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Summary record of the 95th meeting

Topic:
Question of defining aggression

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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.

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; A/CN.4/L.10; A/CN.4/L.11; A/CN.4/L.12) (continued)

GENERAL DEBATE (continued)

1. Mr. YEPES pointed out that he had deliberately abstained from speaking at the previous meeting as the Commission had *a priori* discarded the draft definition of aggression of which he was the author (A/CN.4/L.7). He expected the discussion to result in a formula to which all could agree.

2. His proposal had been based on the notion of an enumerative definition which would not only cover all cases which could be automatically labelled as aggression, but would also provide for the possibility of including any other unforeseen and sufficiently serious cases. It rested on an objective criterion and combined the advantages of a rigid method with those of flexibility. He did not, however, desire to press the matter as the Commission had agreed to the reproduction of the proposal in full in its report to the General Assembly on its third session.

3. It was understood that the Commission still proposed to draw up a definition of aggression. That had been decided in the first phase of the discussion and in itself represented progress. However, the new proposals which were supposed to constitute essential definitions were actually nothing more than enumerative definitions put the other way round and more dangerous than those he had himself submitted.

4. Mr. Amado, who in chronological order was the author of the first proposal, considered that "any war not waged in exercise of the right of self-defence or in application of the provisions of Article 42 of the Charter of the United Nations was an aggressive war" (A/CN.4/L.6, para. 19 or pp. 11-12, mimeographed English text). Such a definition reproduced the outdated notion of a war of aggression which the compilers of the Charter had eliminated from the legal vocabulary. It was an enumeration put the other way round of all that did not constitute aggression in the sense of the formula, and would have the effect of whitewashing any States that took part in a conspiracy against peace but could not be labelled as aggressors under its terms.

5. The definition proposed by Mr. Alfaro was the following: "Aggression is the use of force by any State or group of States, or by any Government or group of Governments, against the territory and people of other States or governments, in any manner, by any method, for any reasons and for any purposes, except individual or collective self-defence against armed attack or coercive action by the United Nations" (A/CN.4/L.8, para. 36).

6. That meant that the use of force, or rather of armed force, would be the sole criterion of aggression since, according to the author of the proposal, "aggression itself is not perpetrated until and unless some form of attack or physical offensive has taken place" (A/CN.4/L.8, para. 58).

7. That again was a typical case of enumeration put the other way round. Nothing except a physical attack, the use of armed force, constituted aggression. Furthermore, that definition would have the effect of exculpating States which, for the last fifteen years, had been branded as aggressors by international public opinion for acts such as the Austro-German Anschluss in 1938, the annexation of Czechoslovakia by Hitlerite Germany in 1939, the annexation of the Baltic Republics by the Soviet Union in 1945, the intervention of the Soviet Union in the domestic politics of Poland, Czechoslovakia, Hungary and Romania, and still more recently of China, and the intervention of the Central People's Government of the People's Republic of China in Tibet. Should the Commission adopt that definition, a whole series of acts, censured by public opinion and opposed to morality, would not be considered as aggression. It was easy to imagine the sensation that such a formula would produce in the General Assembly and the discussions to which it might give rise. As it whitewashed the aggressors of the last few years, and in some sort granted them absolution, the Soviet Union and its satellites would do their utmost to get it accepted.

8. It would not be wise to adopt solutions improvised in the course of a meeting for so delicate a problem. The Commission should ask Mr. Spiropoulos, who, as rapporteur, had given proof of remarkable scientific exactness, to examine the various formulas proposed and evolve therefrom, with the help of the directives resulting from the discussion, precise proposals which would enable the Commission to get on with its work.

9. The CHAIRMAN asked the members to end the general discussion, which had already taken up a great deal of time.

10. Mr. YEPES made the formal proposal that the various definitions before the Commission be referred to the rapporteur, with the request that, in drawing up his conclusions, he should base them on the guiding principles that had emerged from the Commission's discussions.

11. Mr. AMADO pointed out that he had not put forward a formal proposal but had only passed on his reflections to the Commission, which had considered them worthy of consideration. He wished to avoid being made the target for Mr. Yepes's attacks.

12. In his opinion no meticulous definition of aggression was possible. He had not fully grasped Mr. Yepes's argument in regard to so-called enumerative definitions put the other way round. Aggression could not be defined by the methods adopted by Politis, Mr. Vyshinsky and others. All such attempts had foundered on the same rock. They always came up against the impossibility either of enumerating or of giving examples.

13. Mr. YEPES was ready to withdraw anything he had said that might be construed as a personal criticism.

14. The CHAIRMAN informed the Commission that two new proposed definitions had been submitted, one by Mr. Córdova (A/CN.4/L.10) and the other by Mr. Hsu (A/CN.4/L.11). He asked Mr. Hsu to state what new points his proposal contained.

15. Mr. HSU said that it was the absence in the other definitions of any reference to certain aspects of aggression as, for instance, indirect aggression, that had led him to prepare a definition, based largely on General Assembly resolution 380 (V) of 17 November 1950 (Peace Through Deeds). Strictly speaking that resolution did not give a definition of aggression, but paragraph 1 of its operative part came near to constituting such a definition.

