Document:-
A/CN.4/SR.93

Summary record of the 93rd meeting

Topic:
Question of defining aggression

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

116. If interpretative commentaries had to be drawn up, it was to be feared that agreement would never be reached.

117. The CHAIRMAN pointed out that Mr. Yepes left the matter entirely to the Rapporteur. The Commission could therefore leave the latter free to expand any of the commentaries already approved, if he thought it desirable.

It was so decided.

General Assembly resolution 378 B (V): Duties of States in the event of the outbreak of hostilities (item 3 of the agenda) (A/CN.4/44, chapter II: The possibility and desirability of defining aggression)

GENERAL DEBATE

118. Mr. SPIROPOULOS said that the problem of defining aggression had been studied by the principal organs of the League of Nations and by numerous authors. The organs of the League of Nations had adopted the casuistic approach and, after examining one by one all the circumstances giving rise to conflicts, had arrived at the conclusion that it was impossible to formulate such a definition. He had reproduced in the part of his report dealing with the League of Nations precedents, the essential passages of a study entitled the "Opinion of the Permanent Advisory Commission" [8] and a commentary drawn up by a Special Committee of the Temporary Mixed Commission for the Reduction of Armaments [9]. The conclusion arrived at in both documents was the more or less absolute impossibility of defining aggression.

119. Owing to the lack of success of the casuistic approach, he had thought that a dogmatic approach should be attempted with a view to ascertaining whether it was possible to define aggression or not, and, if it were, to what extent the definition could be established. Incidentally it was the first time that an officially constituted international organ had considered the question from such an angle.

120. He had come to the conclusion that it was not really possible to define aggression. One could always, it was true, draft a definition as Mr. Vyshinsky had done before the General Assembly by taking up a text of the Disarmament Conference, and as Mr. Politis had done by taking up a formula employed in the London Treaties. Any legal definition would, however, be artificial in content. In concrete cases, its application would lead to solutions contrary to natural sentiment.

121. What his researches had shown was that aggression was a primary notion like good faith, love and hate, and, as such, did not lend itself to definition but was instinctively perceived.

122. Even were such a definition possible, it would be of no value in complicated cases for the interpretation of which the simultaneous application of a whole series of criteria was necessary. The chronological order of acts, for example, could provide no solution to the question of aggression.

123. Mr. YEPES recalled that he had already had occasion to formulate reservations with regard to the chapter in Mr. Spiropoulos' report dealing with the definition of an aggressor. He would submit at the next meeting a text which he would propose be substituted for that part of the report and which would show that definition of an aggressor was an actual possibility. What was needed was not an abstract definition but a formula which would enable it to be determined who was the aggressor. The problem was not a theoretical one and might be solved by resorting to an objective criterion.

124. Mr. ALFARO thought that the difficulties inherent in a definition of aggression were not insuperable. Aggression could be defined if due account were taken of prevailing trends in international relations. The failure of previous efforts was due to the fact that an attempt had been made to define aggression by an enumeration of acts. Enumerations were, however, always incomplete and often faulty.

125. Mr. Yepes had rightly drawn attention to the fact that the definition of aggression was often confused with the determination of the aggressor.

126. If the Commission, foregoing any attempt at enumeration, examined the nature of aggression in the existing international order, it would achieve some result.

127. He had studied with pleasure the memorandum submitted by Mr. Amado, with whose ideas he was in general agreement, particularly as he recommended a flexible definition applicable to all individual cases without any enumeration.

128. As he would himself submit at the next meeting a memorandum developing his own ideas, he would confine his remarks for the moment to stating that the Commission should make an effort to solve the problem which had so exercised the minds of jurists and statesmen.

129. Mr. AMADO remarked that his memorandum did not claim to provide any solution. It was simply a very cautiously worded contribution to the study of the problem.

130. In substance, he agreed with Mr. Spiropoulos' statement that aggression could only be defined in a very general way.

The meeting rose at 12.50 p.m.

[8] Chapter II, B, II.

[9] Chapter II, B, III.

93rd MEETING

Thursday, 31 May 1951, at 3 p.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. Manley O. HUDSON, 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.

General Assembly resolution 378 B (V): Duties of States in the event of the outbreak of hostilities (item 3 of the agenda) (A/CN.4/44, chapter II: The possibility and desirability of defining aggression; A/CN.4/L.6; A/CN.4/L.7; A/CN.4/L.8) *(continued)*

GENERAL DEBATE (*continued*)

1-2. Mr. KERNO (Assistant Secretary-General) said he had had a short note distributed to the members of the Commission, reproducing passages from the United Nations Charter, the decision taken by the Security Council on 27 June 1950 concerning assistance to the Republic of Korea, and General Assembly resolution 377 (V) (Uniting for Peace). The texts in question were for comparison with the expression " coercive action " introduced by Mr. ALFARO into the definition of aggression proposed by him (A/CN.4/L.8).

3. Mr. YEPES complimented Mr. Spiropoulos on his excellent report; its scientific integrity and wide scholarship did credit to the Commission. He begged to differ, however, on some of the conclusions in the report, and would like to consider the problem from another angle.

4. The question of defining aggression, or rather of determining the aggressor, was closely bound up with the question of national security and the prevention of war. Hence its theoretical and practical importance in any system for securing peace. As the American jurist Shotwell had written: " There is no final way of settling this question of peace and war which does not involve the definition of aggression and defense; for the one is prohibited and the other is retained and we must know which is which."[1] In document A/CN.4/L.7, he submitted to the Commission a series of provisions which might be used as a basis for discussion with a view to establishing the method to be followed by the international authority in determining the aggressor. The proposals were founded on a series of drafts discussed by the League of Nations, the Pan-American Conferences and various United Nations organs; and they were in keeping with the desire for the clarification of the matter manifested by public opinion for the last 30 years. They were not final proposals.

