

Document:-
A/CN.4/SR.90

Summary record of the 90th meeting

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

Extract from the Yearbook of the International Law Commission:-
1951 , vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

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.

90th MEETING

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

CONTENTS

Page

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) (continued)	
Article I (continued)	
Paragraph 4 (resumed from the 89th meeting)	64
Paragraph 7	65
Commentary on paragraph 7	66
Paragraph 8	66
Commentary on paragraph 8	68
Paragraph 9	68
Commentary on paragraph 9	71
Paragraph 10	71

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.

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

⁷ Signed at Washington, 4 April 1949.

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) (continued)

ARTICLE 1 (continued)

Paragraph 4 (resumed from the preceding meeting)

1. The CHAIRMAN opened that two matters had been left over from the previous meeting, namely, the amendment proposed by Mr. Hsu¹ and the question of retaining the word "organized". For his part, he failed to see why the word "organized" had been included in the definition of the crime in question.
2. Mr. FRANÇOIS recalled that Mr. Hudson had pressed for the inclusion of the word "organized" and that in paragraph 11 of document A/CN.4/SR.57 it was stated that: "the Commission decided by 7 votes to 5 that the fomenting of civil war in another State by private individuals acting on their own account should not be considered a crime under international law under the terms of the draft code". Hence the fomenting of civil strife was a crime under international law only where the activities had been organized, not where individuals had acted solely on their own account.
3. It was possible to visualize the need for the activities to have been organized in the case of toleration, but when it came to the question of undertaking or encouragement, it was not necessary. It was sufficient that the activities had taken place. In any case, as regards undertaking, it was sufficient if there had been isolated activities.
4. He proposed the division of the article into two parts, one of which would deal with undertaking and encouragement, and the other with toleration.
5. Mr. AMADO saw the point. All that was required was to show that toleration was another aspect of the crime. He suggested the following wording: "the undertaking or encouragement by the authorities of a State of activities intended or calculated to foment civil strife in one territory of another State, or the toleration of organized activities for that purpose".
6. Mr. FRANÇOIS was agreeable to the suggested wording.
7. Mr. YEPES read out article 4 of the Declaration on the Rights and Duties of States: "Every State has the duty to refrain from fomenting civil strife in the territory of another State and to prevent the organization within its territory of activities calculated to foment such civil strife."
8. That article seemed to him to support the views expressed by Mr. François. The two questions were, in fact, entirely separate. He suggested that the article of the Code be brought into conformity with article 4 of the Declaration on the Rights and Duties of States.
9. Mr. SPIROPOULOS asked why. The Commission was engaged in drafting a penal code and that was something quite different from the Declaration.
10. Mr. AMADO summed up the position: Mr. François had suggested that undertaking and encouraging the fomenting of civil strife could not be treated on the

same footing as the toleration of such activities. Only as regards the latter did it appear necessary for there to have been organized activities before there could be any question of a crime. Mr. Yepes had pointed out that the draft Declaration on the Rights and Duties of States made a similar distinction. It had been suggested that those two aspects of the crime be covered by the same article.

11. Mr. SPIROPOULOS agreed that there was a difficulty. He agreed to draft a new text.

12. Mr. KERNO (Assistant Secretary-General) recalled that the question of fomenting civil strife had been discussed by the Commission at considerable length during preceding sessions. It had been held at the time that the draft Declaration on the Rights and Duties of States should certainly be taken into consideration, but that there were other things as well. The Commission had come to a decision on the matter the previous year, and he was not sure whether that fact had been fully taken into account when it came to a different decision.

13. The CHAIRMAN did not think the Commission had as yet made any fundamental change in its decision of the previous year.

14. Mr. ALFARO said that Mr. François had pointed out that there were three ways of fomenting civil strife: first, by the authorities of a State undertaking activities to foment it; secondly, by their encouraging such activities, and thirdly by their toleration of activities already organized. In the first case, it was pointless to include the word "organized", since it was the authorities that had undertaken to foment civil strife and that was sufficient to establish the crime. By adopting the wording suggested by Mr. François, the Commission had clarified the text and had made it possible for everyone to appreciate the varying degrees of gravity attached to such activities, the most serious being the undertaking of them, and the most venial that of toleration.

15. The CHAIRMAN noted that the Commission was prepared to leave it to the Rapporteur to draft a text in the light of what had been said during the discussion.

16. Mr. HSU suggested that the point he had raised be settled first, and if the Commission agreed to his proposal, that the Rapporteur be asked to prepare a text, taking into account the points raised by Mr. François and himself.

17. The amendment he had suggested was very simple. It consisted in adding two or three words to the text and in saying: "to foment, aid or abet civil strife..." and to add to sub-paragraph (b) of the commentary a sentence explaining why aiding and abetting had been included. Actually, if the fomenting of civil strife was to be prohibited, that was to say, initiating action to that end, aiding and abetting must also be prohibited. As such action was calculated to prolong or intensify the strife, it was just as serious.

18. The CHAIRMAN wondered why Mr. Hsu had given such a restricted meaning to the word "foment", which was a general term and included "aiding and abetting". "Fomenting" did not only mean taking the initiative and the word "aiding and abetting" did not add anything to the meaning of the word "foment".