16. He considered that a definition of aggression should cover not only direct but also indirect acts, acts performed in the light of day and those hid under a disguise. Those simple words, if he had used them, would in their turn have needed defining, and it was for that reason that he had considered it necessary to expand somewhat the definition of aggression.

17. If he might explain the more important phrases of his proposal, the words "crime under international law" were based on the first paragraph of the operative part of the above-mentioned resolution of the General Assembly, which was still more explicit. "Hostile act" had appeared to him preferable to "force". A generic expression had to be used which would cover both the use of force and other acts.

18. The phrase after (a) required no comment. The Commission had already accepted that notion which, moreover, conformed to the crime defined in article 1, paragraph 1 of the draft Code of Offences against the Peace and Security of Mankind, provisionally adopted by the Commission. That wording covered, for instance, the case of the Republic of South Korea, which had been attacked, first by North Korea, and then by Communist China. The United Nations had recognized aggression in both cases, in the first by a decision of the Security Council and in the second by a resolution of the General Assembly.

19. The phrase after (b) "the arming of organized bands or of third States, hostile to the victim State, for offensive purposes", extended the notion of aggression to the arming of organized bands, and corresponded to the concept expressed by the General Assembly in paragraph 1 of the above-mentioned resolution by the words: "whether committed... or otherwise". The same concept was also included in the definition of an aggressor given by Politis in 1933. It constituted the fifth point inserted at the instigation of the Turkish Government. The acts of which Greece had been the victim in the recent past provided an example of that sort of aggression.

20. Such an act, committed by a third State, might occur in time of war or in time of peace. If it occurred in time of war, it was already condemned under the principle of neutrality which, it had to be admitted, still survived, though there might be disagreement as to the obligations deriving therefrom. In such a case the application of the principle of neutrality sufficed to condemn the third State, even if the Security Council were paralyzed by the vote of some of its permanent Members and no effect were given to the recommendations of the General Assembly.

21. In time of peace, aggression took place when a State

armed organized bands or a third State for offensive purposes, against another State. There would be no aggression if the activities in question took place for defensive purposes, as, for instance, at the present time the arming of certain States by the United States of America. It might be objected that it was difficult to define what were "offensive purposes", but interpretation, in that instance, should not be more difficult than in the case of other crimes under international law defined in the draft Code. As an example of an act of aggression, committed under such conditions, reference might be made to the seizure by the Soviet Union in Manchuria in 1945 of large quantities of machinery and all the equipment supplied under Lend-Lease and their delivery to the Chinese Communists.

22. The phrase after (c) was taken almost word for word from paragraph 1 of the General Assembly's resolution. By including the words "in the interest of a foreign Power", the latter established a restriction that did not appear in the crime as defined in article 1, paragraph 4 of the draft code. He had considered it more logical to leave that restriction in his proposal, whereas the crimes referred to in article 1, paragraph 4 of the draft code, were not confined to aggression.

23. The phrase starting with (d) was also based on the General Assembly resolution mentioned above. In the future, other acts would be labelled as aggression, and provision should be made for that contingency by inserting a clause enabling them to be included.

24. Mr. EL KHOURY remarked that, if the Commission were bound by the General Assembly's resolution, the definitions proposed by Mr. Amado and Mr. Alfaro could not be adopted, since they did not include the fomenting of civil strife among acts of aggression. While resolution 380 (V) of the General Assembly included such activities under aggression, the Commission considered that aggression presupposed the use of force. If the Commission were bound by the General Assembly's decision, it must abandon the course it had hitherto followed and find some means of including the fomenting of civil strife under the notion of aggression.

25. As representative of Syria, he had submitted to the First Committee an amendment for the deletion of that phrase, and had argued that aggression always presupposed the use of force. That amendment had, however, been rejected by the First Committee and again by the General Assembly. It therefore appeared that the General Assembly accepted the idea of aggression unaccompanied by the use of force and, in particular, the case of fomenting civil strife.

26. As a preliminary step, the Commission should decide whether it was bound, or free to take its own decisions.

27. Mr. SCELLE thought that the Commission had decided not to establish a definition by enumeration. As the definition submitted by Mr. Hsu was enumerative he proposed its rejection.

28. The general discussion should now come to an end, as the Chairman had wisely recommended, and the Commission should turn its attention to formulating

a non-enumerative definition, an "essential" definition as it had been called.

29. As to the point raised by Mr. el Khoury, he considered that the Commission was not bound by General Assembly resolution 380 (V). If that had been the case the Assembly would not have consulted the Commission.

30. Mr. HUDSON thought that Mr. Hsu had been quite right in drawing the Commission's attention to the General Assembly's resolution. That resolution had been adopted by the Assembly at the instance of the First Committee, like Resolution 378 B (V), by virtue of which the Commission was engaged in defining aggression. Those two resolutions had been adopted at the same plenary meeting of the General Assembly and were, moreover, reproduced on adjoining pages of the official record of resolutions adopted by the General Assembly during its fifth session (A/1775).