5. The main question, and the one to be settled first, was whether determination of the aggressor was possible and desirable. Mr. Spiropoulos in his report argued that it was no more possible to define aggression than it was to define good faith, love or hatred. The conclusions which Mr. Spiropoulos had drawn from that argument seemed to him unacceptable.

6. Actually a definition of aggression was not what was required. Aggression was an abstract, theoretical and remote concept. On the other hand an aggressor was a concrete, personal, tangible reality. If the aggressor were designated, it meant that denunciation of the guilty party was possible. It was true that aggression, good faith and love could not be defined. But it could easily be ascertained whether someone was acting in good faith, or was in love, and which individual or State was the aggressor.

7. Hence the intention behind his proposals was to determine the aggressor and to provide the competent international authority with objective criteria to enable it to do so. There might be those who felt that it was preferable not to lay down fixed rules, however broad in conception, beforehand and that it would be better to allow complete freedom to the authority responsible for determining the aggressor. That was what Sir Austen Chamberlain had had in mind when he said that the definition of the aggressor was " a trap for the innocent and signpost for the guilty ".[2] Yet the advantages of prior codification of rules were obvious. A State would then be fully aware of what it could not do without running the risk of being denounced as an aggressor. Thus certain controversial issues which gave rise to international conflicts would be eliminated.

8. In a celebrated report submitted in 1933 by Politis to the Disarmament Conference, which was the starting point for all writings on the definition of the aggressor, there occurred the following passage:

> "1. The present Act (Annex I), conceived on the universal plane, aims at determining acts of aggression in a definite, practical and direct manner.
>
> " 2. In the opinion of its supporters, this method would . . . (put) an end to doubts and controversies on the point whether States which resort to force have committed aggression or not. States would thus be definitely informed in advance of what they could not do without being regarded as aggressors ".[3]

9. That report had been used in the preparation of the 1933 London treaties between the Soviet Union and its neighbours for determining the aggressor. In those treaties the provisions of the Politis Report laying down the method for the automatic determination of the aggressor were reproduced word for word. The treaties had also been regarded by many people as a big step forward towards a better system for securing peace.

10. After the United Nations Charter had been signed, a detailed resolution concerning the determination of the aggressor had been submitted to the London Con-

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[1] James T. Shotwell, *War as an instrument of national policy*, New York, 1929, p. 139.

[2] *International Conciliation*, 1930, p. 613.

[3] *Series of League of Nations Publications.* IX. Disarmament, 1935.IX.4, p. 679 (document Conf. D./C.G.108).

ference in 1945 by the United States, and fiercely attacked by the Soviet Union delegation.

11. In 1947 at Rio de Janeiro, the American nations, ahead of the European countries in international law, had concluded a convention on the consolidation of peace and security on the American Continent in which the idea of prior determination of the aggressor had once again been taken up. Previously that notion had been the subject matter of one of the articles of the draft proposal for setting up an Association of American Nations submitted in 1936 to the Pan-American Conference in Buenos Aires.

12. He thought the Commission should consider first of all whether it wished to draw up more or less flexible or more or less rigid rules for determining the aggressor. It might even consider the possibility of producing a single draft from the various communications before it, and try to submit to the General Assembly a set of unanimous conclusions.

13. Once it had settled the question of principle, the Commission should take up the question of the method to be followed in determining the aggressor.

14. At a later stage he would explain in detail the proposals contained in his draft.

15. Mr. FRANÇOIS remarked that three separate trends could be observed in the Commission. Mr. Spiropoulos was in favour of not formulating any definition; Mr. Yepes suggested a definition based on the enumerative method; while Mr. Alfaro and Mr. Amado recommended a general definition.

16. He was in favour of the third course. Like Mr. Yepes, he did not share Mr. Spiropoulos' view that by its very essence the notion of aggression was not susceptible of definition in that it was based on sentiment and not on legal considerations and was a " natural " notion.

17. There were of course in law concepts which could not be defined, but aggression was not one of them. In his opinion aggression was a legal concept which, if it was to be comprehensible, called for a legal definition. Such a definition could be produced — Mr. Amado's and Mr. Alfaro's memoranda gave proof of that. Mr. Spiropoulos would object that the definitions submitted by them were without any practical value. But after all, the penal codes themselves contained definitions which were insufficient in themselves to define crime, e.g. where one of the elements of the definition was the lack of justification for the act. It was, in the final analysis, the judge who had to decide whether the circumstances justified the application of an article of the code to a specific case. But that did not mean that a penal code must cease to formulate such definitions. Similarly, when Mr. Amado stated that a war of aggression was any war not waged in exercise of the right of self-defence, it was first of all necessary of course to decide in what circumstances one could speak of self-defence. When using the expression " unprovoked attack ", to be found in the 1947 Treaty of Rio de Janeiro, it had first of all to be decided what was meant by " provocation ", and so on. But it was beyond dispute that it was a question of legal definitions calculated to clarify the meaning of the term.

18. Mr. Spiropoulos appeared to think that aggression must entail *animus agressionis*. He personally considered on the contrary that unlawful aggression was possible even without *animus agressionis*. Even where an aggressor was personally convinced that he had acted within his rights, he might be guilty of aggression.