¹ Summary record of the 89th meeting, para. 110.

19. Mr. SCELLE pointed out that the Chairman's statement applied equally to the French word "*foment*" which likewise had a wider meaning, and aiding and abetting were fomenting. It was only the act of toleration that was not covered by "*foment*" in French.

20. Mr. ALFARO was also of the opinion that the word "*foment*" covered aiding and abetting. It might be stated in sub-paragraph (b) of the commentary that aiding and abetting were also covered by paragraph 4.

21. Mr. HSU accepted Mr. Alfaro's suggestion and withdrew his amendment.

Paragraph 4 was adopted.

Paragraph 7

22. Mr. FRANÇOIS recalled that the Commission had originally based its discussion on the text submitted by the Rapporteur: "The annexation of territories in violation of international law".² Some members, of whom he was one, had considered the text too vague and Mr. Sandström had suggested the wording: "The annexation of territories by the threat or use of force for an aggressive purpose, or otherwise, in a manner incompatible with the right of a State to independence".³

23. As the Commission had been unable to agree on a text, it had left it to its Drafting Committee to prepare a new one. That spoke of "the forcible annexation of territory . . ." (A/CN.4/R.6) which he did not like at all. Actually the forcible annexation of territory did not necessarily constitute a violation of international law. Moreover, annexation without the use of force was not always legitimate, and he wondered whether the Commission would not do better to go back to the wording originally proposed by its Rapporteur, perhaps amended as Mr. Sandström had suggested.

24. Mr. YEPES also considered that the notion of the condemnation of all annexation, whether by force or otherwise, should be included in the article, since its scope could not be restricted just to forcible annexation. In fact, under that definition, the Anschluss would not be a crime. The disguised annexations, of which examples were to be found practically all over eastern Europe, were crimes against peace, and were one of the causes of the prevailing state of insecurity throughout the world. A clearer and more general wording should be used.

25. Mr. CORDOVA supported the proposal to revert to the Rapporteur's original formula.

26. Mr. AMADO asked the members of the Commission to re-read paragraph 7 very carefully. It was worded as follows: "Acts by authorities of a State resulting in or directed toward the forcible annexation of territory belonging to another State, or of territory under an international régime". The previous year, the acts by which annexation was brought about were made criminal, and it had been seen how difficult it was to achieve precision on that point. That was why the Commission had said "acts directed toward . . .". It was a question of the processes by means of which a State directed its activities towards the achievement of that result. He felt

that a careful reading of paragraph 7 would dissipate the objections that had been raised.

27. Mr. FRANÇOIS suggested the wording "the annexation of a territory", and the addition at the end of the proposed text of the words "in violation of international law".

28. Mr. AMADO was reluctant to admit that any annexation could take place in conformity with international law.. The previous year, the Commission had hesitated to go so far; but it was a point of minor importance and he would accept the amendment proposed by Mr. François.

29. Mr. CORDOVA considered that the only objection to Mr. François' proposal was that it did not lay sufficient stress on the fact that recourse to force should constitute a factor in the crime. He proposed: "forcible annexation . . . in violation of international law". He would not like to see the Commission abandon that stipulation in its definition of the crime.

30. The CHAIRMAN said that the proposal met Mr. Yepes' objection. The Anschluss had been brought about after the fomenting of internal strife. It constituted a violation of international law, but there had been no forcible intervention.

31. Mr. YEPES proposed the wording: "Acts by authorities of a State resulting in or directed toward the annexation, by means contrary to international law and to the Purposes of the United Nations, of territory belonging to another State". Article 2, paragraph 4 of the Charter, in fact, provided that "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".

32. Mr. SCELLE was of the opinion that, if the Commission accepted Mr. Yepes' proposal, Mr. Córdova might be told that the word "forcible" was redundant. Actually, if it were said that annexation must be carried out in conformity with international law, forcible intervention was *ipso facto* excluded. The text as it stood reading: "resulting in or directed toward annexation. . .". met with his approval. It was in any case only a drafting matter.

33. Mr. ALFARO supported Mr. Yepes' proposal. The word "forcible" was redundant in the present state of international law as the words "in violation of international law and contrary to the Purposes of the United Nations" implied nothing more nor less than the use of force.

34. Mr. SANDSTRÖM thought it was a mistake to say "resulting in" in connexion with forcible annexation, since the acts in question were contrary to international law. On the other hand one could quite well say "directed toward the forcible annexation".

35. Mr. KERN (Assistant Secretary-General) observed that Mr. Yepes proposed to say: "annexation by means contrary to international law and to the Purposes of the United Nations". But the Purposes of the United Nations formed part of international law. It would

² A/CN.4/25, *Appendix*, Crime No. VII.

³ Summary record of the 58th meeting, para. 89.

therefore be necessary to say: "and notably to the Purposes of the United Nations".

36. The CHAIRMAN observed that he did not like the word "notably".

37. Mr. CORDOVA did not believe that international law had anything to do with the Purposes of the United Nations. The latter took political decisions and, in taking them, was not obliged to conform to international law.

