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A/CN.4/SR.91

Summary record of the 91st 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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157. Mr. SCELLE 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.

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

91st MEETING

Tuesday, 29 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) *(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-

los and by other members. Yet others, however, had taken a different view, including Mr. Hsu, Mr. Alfaro and Mr. Scelle, the last-named having stated at the sixtieth meeting that the " regulations applicable to an international police force were a guarantee of peace and security. The Commission, which had to discuss rules for safeguarding peace and security, must establish rules for the use of such a force ".[1]

2. In order to take account of those divergent opinions, the Commission should request the Rapporteur to tone down sub-paragraph (*b*) a little by using some such wording as: " Although it may be doubted whether such acts actually affect the peace and security of mankind, the mere fact that they figure among the crimes enumerated in the Nürnberg Charter is a sufficient reason for including them in the present draft Code."

3. Mr. SPIROPOULOS thought that a question of principle was involved. Violations of the laws or customs of war did not affect the peace and security of mankind. They were only committed during a war.

4. Replying to an observation by Mr. François, Mr. Spiropoulos said that " peace and security " formed an entity, a single concept. " Security " should not be considered separately.

5. He did not wish to press the point but must repeat that, in his view, acts committed in violation of the laws or customs of war could not occur in peace time.

6. The CHAIRMAN thought that the commission of war crimes could be said to make it more difficult to restore peace and to put peace further off.

7. Mr. SPIROPOULOS felt that such an argument was too broad, but he would not oppose the wording suggested by Mr. François.

It was decided to substitute the text proposed by Mr. François for the last three sentences of sub-paragraph (b).

Sub-paragraph (c)

8. The CHAIRMAN observed that the Commission had already examined sub-paragraph (*c*) to some extent at its previous meeting. He thought that the expression " practically possible " should be replaced by " practicable " or " possible ".

Sub-paragraph (c) *was adopted with that amendment.*

9. Mr. YEPES and the CHAIRMAN called attention to Mr. Liang's suggestion made at the previous meeting (para. 165) that it should be stated whether the term " war ", as used in paragraph 10, was intended in the legal or the physical sense.

10. Mr. SPIROPOULOS thought that the Commission should not decide at that stage whether violations of the laws of war were a crime only in the case of " formal " war or also in war in a wider sense of the term. The question was important but it lay outside the framework of the draft code. All that the Commission had to do was to enumerate offences against the peace and security of mankind, not to specify the cases to which the Code would apply.

11. Mr. FRANÇOIS fully agreed with the view expressed by Mr. Spiropoulos. Civil war raised a similar problem. The Red Cross Conventions signed at Geneva on 12 August 1949 contained detailed provisions as to which of their stipulations applied in the event of civil war.[2] That was a complex question which the Commission could not settle.

12. Mr. LIANG (Secretary to the Commission) said he had not proposed that the question be settled in the Commission, but he thought that the use of the word " war " in paragraph 10 was not in conformity with the terminology adopted in the preceding paragraphs. It would be preferable to use the expression " employment of armed force ", as in paragraph 1. The formula proposed in the draft code would appear to concern war in the legal sense of the term, i.e., the formal state of war. The present wording might suggest that a formal state of war would have to exist before paragraph 10 became applicable.

13. Mr. HSU said his first impression was that no action need be taken on Mr. Liang's suggestion, and that paragraph 10 applied to all categories of war whether declared or not. But since there was a doubt in the minds of certain members, the Commission should explain in its commentary that the paragraph applied to any employment of force.

14. Mr. SANDSTRÖM thought that paragraph 10 should be left as it stood.

15. It could be explained in the commentary that the expression used was traditional and without prejudice to the field of application of the rule. He suggested the following text:

> " The Commission has used the expression ' violation of the laws or customs of war ' because the rules to which it refers are known under that denomination, and without entering into the question to what extent these rules are applicable in different cases of armed conflict."

16. Mr. SPIROPOULOS requested Mr. Liang to propose a text on which the Commission could take a decision.

17. Mr. ALFARO agreed with the observations of Mr. Liang and Mr. Hsu. It was clear that violations of the laws or customs of war would not be permitted in any circumstances. The rule applied to all types of war, whenever armed force was employed, even in the case of self-defence or coercive measures decided on by the Security Council. By establishing that rule the Commission would avoid the suggestion that paragraph 10 applied only to aggressors and to the vanquished.

18. Mr. LIANG (Secretary to the Commission) proposed that the following text from article 2 of the general provisions of the Geneva Conventions of August 1949 be reproduced in the commentary:

> " . . . the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."

[1] Summary record of the 60th meeting, para. 11.

[2] See article 3 of each of the four Conventions in *The Geneva Conventions of August 12, 1949*, Geneva, 1949.

It was decided to insert an addition, based on the above text, to the commentary on article 10.