19. While he was in favour of a general definition of aggression, he was definitely opposed to any definition based on enumeration, such as that found in the Soviet Union draft resolution or in Mr. Yepes' text. The acts listed, for example, in the Soviet Union draft resolution, acts which it was proposed to prohibit altogether, might in certain circumstances be justified under international law as a defence against a premeditated and disguised attack. It must also be realized that such definitions would enable the aggressors to evade responsibility for their acts by taking refuge behind legal texts. Such texts provided no real safeguard. For example, in the case referred to in paragraph 1 (*d*) of the Soviet Union draft resolution (A/C.1/608), where one State landed or led its land, naval or air forces inside the boundaries of another State without the prior permission of the latter, it would be perfectly easy to disguise the aggression either on the grounds that permission had been given by a government that had seized power in the invaded country at the eleventh hour and was in sympathy with the invader, or by denouncing the government of the country invaded as a " Puppet Government " and refusing to recognize it as the legitimate representative of the people.

20. Since it was impossible to foresee in advance all the circumstances in which resort to force might be had, a definition of aggression based on enumeration might well produce too rigid a set of rules, and thus amount to what, as Mr. Yepes had just mentioned, Sir Austen Chamberlain, in a speech in the House of Commons in 1927 had called " a trap for the innocent and a signpost for the guilty ".

21. Mr. Yepes' proposal was open to criticism on other grounds also. It produced a concept of aggression which was so wide that almost any unlawful act by one State against another State could be described as aggression. Any intervention by a State or group of States, even when not accompanied by acts of violence, would constitute aggression; refusal to submit a dispute to the International Court or to arbitration would be another form of aggression; refusal in bad faith to comply with a ruling of the Court would likewise be an act of aggression. There was no reason why the list should not be extended to numerous other instances — the abuse of the right to asylum in embassies or legations for example.

22. Mr. Yepes even provided for the determination of the aggressor at some future time should the use of atomic energy be controlled. With the most laudable intentions, he was thwarting any possibility of making progress towards stamping out aggression in the proper sense of the term.

23. He personally would oppose even an enumeration

in the form of examples suggested as a secondary possibility by Mr. Alfaro. Examples of that kind would do more harm than good.

24. Mr. HSU thought the Commission was greatly indebted to Mr. Spiropoulos for having produced a report containing an historical survey and an analysis of the legal doctrines concerning the definition of aggression. But however convincing his conclusions might appear at first sight, the Commission should surely not leave the matter there. Human problems had to be solved even if their solution came up against difficulties of an academic kind. Scientific definitions themselves were only provisional. That applied even more in the social sphere; but it was nonetheless true that such definitions had been of service to the world for centuries and were the background of our civilization.

25. The study devoted over the last 25 years to the definition of aggression had achieved something. In his view, the definition proposed by Politis in 1933 was the best all-round solution so far produced. Imperfect though it was, it had nevertheless been used in the London treaties of 1933, in the United States proposal at the London Conference in 1945, and in the Rio de Janeiro Convention in 1947.

26. If that formula were taken as a starting point and a basis for discussion, it would be possible to produce something still more satisfactory.

27. In paragraph 143 of his report Mr. Spiropoulos gave some particulars about the origin of the Politis formula, which had been based on a proposal by the Soviet Union. In August 1950 in the Security Council, Mr. Jacob Malik, the Soviet Union representative, had taken up only four out of the five points in the Politis definition. The omission of one of the points, that under Article 1 (5), had been criticized in an article in the *New York Times* as disingenuous. An interview with the Turkish representative on the First Committee, also printed in the *New York Times*, had provided an explanation of that omission by the Soviet Union representative's quotation. It had been Turkey that had first suggested what later became the fifth point in the Politis definition. The Soviet Union delegation had first of all objected to it, but had finally accepted it. That explanation exonerated the Soviet Union representative from any charge of disingenuousness in his quotation, but at the same time it showed that the Soviet Union had had objections to the fifth point, which was precisely that referring to indirect aggression. Incidentally, the draft resolution on the definition of aggression submitted by the Soviet Union delegation to the First Committee on 6 November 1950[4] although it too consisted of five points, likewise omitted the fifth point of the Politis definition, relating to indirect aggression.

28. The Politis definition had had a profound influence. It had been used in various treaties. The 1947 Inter-American Treaty on Mutual Assistance did not contain the provision given in the fifth point of the Politis draft. It did not contain a complete enumeration of cases of aggression. All it did was to furnish examples of aggression, while using the expression " in addition to other acts " — thus allowing for an extension of the list. But that treaty was retrograde.

29. Happily, the United Nations had got rid of those imperfections. General Assembly resolution 380 (V) (Peace through deeds) " solemnly reaffirms that, whatever the weapons used, any aggression, whether committed openly or by fomenting civil strife in the interest of a foreign Power, or otherwise, is the gravest of all crimes against peace and security throughout the world ". That text covered both direct and indirect aggression. It was an improvement on the situation resulting from the 1947 Treaty.

30. The only one of the memoranda he had been able to examine in detail was Mr. Alfaro's. He liked the method followed by Mr. Alfaro, and he would be prepared to support the definition given in the memorandum (A/CN.4/L.8, para. 35) subject to certain modifications. The words " coercive action " might be replaced by " enforcement action " — the term used in Article 53 of the Charter, and the words " armed attack " might be deleted. Nowadays, self-defence might make it necessary to prevent such attack. When a big country was threatened, it could afford to wait until the attack took place, the extent of its territory enabling it to undertake withdrawal operations without endangering its existence. But if Panama for example were threatened with aggression, was she to wait for the armed attack to take place? If she forestalled it, no-one could denounce her as an aggressor. In view of such instances, he urged that the words in question be deleted or replaced by some term covering his objections. In the same way, the use of the words " by any methods " and the examples given by Mr. Alfaro in connexion with those words suggested that Mr. Alfaro's definition followed the definition given in the 1947 Treaty and disregarded indirect aggression as provided for in the Politis formula.