38. The CHAIRMAN remarked that those words appeared in the Charter.

39. Mr. CORDOVA replied that the Charter did not compel the Security Council to take account of international law.

40. Mr. KERNO (Assistant Secretary-General) was entirely opposed to that view. The question had been discussed at length at San Francisco. A perusal of Article 1 of the Charter would show that the Purposes of the United Nations were: "... and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace". Consequently, efforts should in every case be made to bring about the adjustment or settlement of disputes or situations in conformity with international law. That was one of the basic principles of the United Nations.

41. Mr. SCALLE observed that the General Rapporteur was inclined to express heretical views.

42. Mr. LIANG (Secretary to the Commission) asked whether it was necessary to broaden the formula. If reference was to be made to the Charter it was the Principles rather than the Purposes that should be cited. Article 2 of the Charter contained a number of definite obligations and it was to that Article that reference should be made. It would therefore, be better, he thought, either to say nothing at all or to mention international law and the Purposes and Principles of the United Nations.

43. Mr. YEPES agreed to the wording "the Purposes and Principles of the United Nations".

44. Mr. ALFARO pointed out, in connexion with Mr. Kerno's statement, that he had been a member of the Sub-Committee entrusted with the drafting of the first two chapters of the Charter. In conjunction with one or two others of his colleagues, he had been obliged to fight the legal experts of the big Powers to get them to agree to a reference to international law. He had drawn attention at the time to the fact that the words "international law" and "justice" did not appear anywhere in the Dumbarton Oaks Proposals, except in the title of the International Court of Justice and in the draft submitted for paragraph 7 of Article 2 of the Charter. But in the latter case the words had been used not to draw attention to the importance of international law and justice, but to restrict their scope in the interests of national jurisdictions. The Chinese delegation had been the first to propose the insertion of a reference to international law and justice in the first two chapters of the Charter. Later the representatives of Belgium and Chile and he himself had proposed the insertion of the words

"justice and international law" at the beginning of Article 1 so that they might cover all the provisions of that article. That proposal had not been adopted. All that they had been able to obtain had been the insertion of those words in the provision concerning the settlement of disputes.

45. He considered that the Commission should adopt Mr. Yepes' proposal and Mr. Liang's suggestion.

46. The CHAIRMAN noted the Commission's approval and added that it was a drafting matter and should therefore be left to the Rapporteur.

Commentary on paragraph 7

Sub-paragraph (a)

In accordance with the decision taken at the previous meeting⁴ sub-paragraph (a) was deleted.

Sub-paragraph (b)

47. Mr. FRANÇOIS asked what were the various international instruments prohibiting the forcible annexation of territory. In any case the sub-paragraph should be amended so as to bring it into line with the new wording of paragraph 7, where the word "forcible" did not appear.

48. Mr. YEPES recalled that article 9 of the draft Declaration on Rights and Duties of States provided that: "Every State has the duty to refrain from resorting to war as an instrument of national policy and to refrain from the threat or use of force against the territorial integrity or political independence of another State, or in any other manner inconsistent with international law and order".

49. He said that the same notion was contained in Article 2, paragraph 4 of the Charter.

50. He considered that sub-paragraph (b) should be kept, the word "forcible" being deleted.

51. The CHAIRMAN was of the opinion that, if the word "forcible" were deleted, the scope of the provision would become too wide. There might be legal annexations carried out by virtue of a treaty.

52. Mr. SPIROPOULOS proposed the deletion of the sub-paragraph.

53. Mr. SANDSTRÖM would prefer the commentary to follow what was said in the text.

Sub-paragraph (b) was deleted.

Sub-paragraph (c)

54. The CHAIRMAN pointed out that the sub-paragraph contained a formula that had been modified⁵ and it would be amended accordingly.

Sub-paragraph (c) was adopted, subject to the necessary amendment.

Paragraph 8

55. The CHAIRMAN remarked that in sub-paragraph (b) of the commentary it was stated that the text of the paragraph was in substance identical with that of the Convention on Genocide. He asked the Rapporteur whether there was any important divergence.

⁴ Summary record of the 89th meeting, para. 78.

⁵ Summary record of the 89th meeting, para. 25.

56. Mr. SPIROPOULOS replied that the Convention on Genocide did not differentiate between acts committed by the authorities of a State and acts committed by private individuals. The terms of its article IV were not, however, reproduced word for word.

57. Mr. YEPES proposed the addition of the word "political" to the enumeration. He considered that persecution on political grounds was just as serious as on any other.

58. The CHAIRMAN observed that if the Commission were to add that word, it would re-open a controversy that had already been fought out in the General Assembly.

59. Mr. KERNO (Assistant Secretary-General) recalled that the mere fact that the Commission had, the year before, contemplated the inclusion in its Code of the crime of genocide, had given rise to criticism in certain quarters. It had been asserted that, in including in the Code provisions from the Convention on Genocide, the intention had been to prejudice the Convention.

60. Should the Commission decide to include the concept of genocide in the Code, it should consider whether it was advisable to make radical changes in the subject matter of the Convention. As the members would remember, the original text of the Convention spoke of political groups. After lengthy and heated discussion it had been decided to delete the word "political".

