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**A/CN.4/SR.89**

**Summary record of the 89th meeting**

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

Extract from the Yearbook of the International Law Commission:-
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132. The CHAIRMAN stated that the article had nothing to do with the section of the law of treaties with which the Commission was dealing and which concerned the conclusion of treaties.

133. Mr. YEPES thought that view was open to dispute. The Commission had established the framework of treaties but had omitted to state what could be consented to.

134. It had stated that a treaty should be signed, ratified etc., but had neglected the substance of the treaty. A State could not sign, ratify etc. a treaty with an unlawful purpose.

135. Mr. SANDSTRÖM recalled that Mr. Córdova had raised a far broader issue than Mr. Yepes and one which should be considered first. Was the draft which the Commission had just adopted the only text it was going to submit on that item to the General Assembly? That was what should be discussed.

136. Mr. CORDOVA also considered that the latter question should be settled before the problem raised by Mr. Yepes was broached. That problem could not be included in the part of the report the Commission had just adopted.

137. He would like to return to a fundamental point. What the Commission had produced was very little. Could it face the opinion of governments armed with that text alone?

138. Mr. SPIROPOULOS thought that, before taking a decision on that point, it was necessary to await the arrival of the other members of the Commission. It might then be possible to decide either to send the text to governments or to wait until the following year. Or the decision might be left until later.

139. The problem raised by Mr. Yepes was a very important one. He thought it should be kept in view, though it was not the moment to discuss it. The Commission should return to it when it began discussing the section of the law of treaties to which the problem belonged.

140. Mr. KERNO (Assistant Secretary-General) noted that the Commission had almost reached the end of the second week of its third session, which ran to only ten weeks, and had so far completed merely the provisional adoption of that small part of the report.

141. If it did not take steps to expedite its work, it would not achieve such fruitful results as at its first and second sessions.

142. During the meeting in progress, the Commission had transformed itself into a drafting committee. It might perhaps be better for it to concentrate on the important questions and leave the drafting to its rapporteur or to a drafting committee which could meet in the afternoon.

143. If the Commission maintained its decision to commence consideration of the report by Mr. Spiropoulos at its next meeting, that did not mean that it would not deal with the second report by Mr. Brierly. The report by Mr. Spiropoulos was ready for discussion and the Commission could give it priority.

144. Mr. CORDOVA thought on the other hand that since the members of the Commission had the problem of treaties fresh in their minds, it would be preferable to continue the study of the subject. It could consider Mr. Spiropoulos' report afterwards.

*It was decided to begin the study of the report by Mr. Spiropoulos at the next meeting.*

The meeting rose at 1 p.m.

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# 89th MEETING

*Friday, 25 May 1951, at 9.45 a.m.*

CONTENTS



*Chairman:* Mr. James L. BRIERLY
*Rapporteur:* Mr. Roberto CORDOVA

*Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, 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 (item 2 (*a*) of the agenda) (A/CN.4/44)

### GENERAL

1-2. Mr. SPIROPOULOS (Rapporteur) said that his task had not been a difficult one: it had been to put the report into more or less final form; after discussion it would be sent to Governments, in conformity with article 16 of the Statute of the Commission.

3. He proposed that the Commission should begin its examination of the report not with the introduction but

with the text of the draft code at article 1 and then proceed to consider the other articles, returning finally to the introduction.

4. He reminded the Commission that when the Nürnberg Principles had been examined by the General Assembly at its fifth session (1950) a large number of views had been expressed. Some delegations had criticized the general manner in which the problem had been dealt with. Others had raised individual points. Many had expressed approval of the Commission's work.

5. The Sixth Committee had felt that in drafting the Code the International Law Commission should take into account the views expressed by delegations in the General Assembly. He had thought it advisable to reproduce those views, arranged systematically, in his report. He suggested that each member of the Commission read them over in his own time. They should be read even if the Commission failed to take any decision regarding them. His personal opinion was that the delegations' views were most valuable, relating as they did to the Nürnberg Principles which were embodied in the report, albeit in a different form.

6. He further recalled that at its second session the Commission, after accepting certain principles and the definition of certain crimes, had set up a Sub-Committee, consisting of Mr. Alfaro, Mr. Hudson and himself, to prepare a preliminary draft.[1] The text suggested in his report was based on that draft. He had tried not to alter the text approved by the Sub-Committee. He thought that the Commission would make few alterations to the principles, since they were the ones it had adopted at its previous session.

7. He explained that the passages underlined were the definitions of crimes drafted by the Sub-Committee.

8. The CHAIRMAN observed that sub-paragraph (*a*) of the commentary on each article contained the text originally proposed by the Rapporteur.

9. Mr. SPIROPOULOS added that his text had been amended by the Commission.

10. He had thought it best to give the text of the article, followed by the bare comments required to explain it. He felt that the report ought to be submitted to governments after the Commission had made the amendments it thought necessary.

