not clear as to what other Mr. Yepes had in mind.

54. Mr. CORDOVA said that during the discussion on Crime No. I, he had pressed for the retention of the words "use of armed force" in violation of international law, as this expression included armed intervention.⁶ If this wording were retained, armed intervention would be included under Crime No. I. There would then only remain economic and political, that is to say unarmed, intervention. Any attempt to define such intervention would be faced with such a host of state activities that the whole of international relations would be involved. In America, political intervention had been defined very precisely in signed treaties, but it would be very difficult to introduce such a definition into a penal code. He felt that so far as intervention

⁶ See summary record of the 55th meeting, para. 42 b.

constituted a crime against international law, it was already included under Crime No. I.

55. Mr. YEPES admitted that the Commission had already defined its attitude as regards the invasion of the territory of a State by armed bands in Crime No. II, and as regards fomenting civil strife in another State in Crime No. III. His proposal related to another idea. Its purpose was that all intervention in the affairs of another State should be considered as an international crime under the draft Code under consideration. That idea was based on article 3 of the draft Declaration on Rights and Duties of States.

56. Mr. HUDSON remarked that Mr. Córdova's arguments had reminded him that the words "in violation of international law" had not been retained in the definition of Crime No. I.

57. Mr. CORDOVA considered that the new definition given by the Commission to Crime No. I contained the same elements as the original version.

58. The CHAIRMAN also considered that the original concept had been maintained and that all that had been done was to modify the wording, without in any way altering the scope of Crime No. I.

59. Mr. LIANG (Secretary to the Commission) read the definition given by the Commission to Crime No. I, which was as follows: "The use of armed force for purposes other than individual or collective self-defence or the carrying out of a mandate of the United Nations".

60. Mr. SANDSTRÖM was of the opinion that the modification made in the definition of the crime strengthened Mr. Córdova's argument.

61. The CHAIRMAN was of the same opinion.

62. Mr. ALFARO was under the impression that the Commission had decided to insert the words "by one State against another State" in the text of Crime No. I. These words had not been included in the text read out by Mr. Liang.

63. The CHAIRMAN and Mr. LIANG also thought that these words had been included in the text.

64. The CHAIRMAN thought that Mr. Yepes' idea was to include in the text a provision against any spontaneous intervention, carried out without having been approved or ordered by the Security Council, for instance. There had been many instances of such intervention during the last few years.

65. Mr. HUDSON referred to article 3 of the draft Declaration on Rights and Duties of States, according to which "every State has the duty to refrain from intervention in the internal or external affairs of any other State". Mr. Yepes' text was almost identical with that of article 3, and he felt he should mention the opinion expressed by Mr. Hans Kelsen on that article.

"Intervention in the internal or external affairs of another State constitutes a violation of the independence of that State. If article 3 is to be interpreted in conformity with existing general international law, 'intervention' means dictatorial intervention, that is, intervention by the threat or use of force. Hence, the

duty formulated in article 3 is covered by the duty laid down in article 9 to refrain from the threat or use of force against the political independence of another State, and article 3 is redundant."⁷

66. Mr. SPIROPOULOS drew attention to the fact that the problem of intervention had been discussed at length by the General Assembly in the preceding year, in connexion with a statement by the Yugoslav representative.⁸ As a result of that discussion, he had considered that it would not be wise to lay stress on acts of intervention in his report, particularly as "intervention" as a rule of conduct did not seem to have any meaning from the point of view of international law. It was true that the word was to be found in a very large number of international treaties, but he had considered it desirable to refrain from mentioning intervention also because the definition of the word was extremely difficult. There were cases where intervention was prohibited. Such cases were already covered by the draft Code which the Commission was examining. Other cases were not prohibited. Moreover, how was it possible to qualify or define the term "intervention"? Was it to include cases of economic or psychological pressure? According to Mr. Yepes, such interventions were crimes. In his opinion, they were not. It appeared to him to be extremely difficult to include such forms of intervention in a draft Code which was concerned with definite acts.

