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Summary record of the 94th meeting

Topic:
Question of defining aggression

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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 Assembly⁶ — 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 prejudice 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.

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

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 (V) of 17 November 1950: 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 and A/CN.4/L.8) (continued)

GENERAL DEBATE (continued)

1. The CHAIRMAN called on Mr. Alfaro to speak on a point of order.
2. Mr. ALFARO pointed out that at the previous meeting the Commission had decided two preliminary points:
 - (i) That it must draw up a definition, as requested by the General Assembly in resolution 378 B (V);
 - (ii) That the definition must be essential, general and abstract and not a definition by enumeration.
3. The Commission should now decide whether it would adopt either of the formulas proposed, the one by Mr. Amado (A/CN.4/L.6, para. 19 or 11–12 mimeographed English text) and the other by himself (A/CN.4/L.8, para. 36). For his part, he was prepared to accept either. If the Commission decided in favour of the formula he had proposed, it might require amendment if simplicity were desired. If the Commission preferred the formula proposed by Mr. Amado, it might be necessary to supplement it. He proposed that the Commission first decide that point and then begin to discuss the substance of the question.
4. The CHAIRMAN said that he had been about to make the same observation. There were two possible texts before the Commission, proposed by Mr. Alfaro and Mr. Amado respectively. The Commission should choose which of them it wished to adopt as a basis for discussion. Mr. Amado's definition might perhaps be the more suitable, as it was the simpler of the two.
5. Mr. YEPES explained that owing to the late hour at which the meeting had risen, he had been unable to define his position the previous day. In his opinion the problem of defining the aggressor was not as complicated as it had been made out to be. The Commission should submit a concrete proposal and that had been the aim of his draft (A/CN.4/L.7). He had thought it advisable to submit a definition by enumeration, containing the list of cases in which it would be automatically declared that aggression had taken place, while leaving, in exceptional cases, a certain latitude to the international

authority competent to determine the aggressor. He had considered that method the best, and the only one in conformity with the Charter, which simply referred to cases of aggression, thus implying that cases of obvious aggression should be specified. In the absence of any better alternative, he would support any definition providing a constructive solution of the problem. He asked that his proposal be mentioned in the Commission's report to the General Assembly.

6. Mr. SANDSTRÖM thought it most desirable that the definition given should be as close as possible to that contained in article 1, paragraph 1 of the draft Code. Hence, if a formula other than that proposed by Mr. Amado were adopted, the Commission should reconsider paragraph 1 in order to decide whether it required amendment.

7. The CHAIRMAN observed that Mr. Amado's formula reproduced article 1, paragraph 1, word for word, with the exception of the reference to "threat".

8. Mr. HUDSON feared that he had not understood Mr. Sandström's wishes. The Commission should not forget the aim of formulation. Article 1, paragraph 1 of the Code was intended to define a crime. But that was not the purpose of the proposal submitted to the General Assembly by the Soviet Union delegation, which called for directives to international organs which might be called upon to determine whether an act of aggression or breach of the peace had taken place. That proposal was in the following terms: "Considering it necessary to formulate essential directives for such international organs as may be called upon to determine which party is guilty of attack" (A/C.I/608). To formulate essential directives for international organs was one thing, to determine the guilty party was another. If the crime was to be defined, that should be done in more precise terms than would be used for directives addressed to international organs. He found it rather difficult to believe that the formula proposed by Mr. Amado could usefully serve as a directive to international organs.

9. The CHAIRMAN emphasized that the Commission was not acting by virtue of the draft resolution submitted by the Soviet Union. That resolution had not been adopted. The resolution with which the Commission must conform was different. He reminded the Commission that on the previous day it had decided that it was not possible to define aggression by enumeration.

10. Mr. HUDSON considered that there were nevertheless two different problems: the determination of those guilty of the crime and the formulation of directives. The aim which the Commission should pursue was correctly stated in the Soviet Union draft resolution. Directives must be formulated for international organs, for otherwise it was impossible to see what should be done. In his opinion article 1, paragraph 1 of the Code was very satisfactory as a definition of the crime. It was useful in its proper place, but he wondered what would guide the General Assembly, the Security Council or any other organ which might be required to take a decision. It was true that the Commission was not acting by virtue of the Soviet Union draft resolution, but it should pursue the same aim.

11. Mr. ALFARO also considered that the Commission's discussions should not be based on the Soviet Union draft resolution, but rather on the resolution adopted by the General Assembly (378 B (V)).

12. He wished to point out to Mr. Hudson that he had only referred to the fourth paragraph of the Soviet Union draft. He might have quoted the first paragraph which read as follows: "Considering it necessary, in the interests of general security and to facilitate agreement on the maximum reductions of armaments, to define the concept of aggression as accurately as possible, so as to forestall any pretext which might be used to justify it." That was the fundamental aim of the Soviet Union proposal, as was clearly shown by the operative part of the resolution which was, precisely, a definition of aggression by enumeration. That led back to Mr. Scelle's remarks emphasizing that the definition of aggression should not be confused with the determination of the aggressor. The purpose of the Soviet Union draft resolution was to define the aggressor.