11. Mr. KERNO (Assistant Secretary-General) reminded the Commission of the terms of the second paragraph of the operative part of General Assembly resolution 488 (V) of 12 December 1950, which appeared in paragraph 14 of the report: " Requests the International Law Commission, in preparing the draft code of offences against the peace and security of mankind, to take account of the observations made on this formulation by delegations during the fifth session of the General Assembly ". The Commission had at its disposal the records of the meetings of the Sixth Committee, while the views expressed by delegations were set out systematically in the report. The General Assembly resolution continued: " and of any observations which may be made by Governments ". The Commission had also before it a document A/CN.4/45: " Observations of Governments of Member States relating to the formulation of the Nürnberg Principles prepared by the International Law Commission ". Very few Governments, it would be noted, had sent in their observations.

12. Mr. YEPES wished, before discussing the report, to pay a tribute to Mr. Spiropoulos' work. He did not, however, agree with Mr. Spiropoulos on every point. The report did not confine itself to the draft code, but contained a second chapter dealing with aggression, concerning which he wished to make every reservation. He felt that Mr. Spiropoulos was over-pessimistic. Aggression must be defined. The General Assembly and the public looked to the Commission to define it. He approved, however, of chapter I.

13. Mr. SPIROPOULOS said that chapter II of the report should not be confused with chapter I; chapter II dealt with a special topic, constituting item 3 of the Commission's agenda, which he had studied in pursuance of a decision of the Political Committee. He suggested that the Commission first study the question of the code, and then decide when to examine chapter II.

14. Mr. AMADO had been about to make a similar remark. The Commission must study the question of aggression, but it was faced with a more immediate task, that of studying the draft code, which in itself contained matters likely to provoke lengthy discussion. At a first reading he had found the formulation excellent. No less would be expected of a man of Mr. Spiropoulos' ability.

15. He wished to know why some parts were underlined and others not.

16. Mr. SPIROPOULOS explained that he had underlined certain parts of article I in order to throw into relief the crimes defined in it.

17. Mr. ALFARO observed, in connexion with the points raised by Mr. Yepes, that Mr. Spiropoulos' report dealt with two completely different subjects, one constituting item 2 of the agenda, and the other item 3 namely: " General Assembly resolution 378 B (V) of 17 November 1950: Duties of States in the event of the outbreak of hostilities ". The Commission was at the present juncture only engaged in discussing the code. He had remarks to make concerning the definition of the aggressor, but he thought that it would be more appropriate if he made them later.

18. He wished to congratulate the Rapporteur on his admirable work.

*It was decided that study of the definition of aggression be deferred.*

19. Mr. YEPES explained that he had raised the question of the definition of aggression because it was the subject of a study appearing in the same report as the text of the draft code. He hoped that the Commission would study the question of aggression immediately after the code. He had been anxious to express his reservations concerning chapter II at the earliest opportunity because it was embodied in the same document.

[1] A/CN.4/R.6. See *Yearbook of the International Law Commission, 1950*, vol. I, summary record of the 72nd meeting, footnote 2a.

20. Mr. HSU wished to raise a preliminary question concerning paragraph 5 of the introduction to the draft code in which the Rapporteur said: "The Commission, in submitting the present text to the governments in conformity with article 16 (*g*) and (*h*) of its statute, wishes to present the following observations as to some general questions the Commission had to solve in drafting the present draft code." Thus the Rapporteur said that the document would be sent to the governments. The question of the draft code and that of the Nürnberg Principles, if he remembered correctly, had both been referred to the Commission under the same General Assembly resolution. He wondered whether it could justly be said that the work on the draft code came within the category of progressive development of international law, in view of the fact that the Commission had stated that it concerned international law as expressed in the judgment. He inclined to the view that the Commission could submit the draft code to the General Assembly directly, as it had its formulation of the Nürnberg Principles.

21. Mr. SPIROPOULOS replied that General Assembly resolution 177 (II) of 21 November 1947, which directed the Commission to formulate the Nürnberg Principles and to prepare the draft code, consisted of two parts: the first, the formulation of the principles, the Commission had regarded as a special topic, and it had submitted its work on it to the General Assembly according to the procedure employed for special topics. The code fell within the category of progressive development of international law. The Nürnberg Principles were existing law. But the code contained other principles which were not yet part of international law, such as organized terrorist activities carried out in another State, the incursion into the territory of a State by armed bands, etc. Those paragraphs defined new crimes. By them the code contributed to the progressive development of international law, and under article 16 of its Statute the Commission must send it to the governments. Even if it were not clear whether or not the code fell within the category of progressive development of international law, it would be wise to send the text adopted to governments. When some delegations had asked in the General Assembly why the Commission had not submitted the text of the Nürnberg Principles to governments, the General Assembly had decided to communicate the text to them. He repeated once again that the code fell within the category of progressive development of international law, and the Commission was therefore bound to send the draft to governments before submitting it to the General Assembly.

22. Mr. KERNO (Assistant Secretary-General) felt that the main point was to determine whether the draft code was a special topic to which special procedure could be applied, or whether it formed part of the Commission's general work on the progressive development of international law. General Assembly resolution 177 (II) contained two sub-paragraphs:

> "(*a*) Formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgement of the Tribunal, and
>
> "(*b*) Prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in sub-paragraph (*a*) above".