31. In its resolution 380 (V) the General Assembly had supplied the points which should be taken into account in a definition of aggression.

32. Mr. ALFARO considered that the Commission was, in fact, obliged to take account of the above mentioned resolution of the General Assembly. The matters mentioned therein should be included in any definition adopted by the Commission, together with any further points that might occur to the individual members.

33. The notions contained in the General Assembly's resolution, and in Mr. Córdova's and Mr. Hsu's proposals, were covered in his own proposal by the words "in any manner" and "by any methods". That procedure was the only way to avoid enumeration.

34. The definition had to be acceptable to people with varying conceptions of aggression. There were some who thought that the fomenting of civil strife constituted a condemnable form of aggression, whereas others might consider that the use of such an expression in the definition would be dangerous.

35. The words "in any manner" would, in any specific instance, enable a decision to be reached as to whether the fomenting of civil strife did, or did not, constitute aggression. The annexation of Czechoslovakia, of the Baltic Republics and of Manchukuo and the intervention in Tibet might be considered as a special manner of employing force for an attack on the independence or integrity of a State.

36. He felt that the Commission should examine the proposals as a whole and decide what was missing and what was redundant, with a view to arriving at a final formula. It should consider terms such as "whatever the weapons used" and "whether committed . . . or otherwise" in resolution 380 (V) and the words "in any manner" and "by any methods" in his own proposal. He would point out to Mr. Yepes that the word "armed" did not appear in his proposal which began with the words: "Aggression is the use of force". The desire had been expressed, in the Commission itself, for the qualification of the word "force" by "armed". He himself, on the contrary, had pointed out in defence of his text that there were many ways of using force without employing weapons. He considered that it would be

wiser to keep to the terms used in the Charter, so as to avoid any difficulty.

37. The Commission should aim at the best possible text. An international penal code defined offences, as for instance, manslaughter, but did not enumerate the cases in which that offence might take place. If the definition failed to give satisfaction, the blame must be placed on human fallibility.

38. Mr. KERNO (Assistant Secretary-General) observed that during the first stage of its discussion the Commission had made rapid progress and had decided that the definition of aggression should not be enumerative. Since then it had been held up by the problem as to whether an abstract definition was possible, and the longer the discussion went on, the greater appeared to be the difficulty of arriving at such a definition.

39. Under those conditions, the Commission might perhaps state in its report to the General Assembly that it did not consider an abstract definition possible, or, in accordance with Mr. Amado's ideas, that an abstract definition could only exist as a minimum and that the formula adopted did not cover all cases of aggression; that the use of force otherwise than in the exercise of the right of self-defence or coercive action by the United Nations always constituted aggression, but that there were other forms of aggression that could not be defined without recourse to the enumerative procedure rejected by the Commission. He himself did not see any other way out.

40. Mr. SCELLE, while recognizing the difficulties inherent in such a definition, did not believe that they were insuperable. Mr. Alfaro's definition came within an ace of what the Commission could accept, and was the widest of those submitted. Mr. Córdova's followed somewhat different lines but was, though only to a slight extent, enumerative.

41. He repeated the proposal he had made at the previous meeting that the Commission should study Mr. Alfaro's definition, point by point, amending it as and where necessary.

42. Mr. ALFARO wished to add to Mr. Scelle's proposal and to suggest that when his draft definition had been examined in all its details, the Commission should review the other formulas as well, to see whether a better result could not be obtained.

43. The CHAIRMAN proposed that the Commission examine Mr. Alfaro's proposal phrase by phrase (A/CN.4/L.8, para. 36).

It was so decided.

DISCUSSION OF MR. ALFARO'S PROPOSAL

(a) Opening words: "*Aggression is the use of force*"

44. Mr. HUDSON though admitting that, according to one view, threats did not constitute aggression, proposed the insertion after the words "Aggression is" of the words "the threat or".

45. The CHAIRMAN and Mr. SCELLE were opposed to the amendment.

The amendment was rejected by a majority vote.

45a. Mr. ALFARO remarked that, in the light of the preceding discussion, the Commission should take a decision on the advisability of inserting the word "armed" before the word "force".

46. Mr. SCELLE was not in favour of the word "armed" but would prefer "violence" to "force". The terms "force" or "armed force" presupposed an organization, but should aggression be committed by bands, a fifth column or a revolutionary party, there would be no "armed force". There would, however, be "violence". The word "violence" therefore had a wider meaning. It had been pointed out that some definitions would not cover such cases of aggression as, for instance, the annexation of Estonia and Latvia. That was a gap which should be filled.

47. Mr. YEPES said that, in his opinion, the annexation of Estonia and Latvia was most definitely a crime, but it was a crime that would not be punishable if the Commission were to adopt a weak definition.

48. He would approve the substitution of "violence" for "force". He had himself used the former word in a proposal which he was submitting (A/CN.4/L.12).

49. Mr. ALFARO stressed the importance of keeping as closely as possible to the terms used in the Charter. He would therefore vote against the use of the word "violence".