13. He agreed with Mr. Hudson that article 1, paragraph 1 of the Code was satisfactory. In his opinion that formula was perfect, but it could not be used just as it stood to define aggression, since it referred to the threat of employment of armed force. Threat was not aggression; aggression was the physical act of violence.

14. The object in view, which was to provide directives for the organs of the United Nations, would be achieved if aggression could be defined, since the definition would provide a means of determining the aggressor. The Commission's task was to define aggression. The competent organs of the United Nations could then designate an aggressor, just as the courts decided whether a man had committed homicide on the basis of the definition given in the Code.

15. He therefore considered that, as the Chairman had said, the Commission should adopt a basic formula for its discussions that would enable it to reach a definition of aggression.

16. Mr. SCELLE said that the definition of aggression should be followed by a second paragraph stating that it was for the competent organs to designate the aggressor or aggressors, if the need arose; that should be done in order to show the Commission's intention to distinguish between the definition of aggression and the determination of the aggressor. He was not in favour of a definition by enumeration, or even of giving examples of cases in which aggression might be committed. There was, in fact, some danger that such an enumeration might be regarded as constituting presumption of aggression if one of the cases enumerated were to arise. The organ responsible for determining the aggressor should be left full freedom.

17. He was inclined to think there was something missing in the texts proposed, for they did not mention the possibility of aggression through intermediaries. There might be intervention by armed bands in contact with a government. In that case the organ responsible for designating the aggressor would have to determine whether there had been intervention by a government.

18. Mr. SPIROPOULOS explained that in his opinion the Commission was not required to give a definition of that kind. The records of the discussions in the First Committee showed that the International Law Commission had never been asked to declare what everyone knew, namely, that a military attack was an act of aggression if carried out in violation of the provisions of the Charter. It could be seen from the records that the contents of the Soviet Union and Yugoslav proposals had been criticized.

18a. The United States representative had said that: "The Government of the United States had always considered, and was still of the opinion, that no definition of aggression could be exhaustive and that any omission might encourage an aggressor. It would be noted, for example, that the definition proposed by the USSR delegation contained no reference to indirect aggression, to subversion or to the fomenting of civil strife. Any attempt at a comprehensive definition of aggression was inconsistent with the provisions of the Charter, particularly with Article 39, which provided that the Security Council should determine the existence of any act of aggression and take the necessary steps to put an end to it" (A/C.1/SR.386, para. 36).

19. That passage showed that the First Committee had discussed cases of aggression and not a general definition. The members of the Commission could refer to the records of the general discussion. The text submitted by the Soviet Union delegation had been criticized for not including certain cases in its definition. The definition was, in fact, the sum of all acts which might constitute aggression. The Charter prohibited resort to force except for self-defence. He was not referring to coercive action, since that could never be regarded as aggression. Thus there remained only Article 51, which provided that force might be resisted. The Commission had never been asked to repeat, in other terms, what was included in the Charter. It had already been stated in article 16 of the Covenant of the League of Nations that: "Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League". If there was recourse to war in violation of Articles 12, 13 or 15, that was a war of aggression. That definition was contained in the Covenant. Nevertheless, the problem of defining aggression had arisen; that meant the problem of determining concrete cases. The League of Nations Council had been concerned with the question whether aggression was committed in the event of bombardment or blockade, etc. In all the work of the League of Nations and that of the United Nations, it was cases of aggression that had been considered.

20. A negative definition of aggression was contained in the Charter. In addition, directives were required in the light of which the United Nations could decide whether aggression had taken place; it was the Commission's duty to endeavour to draw up such directives.

21. At the San Francisco Conference, the report on Chapter VIII, section B had included the following passage:

"Various amendments proposed on this subject

recalled the definitions written into a number of treaties concluded before this war, but did not claim to specify all cases of aggression. They proposed a list of eventualities in which intervention by the Council would be automatic. At the same time they would have left to the Council the power to determine the other cases in which it should likewise intervene.

“Although this proposition evoked considerable support, it nevertheless became clear to a majority of the Committee that a preliminary definition of aggression went beyond the possibilities of the Conference and the purpose of the Charter. The progress of the technique of modern warfare renders very difficult the definition of all cases of aggression” (A/CN.4/44, para. 148).

Thus cases of aggression had been considered, not a definition of aggression, which was to be found in the Charter.

22. Reference to the work of the two Commissions set up by the League of Nations showed that the Permanent Advisory Commission had examined different cases of aggression. It had reported as follows:

“These few considerations illustrate some of the difficulties inherent in any attempt to define the expression ‘cases of aggression’ and raise doubt as to the possibility of accurately defining this expression *a priori* in a treaty, from the military point of view, especially as the question is often invested with a political character.

“

“But, even supposing that we have defined the circumstances which constitute aggression, the existence of a case of aggression must be definitely established” (A/CN.4/44, para. 138).

The Commission went on to say that: “In the absence of any indisputable test, governments can only judge by an impression based upon the most various factors” (*Ibid.*).