67. Mr. CORDOVA proposed that the Rapporteur should give due consideration to the discussions which had just taken place as well as to the fact that certain types of intervention were already covered in the crimes adopted by the Commission.

68. The CHAIRMAN felt that it was extremely difficult to define cases where intervention was permissible and those where it was not. If an intervention constituted a threat, it was prohibited by the United Nations Charter, but if it did not, it was very difficult to say if and in what circumstances it was a crime under international law.

68 a. He suggested that the substance of Mr. Yepes' proposal be inserted in the report, and that the close connexion between this proposal and article 3 of the draft Declaration on Rights and Duties of States be emphasized.

69. Mr. YEPES pointed out that in the preceding year the Commission had decided that the question of intervention should be included in the draft Code. The Commission now seemed to have changed its mind. Its attitude was also in contradiction with the decision taken in the preceding year condemning all intervention without any qualification whatsoever.⁹

70. The CHAIRMAN asked the Commission whether it wished special mention to be made of non-military intervention in the draft Code.

⁷ In the *American Journal of International Law*, vol. 44 (1950) p. 268.

⁸ See *Official Records of the General Assembly, Fourth Session, Sixth Committee*, 171st meeting, para. 44, etc.

⁹ See *Yearbook of the International Law Commission, 1949, Part I*, 19th meeting.

On being put to the vote, the proposal was rejected by 4 votes to 1, with 6 abstentions.

71. Mr. YEPES insisted that his statement on the change in the Commission's attitude be mentioned in the summary records.

72. The CHAIRMAN ruled that this should be done. The Commission was certainly agreed that any intervention in violation of the Charter was illegal, but such violation did not always constitute a crime against international law.

73. Mr. el-KHOURY explained that he had abstained from voting because he did not understand what sort of intervention was visualized in Mr. Yepes' proposal. The Charter forbade any intervention in matters which fell essentially within the national competence of a State, but the interventions apparently contemplated by Mr. Yepes had not been defined, and it was therefore impossible to say to what extent they might constitute a crime under international law. It was for that reason that he had abstained from voting.

74. The CHAIRMAN was also of the opinion that it was very difficult to stigmatize all types of intervention as crimes, although they were always regrettable. Mr. Yepes' proposal had been drawn up in very general terms, and he also considered it necessary to abstain.

75. Mr. BRIERLY said he had voted against Mr. Yepes' proposal because of the difficulty of arriving at a precise definition.

76. Mr. SANDSTRÖM gave the same explanation of his vote.

77. Mr. ALFARO also wished to explain his vote. He too had abstained because of the vague terms in which the proposal had been drawn up. He had recognized that it would be extremely difficult to draw the line between interventions which constituted crimes and those which did not. Should the use or absence of armed forces or threats for the dividing line, interventions constituting a crime were already covered by Crime No. I, but in the absence of any indication as to where the line was to be drawn, he had abstained from voting.

78. Mr. CÓRDOVA said that his abstention was based on the arguments which he had advanced when speaking of Mr. Yepes' proposal (para. 54 above).

79. Mr. YEPES said that, when submitting his proposal, he had been quite aware of all the difficulties which it would entail, in particular as regards a definition of the word "intervention". He had not expected the Commission to take a definite decision but had simply asked it to consider his proposal, if not that year, at least at the next session. He regretted that the Commission had not thought fit to accede to that request.

80. According to the Chairman that was not so. The Commission had refused to insert the concept of intervention in its draft code, but it had not refused to examine Mr. Yepes' proposal at a later stage of its deliberations. The abstentions did not by any means represent an adverse view; they simply denoted hesitation on the part of some members of the Commission as to

the inclusion of the proposal in the draft code of offences against the peace and security of mankind.