31. Mr. SANDSTRÖM pointed out that the purpose of the Soviet Union draft resolution was not only to define aggression, but also and especially, by the establishment of a simple concrete fact to make it possible to determine the aggressor.

32. It was no doubt possible to give a definition, but it was not possible to exhaust the subject nor to cover every point and every situation. In that respect he agreed with Mr. Spiropoulos — there was no way of avoiding in each individual case the examination and appraisal of a series of factors which were invariably very complex. As was well known, the immediate antecedents of war were themselves a long story.

33. In his draft, Mr. Yepes attempted to compile a list of acts constituting aggression. But even that definition would not make it possible to determine who was the aggressor.

34. He could not disagree with Mr. Amado and Mr. Alfaro, who proposed to make use of the text already adopted by the Commission in article 1, paragraph 1 of its draft Code of offences against the peace and security of mankind. But the authors of the proposal had omitted

[4] A/C.1/608 and A/CN.4/44, chapter II, A. See also *Official Records of the General Assembly, Fifth Session, First Committee*, 385th meeting, paras. 32–35.

to add one very essential point, namely a definition of what constituted self-defence. Mr. Amado made no addition at all to the draft Code; while Mr. Alfaro added a number of subsidiary points which were already implicit in it.

35. He thought the Commission might adopt as a definition of aggression article 1, paragraph 1 of the draft Code, with certain modifications.

36. Mr. CORDOVA thought that the protagonists of the three theories — Mr. Spiropoulos who considered that no definition was possible; Mr. Yepes who felt that a definition based on enumeration could be established; and Mr. Amado and Mr. Alfaro who thought that a legal definition was possible — were all more or less agreed on the impossibility of compiling an exhaustive list of cases of aggression. That was an admission that along those lines a true definition was out of the question. There could be no definition where it was impossible to delimit the field of a concept. Any enumeration involved the obligation to interpret, especially when new cases came up. Hence the enumerative method must be discarded.

37. On the other hand, a legal definition was possible; Mr. Sandström had pointed out that, in its draft Code, the Commission had already defined the crime of illegal use of force. But article 1, paragraph 1 merely laid it down that aggression was a crime; it did not define it. Now that an international organization existed with authority to settle disputes between States, aggression could be defined. Formerly, each State was the judge of its own acts. With the appearance of the United Nations and an International Court, why should a more or less rational definition of aggression not be reached?

38. It was not a question of determining the aggressor. What called for definition was aggression itself. To determine the aggressor meant examining the facts in any specific instance, just as in domestic law a judge examined the facts to try to discover who was the murderer. The criminal code gave a definition of homicide. The Commission should follow the same course and formulate what it considered unlawful in the use of force.

39. That was the procedure followed by Mr. Alfaro in declaring that the use of force by one or more States was never legitimate except for purposes of self-defence or where force was used in carrying out the decisions of the United Nations.

40. One further instance should be added, one which as a matter of fact could be brought under the heading of self-defence, namely, the instance referred to by Mr. Hsu, where a State did not wait until the first shot had been fired before defending itself.

41. Article 51 of the Charter recognized self-defence only in the event of armed attack but not in situations where an attack was merely in preparation, e.g. where a State was mobilizing its forces. Under the Charter a State was not entitled to use force unless it had been the victim of armed attack. Hence he could not accept Mr. Alfaro's proposal, which referred only to attack pure and simple.

42. Mr. HUDSON, making his first re-appearance in the Commission, remarked on the voluminous documentation on the definition of aggression at the disposal of the Commission, and said he was rather surprised to find the Commission engaged on that subject. Only lexicographers were called upon to formulate definitions. Any given word could be defined from several different angles, according to the use it was intended to make of a particular expression, and as the word " aggression " was not to be found in the Commission's draft code, the Commission was surely not called upon to explain the sense in which it used the word. The Charter mentioned only the expression " acts of aggression ". Admittedly, General Assembly resolution 498 (V) on Intervention in Korea by the Central People's Government of the Peoples' Republic of China used the word several times. But why should the Commission try to define it?

43. According to General Assembly resolution 378 B (V), which gave the Commission its terms of reference, " the question raised by the proposal of the Union of Soviet Socialist Republics could better be examined in conjunction with matters under consideration by the International Law Commission ". What were those questions under consideration by the Commission? Was the reference to the draft code? If so, the definition of aggression was unnecessary, since the draft code did not contain the word.

44. Mr. SPIROPOULOS said that when the First Committee took up the question, Mr. el Khoury had pointed out that the Commission was working on a draft Code and thought that it would examine that question at the same time. In reply to the Chairman of the First Committee, who had asked whether the International Law Commission would be prepared to study it, he himself had stated that in his capacity as rapporteur he had felt it incumbent on him to study the question of the definition of aggression, and that although so far he had reached only negative conclusions, he was prepared to go on with the work. A resumé of the exchange of views in question could be found in the summary records of the discussions at the 390th meeting of the Political Committee.

45. Mr. HUDSON said that he had noted the passage in the report where Mr. Spiropoulos summarized that exchange of views (A/CN.44, para. 134). But the resolution adopted by the General Assembly did not embody Mr. el Khoury's proposal. He wondered whether one could be as positive on the subject as Mr. Alfaro was in the third paragraph of his memorandum (A/CN.4/L.8).

46. With regard to the Soviet Union draft resolution (A/C.1/608/Rev.1), the fourth paragraph of the preamble considered it " necessary to formulate essential directives for such international organs as may be called upon to determine which party is guilty of attack ". The organs in question were the General Assembly and the Security Council. They were responsible for applying the Charter, the authors of which had used the expression " acts of aggression ", thus preferring not to go into precise details as to the connotation of the expression.