23. The special Committee of the Temporary Mixed Commission on the Reduction of Armaments, which was also a most important committee, had stated in its commentary on the definition of a case of aggression that: “It would be theoretically desirable to set down in writing, if it could be done, an exact definition of what constituted an act of aggression.” The Committee had added that: “It appears, however, to be exceedingly difficult to draw up any such definition. In the words of the Permanent Advisory Commission ‘under the conditions of modern warfare, it would seem impossible to decide even in theory what constitutes an act of aggression’” (*Ibid.*, para. 139).

24. He repeated that the Commission should make no mistake: it had not been asked for a general definition, since that was not required. Such a definition was included in the Charter.

25. The CHAIRMAN said that he had not wished to interrupt Mr. Spiropoulos, who was the Rapporteur on that question, but he thought that he was reopening a question decided the previous day.

26. Mr. HSU said that he had felt some anxiety on hearing the statement by Mr. Spiropoulos, which unfortunately dealt with only one aspect of aggression. He wished to say that he would vote against any formula which did not make it sufficiently clear that indirect aggression was included. It would be necessary to submit a commentary on the text adopted.

27. With regard to Mr. Amado’s formula, he did not think it sufficient to refer to “any war”; the definition should cover any use of force, direct or indirect.

28. On the previous day, he had spoken of the possibility of enumerating examples, even if a general definition were given; Mr. Scelle thought it inadvisable to do so, but he himself was convinced that it should be stated in the commentary that indirect aggression was included, so as not to omit one of the various kinds of aggression.

29. Mr. AMADO explained his views on the situation. He considered that the Commission should express itself as follows:

“The Commission,

“Having considered the General Assembly resolution which states:

“Considering that the question raised by the proposal of the Union of Soviet Socialist Republics can better be examined in conjunction with matters under consideration by the International Law Commission;

“Having reached the conclusion that it would be impossible to draw up a definition by enumeration; and

“Considering that the General Assembly’s resolution does not relate to directives, but to the definition of aggression;

“Concludes that it can only transmit to the General Assembly a definition so broadly worded that it will coincide with the terms of the Charter.”

30. In his opinion, the argument advanced by the Rapporteur that the Commission should not transmit to the Assembly a definition repeating the provisions of the Charter, did not carry much weight. A definition could very well consist of provisions contained in various Articles of the Charter. The important point was to declare frankly to the world that it was impossible to define aggression, but that the Assembly had been impressed by the desire of the Soviet Union delegation to submit such a definition and that the Commission, after exhausting the subject, had arrived at the conclusion either that no definition could be given or that the definition must be in those terms. That was the only possible course and he was glad that he had been able to point to it. Either it must be said that any war not waged in exercise of the right of self-defence or as coercive action by the United Nations in application of Article 42 of the Charter, was an aggressive war, or else no definition should be given.

31. The CHAIRMAN said that he took the same view as Mr. Amado.

32. Mr. EL KHOURY stated that, in sending its report on that question to the General Assembly, the Commission should consider how the Assembly, the Sixth Committee

and the First Committee, would deal with it. In the first place they would compare the report with the General Assembly's resolution and to see if it met the request made to the Commission. Very severe criticisms would then be made. Indeed, the attitude of many delegations on that subject was well known. The statement by Mr. Spiropoulos would be taken up. Many delegations would support it, and it was quite possible that the draft resolution submitted by the Commission would be rejected.

33. The only way to safeguard the Commission's draft resolution was to make it conform exactly to the General Assembly's resolution. That was what the Assembly expected of the Commission. It was clear that the resolution had been adopted as a result of the draft submitted by the Soviet Union. The General Assembly had, in fact, said so in the following terms: "Considering that the question raised by the proposal of the Union of Soviet Socialist Republics can better be examined in conjunction with matters under consideration by the International Law Commission". The question had not been referred to the Commission as a special item on its agenda, but merely, as the General Assembly's resolution stated, to be examined "in conjunction with matters under consideration". What were those matters? The reference was to the draft Code of Offences against the Peace and Security of Mankind. There was no reason to make the definition of aggression a separate item, to which a special report would be devoted. The second paragraph of General Assembly resolution 378 B (V) included the following passage: "... so that the latter may take them into consideration and formulate its conclusions as soon as possible". The Commission would do so when it formulated its conclusions on the draft code. It would then state its opinion.

34. It was unnecessary, and might even be dangerous, to devote a special report to the definition of aggression. The definition proposed by the Commission would enjoy some measure of protection if it were submitted as a paragraph of the Code. The General Assembly might adopt the definition. If it were submitted in that manner the General Rapporteur, in his report on the work of the third session, could explain the difficulties encountered in drawing up the definition and mention in particular that enumeration was impossible.

