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Summary record of the 92nd meeting

Topic:
<multiple topics>

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

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

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

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

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

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

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

The meeting rose at 1 p.m.

92nd MEETING

Wednesday, 30 May 1951, at 9.45 a.m.

CONTENTS

Chairman: Mr. James L. BRIERLY

Rapporteur: Mr. Roberto CORDOVA

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. Ivan KERNO, Assistant Secretary-General in charge of the Legal Department; Mr. Yuen-li LIANG, Director of the Division for the Development and Codification of International Law, and Secretary to the Commission.

Preparation of a draft code of offences against the peace and security of mankind: report by Mr. Spiropoulos (item 2 (*a*) of the agenda) (A/CN.4/44) *(continued)*

ARTICLE II (*continued*)

Commentary (continued)

Sub-paragraph (b) (continued)

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

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

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

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

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

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

that it had not departed from the principle, since what it had adopted appeared in the judgment of the Tribunal.

6. Mr. CORDOVA declared himself satisfied.

Sub-paragraph (b) *which, with the deletion of sub-paragraph* (a), *became the whole commentary, was adopted.*

ARTICLE II OF DOCUMENT A/CN.4/R.6

7. Mr. YEPES enquired the reason for the omission of the text of article II (A/CN.4/R.6): " The fact that a person acted as Head of State or as responsible Government official does not relieve him from responsibility for committing a crime under international law ", which had been adopted by the Commission the previous year. (See *Yearbook of the International Law 1950*, vol. I, summary record of the 72nd meeting, footnote 3, for the text of doc. A/CN.4/R.6).

8. Mr. SPIROPOULOS replied that that article was embodied in the Convention on Genocide and that many jurists considered it to be absurd. If the text he proposed were left as it stood, it went without saying that the fact of acting as Head of State did not relieve the author of a crime under international law of his responsibility.

9. Mr. YEPES thought the article should be included, since the text of article II proposed in Mr. Spiropoulos' second report referred only to subordinates and by so doing automatically excluded Heads of States.

10. Mr. SPIROPOULOS pointed out that a Head of State received no orders and that the article applied only to persons who received orders.

11. Mr. YEPES thought that a Head of State might plead his office as a defence. The article adopted the previous year constituted a reaction against the theoretical or practical irresponsibility of Heads of States.

12. Mr. SPIROPOULOS considered that the decision taken the previous year had been an entirely provisional one and that, moreover, the Commission was not called upon to explain the reason why it had gone back on a provisional decision.

13. The CHAIRMAN said that the Commission was of course free to go back on its decision of the previous year but that Mr. Yepes wished to know why the article had been changed.

14. Mr. YEPES said he wished to know because the provision in question, a very important one, adopted by a large majority, had nevertheless ceased to appear in the draft.

15. Mr. SPIROPOULOS replied that the explanation was very simple. He had laid down a general principle at the beginning of the list of acts in the first sub-paragraph of article I and, that being so, it was clear that the list applied to everyone.

16. Mr. SCELLE enquired whether the Commission considered, as he did, that acts committed by a Head of State were covered by the preceding articles or whether it preferred a special reference to be made to them.

17. Mr. SANDSTRÖM agreed with Mr. Scelle that the acts were covered by article I but if, despite that, the Commission still wished to discuss the desirability of inserting an article to that effect, he would add that it was desirable to do so, since the Nürnberg principles contained a similar provision.

18. The CHAIRMAN doubted whether the Code already covered the case of Heads of States.

19. Mr. SCELLE suggested that it should be stated in the commentary that Heads of States were included in the same way as anyone else.

20. Mr. CORDOVA thought that, by providing that all concerned were responsible, the article also provided for the responsibility of Heads of States. Since, however, there was a specific reference to persons acting pursuant to orders and since, moreover, the principle of the responsibility of Heads of States was a modification of international law as it existed prior to the Nürnberg trial, he thought the principle should be included in the Code.

21. Mr. YEPES said that Heads of States were traditionally regarded under international law as not responsible. Now that the Commission was going to change that tradition, it was desirable to stipulate in the Code that a Head of State could not plead in defence that his office relieved him of responsibility.

22. Mr. KERNO (Assistant Secretary-General) recalled that the General Assembly had encountered the same problem in connexion with the Convention on Genocide and had solved it by the inclusion of article IV:

> " Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."

23. The term " *gouvernants* " (constitutionally responsible rulers) had been the subject of much discussion.[1] In the Code, the question had been approached from another angle. The words " by the authorities of a State or by private individuals " provided for the responsibility of Heads of States. A further question was whether the old concept of the immunity of a Head of State was thereby destroyed.

24. Mr. YEPES thought that the fact should be explicitly stated.

It was decided to include in the Code article II from the previous year's draft (A/CN.4/R.6).