Paragraph 9 and commentary (reconsidered)

19. Mr. SPIROPOULOS recalled his reference at the previous meeting (para. 139) to the views expressed by the French delegation in the Sixth Committee. After the meeting Mr. Scelle had stated that he had not realized at the time that, owing to the reference it contained to paragraphs 1 and 2, which concerned acts of war, paragraph 9 was also connected with war.

20. He would like the decision taken by the Commission to be based on a full knowledge of the facts. The question was whether the crime referred to in paragraph 9 was a crime against humanity, like genocide, which could be committed in time of peace as well as in time of war, or, on the contrary, whether paragraph 9 referred to crimes against peace and to war crimes, as stated in subparagraph (*b*) of the commentary.

21. In a recent communication, which had not been circulated to members of the Commission, the World Jewish Congress maintained that the crimes against humanity, referred to in paragraph 9, must be interpreted in a broad sense as comparable to genocide. He, personally, had thought that that crime should be understood in a restrictive sense; but, as rapporteur, he felt bound to draw the Commission's attention to the question and might even support a contrary view if one emerged from the discussion.

22. If the Commission did not go into the question, the French delegation to the Sixth Committee might justifiably claim that the Commission had disregarded its observations.

23. Mr. SCELLE admitted that, owing to an oversight, he had not realized at the previous meeting that the reference at the end of the paragraph to various other paragraphs of the draft code restricted the crime defined in paragraph 9 to times of war.

24. Like the French delegation to the Sixth Committee, he was in favour of deleting the reference, which made the article cumbersome without modifying it, and he therefore proposed the deletion of the final clause, beginning with the words " When such acts are committed ".

25. He was grateful to Mr. Spiropoulos for bringing up the matter. At the previous meeting (para. 136 *et seq.*) several members had also supported the deletion of the reference to other paragraphs.

26. Mr. KERNO (Assistant Secretary-General) thought that the proposed deletion raised important problems.

27. The Commission had already deleted from paragraph 9 the word " mass ", so that any isolated murder committed for specific political or other reasons now came under paragraph 9. If the Commission now eliminated the connection between that crime and the others referred to in the draft code, it would make, for example, the persecution of a single individual belonging to some political party or other a crime against humanity and, hence, an international crime.

28. In his view, such a proposal was Utopian; it would be going too far; it would actually establish a form of individual genocide; it would transfer to the draft Code the national penal code itself.

29. Mr. SPIROPOULOS did not think the proposed deletion would involve that danger. The authority that had interpreted the text of the Nürnberg Charter, referred to in paragraph 9 ,was the International Military Tribunal itself, which had always considered that the acts in question must be committed against substantial fractions of the civilian population. The text contained the words " civilian population ", not the one word " civilians ".

30. However, it was true that the proposed deletion would not be in the nature of a mere drafting change. It might jeopardise the success of the entire draft code. Did the Commission consider that the commission of inhuman acts by a State against its own nationals was a crime under international law? At the London Conference, where the Nürnberg Charter had been drawn up, it had been generally agreed that, to justify action by the International Military Tribunal, the acts in question, for example the persecution of Jews, must be committed in time of war. It was only when they were connected with war that they became punishable. At all events that had been the view upheld by the United Kingdom and United States delegations.

31. If the Commission omitted the reference in the commentary to various other paragraphs, it would be creating a crime which was not intrinsically different from genocide. The new concept in the Convention on Genocide was that the latter protected nationals against acts by the State to which they belonged. It was for that reason that certain delegations were chary of ratifying the Convention.

32. The Commission must consider whether it wished to create a new crime, a crime affecting an entire civilian population, and not a form of genocide affecting a specific group. It must bear in mind the fact that in the General Assembly many delegations might refuse to accept the draft Code as a whole for the sole reason that it contained that new crime.

33. Although its decision was not final, by deciding to delete the expression in question the Commission would jeopardize the adoption of the draft Code.

34. Mr. SCELLE understood the fears expressed by Mr. Kerno, but thought they were exaggerated. Mr. Kerno's view resembled that of the criminal jurists, who thought that there was a difference between crimes according as they were committed in time of war or not.

35. While the Commission had deleted the term " mass " it had nevertheless retained " extermination ", " enslavement ", " deportation " and " persecution ", which were acts that could not be committed by a single individual, but presupposed a certain complicity on the part of the State authorities. In addition, before there could be crime there must be specific and explicitly stated motives, so there could be no confusion with simple crimes that would be covered by an ordinary penal code.

36. In order to avoid the risk of such an interpretation the wording of paragraph 9 itself might perhaps be amended by the insertion of the expression " against

a group or against members of a group"; but the reference to various other paragraphs would involve the judge in the study of related cases, which seemed pointless. It was preferable to make the acts referred to in paragraph 9 a specific crime, related to the crime of genocide.

37. Mr. SANDSTRÖM thought that there were two aspects to the question, namely, what elements were required to constitute the crime and what were the required conditions to enable such a crime to be dealt with by a court.