61. Mr. YEPES announced that, in the light of that explanation, he would withdraw his amendment, though he was still sorry the word "political" did not appear in the Convention.

62. Mr. ALFARO observed that the proposed text reproduced the text of the Convention. The result might be prejudicial to that instrument. He proposed that the enumeration of acts in paragraph 8 be replaced by the words: "Acts of genocide as defined in the Convention on Genocide." That wording would leave the Convention unimpaired.

63. Mr. SANDSTRÖM supported Mr. Alfaro's proposal. Its adoption would obviate the risk that the draft Code might involve a change in the wording of the Convention on Genocide.

64. Mr. AMADO contended that such a course was out of the question in the case of a criminal code. The Commission must specify the acts which it covered. He remembered having fought for the inclusion of the enumeration at the previous session. In his opinion the enumeration of acts described as crimes was essential.

65. Mr. LIANG (Secretary to the Commission) recalled that during the discussion on Mr. Spiropoulos's first report (A/CN.4/25) the previous year, numerous suggestions had been put forward as to the way in which genocide should be dealt with in the Code. He himself had suggested that, instead of inserting the Convention in the text of the Code, it should be referred to in the preamble, as follows: "The act of genocide forms the subject of another Convention." In his opinion it would be better to adopt that course, in view of the difficulties in regard to the implementation of the Convention on Genocide; those difficulties might react on the implemen-

tation of the Code, should it contain the same provisions. He had been supported in that opinion by Mr. Spiropoulos. The Commission had finally decided that the definition of the crime given in the Convention be inserted in the Code and it had become paragraph 8. The enumeration might be replaced by the reference proposed by Mr. Alfaro, but it was unusual to find, in a code, a reference to another document. He himself had never seen a code in which that had been done.

66. If the Commission decided to define the crime of genocide in the Code, it should adopt the text as it stood in the Report. If, on the other hand, the Commission preferred merely to refer to the Convention, it should do so outside the text of the Code itself.

67. Mr. CORDOVA stated that before he came to Geneva someone had mentioned to him that inclusion of the crime of genocide in the Code would affect the fate of the Convention. Certain countries would maintain that, since the crime of genocide had been incorporated in the Code, it was not necessary to ratify the Convention.

68. Mr. Alfaro's proposal did not solve the problem, since the same argument applied. By its reference to the Convention, the Code made genocide a crime, and ratification of the Convention was therefore unnecessary.

69. Technically speaking, the Code should not, in his opinion, refer to any other law or convention, since a code was, by definition, a collection of the provisions concerning a given subject.

70. He considered that the text should be adopted as it stood, or that the crime of genocide should be left outside the Code altogether.

71. Mr. SCALLE supported Mr. Liang's and Mr. Córdova's opinion. It was not customary for a penal code to refer to any other law. The Code should be complete in itself. He hoped that the Code would go further than the Convention on Genocide. The establishment of an international court, empowered to judge that crime, would mark a step forward compared with the Convention. He would prefer to keep the text as it stood.

72. The CHAIRMAN observed that the Commission had before it three alternatives: (1) to leave the text as it stood, (2) to adopt Mr. Alfaro's proposal for a reference to the Convention on Genocide, and (3) to omit the crime of genocide and say, in the commentary, that "no mention is made of it because it forms the subject of another convention".

73. Technically speaking, he considered it undesirable to refer to the Convention. He felt too that the third solution was also inexpedient, as the crime of genocide had given rise to more discussion than any other crime, and the Commission was trying to draw up a complete code.

74. He was of the opinion that the text should be left as it stood.

75. Mr. AMADO said he had been the first to raise objections to the proposed reference to the Convention, and he was glad to see that his colleagues had come round to his view.

Paragraph 8 was adopted.

*Commentary on paragraph 8**Sub-paragraph (a)*

In accordance with the decision taken at the previous meeting⁶, sub-paragraph (a) was deleted.

Sub-paragraph (b)

76. Mr. SPIROPOULOS suggested: "The text proposed by the Rapporteur is, with some difference of wording, identical with . . ."

78. The CHAIRMAN considered that the text should be left as it stood.

Sub-paragraph (b) was adopted.

Sub-paragraph (c)

79. The CHAIRMAN pointed out that sub-paragraph (c) merely repeated what was stated in the definition of the crime.

80. Mr. YEPES considered that it would be better to leave the text as it stood to keep it in harmony with the commentary on other crimes.

81. Mr. SPIROPOULOS drew attention to the fact that in the definition of the preceding crimes, the text spoke of: "Acts by the authorities of a State". In the case in point, it should be emphasized that acts by private individuals were also included.

82. The CHAIRMAN observed that in that particular case mention had already been made of "acts committed by the authorities of a State or by private individuals".

83. Mr. YEPES did not press his point.

Sub-paragraph (c) was deleted.

Paragraph 9

84. Mr. CORDOVA asked what was the difference between the crime under discussion and genocide, and why the word "inhuman" was added.

85. The CHAIRMAN replied that it was because that word appeared in the Nürnberg Charter (article 6, sub-para. (c)).

86. Mr. CORDOVA objected that, if the basis of the charge was the inhumanity of the act, it was the same as for the crime of genocide.