Article II accordingly became article III.

ARTICLE III (numbering in document A/CN.4/44)

Article III was adopted without comment.

Commentary

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

Sub-paragraph (b) *was adopted without comment.*

ARTICLE IV

25. Mr. FRANÇOIS pointed out, in connexion with the words " to grant extradition ", that in modern treaties the phrase " to hand over the accused " was often used. The tendency was to adopt a more liberal attitude in the case of war crimes and not to insist on

[1] See *Official Records of the General Assembly, Third Session, Part I, Sixth Committee*, pp. 302–305, 314–322, and 338–343.

the formalities of extradition. Certain States were prepared to hand over their own nationals, a thing they did not do in cases of ordinary extradition; for that reason he proposed the words " to hand over ". The words were used in the Peace Treaties signed with the Balkan countries and with Finland after the second world war and in the Red Cross Conventions of 1949.

26. Mr. SPIROPOULOS recalled that the Convention on Genocide used the phrase " to grant extradition in accordance with . . .". He did not see any reason for substituting another expression. The concept of extradition was a classical one embracing the whole of the relevant procedure, and the Convention on Genocide was one of the most recent conventions to be adopted.

27. Mr. CORDOVA wondered whether the classical concept was valid in the absence of legislation.

28. Mr. SPIROPOULOS agreed that, in the absence of legislation, the expression " to hand over " would have to be used, but he did not like it. In any case, it was always extradition that was implied.

29. The CHAIRMAN thought that Mr. François' view was that, if the words " to hand over " were used, it would make it easier for certain States to comply with article IV. That was not, however, the case for the United Kingdom.

30. Mr. FRANÇOIS remarked that, on the contrary, it was so for the Netherlands.

31. Mr. SCELLE drew attention to a contradiction in article IV. The first paragraph of the article stated that crimes defined in the Code should not be considered as political crimes for the purpose of extradition, whereas the second paragraph stipulated that the States adopting the Code undertook to grant extradition in accordance with their laws and treaties in force. Certain laws might, however, forbid extradition. It would therefore be preferable to say " in accordance with the procedure provided for by their laws and treaties in force."

32. The article included substantive and formal provisions. The rule abrogating domestic legislation was a substantive provision. States could no longer refuse extradition on the plea that the crime was a political one. The provision that they should act in accordance with their laws and treaties, on the other hand, was a procedural one. It was of course a fine point.

33. Mr. SPIROPOULOS thought there must be a mistake. Apart from the restriction laid down in the first paragraph, the article placed a State under the obligation to grant extradition only if provided for under its own laws. States which did not surrender their own nationals were not obliged to permit their extradition. That was what was laid down in the Convention on Genocide.

34. Mr. SCELLE replied that in that case he no longer agreed. States adopting the Code must undertake to grant extradition, otherwise article IV no longer had any meaning. The article declared that the crimes defined in the Code should no longer be considered as political crimes and that States should accordingly grant the extradition of those guilty of such crimes. The crimes lost their political character. The Commission would recall the dispute between Colombia and Peru which had been submitted to the International Court of Justice. One of the parties had pleaded, rightly or wrongly, that a tradition was growing up according to which when a political crime resulted in a terrorist act it thereby lost its political character. When the Convention on Genocide stipulated that the crime defined should not be considered as a political crime, it must mean that a State could not refuse to extradite the perpetrator of the crime on the grounds that the crime was a political one; otherwise the article was meaningless. If, therefore, paragraph 2 permitted a State to decline to grant extradition in cases where its laws forbade it, paragraph 1 no longer had any meaning.

35. The meaning of article IV was, he would repeat, that the State concerned was always under the obligation to grant extradition.

36. Mr. KERNO (Assistant Secretary-General) said that article VII of the Convention on Genocide embodied the same provision. States undertook not to consider genocide as a political crime for the purpose of extradition. " The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force." If his memory was not at fault, a discussion on similar lines had taken place in the Sixth Committee, and it had been agreed that the first paragraph concerned the substantive law while the second paragraph related mainly to procedure.[2]

37. Mr. SCELLE thought it impossible for the article to be interpreted in any other way. If it could be, then it should be deleted.

38. Mr. FRANÇOIS pointed out that, although a State could not in fact refuse to grant extradition on the plea that a political crime was involved, it might have other grounds for refusing extradition. It sometimes happened that the extradition of a State's own nationals was forbidden by the Constitution.

39. Mr. SCELLE did not agree with Mr. François. Either the object of the Convention on Genocide and the draft Code was to provide for extradition in all cases without exception, or else they were purposeless. The perpetrator of an international crime became denationalized.