47. Mr. Yepes, moreover, wondered whether it was really wished to put a strait-jacket on the authorities that would be called upon to apply the Charter. It

all went to show that the most the Commission could do was to explain the use of the words " act of aggression " in the Charter so as to assist the United Nations organs in interpreting them. One might even wonder whether that was desirable. On mature reflection, he was convinced that it would be neither wise nor helpful to embark on an explanation of that expression as used in the Charter. In any case, the Commission was not called upon to define aggression.

48. Mr. AMADO said that he had been present in the First Committee when the Yugoslav proposal (A/1399) had come up for discussion. Quite casually he had expressed the view that it was impossible to define aggression except in very general terms by stating that it meant any use of force not justified by self-defence or in application of Article 42 of the Charter. The idea had been suggested to him by the work of the second session of the Commission.

49. Certainly it was not feasible to enumerate all the acts of aggression, still less to define them. That was an insoluble problem. He did not consider, as did Mr. Spiropoulos, that the term was a primary notion, a first impulse of the human conscience; but like him, he did conclude that a really satisfactory definition was impossible. However, as the question was still one in which people were keenly interested, the Commission should consider whether it was not called upon to provide an answer which was not an entirely negative one. For that reason he had suggested in his memorandum a brief and general definition (A/CN.4/L.6, para. 19).

50. Mr. EL KHOURY said that the discussion in the First Committee on the subject of the Soviet Union draft resolution on the definition of aggression had made it clear to him that the resolution would not be adopted by the General Assembly.

51. As he felt that it was desirable to define aggression, he had not wished the resolution to be sent to the General Assembly only to be rejected, and he had urged that it be submitted for study by experts, i.e., that the Political Committee, not being the one entrusted with the study of legal questions, should refer the draft resolution either to the Sixth Committee, which was composed of legal experts, or to the International Law Commission.

52. He had accordingly submitted a draft resolution requesting the International Law Commission to include the definition of aggression in its studies for formulating a criminal code for international crimes, and to submit a report on the subject to the General Assembly. When he first put forward his draft resolution, many speakers had maintained that it was impossible to give a definition of aggression.

53. Realizing that if his proposal were put to the vote it would be rejected, he had altered it and submitted it afresh in the form in which it had been adopted by the General Assembly. The International Law Commission could either produce a definition of aggression or state that such a definition was impossible; but it could not make such a statement until it had discussed the matter thoroughly. Resolution 378 B (V) stated that the Soviet Union proposal was to be referred to the International Law Commission " so that the latter may take (it) into consideration and formulate its conclusions as soon as possible ".

54. The Commission might perhaps insert the definition of aggression in the Code; or it might make it the subject of a separate document. But he was most anxious that the question should not be shelved. The fact that it had been under discussion for thirty years was ample proof that such a definition was required. If attempts so far had not been crowned with success, that did not mean that it was impossible to arrive at a definition. Until it was proved to be impossible, the Commission must not give up the attempt to produce that definition.

55. Aggression was a punishable crime. All crimes should be defined; and the organ competent to define them was the International Law Commission and not the First Committee. A body consisting of jurists was essential.

56. If the Commission decided that aggression could not be defined, it was not of course obliged to make the attempt. If a majority of the members were of the same mind as Mr. Spiropoulos in his report, the Commission would simply inform the Assembly that a definition was out of the question. He personally considered that it was possible to produce one. But it must not be a definition enumerating cases one after another, since it was not feasible to compile an exhaustive list. Examples could, however, be cited. At any rate, he agreed with Mr. Alfaro that a general definition was desirable but he did not agree with Mr. Alfaro's comments accompanying that definition. The utmost care must be taken in drawing up a commentary, which was bound to be regarded as an interpretation of the text. It must not risk giving rise to any wrong interpretation of the international code. Mr. Spiropoulos had enumerated all the acts described as acts of aggression and had argued that each one of them would provide an aggressor with a pretext to justify his acts and thus to evade responsibility. The Charter provided for the use of force for the purpose of self-defence and for combating aggression. The second of those cases did not permit of any argument. Everyone knew that when the Security Council had designated the aggressor, there could be no argument. But in regard to self-defence, every aggressor would maintain that he had acted in the exercise of his right of self-defence. It was an argument frequently used in the courts by counsel for the defence. In political matters too, it was a common practice to declare that the victim was the aggressor.

57. If, however, the definition were too general, the Commission would not be providing a means of establishing precisely which party was the aggressor.

58. Again, with regard to the determination of the aggressor, was that to be left to the victor, to the General Assembly or to the Security Council? It was extremely dangerous to leave it to the victor. He thought an article should be drawn up specifying the manner in which the aggressor was to be designated, for example by the International Criminal Court. If the Court had not been set up, the task must be entrusted to some other

independent body consisting of eminent and impartial jurists.

59. Hence, a recommendation should be made to the General Assembly concerning the definition of aggression; the definition should be submitted in a general form; and a formula should be added to determine the body responsible for designating the aggressor.

60. Mr. KERNO (Assistant Secretary-General) mentioned the active part played in the First Committee by Mr. el Khoury, who was best fitted to explain how the resolution had been submitted and adopted. His first proposal was to be found in the summary records of the 389th meeting of the First Committee; it ran as follows:

" The General Assembly,

" Considering that aggression may better be defined in connexion with action for peace, and deeming it appropriate to refer such a legal task to the qualified subsidiary organ of the United Nations,

" Noting that the International Law Commission is at present studying the definition of the aggressor and related matters,

" Decides to request the International Law Commission to include the definition of aggression in its studies for formulating a criminal code for the international crimes, and to submit a report on this subject to the General Assembly.