87. Mr. AMADO recalled that he had followed very closely the discussion on that point in the Sixth Committee. By genocide was meant the destruction of a group — the Jews for instance — as such. It was a *dolus specialis*. Paragraph 9, however, related to a political massacre without any question of a group.

88. Mr. FRANÇOIS noted that, in the definition of the crime, reference was made to paragraphs 1, 2, 5, 7 and 10. He wondered why no mention was made of paragraph 3, since inhuman acts could be committed in the event of incursion by armed bands.

89. Mr. SPIROPOULOS said that the text had been adopted by the Commission, and that he had merely inserted what the Commission had decided the previous year.

90. Mr. AMADO did not see why paragraph 3 need be cited in the text relating to the crimes in question, since that paragraph dealt with very different acts. It could, however, be done.

91. Mr. CORDOVA considered that it was no argument to say that the Commission had decided in a certain sense, and that that was the reason why paragraph 3 had not been cited. In the course of the incursions referred to in paragraph 3, individuals might certainly commit mass murder and he did not see why paragraph 3 should not be referred to in paragraph 9.

92. Mr. SPIROPOULOS was ready to refer to it if the Commission so decided.

93. The CHAIRMAN remarked that in the present text, the word "mass" applied only to murder. Hence the extermination, enslavement etc. of a single individual constituted a crime. In his opinion the word "mass" should apply to all the acts. He therefore proposed that, in the English text, the word "or" before "extermination" etc. be deleted and that, in the French, the words "*en masse*" be placed after the word "*déportation*".

94. Mr. LIANG pointed out that the word "mass" did not appear in article 6, sub-paragraph (c) of the Nürnberg Charter.

95. Mr. CORDOVA considered that, in order to give the crime its specific character, the word "mass" should be made applicable to extermination, enslavement and deportation as well. The proposed amendment was an improvement on the Nürnberg text.

96. Mr. AMADO objected that, if the text of articles already adopted were incorporated, it amounted to codification, and for that a precedent was required. Article 6 of the Nürnberg Charter showed why the word "murder" was not qualified, viz. because many isolated allied soldiers had, during the war, been put to death immediately after capture. However, he did not wish to press the point.

97. The CHAIRMAN observed that the Commission was not bound by the text of the Nürnberg Charter and could, if it so desired, retain the word "mass" in paragraph 9.

98. Mr. SANDSTRÖM thought that the concept "mass" was already contained in the words "any civilian population". There was, however, no reason why it should not be repeated.

99. Mr. CORDOVA said he had now changed his mind, since the acts considered as international crimes under paragraph 9 were acts committed against the civilian population. "Civilian" was the key word. It made no difference whether they were committed against only one person or against more than one person. In such circumstances the murder of a single individual constituted an international crime. The word "mass" was therefore unnecessary.

100. The CHAIRMAN repeated that he did not consider that the murder of one individual by another should be considered as an international crime.

101. Mr. AMADO observed that the murder of a leader was a sort of mass murder, since to kill the leader of

⁶ Summary record of the 89th meeting, para. 78.

a group was tantamount to destroying the spirit of resistance within that group.

102. Mr. SCELLE was in favour of the deletion of the word "mass".

103. Mr. CORDOVA remarked that paragraph 9 was not applicable to murder committed by a single individual. That would not be a crime under international law, whereas it would be a crime under international law for a group to murder an individual for the reasons mentioned in paragraph 9. The wording should therefore be amended so as to make it clear that the reference was to "murder by groups, etc.". Where the act was committed by an individual it did not come under international law, but constituted a crime punishable by the law of the land.

104. The CHAIRMAN asked Mr. Córdova whether he considered lynching to be a crime under international law, and Mr. CORDOVA replied that, to constitute such a crime, the lynching would have to be committed on racial grounds.

105. Mr. SCELLE considered that the characteristic feature of genocide was its special motive and not the number of the perpetrators or their victims. What distinguished it from the crime of murder under national law was its motive, the fact that the victim or victims belonged to a particular group or race. Not to admit that point was to side with the criminal lawyers, who considered that genocide was already covered by the penal codes of the various countries.

106. The word "mass" in paragraph 9 did not appear to serve any useful purpose in regard either to the perpetrators or the victims of the crime.

107. Mr. SANDSTRÖM thought that the word "mass" should be kept, especially as it had been stated that the deletion of that word would make it possible to consider an individual murder as a crime under international law. But in the case in point, the Commission had in mind only such acts as had been perpetrated in Germany in the form of mass murder, mass extermination and mass enslavement. That was clearly apparent from the title of the draft code itself, "Offences against . . . mankind" (and from the expression "civilian population" in the paragraph in question).

108. Mr. SPIROPOULOS was in favour of deleting the word "mass". The Commission had been instructed to incorporate the Nürnberg principles in its draft, and the corresponding article of the Nürnberg Charter (article 6 (c)) did not use the word "mass". The Commission should, wherever possible, keep to the wording of the Charter.

109. As to whether the crime in question did or did not presuppose a plurality of victims, i.e., mass murder, the Commission was not called upon to express an opinion. It would appear, however, that all interpretations of the definition of the crime agreed that it was in fact a mass crime. That conclusion was confirmed by the use of the expression "civilian population". The Charter would have said "civilians" if its authors had wished to suggest a different interpretation.