LIST OF CRIMES PROPOSED IN THE REPLIES FROM GOVERNMENTS FOR INCLUSION IN THE DRAFT CODE

81. The CHAIRMAN proposed that the Commission examine the replies from governments in respect to the crimes they suggested for inclusion in the draft code. He believed that Mr. Hudson had studied this document, and asked him to express his views on the subject.

*France*¹⁰

82. Mr. HUDSON said that the proposal made in item 2 was already covered by the draft code under Crime No. I. Item 3 was covered by Crime IX, "Violations of the laws or customs of war". Item 4 contained a very far-reaching proposal—namely, to punish as a crime against humanity any extermination of human groups or individuals for reasons of nationality, race, religion, membership of a political or social category, etc. Such protection for civilians was provided for by the Red Cross Conventions adopted in 1949 and the draft code also covered the actions mentioned in item 4.

*Poland*¹¹

82 a. Mr. HUDSON said that the Polish Government was of the opinion that one of the essential aims of the future code should be the prevention and suppression not only of incitement to war, or the perpetration of other offences against the peace and security of mankind contained in the future code, but also of the spreading of nationalistic, racial or religious hatred. He did not know whether the Commission would examine this point with a view to defining crimes for insertion in its draft code. The Polish Government also asked that the future code should prohibit the use of weapons of mass destruction and the fomenting of chauvinistic tendencies. The first part of this proposal was obviously directed against the use of the atomic weapon. The second part was in line with Mr. Hsu's proposal.

*United States of America*¹²

82 b. Mr. HUDSON said that the Government of the United States of America asked for the inclusion of the crimes of genocide and piracy in the draft code. The crime of genocide was already included in the draft code, but that of piracy was not. According to modern legal conceptions, piracy was no longer considered as an international crime, but as one coming within the purview of ordinary law. The Commission would have to decide whether it intended to look on piracy as a crime against peace and security.

83. The CHAIRMAN asked the Commission whether it wished to consider piracy as an international crime and insert it in the draft code. There had been a time when piracy was a crime against the State and an international menace, but it was certainly so no longer.

¹⁰ See A/CN.4/19, Part II.

¹¹ *Ibid.*

¹² *Ibid.*

84. Mr. HUDSON suggested that the Commission should not concern itself with the question of piracy. In his opinion, no useful purpose would be served by discussing it.

85. Mr. ALFARO considered that piracy was a crime against the security of mankind even if it were not a crime against peace. The pirate was an enemy of mankind.

86. Mr. HUDSON replied that cases of piracy were now very rare, and that he saw no reason for listing it as a separate crime within the framework of the draft code. The Commission might consider it when taking up the study of a general international penal code.

87. Mr. CÓRDOVA considered that there was no reason to go into the question. The Commission's task was to consider crimes of an international character, but not those committed by individuals.

88. The CHAIRMAN said that as a matter of fact the draft code would include a few crimes which could be committed by individuals. He was, however, of the opinion that piracy was a crime against ordinary law and not against international law.

89. Mr. KERNO (Assistant Secretary-General) agreed that the question should not be taken up at that stage, as the Commission was now dealing with a code covering crimes against peace and the security of mankind. Later, however, when discussing a general code of international crime, it might consider whether piracy should be included therein.

90. Mr. HSU pointed out that the Polish Government's reply raised the question of the use of weapons of mass destruction. It was not his intention to support the Polish Government's proposal as formulated in its reply, but he felt that a distinction should be made between weapons of mass destruction and mass destruction itself. Such destruction should be banned, but not the arms by means of which it could be brought about, as arms could also be used for permissible ends. All depended on the purpose of those employing such weapons.

91. Mr. BRIERLY said that the use of such weapons had not hitherto been prohibited by international law. This question had for years been the object of study and very delicate discussions in the United Nations. He felt that the Commission should not take up this question at a time when the United Nations had temporarily suspended its further discussion.