" The Secretary-General is requested to refer to the International Law Commission the proposal of the Union of Soviet Socialist Republics, and all the records of the First Committee dealing with this subject." [5]

61. It could be seen from the summary record of the 390th meeting of the First Committee (para. 11) that Mr. el Khoury, after reaching agreement with certain representatives on the final version of the Syrian draft resolution, had put forward his definitive proposal, which had then been adopted by the First Committee and later by the General Assembly.

62. Incidentally, in the General Assembly, the Soviet Union delegation's amendment for the addition at the end of the draft resolution of the words " and present its report not later than the next regular session of the General Assembly " had been rejected (A/PV.308, paras. 22 and 24).

63. Mr. ALFARO pointed out that while the General Assembly had declined to specify a date, it had used the expression " as soon as possible " (resolution 378 B (V). That meant that if the Commission were able to carry out the task at the present session it should do so.

64. The alternative was for the Commission either to admit that it was unable to draw up a definition of aggression, or to decide that it was able to do so. The Commission's instructions were to define aggression; and before it was relieved of that obligation, it would have to declare itself unable to comply with it.

65. He had been greatly surprised to hear Mr. Hudson say that the Commission was not called upon to define aggression. Mr. el Khoury's reply to that objection was so satisfactory that it hardly seemed necessary to dwell on the point. The resolution and the facts spoke for themselves — the Soviet Union delegation had called for a definition of aggression which would conform with the terms used by Litvinov in 1933. The debate had centred on that point. It had been stated that a definition was desirable, but that up to the present it had proved impossible to reach agreement as to its terms. Later, on a proposal by Mr. el Khoury, it had been decided that the First Committee should entrust the task to the International Law Commission.

66. He thought the reason why no agreement had been reached so far on a satisfactory definition of aggression was that the various attempts had aimed at defining it in terms of an enumeration of acts. No attempt had been made to give a definition of aggression based on the essence of aggression as opposed to a description of it. The difference between a definition based on the essence of the object defined and a descriptive definition was clear. To define a circle for example, one could state either that it was a figure produced by tracing a line with a pencil moving in a circular direction, or that a circle was a curved figure enclosed by a line every point on which was equidistant from the centre. The second of those definitions was an " essential " definition. Was it possible to produce a definition of that kind?

67. Article 2, paragraph 4 of the Charter stated 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 ". That provision contained an embryonic definition of aggression. In 1936, Mr. Scelle had written that all recourse to violence was war and all war was aggression. Taking that statement in conjunction with the text established by the Commission at its second session to define the first of the crimes against the peace and security of mankind, namely: " The employment or threat of employment of the armed forces of a State against another State for any purpose other than self-defence or execution of a decision by a competent organ of the United Nations " (A/CN.4/R.6), one had another embryonic definition of aggression.

68. As Mr. Amado had stated in his brilliant memorandum, and as he himself had said in his study of the problem of an international criminal jurisdiction (A/CN. 4/15), war was criminal, and there were only two cases where the use of force was permissible. There again one had the rudiments of a definition. Mr. Spiropoulos had referred in his excellent report to the natural notion of aggression, namely, violence, war, and the use of force. It might be argued that the South Koreans were the aggressors since they were fighting against the Chinese Communists and the North Koreans. Not at all — they were not the aggressors, since they were exercising the right of self-defence. In the same way, America, France, Turkey, etc., were fighting in accordance with a decision by the United Nations to take police measures to stop aggression and restore peace.

69. In his report of the previous year (A/CN.4/15,

[5] See *Official Records of the General Assembly, Fifth Session, First Committee*, 389th meeting, para. 40.

paras. 90–94) he had given a brief summary of the various concepts of war which had at different times prevailed. War had for a long time been considered as the exercise of a right. Then had come the adoption at San Francisco of the United Nations Charter, especially Article 2, paragraph 4, which outlawed every form of war. A nation could only use force for the purpose of self-defence.

70. He had always felt that it should be possible to overcome those difficulties hitherto regarded as insurmountable, by inserting in the definition of aggression the constituent elements of aggression. Later he had stated in his report that " Whatever words are used in condemning war; whether it is called illegal or declared outlawed, renounced as an instrument of national policy or branded as a crime; whether war is divided into the two categories of *just* and *unjust*, or contemplated in an abstract manner as simply the recourse to force and violence for the solution of controversies between States, the fact stands that in the minds of Governments and peoples, statesmen and jurists, and in conformity with the positive provisions of the world's Magna Carta, war is a crime " (para. 93).

71. It was not necessary to refer explicitly to aggression or a war of aggression. Contemporary international order did not recognize the legitimacy of war waged for the purposes of redressing a real or alleged wrong. In the new international order, there was no just or licit, or legal or justifiable war. The only justifications for the use of force were self-defence and coercive action by the community of States. When either of those two elements was lacking, war was illicit and was a violation of the United Nations Charter, aggression, and an international crime (*Ibid*).

72. War had already been defined; and he would define aggression as " the use of force for any purpose except self-defence or coercive action by the United Nations ". In the memorandum he had submitted " The Question of the Definition of Aggression " (A/CN. 4/L.8), he had referred to the capital sins of aggression, declaration of war, armed attack, blockade etc. But as he had said, the way in which aggression could be committed was beyond the imagination of jurists. When an act of force had been committed, two questions arose: was it a case of self-defence or coercive action by the United Nations? It was impossible for anyone to conceive of an instance where violence or force was used outside those two cases without constituting aggression.

73. Naturally he felt, as Mr. el Khoury did, that a distinction must be made between the definition of aggression and the determination of the aggressor. The definition of aggression must be the legal instrument for determining the aggressor. There would be a verdict to the effect that an act of armed force had been committed which did not constitute self-defence or coercive action by the United Nations. It had been committed by such and such a country, and that country was the aggressor.