38. It was the second of those two aspects that was taken into consideration in the Nürnberg Charter, which stated, *inter alia*, that "the following acts ... are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility" (article 6, second para.), and that the crimes against humanity must have been "in execution of or in connexion with any crime within the jurisdiction of the Tribunal" (article 6, end of sub-para. (*c*)). Those texts provided that the jurisdiction of the Tribunal operated only where there was a connexion. But the crime could exist even without such a connexion.

39. He hoped that distinction would satisfy the requirements of both logic and expediency.

40. Mr. SPIROPOULOS thought that the Commission should not forget that the draft Code was meant to be applied by an international court.

41. With regard to the expression "political... grounds" contained in the text of paragraph 9, political considerations had been excluded from the Convention on Genocide. But they were now reappearing in the draft Code, and with wider implications, because paragraph 9 was not restricted to crimes of destruction committed against groups "as such". Failing the reference to the other articles in the draft Code, all inhuman acts committed on political grounds became crimes under international law. It might therefore be said that imprisonment was an inhuman act. A host of cases might be referred to the international courts. The question was whether governments were really prepared to take that risk.

42. It might also be observed that, since the draft Code was not final, the Commission might wish to ascertain the reactions of governments. Both solutions might perhaps be submitted for their consideration, namely, the deletion of the reference to other crimes, which was supported by Mr. Scelle, and the retention of that reference, which other members favoured.

43. Mr. ALFARO said that the Commission should always remember that its task was not to codify all crimes under international law, but to prepare a draft Code restricted to offences against the peace and security of mankind. All the crimes that it codified must therefore be connected with war, with preparation for war or with the consequences of war.

44. The various members who had argued that paragraph 9 duplicated the Convention on Genocide overlooked the fact that the crime referred to in the draft Code was connected with war. If the Commission omitted the reference to various other paragraphs from its commentary, all that would be left would be a category of crimes which was already covered by the Convention on Genocide or by the penal codes of various countries.

45. Mr. Scelle had rightly observed that the use of the terms "extermination", "enslavement", "deportation" and "persecution" showed that the crime referred to in paragraph 9 could only be committed with the intervention of the State authorities. But the Commission had already deleted the expression "mass", thereby making crimes committed by a single offender against a single victim punishable as crimes under international law. Had such a text been in force at the time of the assassination of Jaurès, that assassination would have been a crime under international law. The amendment to the commentary proposed by Mr. Scelle would be feasible if, at the same time, the word "murder" and the words "by private individuals" were deleted from paragraph 9. Such a deletion would obviate the possibility of the murder of the leader of a party by one of his fellow-citizens being classified as a crime under international law.

46. Mr. Scelle had also stated that one drawback to referring in the text of paragraph 9 to various other paragraphs lay in the fact that the judge would have to refer to the definitions of other crimes in order to assess acts covered by paragraph 9. In order to meet his objection it might be preferable, instead of mentioning the numbers of the paragraphs in which those crimes were defined, to explain the nature of the crimes briefly, or to give their headings.

47. In Mr. AMADO's view, the connection of the crime defined in paragraph 9 with certain others referred to in the draft Code was an element, the elimination of which would imply that any State which expelled foreigners could be arraigned before an international court. Expulsion would become a crime under international law. Only in the heat of discussion could it be maintained that the assassination of Jaurès or of Gandhi were crimes under international law.

48. He favoured the retention of paragraph 9 and the relevant commentary as they stood.

49. Mr. SCELLE was unconvinced by Mr. Amado's remarks. It was true that the Commission had been instructed to prepare a draft international penal code limited to offences against the peace and security of mankind; but if that code was to be complete, the Commission would certainly not hesitate to refer to international courts a whole series of crimes which at present came within the jurisdiction of national courts, such as white slave trafficking, counterfeiting, etc. The Commission had disregarded such acts only because they were outside its terms of reference, that was to say, because they did not endanger peace and security.

50. But peace and security might be endangered by crimes like those which he wished to see included in paragraph 9. He saw no need for stipulating a connexion between the crime defined in paragraph 9 and other crimes in the draft Code; nor was it necessary to limit

the competence of the international courts in the matter by postulating such a connexion.

51. The expulsion of foreigners without valid reason was admittedly an international act that might endanger peace; it might be punishable as a crime under international law, provided, of course, that it was attended by the racial or other motives referred to in paragraph 9.

52. He wondered why the Commission should have misgivings about recognizing the competence of the international courts in relation to such crimes. So far as concerned white slave trafficking or counterfeiting, the day would certainly come when those crimes would be referred to international courts.

53. Mr. HSU said that the question under discussion was important. In his view, crimes against humanity were also offences against peace. Genocide was itself an offence against peace.

54. In addition, there was no reference in paragraph 8 to the other paragraphs of article 1. Why then should they be mentioned in paragraph 9? The distinction drawn between paragraphs 8 and 9 was artificial. It was true that paragraph 8 had been taken from the Convention on Genocide, and paragraph 9 from the Nürnberg Charter; but the crimes referred to in those two texts were the same. Might it not be advisable to combine the two texts, especially now that Mr. Scelle had proposed the deletion of the reference to other crimes in paragraph 9?