92. Mr. HSU was aware that the use of such weapons properly so called was under discussion at the present time, but the Polish Government had spoken of a method of mass destruction, which was another matter. He saw no reason why mass destruction should not be prohibited by international law. He felt that whilst the launching of bombs for mass destruction on warships and purely military objectives was admissible, it was not so as regards the launching of such bombs on large centres of population or on civil buildings which would result in the mass destruction of a large part of the population. The Commission could not simply by-pass this question and ignore these factors. Its duty was to

lay down principles, and amongst such principles, it should provide for the prohibition of all mass destruction in so far as such destruction was not already covered by the crimes it had included in its draft code. Why should not the International Law Commission make known its standpoint on this question? The General Assembly might not agree with it, but the matter would at all events have been put before it.

93. Mr. SPIROPOULOS was afraid that the Commission might be going too far. In following Mr. Hsu's suggestion, it would in any case be encroaching on the sphere of the Red Cross Conventions concerning the protection of the civilian population. He feared that all those discussions might be a waste of time.

94. Mr. CÓRDOVA expressed the opinion that the question was not yet ripe for discussion. The Commission itself was not yet in a position to have a clear idea of what was involved in the use of weapons of mass destruction. Furthermore, the problem seemed to him to be rather of a political nature, and it was not for the Commission to say that the use of such and such a weapon was a crime. It would be overstepping the bounds set for its work if, in trying to codify crimes, it impinged on questions which were at present the subject of difficult and delicate political discussions. He proposed that study of the question be deferred until the following year.

95. Mr. SANDSTRÖM drew attention to the fact that the Commission had decided not to enter into any examination of the question of the laws of war, but the use of weapons for mass destruction came within this field. He suggested that the discussion on this question should be closed.

96. The CHAIRMAN asked the Commission to continue the study of the replies by governments in regard to further crimes for inclusion in the draft code.

*Netherlands*¹³

97. Mr. HUDSON said that the proposal contained in item (1) was already covered by the draft code. The same applied to the proposal under item (2). In regard to item (3), he had to draw attention to the first sentence reading: "The following acts committed on the territory of a State and directed against the interests of another State". He wondered whether the acts referred to in sub-sections (a), (b) and (c) were not already covered by the code. He thought that he might say that this was so and that there was therefore no need for further examination of the proposals under (a), (b) and (c). The acts referred to in item (4) had already been examined. The acts referred to in item (5) broke fresh ground so far as the draft code was concerned. They were, however, partly covered by the 1937 Convention on Terrorism. It would be well for the Commission to defer consideration of this item until a later stage of its deliberations.

98. Mr. BRIERLY agreed. He thought that the Commission should discuss those matters when considering the drawing up of a general international code.

¹³ See A/CN.4/19/Add.1.

99. Mr. HUDSON said that item (6) dealt with the manufacture and circulation of counterfeit currency.

100. The CHAIRMAN did not consider that the Commission should deal with that matter. It was true that the issue of counterfeit money might lead to trouble and a sense of insecurity, which might constitute a threat to peace, but the time was not opportune to consider the question.

101. Mr. HUDSON and Mr. SPIROPOULOS expressed agreement with the Chairman's statement.

102. Mr. HUDSON said that the acts described under item (7) were covered. The acts referred to in item (8)—namely, "the diffusion in bad faith of evidently false publications likely to endanger relations with another State", had not been considered by the Commission.

103. Mr. FRANÇOIS pointed out that this referred to a special type of subversive activities. They were in part covered by the International Convention concerning the use of Broadcasting in the cause of Peace signed at Geneva on 23 September 1936.

104. Mr. HUDSON was of the opinion that item (9) on insults to another State constituted a new subject, but he was not sure what sort of insults the Netherlands Government had in mind. The acts referred to in item (10) were covered by the draft code. The acts referred to in item (11) were covered by the draft code and by the Convention on Genocide. In regard to item (12), the terminology employed by the Netherlands Government was rather more general than the Commission had adopted in its draft code (Crime No. VIII, paragraph 2), in respect of the same sort of action. The same was true as regards item (13). Item (14), on the diffusion in bad faith of evidently false publications about a national, ethnical, racial, political or religious group as such, was something new, but it was related to the crime of genocide.