The amendment to substitute the word "violence" for "force" was rejected by 6 votes to 3.

50. Mr. EL KHOURY formally proposed the insertion of the word "armed".

The amendment to insert the word "armed" was rejected by 4 votes to 4.

(b) *"by any State or group of States, or by any government or group of governments"*

51. Mr. ALFARO explained that he had chosen the above terms in order to be more explicit. He had wished to avoid leaving unpunished political entities not recognized as States. For instance, those who did not consider that North Korea was a State, would not be able to declare its aggression punishable without the use of the word "government". He would however, agree to the deletion of those words should the Commission consider that the word "State" was sufficiently comprehensive in itself.

52. Mr. HUDSON proposed the replacement of the formula under consideration by the words "by a State or a government". The terms "group of States" and "group of governments" were unnecessary and redundant.

53. Mr. ALFARO accepted that amendment.

54. Mr. YEPES did not see what useful purpose was served by retaining the word "government". There were cases in contemporary history of *de facto* governments, which were not recognized but which should be covered by the definition if they were guilty of acts of aggression. If for instance a government were formed abroad for any given country, what standards would be applicable to any use of force to which it might have

recourse? He would vote against the retention of the word "government".

55. Mr. HUDSON pointed out that the term in question was intended to cover cases where there were two governments for one and the same country. That was actually the position in China.

56. Mr. SCELLE was of the opinion that the term should be deleted. Fundamentally, aggression took place as soon as there was a use of force. It was not necessary for the Commission to state in its definition who had to be the perpetrator of such an act in order for it to constitute aggression. It would be the business of the authority competent to determine the aggressor to state who was the offender.

57. Mr. ALFARO remarked that there was no aggression in the international sense of the word unless the act under consideration were committed by one State against another State. If force were used by one party against another, there was no international aggression. But once it was specified that the victim of aggression was the "territory and people of a State or Government" it became necessary to specify the offender as well.

58. Mr. SCELLE considered that Mr. Alfaro's argument was well founded. A term was required which would show that a State had to be implicated in the use of force before there could be any aggression. But in saying "by a State" the Commission would allow a guilty State to remain unpunished, if that State did not take action itself. Naturally a purely domestic revolution did not constitute aggression, but a revolution fomented by a foreign State did.

59. Mr. CORDOVA said that he had had that consideration in mind when he had used the words "the authorities of a State" in his proposal (A/CN.4/L.10). Those words or their equivalent were essential, if aggression such as that committed by North Korea, which was not a State, was to be made punishable.

60. Mr. AMADO pointed out that, although his formula did not constitute a formal definition, he had avoided using the word "State" so as not to limit its application to States alone.

61. Mr. SANDSTRÖM remarked that, if all reference to a State or Government were omitted, the concept of aggression might be extended to cover such acts as the Jameson Raid.

62. Mr. SCELLE considered that the Jameson Raid did constitute aggression.

63. The CHAIRMAN noted that Mr. Scelle's proposal for the deletion of the words "by any State or group of States or by any Government or group of Governments" was the one furthest removed from the text under consideration, and that he would therefore put it to the vote first.

Mr. Scelle's proposal to delete the words "by any State or group of States or by any Government or group of Governments" was rejected.

[64.] *Mr. Hudson's proposal to delete the phrase under discussion and substitute the phrase "by a State or a Government" was adopted.*

(c) “against the territory and people of other States or Governments”

65. Mr. YEPES proposed as an amendment the wording “against the territorial integrity or political independence of another State” in order to bring the definition more into harmony with Article 2, paragraph 4 of the Charter. In his opinion the wording of Mr. Alfaro’s text was not perhaps the best legal phrasing. The wording he proposed was nearer to what the Commission intended.

66. Mr. LIANG (Secretary to the Commission) had taken part in the Dumbarton Oaks conversations, and recalled that paragraph 4 of Article 2 had been preceded by a preliminary draft, which contained the formula “territorial integrity or political independence”. Objection had been raised to those words on the grounds that their inclusion in Article 10 of the League of Nations Covenant had enabled certain sophists to argue, at the time, that the invasion of China by Japan did not constitute an attack on the territorial integrity or political independence of China, but was for the purpose of obtaining reparation for damage suffered. It had therefore been considered necessary to find a more comprehensive formula, and the wording in Article 2, paragraph 4: “or in any other manner inconsistent with the purposes of the United Nations” had finally been adopted. It might be dangerous to use the formula proposed by Mr. Yepes by itself.

67. Mr. ALFARO was opposed to Mr. Yepes’s amendment on the grounds that merely to refer to territorial integrity or political independence would be to restrict the scope of the provision. There might be cases of aggression where neither of the two was threatened. He was thinking of bands raiding a territory for purposes of looting and then withdrawing. He also had in mind the case of Greece. The Charter did, of course, speak of territorial integrity or political independence, but it added: “Or in any other manner inconsistent with the purposes of the United Nations”. Moreover, an attack on territorial integrity or political independence was incompatible with the Charter, and that alone was enough to bring it within the definition.