55. He proposed that the Commission invite Mr. Scelle to prepare two texts, one as a substitute for paragraph 9 and the other a text combining paragraphs 8 and 9. The Commission could then take its choice.

56. Mr. AMADO said that the crime of genocide was a crime *per se*, irrespective of circumstances, when all of its constituent elements were present, for example, in the case of the destruction of a human group standing in the way of a dictator's ambition for a simple political party. That was a specific crime. The crimes referred to in paragraph 9 were already regarded as crimes *per se* under the penal codes of all countries, but became crimes under international law through being connected with acts calculated to disturb the peace. Thus, the expulsion of aliens was an act which any State was legally entitled to commit, but it became a crime under international law if carried out in connexion with the crimes defined in paragraphs 1, 2, 5, 7 and 10. He did not see how any confusion was possible.

57. Mr. SCELLE considered that paragraph 8 referred to genocide as such, whereas paragraph 9 referred to genocide " in small doses ".

58. In view of the obvious connexion between paragraphs 8 and 9, which Mr. Hsu had just brought out, the commentary on paragraph 9 should contain a reference to paragraph 8.

59. In his view, it would be difficult to combine those two texts; paragraph 8 referred to the destruction of a group as such while paragraph 9 referred to inhuman acts resulting in genocide of more limited scope. The first of those texts concerned what might be called " Hitlerian crimes ", while the second referred not to ordinary crimes, but to the practice of genocide on a small scale by an individual.

60. Mr. Amado had referred to the legality of the right of expulsion, and expulsion clearly could not be confused with deportation which was included in the enumeration as an inhuman act committed against the civil population. But it might be pointed out that in many cases expulsion had given rise to international disputes and to proceedings before international courts or arbitral tribunals. Such acts might disturb the peace.

61. Mr. SPIROPOULOS thought that a discussion on the legality of expulsion had nothing to do with the text before the Commission.

62. Replying to Mr. Hsu's proposal that paragraphs 8 and 9 should be combined, he would point out that in drawing up his report he (Mr. Spiropoulos) had observed two guiding principles: first, that no existing text should be disregarded, which was why he had borrowed from the Convention on Genocide what had become paragraph 8 and secondly, that a place should be given to the principles of international law recognized in the Nürnberg Charter, in accordance with the General Assembly's instructions (resolution 177 (II), para. (*b*)). He had therefore thought it necessary to draft two separate paragraphs.

63. Despite the points in common which both texts obviously possessed, it should be noted that the first concerned the destruction of a group as such, while the second referred to inhuman acts against a population. Furthermore, the second of these crimes was very general and might include the first.

64. In one sense the Commission was already going further than the Nürnberg Charter, which had postulated a connexion between the crimes in question and a war of aggression, whereas, under paragraph 9, a connexion with the crimes named in paragraphs 3, 5 or 7 was sufficient.

65. In conclusion, he thought that paragraphs 8 and 9 should be left as they stood owing to the elements peculiar to each and to the different sources from which they had been taken. If governments were ready to broaden the categories of punishable offences, the Commission could review the question.

66. At the request of Mr. CORDOVA, the CHAIRMAN first put to the vote Mr. Hsu's proposal that paragraphs 8 and 9 be combined.

Mr. Hsu's proposal was rejected by 7 votes to 3.

67. The CHAIRMAN then put to the vote Mr. Scelle's proposal that the final clause of paragraph 9 be deleted.

Mr. Scelle's proposal was rejected by 7 votes to 3.

68. Mr. SCELLE proposed that, since the Commission had decided to keep the text of paragraph 9, paragraph 8, and even paragraph 4, should be included in the list, because there was a connexion between paragraph 9 and all the others. For the sake of simplicity, the final phrase, both of paragraph 9 and of sub-paragraph (*b*) of the commentary, might be reworded " in connexion with any of the crimes defined in this Code ".

69. Mr. SPIROPOULOS accepted that proposal, except

for the reference to paragraph 8, since the act in question must be either the one referred to in paragraph 8 or the one referred to in paragraph 9.

70. Mr. AMADO said he would vote against any such amendment.

71. Mr. ALFARO observed that an amendment referring to all other offences would be inaccurate, since it would include paragraph 6.

72. Mr. SPIROPOULOS thought that there would be nothing illogical in visualizing a possible connexion between the offence defined in paragraph 6 and the acts covered by paragraph 9.

73. Mr. ALFARO repeated that, instead of merely referring to paragraphs by numbers, the Commission might mention by name the crimes defined in each of those paragraphs.

74. Mr. SCELLE thought that the text would then become too long. He preferred the wording " a crime covered by this code ".

75. Mr. AMADO said he would vote against any such amendment, but wished to point out that the inclusion of paragraph 8 in the list would weaken the Convention on Genocide, which referred to a crime which could be committed independently of war. The linking of that crime with other offences against the peace and security of mankind reduced its scope.