It was no longer merely a matter of indicating that place, but of preparing a draft code. The General Assembly had followed the same procedure regarding the preparation of the code as it had in directing the Commission to formulate the principles. The text could therefore be sent directly to the General Assembly. It could equally be maintained that it was a matter of the development of international law and, as Mr. Spiropoulos had done, that it was wiser to submit the text first to governments. There was no great difference between the two things in practice, since if the text were sent directly to the General Assembly the latter would communicate it to governments.

23. The CHAIRMAN thought the discussion premature.

24. Mr. HSU did not press the point.

### Text of the draft code

25. On the proposal of the Rapporteur, *it was decided* to substitute the words "under the provisions of paragraph ..." for the words "through application of crime No. ..." wherever the latter occurred in the draft code.

### Article 1

26. Mr. SANDSTRÖM observed that article 1 began with the following introduction: "The following acts are offences against the peace and security of mankind. They are crimes under international law for which the responsible individuals shall be punishable". It was followed by a list of the crimes. He would like to see the principle laid down at the beginning of the article thrown into greater relief by being given in the form of a separate paragraph placed, say, after the list of crimes and beginning: "The abovementioned crimes are crimes under international law ...".

27. Mr. SPIROPOULOS pointed out that the Commission had decided on the present form of the text at the previous session. There appeared to be a misunderstanding. The lines referred to were not an introduction but an integral part of the text, after which came the list of crimes. They represented a positive rule.

28. Mr. YEPES observed that the lines in question therefore applied to paragraphs 1, 2, 3, 4, 5, etc.

29. Mr. KERNO (Assistant Secretary-General) understood Mr. Sandström's objection to refer to the arrangement of the text. That arrangement might be as follows: first, article I (*a*), containing the paragraphs, and then (*b*): "The abovementioned acts ..." reproducing the first two sentences of article I. Those sentences would thus receive greater emphasis.

30. Mr. ALFARO thought that Mr. Sandström's objection deserved consideration. The article consisted of two parts: a list of crimes and a fundamental principle. The principle was placed before the enumeration, but it would be better for it to appear after it and to read: "All the crimes enumerated are crimes under international law and punishable." The article could be divided in the

manner suggested by Mr. Kerno, beginning with a list and ending with a separate paragraph.

31. Mr. SPIROPOULOS agreed to redraft the article in the manner suggested.

*It was so decided.*

*Paragraph 1*

32. Mr. AMADO said that paragraph 1 introduced the problem of the threat of employment of force and that was the vital part of the article.

33. The Nürnberg Tribunal had only regarded as a crime a war of aggression or a war in violation of international treaties, agreements or assurances (A/CN.4/5, p. 93, article 6 (*a*)). The text of the draft code read: "The employment or threat of employment, by the authorities of a State, of armed force against another State . . .", and Article 2, paragraph 4 of the Charter read as follows: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."

34. The problem was to state clearly, in the definition of the crime, the objective factors characterizing it. Ought threat to be put on the same footing as actual employment of armed force? For his own part he had no objection to such a course, but he felt that criminal jurists would have difficulty in finding what was the characteristic element of a threat in virtue of which it might be regarded as equivalent to the employment of armed force. The meaning of the word "threat", a crime placed by the Charter before the use of force, must be carefully weighed and distinguished.

35. Mr. ALFARO thought that the point deserved careful examination. The Charter forbade the threat or use of force. It had frequently happened in the past that a weak or small nation had been obliged to give way to pressure from a great power. It had found itself in a situation equivalent to one of *force majeure*. Nevertheless, though the provisions of the Charter were justified since no pressure ought to be brought to bear by one power on another in order to obtain an advantage, it would be going too far to class threat of employment of armed force as a crime. In a dispute between nation A and a weaker nation B, nation A could threaten to use force, for example in the economic field. The point had come up at Rio de Janeiro in 1947 and at Bogota in 1948 following a complaint by Cuba, which had protested against alleged economic aggression on the part of the United States of America in the shape of the raising of the import duty on Cuban sugar. It would be too much to suggest that nation B could appear before the court and plead that such a threat constituted a crime. The paragraph ought to confine itself to actual aggression. He doubted the wisdom of classing the threat of employment of force among crimes. Threat was a very elastic term, and it was hard to say where threat began.

36. Mr. AMADO wondered whether paragraph 2 of article 1 did not cover threat when it referred to the planning and preparation of a war of aggression. Perhaps paragraph 2 distinguished more exactly the threat which constituted a crime. He thought it would be preferable for paragraph 1 merely to mention the employment of force, and for it to be stated that "the planning of or preparation for" a war of aggression included threat.

37. He wondered whether the Rapporteur would be willing to delete the word "threat" in paragraph 1.

38. Mr. SANDSTRÖM was more inclined to favour retention of the word "threat" in paragraph 1. In point of fact threat was very frequently the origin of armed conflict, but that did not mean he thought threat could be defined as a commencement of aggression.