68. In his opinion it would be enough to state against whom the aggression was directed. The text he had proposed said: “against the territory and people of other States or Governments”. That wording was to be found in the Inter-American Treaty of Reciprocal Assistance, signed at Rio de Janeiro in 1947:

“In addition to other acts which the Organ of Consultation may characterise as aggression, the following shall be considered as such:

“(a) Unprovoked armed attack by a State against the territory, the people or the land, sea and air forces of another State” (A/CN.4/L.8, para. 23).

69. The formula he had proposed did not mention the armed forces of States victims of aggression. The object of aggression might be the territory, the people or the armed forces. Was it necessary or expedient to introduce a reference to “armed forces” into his proposed text? He had considered that, in case of aggression against

the armed forces of a State, that State and its people were *ipso facto* attacked.

70. Mr. AMADO considered that, in speaking of territory, what was really meant was frontiers. In the case of the Chaco, the territory had not been delimited and it was a desert. The Commission had agreed on an objective criterion for its formula. If, therefore, Ethiopia had attacked the Italian forces massing on its frontier for the purposes of invasion, it would have been the aggressor. He had to make some reservations on that point.

71. Mr. EL KHOURY proposed that the words “against another State or Government” be substituted for “against the territory and people of other States or Governments” because the words “States or Governments” included the territory and the people.

72. The CHAIRMAN remarked that some members of the Commission had strayed some distance from Mr. Yepes’s concept. The latter seemed to him rather limited in its effect, as it did not include certain eventualities for which the Commission wished to make provision. If, for instance, Great Britain were to attack Albania, in order to collect the damages due to her by virtue of a decision of the International Court of Justice, that would constitute aggression.

73. Mr. YEPES withdrew his proposal on condition that Mr. el Khoury presented his own as a formal motion.

74. Mr. ALFARO was prepared to accept the amendment proposed by Mr. el Khoury, provided it was expressly understood that it covered the territory, people, armed forces and all other components of a State.

75. Mr. EL KHOURY replied that that was, of course, the case.

76. The CHAIRMAN wondered whether it would be wise to say that the use of force against a Government constituted aggression. The result of such a wording would be that an attack against the Communist Government in China would be aggression.

77. Mr. HUDSON pointed out that there were two Governments in China, and that if one were to attack the other, that would be civil war.

78. Mr. ALFARO said that Mr. Hudson had asked him whether a Government could attack another Government belonging to the same country. In his opinion, such an attack would constitute a civil war of the kind that had taken place in the United States in the nineteenth century. If, however, during the war of secession one of the contending Governments had attacked Jamaica, that would have constituted aggression. In China there were two Governments, the Communist Government and that of Formosa. Should the latter attack the Communist Government, it would constitute civil war. If, on the other hand, Mao Tse-tung attacked Siam, that would be aggression.

79. The best solution would be to delete the word “Government”, and explain in the commentary that it was to be understood that the words “aggression by a State” covered aggression committed by any Government or entity not constituting a State, but capable of

committing aggression. He accepted Mr. el Khoury's amendment.

80. Mr. HUDSON felt that a commentary was needed, and had considered saying that the provisions in question did not apply to civil war, but had come to the conclusion that it was preferable to draw up the text in such a way as to exclude insurrection and civil war, as was, in fact, done in the Charter by the use of the words "in their international relations" (Article 2, para. 4).

81. Mr. KERNO (Assistant Secretary-General) asked whether by saying "by a State . . . against another State" the definition could have been made to apply to the case to which the Security Council's resolution of 27 June 1950 concerning the events in Korea referred. That resolution was worded as follows: "The Security Council, having determined that the armed attack upon the Republic of Korea by force from North Korea, constitutes a breach of the peace" (S/PV.474, p. 4).

82. The operative part of the resolution adopted by the General Assembly on 1 February 1951 read as follows:

"1. Finds that the Central People's Government of the People's Republic of China, by giving direct aid and assistance to those who were already committing aggression in Korea and by engaging in hostilities against United Nations forces there, had itself engaged in aggression in Korea" (A/1771).

83. Mr. HUDSON found that question difficult to answer off-hand. Perhaps an opportunity would occur for Mr. Alfaro to revise his text to take account of the words appearing on page 10 of his memorandum: "In addition to other acts which the Organ of Consultation may characterise as aggression, the following shall be considered as such." The question raised by Mr. Kerno touched on a problem which it had been his intention to raise.

84. He proposed that the definition open with the wording: "The use of force . . . is an aggression". Account must be taken of the words used by the General Assembly and the Security Council in referring to the attack by the North Koreans on the South Koreans and the intervention of the Chinese communists.

85. The Commission might not wish to adopt an exclusive definition, it might prefer to allow for an enquiry into the meaning of the word "aggression".

86. He was anxious to avoid, as had been done at Rio, putting the international authority into the straitjacket of a definition.