76. The CHAIRMAN put to the vote Mr. Scelle's proposal that the reference to paragraph numbers be replaced by the phrase " in connexion with any of the crimes defined in this code ".

Mr. Scelle's amendment was adopted by 5 votes to 2, with 3 abstentions.

77. Mr. AMADO noted that the Rapporteur had given way on the main point.

78. Mr. SPIROPOULOS pointed out that the result of the Commission's vote meant that the crimes covered by paragraph 9 could be committed in time of peace, since the general reference embraced paragraph 8 and the crimes defined in that paragraph could be committed in time of peace.

79. Mr. ALFARO observed that the Commission had decided to use the words " any of the crimes ", from which it might be inferred that the crime defined in paragraph 6, which had no connexion with paragraph 9, was included in the list. He would prefer the phrase " in connexion with other crimes ".

80. The CHAIRMAN thought it would be better merely to say " another crime ", since one crime would suffice.

81. Mr. SCELLE thought that the Chairman was best qualified to decide that drafting point in an English text.

82. Mr. SANDSTRÖM did not see much difference between the text proposed by Mr. Alfaro and the other wording.

83. The CHAIRMAN said that the phrase might read " in connexion with another crime defined in this code ".

84. Mr. YEPES observed that the French translation read : " *lorsque ces actes sont commis au cours de l'exécution ou à l'occasion . . .* ".

85. Mr. SCELLE did not approve of the translation.

86. Mr. AMADO was in favour of keeping the present wording.

The text originally read out by the Chairman was adopted.

Paragraph 11

Sub-paragraph (a)

87. Mr. SANDSTRÖM asked whether it was suggested that a private individual could be an accomplice in a crime which, by definition, was committed by the authorities of the State.

88. Mr. SPIROPOULOS replied that the State authorities could certainly have the complicity of private individuals. For example, a bank might arrange a loan for the purpose of financing a war of aggression.

Sub-paragraph (b)

89. The CHAIRMAN doubted whether it was necessary to refer to " direct " incitement. It mattered very little whether the incitement was direct or indirect.

90. Mr. SPIROPOULOS observed that the word " direct " had been used in the Convention on Genocide at the instance of the General Assembly.

91. Mr. KERNO (Assistant Secretary-General) confirmed that article III (*c*) of the Convention on Genocide referred to " direct and public incitement ", and that had been one of the difficulties in the way of ratification of the Convention by certain States. The words " and public " had been added to soften the effect of the word " direct ".

92. The CHAIRMAN thought it was inconsistent to keep the word " direct " after dropping the word " public ".

Sub-paragraph (b) *was adopted.*

Sub-paragraph (c) *was adopted.*

Sub-paragraph (d)

93. Mr. FRANÇOIS pointed out that in the Sixth Committee the provision contained in sub-paragraph (*d*) had been severely criticized by Mr. Röling, the Netherlands representative. Although he did not share Mr. Röling's view, he thought he should place it on record. Mr. Röling had considered that the Commission had gone much too far in the matter of complicity. The Nürnberg Charter had visualized only complicity in conspiracy and complicity restricted to the major war criminals. Again, the Nürnberg Tribunal had limited the application of article 6 (*a*) of the Charter. But the Commission had accepted the principle of complicity in all acts of aggressive war, so that soldiers might be accused of complicity in that crime. Mr. Röling's fear was that such a provision might make capitulation more difficult (A/C.6/SR.236, para. 32 *et seq.*).

94. The Commission probably did not intend to declare soldiers taking part in a war of aggression to be guilty of complicity; but he thought the Commission should say so in the commentary in order to dispel misgivings such as had been expressed by Mr. Röling.

95. Mr. SPIROPOULOS thought there was no room

for doubt. Mr. Hudson had raised the problem the previous year at the 47th meeting (paras. 74 *et seq.*). The Commission had never considered the question of the responsibility of the fighting men. In the commentary on paragraph 3 of the draft code it was stated, in relation to armed bands, that:

> " While in the case of crime No. 1 the simple soldier would not be criminally responsible under international law, in case of invasion by armed bands of the territory of another State, any member of the band would be responsible. This difference of treatment is justified because, in the case of State action, it would go beyond any logic to consider a mere soldier as criminally responsible for an action which has been decided and directed by the authorities of a State, while in the case of armed bands, participation in them will result from the free decision of the individual members of the band."

96. The question before the Commission was the question of complicity. Mr. Röling's view had been expounded in the Sixth Committee, but it had received no support. Mr. Amado had replied to it in an excellent speech (A/C.6/SR.237, paras. 54–58), as had also Mr. Robinson, the Israeli representative, who had pointed out that the question of complicity would be decided by the judge and that the text was in no way dangerous.

97. He saw no need to include a special comment on the point in the text, which was sufficiently clear as it stood.

98. The CHAIRMAN thought that Mr. Röling's fears were exaggerated.

99. Mr. SANDSTRÖM wished to put a question which had a bearing on the one he had asked at the beginning of the meeting, namely, whether the actual wording of paragraph 1 did not exclude complicity? Did the employment or threat of employment of armed force apply also to mere soldiers?