35. He knew the attitude of delegations on that point. He had had considerable difficulty in persuading them to transmit the draft resolution to the International Law Commission. There was nothing to be lost by describing the situation as it had arisen. It would therefore be preferable to add a paragraph to the Code, showing how the aggressor was to be determined. Indeed, if the war in Korea were considered, it would be seen that the Soviet Union and China still maintained that the United States and the United Nations were the aggressors. Hence, it was necessary to know how the aggressor was to be determined. A general definition might be given, as had been done by Mr. Alfaro and Mr. Amado. But it was preferable to insert it in the Code, in order to secure some protection before the General Assembly.

36. Reverting to Mr. Scelle's equation, it might be said

that: All use of force equals war, and all war equals aggression. If the definition of aggression were discussed within the framework of the Code, it would be accepted more easily.

37. Mr. CORDOVA noted that Mr. el Khoury had explained what the General Assembly expected of the Commission. He himself had been in a difficulty because the Rapporteur's report had separated the question of the draft code from that of aggression, which had made him think that the Commission might be called upon to submit a definition entirely independent of the Code. But as had been pointed out, there was a connexion between aggression and the illicit use of force. Examination of the proposals submitted by Mr. Alfaro and Mr. Amado regarding the definition of aggression and of the definition of the crime given in article 1, paragraph 1 of the draft code, showed that they were similar. The only difference was that the threat did not constitute aggression. The Commission should therefore take account of Mr. el Khoury's suggestion and provide in the draft Code that the illicit use of force constituted aggression. Hence aggression would always be regarded as a crime. The threat must be omitted since it was not an objective act. The Commission would thus conform to the Assembly's wish and there was no doubt that the General Assembly would accept the definition of aggression submitted to it by the Commission. He proposed the following text:

"Aggression, that is, the direct or indirect 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.

"The threat of aggression shall also be deemed to be a crime under this article."

38. Mr. HUDSON observed that the discussion had taken a different turn. He had been most interested by what Mr. el Khoury had said at the previous meeting, but he believed that the latter had now changed his views and was suggesting that the Commission should not submit a special report.

39. Mr. EL KHOURY explained that on the previous day he had said that the Commission was free to submit a special report or to include the definition it proposed in the Code. He had not contradicted himself at the present meeting; he had clearly stated that he would prefer the definition to be incorporated in the Code.

40. Mr. HUDSON said he had been impressed by the remarks of Mr. Córdova, who had emphasized that the definition should be included in the Code. He believed that that was what Mr. Sandström had proposed.

41. Mr. SANDSTRÖM explained that he had said he thought it desirable to keep the definition of aggression as close as possible to article 1, paragraph 1 of the Code and, consequently, to consider whether that paragraph required amendment.

42. Mr. HUDSON agreed with Mr. Córdova that the paragraph might require amendment.

43. It appeared to him that there were four different questions which could be discussed. Mr. Spiropoulos

had referred to cases of aggression, which had been the subject of the work done by the League of Nations commissions. It had been said that it was impossible to enumerate all cases of aggression and he believed that the Commission had accepted that view. Secondly, there was Mr. Amado's definition, which indicated the cases in which war was not aggression. Thirdly, it had been agreed that it was possible to define aggression and Mr. Alfaro had endeavoured to do so in a positive manner, on the lines of article 1, paragraph 1 of the Code. Fourthly, the proposal of the Soviet Union delegation referred to the necessity of defining the concept of aggression as accurately as possible and of considering whether it was possible to determine the aggressor. Mr. Scelle had made a distinction between the concept of aggression and the determination of the aggressor. He himself did not believe that anything could be added to the Charter so far as the procedure for determining the aggressor was concerned. The organs already existed. In his view those were the four questions which members of the Commission should bear in mind.

44. Mr. ALFARO pointed out that the Commission was considering Mr. el Khoury's proposal to include the definition of aggression in the Code; but he wished to remind members that they had already settled the question they were discussing and had decided to draw up a definition of aggression. Mr. el Khoury thought that the essential part of their task was to formulate conclusions linked to the Code.

45. He had read the discussions leading up to the adoption of Resolution 378 (V) and had the text of the latter before him. The question raised by the Soviet Union draft resolution was that of defining aggression by the enumeration of certain acts. The Commission was entitled, when drafting the Code, to deal with the determination of the aggressor, which depended on a clear conception of aggression. It was, in fact, necessary to have a clear idea of what constituted aggression before attempting to determine the aggressor. In attempting to define aggression, the Commission should start from one of the two formulas submitted to it.

46. On two occasions an argument had been advanced which he could not pass over without comment. Mr. Spiropoulos had asked why the Commission need draw up a definition which was contained in the Charter. He would reply that if the definition submitted was in complete conformity with the Charter, that was a merit rather than a defect. In his opinion it should not be said that the Commission was repeating the terms of the Charter, but that it was acting in conformity with the Charter. It was drawing on the latter for the elements with which it was attempting to draw up a definition. It was using Article 2, paragraph 4, which prohibited any use of force, Article 42 which provided for United Nations action to restore international peace and security and Article 51 which confirmed the right of self-defence. The merit of the proposed definition was that it combined those three elements. Mr. Spiropoulos had drawn attention to the fact that even at the time of the League of Nations it had been held that all war was aggressive war. He thought the Commission was in the position

of M. Jourdain, who spoke prose without knowing it. A definition had been discussed ever since 1945; but one had already been adopted, of which the elements were contained in Articles 2, 42 and 51 of the Charter. Aggression was the use of force for any purpose other than United Nations action or self-defence. When it was stated that that definition also appeared in article 1, paragraph 1 of the Code, that meant that the proposal was in full harmony with that paragraph. He did not say that it was identical, but that it was in full harmony; for the concept of threat must be eliminated from the definition of aggression.