110. However, the matter was not one for the Commis-

sion to decide. It had to follow the wording of the Nürnberg Charter without restricting the interpretation to which it might lend itself. It would be the responsibility of the Courts to interpret the paragraph.

111. Mr. CORDOVA was in favour of deleting the word "mass", but in that case thought that the word "civilians" should be substituted for "civilian population".

112. Mr. SPIROPOULOS considered that there was no reason why the Commission should draw up a text differing from that of the Nürnberg Charter, and admitting of a different interpretation.

It was decided by 8 votes to delete the word "mass".

113. Mr. SCELLE pointed out that no mention had been made of cultural genocide. If that omission was to be explained solely by the silence of the Convention on Genocide in regard to the matter, that reason was insufficient, and the Commission should not disregard one of the essential forms of genocide.

114. The CHAIRMAN pointed out that the omission was the result of a decision by the General Assembly and that it was to the General Assembly that the Commission would send its draft.

115. Mr. SCELLE maintained that the Commission was not necessarily bound to abide by such a decision. Moreover, the General Assembly could, if it so desired, take a second decision to the same effect.

116. Mr. AMADO recalled that the members of the General Assembly who had voted against the inclusion of cultural genocide had based their attitude on the fact that culture was already covered to a large extent by the word "religious". That made punishable such things, for instance, as outrages on sacred books, religious symbols, etc. Moreover, the word "cultural" was difficult to define.

117. Mr. SCELLE thought that the absence of such a word represented a serious omission. The word "religious" did not cover the same ground as the word "cultural". In France for instance there were two forms of education: State education and Catholic education. Were the freedom of Catholic education to be denied that would be genocide. In certain countries persecution of the Church had often been preceded by cultural persecution. The Commission was entirely free to take its own decisions and owed it to itself to make cultural genocide a crime.

118. Mr. YEPES stated that he was strongly in favour of the addition of the words "or cultural" after the word "religious".

119. Mr. ALFARO considered that there could be no objection to the inclusion of cultural genocide in the draft code, but wondered whether, from the point of view of form, an amendment consisting in the insertion of the words "or cultural", as proposed by Mr. Scelle, would meet the desired aim. Was it possible to treat certain acts committed against a particular category of schools — for instance, the prohibition to teach a certain language — on the same footing as the murder of a civilian population? Would it not be better to deal with the crime in question separately?

120. Mr. SCELLE admitted that it would not always be possible to link cultural genocide with a war crime, since such action was not necessarily connected with war.

121. Anyone conversant with the question of minorities would be astonished if the Commission disregarded that particular form of genocide, which was already covered in treaties on minorities and which might take the form of the prohibition of schools, the prohibition of a language or the prohibition of notices (for instance the prohibition by Italy of notices in German in the part of the Tyrol annexed after the First World War).

122. It appeared to him that the words "or cultural" would apply to all acts of that description.

123. Mr. AMADO referred to the difficulties with which immigration countries were faced. In Brazil, States like Santa Catarina and Rio Grande Do Sul had a very large German population, with its own schools and churches, that did not speak the language of the country. Very difficult problems had arisen, particularly after the rise to power of Hitler, which had created a real German peril for Brazil. Similarly the State of São Paulo had experienced a large influx of Japanese. It was difficult to induce foreigners to study the language of the country and to mix with the population.

124. In view of those difficulties, he regretted that he could not associate himself with the suggested amendment. The question presented special aspects for immigration countries, desirous of assimilating foreigners.

125. Mr. SCELLE considered that France was faced with a similar problem in regard to Poles in the north and Italians in the south-west. Large numbers of immigrants had settled there with their families, priests and teachers, and received the support of their Consuls. France hoped to be able to assimilate those foreigners, but did not wish to compel assimilation. As had been said in regard to minorities "immigrants could be enticed but not forced."

126. Mr. CORDOVA recalled that the mass immigration of foreigners from a neighbouring country had resulted in the loss to Mexico of territories such as Texas and New Mexico.

127. It was legitimate to enact legislation to compel immigrants to use the language of the country — that did not constitute persecution. What were punishable were inhuman acts more or less comparable to genuine crimes.

128. He did not see the necessity of including the words "or cultural" in paragraph 9.

129. Mr. SCELLE agreed that to compel immigrants, for instance, to use the language of the country before the Courts did not constitute persecution, but if the immigrants were forbidden to use their mother tongue in private conversation that would be persecution.

130. Mr. KERNO (Assistant Secretary-General) gathered from what Mr. Scelle had said that his desire was to safeguard the cultural heritage constituted by institutions, schools and language. It would be difficult to include that concept in paragraph 9, even with the addition of the words "or cultural" to the enumeration. Murder, extermination, enslavement etc. would still be

required, if the crime was to be punishable. It would not be easy, even by means of a broad interpretation, to bring, say, the prohibition of the posting of notices in a language other than the language of the country within the provisions of that paragraph.