105. The CHAIRMAN said that the case referred to in item (14) was not a matter for international regulations and there was therefore no need to consider it.

106. Mr. HUDSON said that the same applied to the acts referred to in item (15). Item (16) was covered by Crime No. X. The cases referred to in item (17) were related to Mr. Hsu's proposal. The cases mentioned in sub-sections (a) and (b) were covered by Crime No. X, paragraph (b) (incitement).

107. The CHAIRMAN asked Mr. François whether he wished to provide any supplementary information concerning the list drawn up by his government.

108. Mr. FRANÇOIS only wished to say that his government had drawn up its list on the assumption that the code would be more comprehensive than the Commission had now decided should be the case. He added that some of the crimes contained in the list were already covered by the draft code and that others would be included in the general draft code which the Commission would be called upon to consider. He simply wished to draw the Commission's attention to item (4), which read as follows:

4. The following acts if they should endanger the interests of another State:

- (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.

108 a. He wondered whether these acts did not constitute a crime which should be included in the category of crimes against the peace and security of mankind.

109. The CHAIRMAN asked the Commission whether it wished to consider the actions referred to in item (4), sub-sections (a) and (b) as constituting international crimes for inclusion in the draft code, or whether it was satisfied with the protection already provided by the Special Convention of 1925.¹⁴

110. Mr. ALFARO considered that if the acts referred to in item (4) were not covered by other provisions of the draft code they should be considered now.

111. Mr. HUDSON noted that the Netherlands proposal left the national legislation free to deal with the question. He considered that the Commission should also take the view that such matters fell within the competence of States. He recalled that he had formerly examined this question at some length with the Secretary-General of the League of Nations, and that some provisions in this regard had been included in the Convention of 1925, but that convention had not had much success.

112. Mr. AMADO thought that the members of the Commission would not wish to embark on an examination of this question. Furthermore, he was of the opinion that the Commission had reached the limit of the provisions which could be included in its draft code, and it seemed to him a waste of time to indulge in the involved discussions which would be inevitable if the Commission were to consider the acts described in item (4) of the Netherlands proposal. Item (4) spoke of "the interests of another State", but the Commission was not called upon to concern itself with the interests of States. There again discussion was liable to lead to serious confusion in the minds of the members of the Commission. He agreed that they should try to solve problems which might endanger the security of mankind, but it did not seem to him possible to go into all the details, nor, in particular, to determine whether such and such a problem was likely to prejudice the interests of a State. They should close the discussion and proceed with the examination of Mr. Spiropoulos' report.

113. Mr. SPIROPOULOS had nothing to add to Mr. Amado's remarks. He merely wished to emphasize that the text of item (4) had nothing whatever to do with the draft code. The Commission had not met to define the

¹⁴ Geneva Convention of 17 June 1925 for the control of the international trade in arms, ammunition and implements of war.

interests of States, but to draw up a code of crimes against the peace and security of mankind. For purposes of the draft code the Commission had hitherto always considered facts even where genocide was concerned, and it was now suddenly proposed to introduce a subjective element, that of the interests of a State. If the Commission accepted such a suggestion, it would be straying from its real work. Consequently he seconded Mr. Amado's proposal that the discussion on this point should be closed.

114. The CHAIRMAN maintained that it was the Commission's duty to examine the replies sent in by governments at its express request. Item (4) was not only concerned with the interests of such and such a State, but was of great importance from the point of view of peace. The manufacture of and trade in arms was an industry particularly harmful to peace. The transfer, sale or distribution of weapons, etc. and their export might in certain circumstances constitute the crime of fomenting war. However, he was of the opinion that consideration of the acts visualised in item (4) should be postponed and taken up later with a view to their insertion in the general code which the Commission would be called upon to draw up.