39. The conclusion arrived at in the part of Mr. Spiropoulos' report dealing with the definition of a war of aggression, was that it was not always possible to determine whether or not there were an aggressor; perhaps the same applied to threat. Nevertheless he thought it would be advisable to retain the reference to threat in paragraph 1.

40. Mr. YEPES was in favour of leaving the paragraph as the Rapporteur had drafted it. There was only a difference of degree between the threat of employment of armed force and the actual employment of it. The two should be put on an equal footing.

41. It might even be said that the threat of force was more treacherous than its employment. In the latter case the aggressor ran risks; if threat enabled him to obtain the same result without running them it was a more cowardly way of making an attempt on the sovereignty of States. Mr. Alfaro had mentioned economic pressure, which was a different matter; it was reprehensible no doubt but not as serious as threatening to use force.

42. He was therefore in favour of the proposed text and desired the threat of employment of force to be constituted a crime.

43. Mr. SCELLE was also in favour of the word "threat" being retained in the paragraph. It should however be understood to mean a serious threat, not merely pressure: the French words "*menace caractérisée* might perhaps be employed; it would be for the judge to decide whether the threat should be regarded as a "*menace caractérisée*" or simply as pressure. The paragraph described a crime, not merely a misdemeanour, and for threat to amount to a real crime it must be backed by very substantial force. Mr. Amado had been right in pointing out the relation between paragraph 1 and paragraph 2. The planning of force was a "*menace caractérisée*".

44. The CHAIRMAN wondered what the correct English translation of the words "*menace caractérisée*" would be.

45. Mr. ALFARO suggested "effective threat".

46. Mr. SCELLE explained that he meant by "*menace caractérisée*" a threat having the characteristics of a real threat, which was distinct from pressure.

47. Mr. SPIROPOULOS wondered whether the text actually left any room for doubt. It referred to the "threat of employment . . . of armed force" not to any threat, and consequently did not cover pressure.

48. Mr. Amado had asked whether the words " the planning of or preparation for . . ." did not cover threat; his reply was that threat was to appear among the crimes. At its previous session the Commission had regarded threat as something new. He himself had always opposed its inclusion in the draft, but he did not wish to press his view: it was for the Commission to decide.

49. The object was to have a text adopted, and he had therefore always tried to discern what the view of the General Assembly would be. If the General Assembly failed to adopt the code submitted to it by the Commission the code would be useless; the Commission must try to submit one which would be adopted. That was why he had opposed inclusion of the idea of threat; he did not think the General Assembly would adopt that crime. But he would not press the point.

50. Mr. LIANG (Secretary to the Commission) thought that the word " threat " had two meanings. According to Article 11 of the Covenant of the League of Nations " threat " might be interpreted as meaning an objective situation, so that it might be maintained that planning constituted a threat. He suggested, however, that the words " threat of employment . . . of armed force " in the text of the draft code and the text of Article 2, paragraph 4, of the Charter, referred to something more than an objective situation, in fact to a positive act approximating to an ultimatum. Thus Mr. Amado's suggestion only took into account part of the meaning of the word.

51. As to the advisability of making threat a crime, it might be provided that the threat must be known to the State concerned. Threatening to use force was different from attempting it, which was secret. In most cases the threat of employment of force was communicated to the other State: that was the idea to be borne in mind.

52. Mr. AMADO said he had foreseen the direction the discussion would take: that was why he had chosen his words with such care.

53. In criminal law it was acts that were punished, and it would be a difficult thing for a judge to determine what acts constituted a threat. He would accept the article if the Commission decided to retain the word " threat ". Mr. Liang had put his finger on the vital spot. In speaking of threat one naturally thought of the attempt to use force, but he himself had not mentioned the attempt. It must be remembered that in criminal law the concepts bordered on each other.

54. If the Commission did not wish to distinguish threat he would vote for the article; but it would be too difficult, from the point of view of criminal law, to state what the acts were which constituted threat.

55. The CHAIRMAN asked Mr. Scelle whether the words " employment . . . of armed force " did not sufficiently distinguish threat.

56. Mr. SCELLE thought they did not, but he held no particular brief for the words " *menace caractérisée* "; " explicit threat " would do as well. He agreed with what Mr. Liang had said and Mr. Amado, a criminal jurist, had approved. There could be no condemnation unless there had been an act. Was it a threat when a State said: " There is no telling what the consequences may be"? It was too much always to require an ultimatum. Every criminal threat was not an ultimatum. There were degrees of threatening. If the judge could find that there had been a threat of resort to arms, the case contained the elements of a " *menace caractérisée* " or an " explicit threat ", should the latter term be preferred. It would be too much to make implicit threat a crime, but threat backed by steps taken was an act: he therefore desired threat to be qualified.

57. Mr. YEPES considered that threat was distinguished in the article in question by the words: " threat of employment . . . of armed force "; that was an act which should be classed as a crime.