131. When the draft Convention on Genocide was being discussed by the General Assembly, some delegations had proposed, as an addition to the definition of that crime, a sixth sub-paragraph, referring to cultural genocide. The Commission had, however, just adopted paragraph 8, which included the definition of genocide, without modifying it in that sense.

132. Mr. SCELLE said that he had no objection to the transfer of his amendment from paragraph 9 to paragraph 8.

133. Mr. AMADO explained that the objections he had raised to the amendment proposed by Mr. Scelle had been due, in part, to the fact that he had thought that the amendment referred to paragraph 8. He would have no objection to the inclusion of the words "or cultural" in paragraph 9.

134. Mr. SPIROPOULOS said he would abstain from voting, but wished to draw the Commission's attention to the desirability of also inserting in paragraph 9 the words "national" and "ethnic" which appeared in the Convention on Genocide (article II). Paragraph 8, which followed the wording of the Convention, included those two words, whereas paragraph 9, which corresponded to the Nürnberg Charter, did not. He considered, however, that they would be equally appropriate in paragraph 9.

135. Mr. SCELLE thought that the Commission might vote on the word "cultural" and leave it to the Rapporteur to add the words "national" and "ethnic".

It was decided by 6 votes to add the words "or cultural".

136. Mr. SANDSTRÖM recalled that, at the previous session, he had proposed the deletion of the last clause of paragraph 9, viz. "when such acts are committed in execution of or in connexion with the offences defined in Nos. etc.". He did not understand the reason for that stipulation, and the Sixth Committee had subsequently discussed the point at length.

137. The CHAIRMAN was of opinion that the deletion of the word "mass" made it necessary to retain those reservations, since otherwise a whole series of domestic crimes would be converted into crimes under international law.

138. Mr. SPIROPOULOS recalled that at the previous session the Commission had considered that the acts referred to in paragraph 9 were crimes under international law only if they were connected with war crimes or crimes against peace.⁷

139. In the Sixth Committee, the French delegation had criticized that view as being too narrow.⁸ It had considered that there could be a crime against mankind in time of peace just as well as in time of war. If he

⁷ See summary record of the 59th meeting.

⁸ See A/C.6/SR.232, paras. 63-69.

remembered rightly no other delegation had supported that view.

140. Mr. SANDSTRÖM, taking as an example the "cultural" crime, wondered why that crime could only be directed against mankind when it was connected with war.

141. Mr. AMADO confirmed the account given by Mr. Spiropoulos of the discussion in the Sixth Committee. The French delegation had in fact advocated the widening of the concept of crime under international law. The Commission was not, however, entrusted with the preparation of a general international penal code. The acts covered by the draft code were "offences against the peace and security of mankind", that was to say, they belonged to a specific category.

142. Mr. SANDSTRÖM explained that he had not intended to submit a formal proposal.

*Paragraph 9 was adopted as amended.*⁹

Commentary on paragraph 9

In accordance with the decision taken at the previous meeting,¹⁰ sub-paragraph (a) was deleted.

Sub-paragraph (b)

143. The CHAIRMAN pointed out that on page 44, line 3, the text should read "characterizes as crimes", and that No. 3 should be added to the enumeration of paragraphs in line 5.

144. Mr. HSU pointed out that as a result of the amendments made to paragraph 9, it no longer entirely corresponded to the "crimes against humanity" of the Nürnberg Charter.

145. The CHAIRMAN and Mr. SPIROPOULOS replied that the word "correspond" did not mean "to be identical with".

Sub-paragraph (b) was adopted.

Sub-paragraph (c)

Sub-paragraph (c) was deleted.

Paragraph 10

146. Mr. YEPES drew attention to the fact that, in a communication sent to the Commission at the time of its second session, the United Nations Educational, Scientific and Cultural Organization (UNESCO) had asked it to define as a crime under international law the systematic destruction of works of art and historic monuments. The Commission had replied to UNESCO at the time that its request had arrived too late for action to be taken during the second session, but that it recognized that such acts should be punishable internationally. It would consider the matter in the course of its second reading of the Draft Code of Offences against the Peace and Security of Mankind.

147. Mr. KERNO (Assistant Secretary-General) pointed out that UNESCO's request had been recorded in paragraph 153 of the Commission's report on its second

session¹¹, and in paragraph 6 of the introduction to the Draft Code of Offences against the Peace and Security of Mankind, contained in Mr. Spiropoulos's second report (A/CN.4/44). The Commission should therefore discuss the question. But the protection of historic monuments had no connexion with the murder of a civilian population. It might possibly be included in paragraph 10 or be dealt with in a separate paragraph.

148. Mr. SPIROPOULOS thought that, although that particular instance of violation of the laws of war fell within the general concept of a war crime, it need not be mentioned specifically in the draft code.

149. In reply to a question by the CHAIRMAN, Mr. SCALLE pointed out that the acts referred to in the UNESCO communication were in fact connected with a state of war since UNESCO had specified "during a conflict". UNESCO attached great importance to the problem. It had convened a conference of curators of museums and of architects, who had studied practical means of preserving works of art, monuments, archives etc. The Commission should try to meet UNESCO's request, perhaps by referring to the relevant provisions of the The Hague and Geneva Conventions.