100. Mr. SPIROPOULOS replied that soldiers were instruments of war in the same way as a bomb and that there could be no question of complicity in their case.

101. Mr. ALFARO said that he clearly recalled Mr. Spiropoulos' reply to Mr. Hudson, when the latter had raised the question of soldiers and also of officers. It was mentioned in the record of the 47th meeting (paras. 74 *et seq.*). Moreover, the passage in the previous year's report referring to Nürnberg Principle VII read as follows:

> " 125. The only provision in the Charter of the Nürnberg Tribunal regarding responsibility for complicity was that of the last paragraph of article 6 which reads as follows: ' Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such a plan.'
>
> " 126. The Tribunal, commenting on this provision in connexion with its discussion of count one of the indictment, which charged certain defendants with conspiracy to commit aggressive war, war crimes and crimes against humanity, said that, in its opinion, the provision did not ' add a new and separate crime to those already listed '. In the view of the Tribunal, the provision was designed to ' establish the responsibility of persons participating in a common plan ' to prepare, initiate and wage aggressive war. Interpreted literally, this statement would seem to imply that the complicity rule did not apply to crimes perpetrated by individual action.
>
> " 127. On the other hand, the Tribunal convicted several of the defendants of war crimes and crimes against humanity because they gave orders resulting in atrocious and criminal acts which they did not commit themselves. In practice, therefore, the Tribunal seems to have applied general principles of criminal law regarding complicity. This view is corroborated by expressions used by the Tribunal in assessing the guilt of particular defendants." [3]

102. All the Commission's views had been based on that statement. The fears expressed by Mr. Röling were exaggerated. But he (Mr. Alfaro) thought that a provision on the lines suggested by Mr. François might be inserted in the commentary.

Sub-paragraph (d) *was adopted.*

Commentary on paragraph 11

Sub-paragraph (a) *of the commentary*

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

Sub-paragraph (b) *of the commentary*

103. Mr. ALFARO pointed out that the question of soldiers had been specifically mentioned in the records of the previous session.

104. Mr. SPIROPOULOS said that the observations submitted at the London Conference in that connexion could be found in the historical part of his report on the formulation of the Nürnberg Principles (A/CN.4/22, para. 1 *et seq.*)

105. Mr. FRANÇOIS thought that that important matter should be mentioned in the commentary, which was perhaps rather too brief.

106. Mr. AMADO agreed with Mr. François.

107. Mr. FRANÇOIS quoted the actual words spoken by Mr. Röling at the end of his speech:

> " I want to apologize for the frank criticism expressed here. I happen to have been involved in the trial of Major War Criminals which lasted more than two-and-a-half long years, in which years I realized daily what consequences might come forth from hastily adopted provisions. At such a time, Mr. Chairman, such conflicts go deep into the heart and it might be that remembering these conflicts I forgot the laws of courtesy for the sake of the laws of justice " (A/C.6/SR. 236, para. 35).

108. Mr. YEPES suggested that the rapporteur be asked to prepare a short text explaining the point of view of Mr. François.

[3] *Official Records of the General Assembly, Fifth Session, Supplement No. 12*, (A/1316), p. 14. Also in *Yearbook of the International Law Commission*, 1950, vol. II.

109. Mr. SPIROPOULOS thought that the best place for such an explanation would be in the commentary on paragraphs 1 or 2, since the commentary then being discussed by the Commission applied to a special case. He had already made a similar remark in connexion with paragraph 3.

110. Mr. SANDSTRÖM said that the report actually referred to that question in the commentary on paragraph 3; but he thought it preferable to add a comment under paragraph 11, since the present text of the commentary on that paragraph appeared to cast doubts on the commentary under paragraph 3.

111. Mr. SPIROPOULOS accepted the suggested amendment.

It was so agreed.

Proposal by Mr. Yepes for two new articles

112. Mr. YEPES proposed the adoption of the following two new articles:

> " The dissemination in a State of false reports, or of faked documents falsely attributed to other States, where such dissemination has taken place with evil intent and has actually helped to disturb international relations ";

and

> " All forms of propaganda, in whatever country, intended or calculated to cause or encourage any threat to peace, or to break that good understanding between peoples on which peace depends."

113. He proposed those articles as constructive contributions to the framing of a code which should be as complete as possible. A code of offences against the peace and security of mankind would be incomplete if it did not contain a condemnation of propaganda carried out by means of false reports.

114. The two articles which he proposed were based mainly on resolution 127 (II) adopted by the General Assembly in 1947, and likewise on resolutions of the Inter-Parliamentary Union and almost all peace-loving associations in the world. World opinion was in favour of war propaganda being regarded as an international crime. Had not appeals to violence and attacks on certain States actually been made from the tribune of the General Assembly? Did not such an attitude, which was so common nowadays, constitute a direct attack on peace?

115. Public opinion expected the Commission to take courageous action for peace through law. A provision should be inserted in the code making propaganda by means of false reports a crime.