58. Mr. CORDOVA felt that the members of the Commission were more or less agreed that threat must be classed among the crimes. The question at issue was whether the threat in question was explicit threat or whether it covered implicit threat as well.

59. He was interested in what Mr. Scelle had said. In the history of Mexico troops had been concentrated at the frontier, without explicit threat, and that had meant that a neighbouring State would employ force if Mexico refused to do what it wished; that amounted to commencing to put force into effect. He thought therefore that the Commission ought to introduce a provision into the article taking into account the point made by Mr. Scelle in his first statement during the discussion, a provision covering any commencement to put force into effect, that was to say, any preparation for the employment of force for the purpose of making a country believe it was in danger of having the will of another State imposed upon it. It must not be essential that the threat be explicit, it could be merely implicit.

60. Mr. ALFARO had been much impressed by the reasoning of Mr. Sandström, Mr. Scelle and Mr. Yepes; for his own part he was inclined to class as a crime any serious violation of the Charter, but he wondered about the implications of the provisions under discussion from the point of view of criminal law. Mr. Scelle had proposed to qualify threat as " *menace caractérisée* "; that would make the meaning clear, but he could remember no case in which a government had said: " If you do not do this I am going to resort to force ". No government ever said such a thing. Of recent years the declaration of war had lost some of its significance. During the discussions between the United States of America and Japan before Pearl Harbour, Japan had repeated on a number of occasions: " Should we fail to reach agreement the consequences will be very serious." Mussolini said: " If Germany comes into the war I know which side I shall be on ". States never used a " *menace caractérisée* ". There were however the signs that resort to arms was imminent: mobilization for example was in itself an effective threat, but States frequently said that it was merely for the purpose of manoeuvres. It was difficult to establish clearly whether there was a threat or not.

61. Mr. SANDSTRÖM would have liked the article to refer to imminent employment of force, but that would

restrict the idea of threat too much. Nor did he care for the word " explicit ", since it was rare for a State to threaten explicitly. He could support Mr. Scelle's proposal that the words " *menace caractérisée* " be used, or could support the text as it stood.

62. Mr. HSU felt that the Commission would not succeed in qualifying the word " threat " ; it was extremely difficult to do so without giving rise to misunderstanding.

*It was decided that the word " threat " be retained.*

63. The CHAIRMAN asked whether the Commission desired to qualify threat by using the words " *menace caractérisée* ", proposed by Mr. Scelle and supported by Mr. Sandström, alternatively he suggested " unequivocal threat ". He did not like the word " unequivocal " in a legal document, but it expressed the same idea.

64. Mr. CORDOVA thought that manoeuvres were a disguised threat. What the Commission wished to do was to distinguish threat and classify it among crimes even in cases in which the threat was disguised, that was to say to enable a threat to be identified as such even when it had the appearance of some other act.

65. Mr. SPIROPOULOS was in principle opposed to use of the word " threat ", but he felt that the paragraph must be left as it was. It would be for the judge to decide whether there was a threat within the meaning of paragraph 1; the Commission should not try to introduce any fresh idea.

66. Mr. YEPES approved of the article as it stood. Any attempt to clarify its meaning would narrow the idea of threat; it was for the judge to decide.

*It was decided that the text be left as it stood without qualification of the word " threat ".*

*Paragraph 1 was unanimously adopted.*

67. Mr. SPIROPOULOS requested the Commission to study the commentary on paragraph 1.

*Commentary on paragraph 1*

68. Mr. SPIROPOULOS explained the principles he had followed in drafting the commentaries accompanying the statements of the various crimes enumerated on his second report. He had confined himself, in accordance with United Nations practice, to mentioning only essential texts.

69. In the case of paragraph 1, he had given in sub-paragraph (*a*) the text he had originally proposed, in order to enable governments to follow the development of the Commission's work.

70. In sub-paragraph (*b*) he had, in conformity with General Assembly resolution 177 (II), mentioned the article of the charter of the International Military Tribunal corresponding with the crime. It should be noted however that the report expressly mentioned[2] the fact that the Commission had considered at its second session that it was not bound to indicate the exact extent to which the various Nürnberg Principles had been incorporated in the draft code. Any attempt to do so would have met with considerable difficulties since there were divergencies of opinion as to the scope of some of those principles. Only a more or less general reference to the corresponding Nürnberg Principles had been considered possible. In that connection he reminded the Commission that some of the criticisms related to the formulation of the crimes, and others to the manner in which the Nürnberg Principles had been interpreted. A further criticism had been that the formulation was incomplete. Since there were differences of opinion he had felt it necessary to indicate in a general manner the relation between the various paragraphs of the code and the Nürnberg Principles upon which they were based.

71. Sub-paragraph (*c*) mentioned certain basic documents essential to an understanding of the origin of the definitions given in the paragraph.

72. Sub-paragraph (*d*) stated who the possible perpetrators of the crime were. At its second session the Commission had taken the view that there were international crimes the perpetrators of which could be either individuals or State officials. That was laid down for example by the Genocide Convention. In the case of other crimes however, such as crimes committed by an armed force, the international responsibility of State officials only was engaged.