74. The definition of aggression would enable the aggressor to be designated.

75. Mr. SPIROPOULOS said he was grateful to his eminent colleague, Mr. el Khoury, for having proposed that the General Assembly refer the question to the International Law Commission. It was a mark of confidence on the part of Mr. el Khoury to have urged that the Commission be entrusted with the question, and knowing various representatives to the General Assembly, he realized that Mr. el Khoury had rendered a signal service to the Commission by doing so. But the reply given by the Commission must be carefully thought out.

76. Fundamentally there was little to be said about the matter, as it was a question of personal belief. Just as the Protestant, Catholic and Orthodox Churches each believed it had discovered the truth, so it was with the question at issue. There were two opposed viewpoints. According to the first, it was not logically possible to give a definition of aggression which would cover all that was understood by the word. The other was the opinion held by Mr. Yepes, based on the view that a definition was possible. There was no way of reconciling the two viewpoints. It was a matter of personal belief. On the other hand, there was no fundamental contradiction between the opinions expressed by Mr. Alfaro, Mr. Amado and himself.

77. Mr. Amado had stated that he agreed that it was impossible to define aggression. It was not surprising that they should agree since they had both had the same legal training and were brought up in the same legal tradition.

78. There was no contradiction between the report of his eminent colleague Mr. Alfaro and his own, as the two reports dealt with different matters. His own report dealt with the definition of the aggressor, and Mr. Alfaro's report with the question of the limits within which the United Nations Charter permitted recourse to armed force. Where recourse to force was not permissible, there was aggression. If Mr. Alfaro regarded that as a definition they were both in agreement, and there was no difference of opinion between them. But definitions of that kind were to be found in every treatise on public law.

79. When he was preparing his own report, he had consulted the various penal codes to see what they had to say. Generally speaking they included the question of self-defence. Self-defence was permissible in the fact of unjust attack, and the only question was in each particular case to decide whether such an attack existed. It was the judge who determined that. But when the General Assembly referred the question to the Commission, had it wanted the Commission to state positively what the Charter stated negatively? After all, that negative statement was to be found in the Charter (Article 2, para. 4). All that was being done was to express in other words what the Charter stated, and what Article 16 of the Covenant of the League of Nations stated. The various commissions and committees and jurists and politicians who had dealt with that question in the League of Nations had never considered that that constituted a definition. It was simply a delimitation.

80. Mr. Sandström had already drawn the Commission's attention to the Soviet Union proposal. If it were read carefully, and it must be read carefully in order to understand clearly what was the Commission's task,

it would be seen that it considered it necessary to formulate " essential directives " (A/C.1/608/Rev.1). There could be no question of saying in other words what the Charter had said; and what Mr. Alfaro was proposing was precisely that. The Commission had been asked to formulate directives. It had been asked to specify which were the actual cases constituting aggression. The act of aggression and the aggressor were one and the same thing. The text of the Soviet Union proposal would be found to state: " considering it necessary to formulate essential directives for such international organs as may be called upon to determine which party is guilty of attack ". The point was to determine which party was guilty of aggression. The crux of the matter was that the Commission was being asked to clarify the issue and not to repeat in its own words what the Charter had already said. The members of the Political Committee knew the Charter at least as well as the Commission.

81. What was wanted was a definition by which in any specific instance it could be determined whether there was aggression. The Commission must not lose sight of that fundamental fact. If it transmitted to the General Assembly a reply along the lines proposed by Mr. Alfaro, the First Committee would not be so much disappointed as astonished. It would see that all the International Law Commission had to say was already in the Charter. It wanted something more. It wanted to know whether there was any means of ascertaining which party was the aggressor. All the various definitions included the enumeration of certain factors. The various commissions and committees of the League of Nations, as the historical section of his own report (Chapter II, part B) showed, had examined cases of attack, invasion, blockade etc. Specific cases had been examined, not aggression in violation of the Covenant. What it was desirable to ascertain was what acts were contrary to the Covenant.

82. With regard to the proposal submitted by Mr. Yepes, he had nothing to say on the subject. It was a matter of personal belief. If Mr. Yepes thought he could define aggression, let him do so. Personally he felt incapable of doing so. He had analysed the concept of aggression, a thing which no one had done in the League of Nations. Having completed his report he ventured to say that he was proud of it. He had thought the report would put an end to the idea of defining aggression. Was it not desirable to analyse the concept as he had done? All he had had to listen to was a series of assumptions. Mr. Yepes talked of defining; but it was first of all necessary to see whether definition was possible.

83. The usual practice in the Commission should be followed, and the report examined word by word and chapter by chapter, to see whether its contents were approved. Obviously the Commission was at liberty to change the report or reject it, but at least it was necessary to examine it and reject each separate paragraph. In his report he had spoken of primary notions. He had no objection to his text being altered, and if it were found that his report was not based on law, by all means let it be rejected. It was undoubtedly a question of personal belief.

84. For the first time — and that was very important for the future of the International Law Commission — the Political Committee of the General Assembly had recognized its existence. Hitherto only the Sixth Committee of the General Assembly had taken cognizance of the International Law Commission. Hence the Commission must establish a real report for submission to the Political Committee. Such a report was like an advisory opinion by the International Court of Justice, and he had drafted it in the form of an advisory opinion.

85. Like Mr. Alfaro and Mr. el Khoury, he thought that a reply must be given. That was the only proper attitude. No doubt it was possible to argue that the question did not much matter, but the International Law Commission was not entitled to do so. It must proceed on the assumption that the question was important.