116. A study of the findings of the Nürnberg Tribunal would reveal the origin of his proposal.

117. Streicher, for example, had been convicted primarily of the crime of propaganda against peace. Crimes of that nature were more serious threats to peace than certain acts which had already been designated by the Commission as offences against peace.

118. Mr. SPIROPOULOS was opposed to the proposal, since the Code should not be made the means of turning the Commission into a propaganda commission. He was afraid that the time had not yet come to insert such crime definitions in the Code. The Commission must be positive and realistic.

119. He agreed, of course, with Mr. Yepes that the acts covered by the articles proposed by him were reprehensible, but not all reprehensible acts could be inserted in the Code, otherwise it would not be a code of offences but an instrument of propaganda. Many authors had dealt with the question of offences against peace and, like the General Assembly, had opposed the inclusion of the acts covered by the articles which Mr. Yepes proposed.

120. He asked what was to be meant by " faked documents ".

121. Mr. YEPES replied that he had borrowed the expression from the General Assembly resolution. The documents referred to were deliberately falsified documents.

122. Mr. SPIROPOULOS added that the proposed provisions were also very vague and it would be going too far to insert them in a Code listing concrete acts.

123. He was in sympathy with the aims of the proposal, but did not see how the acts referred to would fit in with the other crimes which were of an entirely different nature.

124. Mr. YEPES said he had submitted those articles as a basis for discussion, since he wished the Commission to take a decision on those lines. The rapporteur could amend the text as he chose, so long as he left the substance of the articles intact. Mr. Spiropoulos had said that he did not wish the Commission to be turned into a propaganda platform. But to what propaganda was he referring? If it was anti-war propaganda, he himself was prepared to accept the description. If the reference was to any other form of propaganda he could not accept it.

125. Mr. SPIROPOULOS observed that Mr. Yepes had mentioned the case of persons who had been convicted for acts of propaganda, but the acts in question had provoked a war. Such acts were covered by article I, paragraph 2, of the draft code:

> " The planning of or preparation for the employment, by the authorities of a State, of armed force against another State for any purpose other than national or collective self-defence or execution of a decision by a competent organ of the United Nations."

But Mr. Yepes proposed that those crimes be included independently of a war of aggression, so that the examples given did not apply.

126. Mr. YEPES pointed out that the first of the two articles he had proposed referred to the disturbance of international relations.

127. Mr. AMADO said that the texts proposed by Mr. Yepes were expressions of his generous nature. Mr. Yepes wished to improve the world. The systematic list of international crimes drawn up by Mr. Pella also referred to war propaganda; but the difficulty, even with texts as well prepared as those of Mr. Yepes, was how to define the crime. It was not possible for a rec-

ommendation to be made in a code. In the age of broadcasting and television to define such crimes was a very risky matter. While paying tribute to the sentiment behind the texts, he could not give them his practical support.

128. Mr. SANDSTRÖM thought that the two articles submitted by Mr. Yepes represented an organic whole. They were designed to abolish propaganda which was harmful to peace. They were perhaps even intended to put an end to the " cold war ". The underlying motive was a praiseworthy one. But he considered that the second of those articles went too far and was too vague. The subject was a very delicate one, and it would be very easy to come into conflict with freedom of speech and of opinion. He could not support the second article.

129. As to the first article, although it was more precise he did not think it would have much effect.

130. He would very regretfully be obliged to vote against both articles.

131. Mr. YEPES said that, as Mr. Amado had stated, he had submitted those articles in a constructive spirit. If discussion of his proposal would have the effect of delaying approval of the draft Code he would withdraw it.

ARTICLE II

132. Mr. FRANÇOIS approved in substance the amendments made by Mr. Spiropoulos; but he wondered whether article II should not be expressed in a different form. Article 8 of the Nürnberg Charter was in the nature of a warning. In the previous year's report Mr. Spiropoulos had quoted the following statement from the " United States Manual " of 1944 (A/CN.4/25, para. 114):

> " Individuals and organizations who violate the accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defence or in mitigation of punishment."

The warning words used were " may be punished ". Thereafter, in the same report (*Ibid*, para. 117), Mr. Spiropoulos had quoted the United States draft of 1945, which had served as a basis for discussion at the London Conference, viz.:

> " In any trial before an International Military Tribunal, the fact that a defendant acted pursuant to order of a superior or government sanction shall not constitute a defence *per se*, but may be considered either in defence or in mitigation of punishment if the Tribunal determines that justice so requires."

133. In his view, no note of warning was sounded in the rapporteur's text. Perhaps it could be reintroduced, in view of its great value, by inserting the word " only"' before the words " if justice so requires ". In that way the text would give a different impression. He considered that, as it stood, it was reassuring to anyone contemplating committing the crime.

134. Mr. SPIROPOULOS said that the text which referred to moral choice had been criticized in the General Assembly. He had no objection to the proposal submitted by Mr. François, although it did not seem to him to alter the sense of the text.