73. He had followed the same system, *mutatis mutandis*, in the commentary on the other paragraphs of article I.

74. Mr. HSU proposed that sub-paragraph (*a*) of the commentary be deleted. He thought that repetition of a text which had been amended might be interpreted as the expression of a minority view.

75. Mr. SPIROPOULOS agreed to the deletion. He had given the former texts for comparison with the new ones in order to follow United Nations practice, but it was true that governments desiring to study the stages in the preparation of the draft code could refer to the first report.

76. Mr. ALFARO admitted that the uninformed reader might wonder whether the text given in the various sub-paragraphs (*a*) of the commentary was not intended as a variant of the text immediately preceding it. On the other hand it was very valuable for the purpose of reconstructing the development of the Commission's work to have the two texts given together. Their juxtaposition would show what amendments had been made following the decisions of the Sixth Committee.

77. To avoid any ambiguity the words " The text originally proposed by the Rapporteur was as follows " should be substituted for the words " The text proposed by the Rapporteur reads as follows ".

78. Mr. HSU felt that juxtaposition of the two texts might lead to misunderstanding. Governments could refer to the original text.

*It was decided by 5 votes to 3 with 2 abstentions that the various sub-paragraphs* (a) *in the commentary be deleted.*

*Sub-paragraphs* (b), (c) *and* (d) *were adopted but renumbered* (a), (b) *and* (c).

*Paragraph 2 and note*

79. Mr. YEPES suggested that, in order to keep to the terminology of Article 51 of the Charter, the words

[2] In the " Introduction to the draft text ", para. 5 (*b*) (ii).

" national or collective self-defence " be replaced by " individual or collective self-defence ".

80. Mr. SPIROPOULOS saw no objection to the alteration which would apply equally to paragraph 1.

81. Following a remark by the CHAIRMAN, Mr. Yepes agreed that the word " national " was clear. He would not press the matter, though he thought it would be preferable to bring the draft code into line with the text of the Charter.

82. Mr. SCELLE, Mr. AMADO and the CHAIRMAN said they preferred the word " national ".

*Paragraph 2 and the note thereto were adopted unchanged.*

*Paragraph 3*

83. Mr. SANDSTRÖM proposed that the words " coming from the territory of another State " be deleted, since by definition an incursion by armed bands implied crossing the frontier. If those words were retained, they might be interpreted as putting the responsibility on the State from whose territory the armed bands came.

84. Mr. AMADO thought that Mr. SANDSTRÖM's point was all the more apt in that the incursion might be made by sea and have been prepared within the territorial waters of the State invaded.

85. Mr. CORDOVA was anxious that the international aspect should be retained in the statement of the crime; he proposed that the words which it had been suggested be deleted be replaced by the words " organized on territory under the jurisdiction of another State ".

86. Mr. AMADO pointed out that armed bands would not necessarily come from an adjoining country. They might come from a more distant country and cross the adjoining country. He suggested that the deletion be limited to the words " coming from the territories " and that the word " of " be replaced by the word " from ", so that the text would read " armed bands from another State ".

87. Mr. SANDSTRÖM thought the wording proposed by Mr. AMADO did not cover every case. Armed bands from another State might consist of nationals of the State invaded.

88. Mr. CORDOVA pointed out that frequently revolutionaries took refuge abroad. Mexican revolutionaries for example might prepare a revolutionary attack on Mexico in the United States. That would not be an international crime. Before there could be an international crime, there must be an incursion by foreigners. An operation carried out for revolutionary purposes by nationals of the invaded State did not meet that definition.

89. Mr. SPIROPOULOS recalled that, at its second session (56th meeting), the Commission had drawn a distinction in international crimes between crimes which could be committed by individuals, crimes which could be committed equally by private individuals and by State officials, and crimes which could be committed only by State officials. With regard to the crime referred to in paragraph 3, a minority group among the members of the Commission had taken the view that foreign officials allowing armed bands to invade an adjoining territory were solely responsible. But after discussion, the Commission had agreed that international responsibility applied not merely to the foreign officials, but also to the members of the armed bands themselves. It was at liberty now to restrict responsibility to the former category. But the officials of the foreign State could already be held responsible under the crime defined in paragraph 11.

90. Mr. ALFARO agreed that the expression " coming from the territory of another State " was not altogether precise. But it was important to stress that before there was international crime, an incursion must be organized abroad.

91. He was therefore prepared to agree to the phrase which it was proposed to delete being replaced by the words " organized in another State ".

92. Mr. CORDOVA thought the object of the incursion must be taken into consideration. If the object aimed at was a domestic one, there was no international crime, even where the incursion was organized abroad. If an armed band of Mexicans coming from the United States crossed into Mexican territory with the intention of overthrowing the Government, there was both organization abroad and crossing of the frontier, but there was no international crime, at any rate so far as the members of the armed bands were concerned. The only persons on whom international responsibility could be placed would be the United States agents who had allowed the incursion to be organized.