87. Mr. HSU remarked that if the Rio Treaty gave an enumeration, the definition contained therein could not be adopted.

88. Mr. CORDOVA considered that the formula proposed by Mr. Hudson amounted to an enumeration and made it possible for the competent international authority to decide when aggression had taken place and, consequently, to determine the aggressor. The Commission should not revert to an enumerative definition. If it could not draw up an abstract definition, it should recognize that it could not define aggression.

89. Mr. HUDSON explained that he was trying to take due account of the terms employed by the General Assembly in its resolution of 1 February 1951 (A/1771). He was not urging the adoption of a definition by enumeration but was anxious that the international authority should not be prevented from going somewhat beyond the definition.

90. The CHAIRMAN observed that the Commission was trying to establish a definition which the Security Council could apply automatically, without having to undertake the work of legal interpretation. But that was a hopeless task. The Commission should rather try to establish a general text capable of interpretation by normal legal methods.

91. Mr. HUDSON repeated his proposal to say: "The use of force is aggression". He wished to avoid saying that aggression was one thing when, in fact, it might be something else. He was trying to improve on the actual text before the Commission, without clashing with the General Assembly's resolution of 1 February 1951.

92. The CHAIRMAN said that Mr. Hudson's proposal was very simple. It consisted in saying "The use of force is aggression" instead of "Aggression is the use of force".

93. Mr. CORDOVA asked whether Mr. Hudson only had one or two cases of aggression in mind.

94. Mr. HUDSON said he wanted a definition which would make it possible to say, in all cases of aggression, that it was aggression. He wished to avoid the possibility of its being said that such and such an act was not aggression.

95. Mr. ALFARO believed that Mr. Hudson had in mind a formula which would smooth away the difficulties which confronted those who believed that it was not possible to arrive at an abstract definition covering all cases. When examining that formula the Commission might consider whether there were any cases that it did not cover. If any were found a second clause might be added to the definition worded as follows: "What the Security Council shall declare to be aggression, shall constitute aggression".

96. Mr. HUDSON said that, while it was about it, the Commission should eliminate all cases not included in the definition; for instance it had been found that the definition did not apply to either civil war or insurrection. It was not possible, on the basis of the text under examination by the Commission, to give Mr. Kerno a satisfactory reply.

97. Mr. AMADO explained that that was the reason why he had proposed a definition which was not one; any definition of aggression that went beyond the bald statement that aggression was the use of armed force otherwise than in self-defence or coercive action by the United Nations, and mentioned territories or States, met with difficulties; if it referred to Governments and States, it met with other difficulties.

98. Mr. ALFARO proposed that the Commission say "against another State or Government", and await

Mr. Hudson's proposal for the elimination of the word "Government".

99. Mr. CORDOVA proposed the wording: "the use of force by a State against another State or the Government of another State"; that would show that the reference was to the Government of a nation other than that of the perpetrator of the aggression.

Mr. el KHOURY's amendment to substitute the wording: "against another State or Government" was provisionally adopted.

(d) "in any manner, by any methods"

100. Mr. ALFARO explained that the above words referred to the manner in which aggression was effected, whether by invasion, blockade, armed bands, etc. They would serve as a basis for discussion in the Security Council, which might decide that it was faced with a novel manner of committing aggression, but that it was aggression all the same. The expression covered what Mr. Hsu and Mr. Córdova meant by "direct or indirect". What was involved was a manner of employing force. If a more general expression could be found, he was quite ready to accept it.

101. The CHAIRMAN considered that the Commission might find an answer in the Resolution on Peace by Deeds (380 (V)) and say: "whatever the weapons used and whether the aggression be committed openly or otherwise."

102. Mr. ALFARO asked whether the Commission did not consider that the words which the Chairman proposed to insert were covered by "any methods".

103. The CHAIRMAN did not think that the words could be taken in that sense.

104. Mr. YEPES had always advocated the insertion of the words "direct and indirect". He did not believe that "in any manner" could be considered as including "direct and indirect", and, even if it could, it would be preferable to add the latter words.

105. Mr. HSU said that, in his opinion, the terms "in any manner" and "by any methods" were a makeshift to replace an enumeration. He considered that the Chairman's proposal was the best, although it was not perfect.

106. Mr. SANDSTRÖM supported the Chairman's proposal, but wondered whether it was advisable to say "whatever the weapons used" as that meant reverting to the question of armed forces. In his opinion "openly" was preferable to "direct".

107. Mr. HUDSON drew attention to the fact that those words were used in the General Assembly's resolution, in referring to the case of an aggression.

108. In paragraph 48 of his memorandum (A/CN.4/L.8) Mr. Alfaro had said that the words in question ("in any manner") referred to the various ways in which aggression might be started, i.e., invasion, crossing of frontiers, open armed attack, naval or land blockade etc. He did not approve of that commentary and considered that the Commission might say "whatever the weapons used".

109. He did not consider that it was possible to say "committed openly", in connexion with the use of force.

110. The CHAIRMAN agreed.

111. Mr. HUDSON proposed the wording: "whatever the weapons used, openly or otherwise".

112. Mr. ALFARO observed that the text would then read: "Aggression is the use of force by a State against another State whatever the weapons used, openly or otherwise".