115. Mr. FRANÇOIS was in agreement with the Chairman's suggestion, but he pointed out that the Commission had requested governments to submit their views and suggestions and that there had been very little response. The replies which had been sent in might therefore be given somewhat greater consideration. From the point of view of future replies, it would not be encouraging if they did not take the trouble to give due consideration to those they had received.

116. Mr. AMADO said that he had had no intention of minimizing the importance of the Netherlands Government's reply. He merely wished to avoid an indefinite prolongation of the discussion, and specifically a discussion of the obvious. The members of the Commission all knew what was meant by the manufacture of counterfeit currency, the assassination of the Head of a State, or of his wife, etc. That was what he called the obvious. He trusted that the Commission would not misunderstand his intentions.

117. Mr. SPIROPOULOS was sorry that the replies of governments had not reached him in time to enable him to take them into account in drawing up his report.

118. The CHAIRMAN called upon the Commission to continue the examination of the replies of governments.

*Pakistan*¹⁵

119. Mr. HUDSON said that the reply of the Government of Pakistan suggesting that the taking of hostages should be included amongst the crimes listed in the draft code was something new. However, the Commission had already discussed that question. Another new idea suggested by the Government of Pakistan concerned the overthrow of a foreign government by internal upheaval. There again, there was a certain similarity

with one of Mr. Hsu's proposals which had already been discussed by the Commission. In regard to the definition of the word "war" proposed by the Government of Pakistan, he considered that the Commission had already settled this question in connexion with Crime No. I.

LIST OF THE INTERNATIONAL CRIMES PROPOSED BY MR. PELLA IN HIS MEMORANDUM¹⁶

120. Mr. SPIROPOULOS said that, during his stay in the United States in the preceding year, he had seen Mr. Pella who had told him that he would send him the list. However, he had only received a part of it. It

¹⁶ Doc. A/CN.4/R.3, which reads as follows:

LIST OF THE INTERNATIONAL CRIMES PROPOSED BY MR. PELLA IN HIS MEMORANDUM (A/CN.4/39)

I

The unlawful and direct use of force by one State against another State

1. The invasion of the territory of a State by the armed forces of another State.
2. Attack by the land, sea or air forces of a State on the territory, ships or aircraft of another State.
3. Attack by a State on the territory of another State by means of weapons already on the territory of the latter State.
4. The establishment by a State of a naval blockade of the coasts or ports of another State.
5. Declaration of war.

II

Threat of unlawful use of force and preparation for such use

1. The conclusion of treaties of an aggressive character or any arrangement to ensure the co-operation of one State with another State in the eventuality of the latter committing an aggression.
2. Threat of resort to force.
3. Mobilisation carried out with a view to intimidation or in preparation for an act of international aggression.
4. War propaganda.

III

The furnishing of direct or indirect assistance to an aggressor State

1. The furnishing of assistance to an aggressor State.
2. Refusal to lend assistance to the United Nations when the latter takes action for the maintenance of international peace and security.

IV

Failure to submit a dispute to the competent organs of the United Nations in the cases provided for under the Charter

V

Violation of the international obligation of States with regard to armaments

1. Recruitment of forces in excess of those authorised and the construction of forbidden strategical works.
2. The manufacture of, traffic in and possession of weapon of war forbidden by international agreements and the training of persons in the use of such weapons.

VI

The annexation of the territory of a State in violation of international law and any veiled form of annexation

¹⁵ See A/CN.4/19/Add.2.

appeared to him that the list contained a very comprehensive enumeration of international crimes. Should the Commission be of opinion that some of the crimes contained therein should be inserted in the draft code, he would willingly accept the Commission's suggestions on the subject.

121. Mr. ALFARO said that he had not yet occasion to study the list and pick out the items which might constitute a new crime for insertion in the code. He suggested that the Commission should examine the list and decide whether, apart from the crimes already provided for in the draft code, there were any others which had hitherto been overlooked.