150. Mr. YEPES suggested that the following might be added to paragraph 10: "including the systematic destruction of artistic, historic, scientific or religious monuments or works of art".

151. Mr. SCALLE considered that that might be making too much of one particular point.

152. Mr. SPIROPOULOS referred the members of the Commission to the statements in sub-paragraphs (b) and (c) of the commentary on paragraph 10. The destruction of historic monuments etc. was undoubtedly prohibited by the laws and customs of war and Greece was keenly interested in their preservation. But how could a departure from the principle adopted by the Commission of keeping to a general definition be justified?

153. He therefore proposed that consideration be given to the possibility of drawing up a special Convention on the subject in which UNESCO was interested. That was the only means of dealing with the matter satisfactorily. If it were taken up in paragraph 10, it might well be asked why other even more important questions, such as the destruction of whole towns, had not been mentioned in that paragraph.

154. He considered that the Commission should not deal with the question in that or any other paragraph of the draft Code.

155. Mr. SANDSTRÖM thought that, without changing the paragraph itself, the Commission might meet UNESCO's wishes by enlarging on the explanation given by Mr. Spiropoulos in the accompanying commentary.

156. Mr. SPIROPOULOS pointed out that UNESCO's communication had already been referred to in the last paragraph of the introduction preceding the text of the draft Code.

⁹ See summary record of the 91st meeting, paras. 19-86.

¹⁰ Summary record of the 89th meeting, para. 78.

¹¹ *Official records of the General Assembly, Fifth Session, Supplement No. 12 (A/1316)*. Also in *Yearbook of the International Law Commission, 1950*, vol. II.

157. Mr. SCALLE did not think the Commission could tell UNESCO that it would undertake the preparation of a convention on the subject. That should be done by experts in those fields.

158. He supported Mr. Sandström's proposal. By adopting it the Commission would show UNESCO how it had dealt with its request.

159. Mr. SPIROPOULOS replied that it had not been his intention that the Commission should draw up such a Convention.

160. Mr. CORDOVA thought the Commission would do better to mention the crimes referred to by UNESCO in the commentary. That would show that the Commission was anxious to defend humanity against certain acts prejudicial to its heritage and that it had gone so far as to consider the destruction of irreplaceable monuments as a special crime no less serious than the others.

161. Mr. YEPES associated himself with Mr. Sandström's proposal. In his opinion the following paragraph should be added to the commentary: "The Commission considered whether special reference could be made in this article to the destruction of artistic, historic, scientific or religious monuments, but decided that the question was already covered by the terms of the paragraph itself".

162. Mr. SPIROPOULOS considered that some reference should nevertheless be made to UNESCO's request, otherwise the reader would be puzzled. He would, however, prefer to do it in the introduction instead of in the commentary on paragraph 10.

163. Mr. AMADO pointed out that the list of war crimes would cover pages and pages. That was why the Commission had abandoned the idea of an enumeration that could never be exhaustive. As regards the question of the protection of historic monuments, the Commission consisted of legal experts entrusted with the preparation of a penal code. It did not need to go out of its way to be polite to agencies which approached it with requests.

164. Mr. SANDSTRÖM admitted that, when he drew up his proposal, he had forgotten that UNESCO's request had already been mentioned in the introduction.

*The Commission decided not to deal with the question of protection of historic monuments either in paragraph 10 or in the relevant commentary, but to ask the rapporteur to expand the passage on that question in the introduction to the draft code.*¹²

Paragraph 10 was adopted.

165. Mr. LIANG (Secretary to the Commission) pointed out that the expression "laws or customs of war" was worded somewhat differently in the Nürnberg Charter and in its counterpart, the Charter of Tokyo. The former spoke of a "war of aggression" (article 6 (a)) while the latter used the term "a declared or undeclared war of aggression" (article 5). It was clear that the word "war" must be interpreted in its strictly legal sense in both documents.

166. The only place in which the word "war" appeared in the Commission's draft was in paragraph 10. It was necessary to specify that the laws and customs of war would also be applicable in the case of any other illicit use of force. That would avoid giving the impression that the Code drawn up by the Commission was only applicable in the case of a state of war in the restricted legal sense of the word, and hence that there could be no war crimes in the case of the illegal use of force.

167. In other words it should be made quite clear that the laws and customs of war applied even when a state of war existed only in the material sense of the term.

The meeting rose at 6 p.m.

91st MEETING

Tuesday, 29 May 1951, at 9.45 a.m.

CONTENTS

	Page
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) (continued)	
Article I (continued)	
Commentary on paragraph 10	72
Paragraph 9 and commentary (<i>reconsidered</i>)	74
Paragraph 11	77
Commentary on paragraph 11	78
Proposal by Mr. Yepes for two new articles	79
Article II	80
Commentary	80

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 SCALLE, 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) (continued)

ARTICLE I (continued)

Commentary on paragraph 10

In accordance with the decision taken at the 89th meeting (para. 78), sub-paragraph (a) was deleted.

Sub-paragraph (b)

1. Mr. FRANÇOIS said that the view expressed in paragraph (b) of the commentary had been supported at the second session by the Chairman, by Mr. Spiropou-

¹² See *infra*, summary record of the 92nd meeting, paras. 108-112.