47. It had been said that the General Assembly had asked the Commission to indicate concrete cases of aggression, which meant that the Commission would be up against the difficulties encountered, since the early days of the League of Nations, by those who had attempted to define aggression in that manner. Mr. Spiropoulos, Mr. Amado and he himself had reached the conclusion that it was humanly impossible to enumerate all acts of aggression. Hence it was natural that the Commission, having been asked to draw up a definition, should consider the possibility of doing so by other means.

48. With regard to Mr. el Khoury's proposal to submit the definition of aggression under cover of the Code, that might be done by dividing paragraph 1 into two paragraphs. The first would be worded as follows: "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". It could be said that aggression was the commission of the crime described in article 1, paragraph 1 of the Code. A second paragraph would follow, beginning: "The threat of employment . . .".

49. The Commission must answer two questions: Was there, apart from self-defence or United Nations action, any act of violence by a State against another State which did not constitute aggression? And, putting it the other way round: was it or was it not aggression to commit an act of violence apart from self-defence or United Nations action? The Commission would then arrive naturally at the following definition of aggression: Aggression is the employment of force for any purpose other than self-defence or United Nations action.

50. Mr. HSU, referring to Mr. el Khoury's suggestion that the definition of aggression be inserted in the Code, said he thought that should be done only if the Commission found the definition imperfect. There were, indeed, many respects in which the definition was independent of the Code. The two questions overlapped. The Commission had discussed article 1, paragraph 1, which embodied part of its views on aggression, but only a part, for it did not include the provisions of paragraph 4 of the same article relating to the fomenting of civil strife, which covered subversive activities calculated to undermine the authority of the State. Thus the Code and the definition of aggression overlapped, but did not completely coincide.

51. The General Assembly had asked the Commission to define aggression because it greatly needed a definition

of such acts. Yugoslavia feared invasion and had, in fact, asked the United Nations what it would do in the event of aggression. The Soviet Union had given a definition which only included direct aggression. That might imply that it was thinking only of indirect aggression. At the present time no one dared be found guilty of direct aggression unless he wished to start the third world war. Only indirect aggression was thought of, so that unless the definition covered that form of aggression it would be worthless.

52. Another factor was that the Code could not be adopted for some considerable time. Hence the needs of the situation could not be met by merely inserting the definition of aggression in the Code. The Commission must give the Assembly a definition it could apply, and submit that definition separately so that it could be adopted by the Assembly in a separate resolution.

53. Mr. HUDSON asked whether Mr. Hsu meant that the contents of the Code would have to be adopted by States, whereas a definition submitted separately, in the form of directives to the United Nations organs, could be adopted directly by the General Assembly.

54. Mr. HSU replied that the definition should, indeed, give directives to the United Nations, but that if it were included in the Code it would have to await ratification of the latter. If it were submitted to the General Assembly, he thought that, contrary to what had been stated, it would be adopted if the directives were satisfactory. The world was, in fact, awaiting a definition of aggression. The League of Nations had made three attempts, the first and second of which had been complete failures. It had then been said that it was impossible to define aggression. The third attempt had been an enumeration, but that solution was inadequate. If the Commission submitted a useful solution to the General Assembly, he thought that it would enjoy strong support.

55. The CHAIRMAN observed that there were still five speakers on his list though all had already spoken at least once. He asked members to make their remarks as brief as possible. When those five had spoken, the general discussion would be closed.

56. Mr. ALFARO, on a point of procedure, said that the Commission should consider which formula it was going to take as a basis for discussion, as the Chairman had asked it to do. Furthermore, during the debate Mr. el Khoury had proposed that the definition be included either in the draft Code of Offences or in the General report.

57. Those two problems should be considered separately.

58. The CHAIRMAN thought that proposal fully justified. The Commission should first adopt a text and then decide how it should be submitted.

59. Mr. KERNO (Assistant Secretary-General) noted that various speakers considered that the question put to the Commission by the General Assembly (resolution 378 B (V)) was not clear. It had, however, arisen 30 years ago. It had been re-formulated at the San Francisco Conference during which, in his capacity as representative of Czechoslovakia, he had made the following statement :

“ This complete freedom ” (left to the Council under

chapter VIII (B), paragraph 2 of the Dumbarton Oaks Proposals relating to the ‘ determination of threats to the peace or acts of aggression and action in respect thereto ’) “ certainly has the advantage of enabling the Council to adapt its action to any situation. Yet it remains a question whether this absence of any rule of conduct will still be of advantage when the case seems absolutely clear, and when only the application of previously defined rules would seem to guarantee action sufficiently swift to prevent an unscrupulous aggressor from creating, in his own favour, a situation the redress of which may prove very lengthy and very difficult ”.¹

60. That was the form of the question. It had been subsequently re-stated by the Yugoslav delegation (A/CN.1/604) and by the delegation of the Soviet Union (A/C.1/608). When the members of the Political Committee came to study aggression themselves, they had wished to obtain the opinion of an independent and authoritative legal body already dealing with related matters, thinking that if the work of both bodies were combined, some progress could be made with the problem.