113. Mr. HUDSON was in favour of deleting the words "by any methods", and of saying: "in any manner whatsoever, whatever the weapons used, openly or otherwise".

114. Mr. HSU asked whether it was intended to delete the reference to the fomenting of civil strife contained in paragraph 1 of the operative part of resolution 380 (V).

115. The CHAIRMAN was not in favour of inserting those words in the definition as that would be tantamount to reverting to an enumeration.

116. Mr. YEPES wished to know whether the definition would cover attacks by bands organized in one State against another State. Should that not be the case he would propose the addition of a separate paragraph to cover such attacks. He wished to know whether they were not covered by the words "in any manner".

117. Mr. HUDSON considered that if a State armed or encouraged armed bands such acts would be included under the above term, but if it was a case of activities in which the State did not participate, they would be excluded by the words "by a State".

118. The CHAIRMAN put to the vote Mr. Hudson's amendment for the substitution of the words "by any methods whatsoever, whatever the weapons used, openly or otherwise" for the proposed text.

Mr. Hudson's amendment was adopted.

(e) "for any reasons and for any purposes"

119. Mr. HUDSON proposed the deletion of the words "for any reasons and".

120. Mr. ALFARO was always in favour of conciseness. If the expression "for any purposes" sufficed he would accept it, but the words "for any reasons" were the outcome of lengthy discussions on the subject. Article III of the Convention on Definition of the Aggressor, signed in London in 1933, read: "No political, military, economic or other consideration may serve as an excuse or justification for the aggression referred to in Article II", and an annex to the Treaty declared that: "No act of aggression within the meaning of Article II of that Convention can be justified on either of the following grounds, among others" (A/CN.4/L.8, para. 17). The Litvinov-Politis formula contained a similar clause. Its object was to anticipate any attempt at justification. The words "for any purposes" referred to the purposes decided upon for the reason given.

121. He had used the words "for any reason" to cover the circumstances mentioned by Litvinov. He considered it wise to keep those words. They might be explained in the commentary.

122. Mr. AMADO pointed out that, if a State was attacked by armed forces, that was an objective fact,

to wit, armed aggression. For that reason he considered it pointless to insert those words, though he did not think they would do any actual harm. The "reason" invoked could not exclude aggression. Only in cases of self-defence or collective action was there no aggression.

123. The CHAIRMAN considered that the phrase "for any purposes" sufficed.

124. Mr. ALFARO did not wish to appear obstinate but felt he must press the point, as "for any reasons" did not mean the same thing as "for any purposes". The former words were intended to preclude an attempt at justification and enable the Security Council to reply that the perpetrator of the aggression had been wrong to attack.

125. The CHAIRMAN felt that the Security Council would say that the guilty party had attacked where it was not a case of self-defence or coercive action by the United Nations, and that its purpose was therefore illicit.

126. Mr. ALFARO considered that the definition might be strengthened by reference to the clause contained in the Litvinov Treaty: "No consideration may serve as an excuse or justification."

127. Mr. AMADO maintained that, in the case in question, there were no extenuating circumstances. If an act did not come within the category of self-defence or action by the United Nations, it constituted aggression.

128. Mr. YEPES did not believe that it was necessary to use the words "for any reasons".

129. Mr. EL KHOURY considered that the reason for an action was not the same thing as its purpose. The Soviet proposal stated the reasons for an attack. He considered it preferable to keep the word "reasons".

The amendment to delete the words "for any reasons and" was rejected by 4 votes to 4.

130. Mr. HUDSON proposed that the English text be amended to read: "for any reason or for any purpose".

131. Mr. ALFARO accepted that amendment.

(f) *"except individual or collective self-defence against armed attack"*

132. The CHAIRMAN asked Mr. Alfaro if he had any objection to the wording: "other than national or collective self-defence".

133. Mr. ALFARO preferred the words used in the Charter "individual or collective self-defence" even though the formula proposed by the Chairman had been adopted in the Code. It might be better to say "national" but he had taken the phrase as it appeared in the Charter.

134. Mr. HSU saw no objection to that final provision, but wondered whether it was really necessary. It would be sufficient to say: "Aggression is the illicit use of force" since that definition would include indirect as well as direct aggression.

135. The CHAIRMAN was of the opinion that the deletion of that phrase would leave a gap in the definition.

136. Mr. HUDSON was not very happy about the text.

He admitted that the words "against armed attack" were based on Article 51 of the Charter, but he wondered whether a State that was the victim of resort to force, but not armed force could claim the right of self-defence.

137. Mr. ALFARO thought it was inadvisable to say "armed forces" at the beginning of the definition, as the Charter only spoke of force. When speaking of the use of force by a State, all ways in which force could be employed should be taken into consideration. There might be cases where it was not a question of the use of armed force. To depart from the terms of the Charter was bound to create difficulties. Article 2, paragraph 4, mentioned only force, and there was therefore no reason for delving into motives for the use of such force. Supposing a nation were to mobilize 500,000 men without arms and then to send them into the territory of another country, where it would arm them, that would rightly be termed "force". The 500,000 men were a force, but, in order to justify self-defence, there had to be an armed attack. He had therefore been right to use the words "armed forces" at the end of his definition and the word "force" at the beginning.