93. The Commission must therefore find some wording which took account of those factors; he suggested the following " coming from outside and acting according to an international political purpose ".

94. Mr. KERNO (Assistant Secretary-General) said that the drafting difficulty arose from the fact that the Commission was trying to cover both the responsibility of the individuals taking part in an incursion and the responsibility of the authorities who tolerated such an incursion. Under the proposed text as it stood, the incursion alone appeared to be punishable. Thus if responsibility were to be extended to foreign agents, the use of the word " organized " was not sufficient, since the word " incursion " would still be the key word.

95. Mr. SPIROPOULOS pointed out that, while it was true, as Mr. Kerno had said, that only the members of the armed bands were internationally responsible under paragraph 3, paragraph 11 made the State officials taking part in the organization of the incursion punishable also.

96. When the Commission had examined the war crime of aggression, it had agreed that only high officials were responsible, and that the ordinary soldier, as a member of a mobilized force, could not be held responsible. But the members of an armed band effecting an incursion were volunteers. The Commission had established their responsibility.

97. As for the example given by Mr. Córdova of a Mexican band with a political aim of a domestic nature coming from the United States and making an incursion into Mexican territory, in his opinion that was not altogether a domestic matter. It had its international

aspect — the fact that a foreign territory was selected as a base for the action, and that generally speaking, the moment such an action reached a certain amplitude, it was not feasible without the consent of the authorities of the territory where it was organized. The individuals taking part in such an incursion could therefore be regarded as foreign residents. The Commission was at liberty to restrict responsibility exclusively to State officials, but the members of such bands, inasmuch as they were free to act and caused a threat to peace owing to the international conflicts which might arise from their action, should be held internationally responsible.

98. Mr. CORDOVA was convinced by the explanation given by Mr. Spiropoulos that incursions taking place for a political purpose of a purely domestic nature also constituted a danger to peace.

99. Mr. SANDSTRÖM explained that his proposal was not meant to alter the interpretation given a year previously of the crime defined in paragraph 3. On the contrary, his idea had been to prevent any possibility of the formula being interpreted in any other way.

100. After some discussion, in which the CHAIRMAN and Mr. SPIROPOULOS took part, Mr. SANDSTRÖM withdrew his request for the deletion of the words " coming from the territory of another State ".

*Commentary on paragraph 3*

*In accordance with the decision taken previously (see* supra, *para. 78), sub-paragraph* (a) *was deleted.*

*Sub-paragraph* (b)

101. Mr. LIANG (Secretary to the Commission) thought the word " invasion " should be replaced by " incursion ".

*It was so decided.*

102. Mr. SANDSTRÖM thought it would be desirable to mention in sub-paragraph (*b*), in addition to the crime formulated in paragraph 11, the crimes mentioned in paragraphs 4 and 5. The latter paragraphs would after all apply if for example an incursion were organized to foment civil strife in another country.

103. Mr. KERNO (Assistant Secretary-General) remarked that the crime specified in paragraph 3 could only be committed by members of the armed band. Nevertheless, leaving aside the provisions of paragraph 11, those same acts could involve the responsibility of the authorities of a State, since they constituted the crimes defined in paragraphs 4 and 5. As far as he was concerned, he was not sure that it was necessary to mention those paragraphs in the commentary.

104. Mr. SANDSTRÖM said that he had merely wished to put the question; he did not press it. He had wanted to point out that there could be overlapping between the crimes.

105. Mr. SPIROPOULOS agreed. It would be for the judge to rule whether paragraphs 4 and 5 constituted grounds for indictment in specific instances.

*Sub-paragraph* (b) *as amended was adopted.*

*Paragraph 4*

106. Mr. CORDOVA wondered whether the word " organized " should be kept. He was thinking of the case of a politician who enjoyed considerable prestige in his own country and who fomented civil strife from abroad by broadcasting.

107. Mr. SPIROPOULOS pointed out that the word " organized " did not appear in the original text. It had been inserted to show that the activity of one or two individuals was not sufficient to constitute crime.

108. Mr. YEPES thought the word " organized " should be kept. The Commission could not make every act committed abroad by an individual against his government an international crime. He mentioned the example of wireless broadcasts or newspaper articles. Such acts were purely national crimes.

109. Mr. FRANÇOIS read out article 4 of the Draft Declaration on the Rights and Duties of States on which paragraph 4 was based, and which also contained the idea of organization. [3]

110. Mr. HSU criticized the expression " fomenting civil strife ". It struck him as incomplete. Suppose there was already civil strife and activities were organized to keep it alive. He mentioned his proposal of the previous year that subversive acts be included in the definition of the crime (A/CN.4/R.1) [4]. At least subversive support given by foreign countries to civil strife could be made punishable — the kind of support covered by the English expression " aiding and abetting ".

111. The CHAIRMAN pointed out that the expression " fomenting " was taken from article 4 of the Draft Declaration on the Rights and Duties of States; he thought it could not be changed.