61. Above all, the Commission should consider whether it was possible to propose to the political organs of the United Nations a rule which those organs could apply automatically. Rightly or wrongly, it had already rejected the solution of a definition by enumeration. It should now consider whether an abstract definition was possible. Although of less direct use, such a definition would, however, be of value to the organs of the United Nations.

62. Was it possible to draw up an abstract definition of aggression and if so, how should it be drafted? Those were the questions which the Commission had to answer.

63. With regard to the method of presentation, which had been dealt with by Mr. el Khoury, the Commission was free either to draw up a separate report on the results of its work on the subject or to submit them in a general report on its third session, stating that it had studied the question in conjunction with the Code of Offences. If the latter course were adopted, the General Rapporteur could point out that the Commission had rejected the method of definition by enumeration, recapitulate the main stages of the discussion, give the text of the definition adopted and, finally, explain why the Commission had decided to submit that definition in its general report.

64. Mr. SCALLE was sorry to see that members of the Commission were reconsidering decisions taken at the previous meeting. Except for a few minor differences, their views were identical. The Commission should next decide on the text of the definition and where to introduce it. Those two points should be considered separately.

65. Mr. AMADO wished to comment on Mr. el Khoury's suggestion that the definition should be inserted either in the draft Code of Offences or in the Commission's report, rather than be made the subject of a separate decision. It was in resolution 177 (II) that the General

¹ *Documents of the United Nations Conference on International Organization, San Francisco, 1945, vol. 3, p. 469.*

Assembly had asked the Commission to prepare a draft Code of Offences, whereas it was in resolution 378 B (V) that it had asked the Commission to consider the definition of aggression in conjunction with other matters.

66. In his opinion, the preparation of a draft Code dealing with clearly defined matters should be distinct from any decision on a definition of aggression. In support of that view it might be pointed out that the General Assembly asked the Commission to formulate its conclusions on the subject of the definition of aggression "as soon as possible", whereas it might be many years before the draft Code came into force.

67. The definition should be as broad as possible and should serve to clarify an idea of which the world had long been socially and legally conscious.

68. Mr. SPIROPOULOS was glad to note that the Commission was approaching agreement on many points. He proposed that a sub-committee be set up, which might include Mr. el Khoury, Mr. Alfaro, Mr. Amado, Mr. Hudson and himself as Rapporteur. The sub-committee could be instructed to give general consideration to the proposal contained in Mr. Amado's memorandum (A/CN.4/L.6) with a view to deciding whether it could be adopted or not. It could then endeavour to formulate a definition, accompanied by a draft report to the General Assembly.

69. He himself doubted the possibility of using the formula submitted by Mr. Amado. He had been impressed by Mr. Hsu's comments.

70. The CHAIRMAN recognized that it was difficult to draft a text in plenary meeting. The proposed sub-committee should not have more than five members.

71. Mr. ALFARO doubted whether anything was to be gained by setting up a sub-committee. Any decision taken by such a body would have to be examined by the Commission in plenary meeting. Moreover, all members had taken a very active part in the discussion; he did not see why only five should serve on the sub-committee.

72. Mr. AMADO was not prepared to serve on the sub-committee. The proposal he had submitted in his memorandum was very modest. During the discussion it had been criticized, but he did not wish to take it upon himself to defend it. He suggested that the Commission nominate Mr. Córdova in his place and expressed the wish that Mr. Scelle should also be appointed.

73. The CHAIRMAN and Mr. SPIROPOULOS observed that the Committee would be instructed to prepare not only a definition of aggression but also a draft report to the General Assembly.

74. Mr. SCELLE was opposed to setting up a sub-committee at that stage. If it were to be instructed to draft a report, it would be premature to set it up before the definition had been drafted.

75. The Commission had various texts before it: that of Mr. Amado (A/CN.4/L.6), that of Mr. Alfaro (A/CN.4/L.8) and that of Mr. Córdova, submitted verbally at the beginning of the meeting (para. 37). Those proposals must be examined.

76. Mr. HUDSON thought that the Commission should

not set up the sub-committee until the definition of aggression had been drafted.

It was so decided.

77. Mr. SPIROPOULOS had been greatly impressed by Mr. Hsu's observations and consequently wished to make certain comments on Mr. Amado's memorandum.

78. Mr. Amado had wondered whether it would be possible to draw up a definition of aggression based on the United Nations Charter. He had observed that the Charter permitted the use of force in two cases and had deduced, *a contrario*, that apart from those two cases any resort to armed force, any attack or war (there was no need to choose between those terms for the time being) constituted aggression.