138. The CHAIRMAN observed that, if Ethiopia had crossed the frontier into the Italian colonies at a time when Italy's intentions were perfectly clear, the definition would have made her an aggressor, which would have been monstrous. That would be the result of keeping the words "armed forces".

138a. He pointed out that the English text seemed to permit self-defence against coercive action by the United Nations. But that was simply a question of drafting.

139. Mr. AMADO explained that that was the reason why he had not included those words in his proposed definition. He recalled that defence should be proportionate to the attack. Self-defence was self-explanatory. That was why he preferred that it should not be defined.

140. Mr. HSU recalled that from the very start he had asked for the deletion of the word "except". Neither could he approve the words at the beginning of the first sentence of paragraph 35: "Self-defence in our day can only be the outcome of armed attack".

141. Mr. CORDOVA maintained that the Charter only recognized self-defence in the case of armed aggression (Article 51). It was an exceptional right given to States only in cases where the Security Council did not take the necessary measures. There could be no self-defence, except where there had been armed aggression. In his opinion, self-defence should be included in the text under the same conditions as in the Charter.

142. Mr. HSU did not believe that the Charter used those terms in order to restrict the right of self-defence. It merely specified one instance, without excluding others.

By a majority of 5 it was decided to retain the word "individual".

By a majority of 8 it was decided to delete the words "against armed attack".

(g) *"or coercive action by the United Nations"*

142a. The CHAIRMAN proposed the wording: "or

in execution of a decision by a competent organ of the United Nations ”.

143. Mr. HUDSON remarked that the use of the word “decision” without any amplification raised a difficulty. While the Security Council took decisions, the General Assembly made recommendations.

144. Mr. KERNO (Assistant Secretary-General) wondered whether it would not be better to say “in execution of a decision providing for the use of armed force” or “a decision to that effect”. It should not be suggested that all decisions authorized the use of force.

145. As regards the term “decision”, the Charter spoke of decisions and recommendations, but in actual fact, they were always resolutions. He had himself been embarrassed by the word “decision”, which did not include resolutions. The Security Council’s decision of 27 June 1950 stated that the Council “recommends”. He suggested the wording: “a resolution to that effect”.

146. Mr. HUDSON pointed out that it was not possible to execute a recommendation. The proper wording was “or in pursuance of a decision or recommendation by a competent organ of the United Nations”.

Mr. Hudson’s amendment was adopted.

The meeting rose at 6.20 p.m.

96th MEETING

Tuesday, 5 June 1951, at 9.45 a.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. 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.11 and A/CN.4/L.13) (*continued*)

DISCUSSION OF THE TEXT TENTATIVELY ADOPTED BY THE COMMISSION

1. The CHAIRMAN stated that the Commission had before it a text (A/CN.4/L.13) which it had tentatively adopted the previous day as a definition of aggression.¹ He added that the Commission needed to speed up its work.

2. Mr. HSU noted that Mr. Córdova proposed the wording “or Government of another State” instead of “or Government” in line 2. He himself would like to propose the wording “against a foreign State” instead of “against another State or Government”.

3. The insertion of the words “whatever the weapons used and whether openly or otherwise” was a great improvement. As a further amendment it might be possible to consider inserting, between “openly” and “or otherwise”, the words “by fomenting civil strife in the interest of a foreign State”. The definition could not possibly be interpreted as including that type of aggression of which there had been several cases during the last few years. Unless that course were followed the word “abstract” which had been used to qualify the definition would no longer be the opposite of concrete but would signify “abstruse”. The commentary might of course help to make the definition intelligible, but to rely on the commentary to do so was only a makeshift.

4. It would be well also to make it clear what was meant by “openly or otherwise”. If an atom bomb were dropped on the Empire State Building in New York, it would be used openly; but if a delayed action bomb were placed in the basement of that Building, it would be a secret use of the bomb. Hence it was not enough to say “openly or otherwise”; the text of General Assembly resolution 380 (V) must be followed in its entirety. If the amendment (A/CN.4/L.11) he was proposing were rejected, it would be a retrograde step.

5. Mr. SANDSTRÖM said that so far the Commission had made great efforts to arrive at a satisfactory definition. It remained now to be seen whether the definition really was satisfactory. He agreed with Mr. Hsu that the definition produced was “abstract”. An examination of the draft resolution submitted by the Soviet Union in the First Committee of the General Assembly (A/C.1/608) made it clear that its object was essentially a practical one and he was sure the Commission’s definition would not be acceptable to the Soviet Union, which had aimed at a definition which would make it possible to ascertain

¹ Document A/CN.4/L.13 read as follows:

“Aggression is the use of force by a State or Government against another State or Government*, in any manner, whatever the weapons used and whether openly or otherwise, for any reason or for any purpose other than individual or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations.”

* Mr. Córdova proposed to add here the words “of another State”.