135. Mr. SCELLE recalled that the previous year at its 47th meeting (para. 26) the Commission had, on Mr. Brierly's proposal, accepted the lack of moral choice as an extenuating circumstance, but the provisional French text used the phrase " *à titre d'excuse* " whereas in criminal law the word " excuse " had no meaning whatsoever. The phrase must either be " *circonstances atténuantes* " or " *excuse absolutoire* ". " *A titre d'excuse* " was a purely moral expression which never appeared in a legal text. If the Commission was prepared to go as far as defence, i.e., acquittal, " *excuse absolutoire* " must be used in the French text.

Mr. François' proposal was adopted.

Commentary

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

Sub-paragraph (b)

136. It was pointed out that the words " article 7 " should read " article 8 ".

137. Mr. FRANÇOIS observed that the word " corresponds " was very ambiguous, since there were substantial differences between the Nürnberg Charter and the text adopted by the Commission. He would prefer some other word.

138. Mr. SANDSTRÖM suggested the substitution of the words " differs from " for " corresponds to ". It should, however, be remembered that the Charter was solely concerned with the major war criminals. The differences between the draft Code and the Charter were so great that the grounds for those differences should be explained. That was something the text submitted by Mr. Spiropoulos did not do.

139. Mr. SPIROPOULOS pointed out that the General Assembly had directed the Commission to formulate the Nürnberg Principles and to draft a code. But it was not always possible to formulate principles, since opinions on them differed. The Commission should indicate, as far as possible, the place given to the principles. But the question now was whether the difference could be shown. In the particular case under discussion the Commission should not include the principle contained in the Charter.

140. Mr. LIANG (Secretary to the Commission) thought that the question raised serious problems. The text adopted contained very brief comments. But the article had amended the Nürnberg Charter and the reason why that had been done must be stated. Given that premise, the articles of the Charter could be quoted and that would permit of comparison, though it would still be necessary to explain the change. It remained to be decided where the explanation should be inserted.

141. Mr. SPIROPOULOS thought it would be impossible to give the reasons for the change, since the extent of the difference between the Charter and the Code was unknown, certain crimes being combined and the arrange-

ment being different. But in the case in point the crime was the same.

142. It should be noted that the General Assembly had not accepted the Commission's interpretation, so that the question was whether the Commission should adopt its last year's interpretation. Which interpretation was the right one? The Commission itself could not answer that question. The text adopted the previous year made no reference to a defence. Before any comparison could be made and before it could be shown to what extent the interpretations differed, the correct interpretation must be ascertained.

143. The CHAIRMAN thought that the Commission should state in what particulars the text it proposed differed from the Charter. He himself thought the difference lay in the fact that the proposed text made it possible for a superior order to be a defence, while the Charter did not.

144. Mr. SANDSTRÖM thought that it was permissible to state that the article departed from the Charter, since the draft Code was a general document, whereas the Charter had been prepared for the trial of the major war criminals.

145. Mr. SPIROPOULOS considered that the principle adopted the previous year by the Commission was the same, but differently worded. The text which he was submitting was correct. It expressed the same principle in other terms. His previous text might equally well be adopted.

146. Several members of the Commission having proposed amendments to the text submitted in the report, the CHAIRMAN requested Mr. Spiropoulos to prepare a text for the following meeting in the light of those suggestions.

The meeting rose at 1 p.m.

92nd MEETING

Wednesday, 30 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. Faris EL KHOURY, 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) *(continued)*

ARTICLE II (*continued*)

Commentary (continued)

Sub-paragraph (b) (continued)

1-2. The CHAIRMAN pointed out that the Commission had before it the following draft commentary submitted by Mr. Spiropoulos:

> " The Commission, in its formulation of the Nürnberg principles, formulated the following principle on the basis of the interpretation given by the Nürnberg Tribunal to article 8 of its Charter:
> In drawing up this article, the Commission has taken into account certain views expressed concerning the principle at the fifth session of the General Assembly and, in particular, the observations on the concept of ' moral choice ', which was criticized for its lack of clarity.
>
> " The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law provided a moral choice was in fact possible to him ".

(Principle IV. See the report of the Commission on its second session, A/1316, p. 12).

3. Mr. CORDOVA considered that the Commission should explain clearly why it had departed from the Nürnberg principles. Perhaps, however, the rapporteur had taken the view that, since the point had already been made clear in the second report to the General Assembly, the Commission's reasons were already known to the Assembly.

4. Mr. SPIROPOULOS replied that the conclusion of the Commission had been that it had not departed from the text of the Nürnberg Charter. Although he personally was of a different opinion, he had respected the Commission's decision.

5. Mr. KERNO (Assistant Secretary-General), supported by Mr. SANDSTRÖM, thought the text proposed for the commentary on article II met Mr. Córdova's point. It stated, in fact, that the Commission had formulated the following principle on the basis of the interpretation given by the Nürnberg Tribunal to article 8 of its Charter. The Commission therefore considered