79. He himself was not sure whether that general definition covered all cases of aggression possible in the future. Foresight was certainly required, since the concept was continually evolving. A few centuries ago, for instance, the idea of neutrality had not been developed. The support given by a neutral to a belligerent was not considered as aggression, whereas nowadays, if a State gave military assistance to an aggressor, it was considered as an aggressor itself.

80. He again read out the statement of the United States representative in the First Committee of the General Assembly²

81. Mr. Amado's draft, which was based on Articles 42 and 51 of the Charter, took account of the definition given in article 1, paragraph 1 of the draft Code of Offences which condemned "the employment . . . by the authorities of a State, of armed force against another State for any purpose other than . . ."; but it left out acts which, according to the United States Government, also constituted aggression, namely, indirect aggression, subversion and incitement to war, to which must also be added the incursion of armed bands referred to in article 1, paragraph 3 of the Commission's draft code.

82. If the Commission based its definition of aggression on article 1, paragraph 1 of the draft Code, and left out the other crimes also defined in the draft which were classed as acts of aggression, such as the incursion of armed bands or the forcible annexation of territory, its formula would be less comprehensive than that of Mr. Politis. Moreover, Mr. Vyshinsky also considered that the presence of foreign troops on a territory, against the wishes of the population, constituted aggression. All those considerations showed how complex the problem was.

83. In his own report, he had also examined another case and described it in the following terms:

"According to international law, no State is obliged to prevent its nationals from joining, as volunteers, the army of a belligerent. But what about a State which would allow a very important portion of its male population to enter the territory of a belligerent State in order to serve in the army of that State as volunteers? (We do not refer to the participation of Chinese troops in the Korean war since the situation

² See para. 18a, *supra*.

- there is somewhat different.) Could one say that a State which, in the above case, would allow its nationals to join a belligerent army would not be an 'aggressor' according to the general feeling of our time? A definition of aggression like that adopted by the Treaties of London would for instance leave the above case of aggression uncovered."³
84. The proposed definition left that case out of account ; that showed how dangerous any definition was. The General Assembly, to which the definition would be submitted, would no doubt consider that it was both very broad and insufficiently comprehensive. It would often be felt that a State was an aggressor, though the terms of the definition gave no express authority to call it one.
85. Mr. SCELLE asked the Commission to cut short the general discussion and begin examining the proposals before it.
86. Mr. SPIROPOULOS explained that the purpose of his remarks had been to show that Mr. Amado's solution did not cover all possible cases of aggression.
87. The CHAIRMAN noted that Mr. Spiropoulos considered that the formula contained in Mr. Amado's memorandum should be supplemented.
88. In order to show the inadequacy of certain definitions, Mr. el KHOURY cited the Corfu Channel incident. Following a decision by the Security Council, the dispute between the United Kingdom and Albania had been referred to the International Court of Justice. In its judgement, the Court had ordered Albania to pay compensation to the United Kingdom. Albania had not complied with that decision and the compensation remained unpaid. If the United Kingdom asked the Security Council to enforce the decision of the Court, it would be replied that the United Nations was not responsible for enforcing such decisions. If, in order to obtain satisfaction, the United Kingdom took measures against Albania to enforce the judgement, it would be considered as an aggressor under Mr. Amado's formula. Hence, it would not do so and the judgement of the Court remained a dead letter.
89. In his opinion the provisions of the definition of aggression should be such that resort to force to ensure the enforcement of a decision by the International Court of Justice would be regarded as legitimate, whereas under existing international law it was classed as aggression.
90. In reply to a question by the CHAIRMAN, Mr. EL KHOURY explained that he had not forgotten the provisions of Article 94, paragraph 2 of the Charter, but he considered them difficult to apply.
91. Mr. CORDOVA observed that Mr. el Khoury had meant to say that the Court's decision in favour of a State did not give that State full legal authority to enforce the judgement, and that under the above-mentioned provisions of the Charter the Security Council remained free to decide whether it should make recommendations or take enforcement measures.
92. In claiming the right of a State to take justice into its own hands, however, Mr. el Khoury was putting international law back to a stage which had now been passed.
93. Mr. EL KHOURY observed that decisions of the Security Council, under Article 94, paragraph 2, would be mere recommendations, which were not binding. The Council did not exercise its powers under Article 42 if a decision of the Court was not respected.
- 93a. The CHAIRMAN thought that Mr. el Khoury's conclusions would put international law back to a stage prior to the establishment of the League of Nations.
94. He asked Mr. Amado if he would agree to his draft being supplemented, to take account of cases of indirect aggression and armed incursion.
95. Mr. AMADO pointed out that the suggestion contained in his memorandum was only put forward tentatively, being preceded by the words: "One solution might be to say..." (A/CN.4/L.6, para. 19 or p. 11, mimeographed English text).
96. The CHAIRMAN thought that the ideas contained in Mr. Amado's formula might serve as a basis for the definition to be adopted by the Commission, whose general view it was that they should be supplemented so as to cover indirect aggression.
97. Mr. AMADO considered that, rather than allow itself to be convinced by the too plausible arguments of Mr. Spiropoulos, the Commission should seek the only solution that remained possible. In its report to the General Assembly, it should explain that it seemed impossible to enumerate all cases of aggression and unsatisfactory to give examples; that it considered that article 1, paragraph 1 of its draft code gave a sufficiently comprehensive definition of aggression, and that it had supplemented that text to cover the possibilities of indirect aggression.
98. That was the course to be followed if the Commission did not wish to evade the issue. If it abandoned the attempt, however, it would not be the first time that a learned body had admitted the impossibility of carrying out a task entrusted to it.
99. Mr. SCELLE considered that the texts submitted by Mr. Alfaro and Mr. Córdova were both amplifications of the suggestions contained in Mr. Amado's memorandum. Mr. Alfaro's definition was the more detailed. The Commission might give it preference, subject to certain deletions. It was easier to make deletions than additions.
100. The CHAIRMAN thought that Mr. Alfaro's definition did not include indirect aggression either.
101. Mr. ALFARO pointed out that indirect aggression was covered in his definition by the words "in any manner" which should be understood as meaning "whether directly or indirectly". He would not be opposed to amendment of that expression if the Commission considered it insufficient. He agreed with Mr. Hsu and, in introducing the words "in any manner" into his definition, had been thinking particularly of the constitution of the puppet state of Manchukuo in 1931.