86. In conclusion he apologized to the Commission for taking up so much of its time, and especially for his failure to observe all the rules of surface politeness. But the Commission was not a mutual congratulation society; its members were there to tackle the important and responsible task ahead of them.

87. Mr. SCELLE thought that the first thing the Commission must do was to decide what its instructions were.

88. He had not taken part in the Assembly discussions, and hence he was in an unfavourable position. But the definition submitted by the Soviet Union had been sent to the Commission along with a request for its opinion on the subject of aggression. If the Commission found that that definition was unsatisfactory, it must produce another. It must not shirk its duty.

89. He approved the conclusions reached by Mr. Amado and Mr. Alfaro. He did not think it possible to give a definition based on enumeration; but an abstract definition of what aggression was could be produced. Presumably that definition would be very similar to the definition of the crime mentioned in article I, paragraph 1 of the draft code — very similar but not identical, since all that was required for the crime was the threat of employment of force, whereas for aggression actual recourse to force was necessary.

90. The fact that the terms found in the Charter would have to be used was no reason for not giving a definition. Aggression was an extremely serious problem, as was proved by the fact that on two recent occasions, two States — North Korea and China — had been declared aggressors by the United Nations.

91. According to Article 39 of the Charter " The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression . . .". Presumably there was a difference between breach of the peace and an act of aggression, otherwise the two terms would not have been used. Hence the attempt to define what constituted aggression was not a waste of time. It was a difficult, but not impossible task.

92. He was opposed to a definition based on enumeration, since any act of aggression could slip through the terms of a definition, and by applying the enumerative

method, the victim of aggression could be regarded as the aggressor. He did not think it was impossible to find an "essential" general and abstract definition.

93. The definition of aggression and the question of the determination of the aggressor were two different things. In a penal code, it was not infrequent to find a definition of a crime which was just as vague as any that could be imagined for aggression. Take the definition of manslaughter given in the French penal code — the Code left it to the judge to determine whether a given party had been guilty of criminal negligence. The same procedure should be adopted in defining aggression, leaving it to the competent organ — the Security Council, by virtue of Article 39, and perhaps at present the General Assembly [6] — to determine which party was the aggressor.

94. He would not venture to put forward a definition of aggression. The Commission would have to study the question once it had decided what the General Assembly expected of it. The Charter mentioned resort to force, in some cases on justifiable grounds and in others without justification. According to the Briand-Kellogg Pact, all recourse to armed force for the purpose of furthering a national claim was unlawful.

95. There was always a tendency to think of aggression in terms of attack; but it was conceivable for both combatants to be aggressors, if they failed to carry out the provisions of the Charter (Article 2, para. 4) prohibiting the use of force. Suppose, for example, Pakistan and India decided to go to war on the subject of Kashmir and to settle the issue by a sort of trial by combat. Both countries would be aggressors.

96. The consequences of determining the aggressor would not be the same as the consequences of a breach of the peace. Hence it would be necessary to define both concepts.

97. The question on the agenda was a concrete point for discussion. The Commission was called upon to state what constituted aggression. The determination of the aggressor, a very different question, was a matter for whatever competent organ might be required to examine questions of fact. Hence any enumeration was risky.

98. What was the General Assembly to think if the Commission did not reply to its inquiry? He was convinced that the Commission was capable of defining aggression. He did not think it was as difficult a matter as had been made out. Indeed, he thought it was a relatively easy matter; and before proceeding, he would like to know whether the Commission intended or did not intend to undertake the task entrusted to it.

99. The CHAIRMAN asked the Commission to decide whether it considered itself called upon by General Assembly resolution 378 B (V) to endeavour to produce a definition of aggression.

100. Mr. HUDSON pointed out that the question did not prejudge the attitude of the rapporteur, and that it was merely a reply to the question he had put.

101. The CHAIRMAN replied that that was the case, and that possibly the Commission might feel that the question could not be answered.

[6] See General Assembly resolution 377 A (V) of 3 November 1950.

102. Mr. SPIROPOULOS said that if he understood the General Assembly resolution correctly, the Commission was to examine the problem of aggression; and in order to discover exactly what the problem was, it should refer to the discussions of the First Committee. Hence it should consider whether a definition of aggression could be given, and it should then endeavour to define aggression, unless it considered that the Soviet Union proposal provided a satisfactory definition. In his view, the Commission must not disregard the definition put forward by the Soviet Union.

It was decided that an attempt should be made to define aggression.

103. The CHAIRMAN asked whether the Commission considered that it should try to define aggression by enumeration.

104. He thought Mr. Yepes had been the only member to advocate that method of dealing with the question. The other members of the Commission had felt that it was impossible or dangerous to adopt that procedure.

105. Mr. HUDSON shared the majority view. No attempt should be made to produce a definition by enumeration.

106. Mr. YEPES explained that he was in favour of defining aggression and he was convinced that it was possible to do so. He had suggested a definition by the enumerative method, but he was prepared to accept any form of definition.

It was decided to formulate an abstract definition of aggression.

107. Mr. HUDSON referred to the other question raised by the Rapporteur: the majority might decide that it was possible to establish a definition.

108. The CHAIRMAN thought that was perhaps a little premature.

109. Mr. HSU asked whether it would not be feasible to give an enumeration in the commentary.

110. The CHAIRMAN replied that the Commission's decision did not prejudge that issue.

111. In reply to Mr. SPIROPOULOS, who had asked whether the Commission proposed to study his report, the CHAIRMAN replied that it did: but he added that, in view of the decision just taken by the Commission to try to produce an abstract definition, it would not be necessary to examine the report paragraph by paragraph.

The meeting rose at 6.15 p.m.

94th MEETING

Friday, 1 June 1951, at 9.45 a.m.

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