122. The CHAIRMAN read Part I of the list, "The unlawful and direct use of force by one State against another State", and pointed out that the acts described in items 1, 2, 3, 4 and 5 thereof were already provided for in the draft code. He then proceeded to read Part

VII

Acts calculated to disturb the public order of another State

1. The furnishing of support by a State to armed bands organised on its territory who have invaded the territory of another State, or the refusal, despite the request of the invaded State, to take on its own territory all the measures in its power to deprive the said bands of help and protection.
2. The fomenting of civil strife in another State or the encouragement of one of the contending parties.
3. Abuse by a diplomatic representative of the privileges accorded him in order to commit acts prejudicial to international public order or infringements of international law directed against the State to which he is accredited.
4. Acts of terrorism affecting international relations.
5. The counterfeiting of currency and bank notes conducted, encouraged or tolerated by one State and detrimental to the credit of another State.
6. The forging of passports or other equivalent documents.
7. The cession, sale or distribution of arms, ammunition or explosives in violation of the national legislation of a State.

VIII

Various acts constituting failure on the part of States to observe their obligations to respect the dignity of other States and to conform to international usages

1. Admission by a State into its armed forces of deserters from the land, sea or air forces of other States.
2. Violation of diplomatic immunities.
3. Dissemination of false or distorted news or of forged documents in the knowledge that they are harmful to international relations.
4. Flagrant insult of a foreign State.
5. Abuse in the exercise of police powers on the high seas.

IX

Violation of the laws and customs of war

X

Crimes against humanity

1. Extermination or persecution of a population or of an element of the population on grounds of race, nationality, religion, political or other opinions by one of the following means: wilful homicide, torture, inhumane treatment, including biological experiments, the infliction of serious bodily injury or injury to health, deportation or illegal detention.
2. The encouragement by a State of slavery or analogous practices.

II, "Threat of unlawful use of force and preparation for such use".

123. Mr. CORDOVA pointed out that the Commission had decided to delete the term "threat" from the wording of Crime No. I. He was of the opinion that that word should be re-introduced.

124. Mr. HSU supported the proposal.

125. Mr. SPIROPOULOS was against it and said that a threat might be legitimate. If a State threatened to intervene if another State occupied the territory of a third, that constituted a legitimate defensive threat. The Commission had discussed this question at some length in the course of the examination of Crime No. I. He did not see why it should now take the idea of a threat up again and re-introduce it into Crime No. I.

126. Mr. CORDOVA pointed out that the case mentioned by Mr. Spiropoulos constituted a threat made for the purpose of legitimate defence, but Mr. Pella visualized the case of threats of the illegal use of force. The Commission should legislate for such cases by inserting an appropriate provision in the draft code.

127. Mr. SANDSTRÖM thought that the Commission would be well advised to leave it to the Drafting Committee to see whether it could find a formula suitable for insertion in the report.

128. The CHAIRMAN proceeded to read Part III of the list.

129. Mr. SPIROPOULOS recalled that the matter in question had been submitted to the General Assembly and examined by it. It had been mentioned in its first draft report, but in connexion with article 10 of the draft Declaration on Rights and Duties of States, the British representative, Mr. Fitzmaurice, had raised the point in the Assembly, as to what sort of assistance was contemplated.¹⁷ As a result of the discussion he had come to realize the difficulties inherent in the question of assistance to an aggressor State. It was for that reason that he had preferred to omit all reference to such action in his second draft.

130. The CHAIRMAN expressed the opinion that the case of direct or indirect aid was covered by Crime No. X of the draft code. In his opinion such acts undoubtedly amounted to complicity.

131. Mr. SPIROPOULOS did not agree. Assistance of this type could be given much later, when the act of aggression had already been committed.