³ A/CN.4/44, para. 159.

102. He was willing to have every word of his definition discussed, but thought that in order not to waste time the Commission should begin to examine a text, whichever one it chose.

103. Mr. AMADO thought that Mr. Alfaro was taking a stand on a very controversial point in introducing into his definition the ideas of territory and people, which were very imprecise notions, like those of space and time, of which Politis had made an exhaustive study. The use of such words in a definition which could only be broad and abstract, should be ruled out if it was desired to avoid the difficulties so clearly brought out by Mr. Spiropoulos in his report. He himself would not urge their deletion, but he drew the Commission's attention to the problem.

104. Mr. CORDOVA thought that examination of the definition given by Mr. Amado might cause a repetition of the Commission's discussion in connexion with article 1, paragraph 1 of the draft Code of Offences.

105. Moreover, he thought that the words "or governments", in Mr. Alfaro's definition, should be deleted. It was, in fact, always against a State, rather than a government, that force was used.

106. The use of the words "territory" and "people" was confusing, as Mr. Amado had pointed out.

107. Mr. HSU was not satisfied with the words "in any manner", which did not give sufficient prominence to indirect aggression; he considered that they should be amended.

108. The CHAIRMAN asked Mr. Alfaro whether, by the words "use of force", he had meant "armed force".

109. Mr. ALFARO thought that such a stipulation might exclude bacteriological and gas warfare from the definition. Microbes and gas were not really arms. Moreover, the Charter did not use the words "armed force".

110. Mr. SCELLE asked the Chairman if he would be satisfied with the word "violence".

111. The CHAIRMAN preferred the word "force".

112. Mr. HUDSON pointed out that the same comment could be applied to the definition of the crime contained in article I, paragraph 1 of the draft Code of Offences.

113. Since Mr. Alfaro had explained in his memorandum⁴ that by "force" was meant all kinds of weapons, the word "armed" would not limit the application of the word "force". If the bombs used were charged with microbes or gas, armed force was still being employed.

114. Mr. HSU considered the word "armed" unnecessary and even undesirable. Aggression might take the form of ideological action to foment civil strife or of subversive activities, which the term "armed force" appeared to exclude.

115. Mr. HUDSON was not clear what Mr. Córdova meant in his definition by the words "indirect employment of armed force". He thought that that point should be thoroughly studied. It would be better provisionally to adopt a starting point for the definition,

without seeking to include everything in the opening words.

116. Mr. KERNO (Assistant Secretary-General) asked whether the words "armed force" covered the case of volunteers sent without arms to join the ranks of a belligerent army and to be armed abroad.

117. Mr. HUDSON thought that case was not covered: The Commission could consider it later.

118. Mr. ALFARO was willing to accept the addition of the word "armed" to his definition, if the majority of the Commission thought that it corresponded to the definition of the word "force" given in his memorandum; but he warned the Commission against any qualification of the various concepts. The Charter constantly used the word "force" without justification.

119. Mr. SPIROPOULOS asked what difference there was between an enumeration given in a note and one contained in the definition itself.

120. Mr. HUDSON thought that the debate should continue. The general discussion must be brought to an end but, on the other hand, the Commission was too large a body to be turned into a drafting committee.

121. Mr. CORDOVA considered that the problems raised by the Commission were matters of substance rather than of drafting.

The meeting rose at 1.05 p.m.

95th MEETING

Monday, 4 June 1951, at 3 p.m.

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Chairman: Mr. James L. BRIERLY

Rapporteur: Mr. Roberto CORDOVA

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. 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.

⁴ A/CN.4/L.8, para. 41.