112. Following a discussion in which Mr. SPIROPOULOS, Mr. YEPES and the CHAIRMAN took part, Mr. HSU reiterated his view that all cases of subversive action were not covered by the expression in question.

113. Following a proposal by Mr. SPIROPOULOS and an exchange of views in which the CHAIRMAN and Mr. SANDSTRÖM took part, *it was decided to leave paragraph 4 in abeyance,* and to take it up again after reference to the summary records of the meetings at which the text had been formulated. [5]

*Commentary on paragraph 4*

*In accordance with the decision taken previously (see* supra, *para. 18), sub-paragraph* (a) *was deleted.*

*Sub-paragraph* (b)

114. Mr. CORDOVA, supported by Mr. SPIROPOULOS, proposed the insertion of the whole of article 4 of the Draft Declaration on the Rights and Duties of States in the sub-paragraph under consideration.

*It was so decided.*

*Sub-paragraph* (c) *was adopted.*

*Paragraph 5*

115. Mr. KERNO (Assistant Secretary-General) said he would prefer the simpler version proposed originally

[3] General Assembly resolution 375 (IV) of 6 December 1949.

[4] See *Yearbook of the International Law Commission, 1950,* vol. I, 60th meeting, footnote 15.

[5] See summary record of next meeting, paras. 1–21.

by the Rapporteur, In an attempt to define " terrorist activities ", which was a current expression, terms like " a state of terror " had been used. Such expressions would merely embarrass a judge.

116. Mr. ALFARO pointed out that the new version was taken from the 1937 Geneva Convention for the Prevention and Punishment of Terrorism.[6]

117. The CHAIRMAN said that that was an explanation, though not a justification.

118. Mr. ALFARO agreed that the proposed expression was too literary.

119. Mr. SPIROPOULOS suggested reverting to the original text.

120. Mr. SANDSTRÖM pointed out that the wording of the text would have to be altered to bring it into line with the text of the preceding paragraphs.

121. Mr. YEPES thought that the purpose of terrorist activities should be defined. It would be advisable to specify that the reference was to terrorist activities pursued for some international purpose.

122. The CHAIRMAN suggested that the Rapporteur be asked to make the necessary drafting changes.

*Subject to the necessary drafting changes, it was decided to replace paragraph 5 by the original text proposed by the Rapporteur.*

*Commentary on paragraph 5*

*In accordance with the decision taken previously* (*see* supra, *para. 78*), *sub-paragraph* (a) *was deleted.*

*Sub-paragraph* (b)

*Sub-paragraph* (b) *was adopted.*

*Sub-paragraph* (c)

123. Mr. CORDOVA suggested replacing the words " crime No. 5 " by the words " this crime ".

*Sub-paragraph* (c) *was adopted as thus amended.*

*Sub-paragraph* (d)

124. The CHAIRMAN said that the Rapporteur would make such changes in the text as were called for by the changes already decided upon in parallel instances.

*Sub-paragraph* (d) *was adopted, subject to the necessary drafting changes.*

*Paragraph 6*

125. Mr. FRANÇOIS thought the wording of the paragraph too comprehensive. It would be well to make it clear that the authorities of a State would be held responsible for violation of such treaty obligations only when armaments exceeded the limits laid down in the treaty. The proposed formula might be interpreted as also covering violation arising from the level of armaments being too low. He cited as an example the North Atlantic Treaty.[7] A case of that type would not constitute a war crime, and such action should not be denounced under paragraph 6.

126. Mr. SPIROPOULOS agreed that failure to execute an undertaking to maintain armed forces at a certain level might have consequences of a negative kind for the maintenance of peace. Nevertheless, it could not be regarded as an international crime.

127. After a discussion in which Mr. KERNO, the CHAIRMAN and Mr. AMADO took part, Mr. SANDSTRÖM proposed that the addition, at the end of the paragraph, of the words " restrictions as to ".

*It was so decided.*

*Paragraph 6 was adopted as thus amended.*

*Sub-paragraphs* (*i*), (*ii*), *and* (*iii*) *were adopted.*

*Commentary on paragraph 6*

*In accordance with a decision taken previously* (*see* supra, *para. 78*), *sub-paragraph* (a) *was deleted.*

*Sub-paragraph* (b)

128. Mr. LIANG and Mr. SPIROPOULOS suggested that the words " the above " be inserted before " violation of treaty obligations ".

*Sub-paragraph* (b) *was adopted as thus amended.*

*Sub-paragraph* (c)

129. The CHAIRMAN remarked that the text would have to be altered in the same way as all the other parallel texts.

*Sub-paragraph* (c) *was adopted, subject to the necessary drafting changes.*

The meeting rose at 1.5 p.m.

[6] League of Nations document C.94.M.47.1938.V.

[7] Signed at Washington, 4 April 1949.

## 90th MEETING

*Monday, 28 May 1951, at 3 p.m.*

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*Chairman:* Mr. James L. BRIERLY
*Rapporteur:* Mr. Roberto CORDOVA

*Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, 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.