132. The CHAIRMAN considered that complicity in the crime still existed. They might get over the difficulty by stating in the report that Part III of Mr. Pella's list was covered by Crimes I and X of the draft code.

133. Mr. ALFARO was of the opinion that in the case of Crime I the criterion to be observed was the following: If the act was done in legitimate defence or in the execution of a United Nations mandate, there would be no violation of international law.

134. Article 10 of the draft Declaration on Rights and Duties of States stipulated that: "Every State has the

¹⁷ See *Official Records of the General Assembly, Fourth Session, Sixth Committee, 172nd meeting, para. 17.*

duty to refrain from giving assistance to any State which is acting in violation of article 9 or against which the United Nations is taking preventive or enforcement action." A State providing assistance in such circumstances specifically violated the terms of the draft Declaration and of the United Nations Charter. Such an act was not merely one of complicity. Once aggression had been committed, any assistance given to the aggressor made the party concerned, not an accomplice, but a principal in an act of aggression. He was of the opinion that the act contemplated in Part III of Mr. Pella's list should be examined and specifically defined as a crime.

135. The CHAIRMAN suggested that further consideration of Mr. Pella's list be postponed until the following day. He was of the opinion that this list served a very useful purpose in clarifying the Commission's views. The Commission could then go on to consider the bases for discussion contained in Mr. Spiropoulos' report.

136. Mr. KERNO (Assistant Secretary-General) expressed his great appreciation of Mr. Pella's work. Mr. Pella was amongst those who had been of great assistance to the Secretariat in preparing documents for the Commission.

The meeting rose at 1.10 p.m.

62nd MEETING

Thursday, 6 July 1950, at 10 a.m.

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Chairman: Mr. Georges SCELLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

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

Secretariat: Mr. Ivan KERNO (Assistant Secretary-General in charge of the Legal Department); 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)

LIST OF INTERNATIONAL CRIMES PROPOSED BY MR. PELLA IN HIS MEMORANDUM (continued)¹

Section III

1. Mr. ALFARO, referring to the matters dealt with in section III, said that assistance to an aggressor after war had broken out was a different crime from complicity in a war of aggression; it was a crime in itself.
2. The CHAIRMAN considered that it was an illegal use of force which came under the definition of Crime No. I.
3. Mr. ALFARO replied that assistance could be furnished without any apparent use of force.
4. Mr. SANDSTRÖM recalled that Mr. Alfaro had stated that the act was consummated once an attack had taken place. But if there were continuous use of force, the crime would also be continuous. There could therefore be complicity throughout the whole period during which force was used.

The Commission decided by 5 votes to 4, with 3 abstentions, that the act referred to in Section III was not a separate crime for the purpose of the draft Code.

5. The CHAIRMAN suggested that the general report should mention that the matter had been raised.
6. Mr. HUDSON thought that the comments on Crime No. I should indicate that the definition of Crime No. X covered Mr. Alfaro's idea.

Section IV

7. The CHAIRMAN observed that there was nothing new in the proposals which remained to be considered. The act dealt with in Section IV did not constitute a crime. He asked whether two States committed a crime if they agreed to leave a dispute in abeyance.
8. Mr. YEPES thought that they did not, but that the question should be put in another form. States refusing to submit a dispute to peaceful settlement were committing a criminal act.
9. Mr. KERNO (Assistant Secretary-General) observed that the act referred to in Section IV was defined in a manner which might cause misunderstanding. He thought that it should be interpreted in conformity with Article 33 of the Charter. Refusal to settle a dispute by peaceful means was a violation of the undertakings contained in the Charter. Nevertheless, it remained to be decided whether a violation of any provision of the Charter was a crime under international law. It was a question of degree.
10. Mr. YEPES proposed the following wording: "Refusal by a State to submit a dispute to the competent organs of the United Nations in the cases provided for in the Charter". He asked the Commission to take a decision on that proposal.

¹ See summary record of the 61st meeting, footnote 16.