40. Mr. CORDOVA remarked that Mexican law forbade the extradition of Mexican subjects. It seemed to him that if a rule regarding extradition were established, it must stipulate that it was not possible to refuse extradition on the grounds that the accused was a national of the State concerned. Otherwise a distinction would be established between States whose laws forbade the extradition of their own nationals and those whose law did not.

41. Mr. SPIROPOULOS recalled that the question was one which had been discussed at the previous session, during which the Commission had adopted the text in its existing form.[3] At that time, everyone had agreed that the Convention on Genocide should be followed: that Convention stipulated that genocide was not a

[2] *Ibid.*, pp. 327–338.

[3] Summary record of the 62nd meeting, paras. 88 *et seq.*

political act but that the obligation to grant extradition of the State's own nationals existed only in so far as provided for by its domestic law. That decision had been taken because certain States did not surrender their own nationals. The Anglo-Saxon countries, on the contrary, did.

42. If the Commission had changed its view on the point, that was another matter. The discussion could be resumed but, he would repeat, the text he had submitted was in accordance with the decision taken the year before.

43. Personally, he was not in favour of going any further and taking a fresh decision. The question of extradition must be considered within the framework of the Code. The laws of the countries of Europe had not yet reached the stage of development where they would agree to surrender their own nationals to another State. The Code was based on the legal system in force in many European countries, in the Arab countries and in other parts of the world. If the Commission departed from such usage, there was little likelihood of the principle being adopted by many States.

44. Mr. SCELLE did not agree with Mr. Spiropoulos. The question was not merely one of handing the accused over to another State, since the Code provided that " pending the establishment of a competent international criminal court, the States . . . undertake (article III) ". The object of the Code was to bring accused persons before such an international court. There was also another problem, one of general penal law. The territorial jurisdiction was the normal jurisdiction. Accordingly, in the case of an international crime, it was preferable, pending the establishment of the international court, that the accused be tried by a court of the territory in which the crime had been committed.

45. He wished to re-affirm that, if article IV did not mean that extradition must be granted even though the substantive provisions of municipal law did not permit it, then the article meant nothing at all. Otherwise, indeed, paragraph 1 would state that extradition must take place and paragraph 2 that the State retained the right not to grant extradition. The true explanation was that given by Mr. Kerno. There was, first, a substantive rule providing for extradition and then a formal rule laying down the manner in which the substantive rule was to be applied. In the case in point, the effect of the substantive rule was to make the crime no longer a political one, but, as far as the formal rule was concerned, each State should be guided by its own laws and treaties when determining the competent court, the manner of apprehending the accused etc. The Commission had taken a decision on those lines the previous year, attributing to the article the sense he gave it. He recognized, however, that the article was amphibological.

46. Mr. SPIROPOULOS said that the Commission had taken a decision on the provision contained in the Convention on Genocide during the discussion of that Convention. The fact that Mr. Kerno had expressed himself somewhat ambiguously had given Mr. Scelle the impression that they were both in agreement, whereas, in point of fact Mr. Kerno was in agreement with him (Mr. Spiropoulos). Every one was agreed on the text. To take a concrete example: supposing Greece were asked to grant the extradition of a Frenchman: if there was an extradition treaty between France and Greece, the latter country could not refuse to grant extradition on the ground that a political crime was involved, since paragraph 1 precluded that. To take next the case of a Syrian: failing an extradition treaty between the two countries, Greece would be free either to grant extradition or to refuse it. The question would depend on the interpretation given to Greek municipal law. However, if France requested the extradition of a Greek, Greece would reply that its legislation did not permit the extradition of one of its own nationals. That was the meaning which it had been agreed to give to article VII of the Convention on Genocide when it was drawn up, and Mr. Amado, Mr. Alfaro, Mr. Hsu, Mr. Kerno and Mr. Liang knew that as well as he did. He was mentioning the fact merely because he did not wish to be the only one to defend the Convention on Genocide. What the Commission had to decide was whether it wished to adhere to that text or to go further. He would like Mr. Kerno to say whether his interpretation was correct.

47. Mr. SCELLE recognized that he had misinterpreted Mr. Kerno's remarks. He agreed with Mr. Kerno on the difference between the formal and the substantive view points.

48. Mr. FRANÇOIS said that the reason States refused to grant the extradition of their own nationals was their lack of confidence in the administration of justice in another country. That lack of confidence still existed and it would only be possible to obtain extradition of a State's own nationals if they were to be brought before an international court. In the Netherlands, where the Constitution was under revision, the intention was to include such a distinction. When it was a question of bringing a Netherlands subject before an international court, his extradition would no longer be refused. On the other hand, if it was proposed to bring him before the court of another country, the old principle would be adhered to.

49. So long as no international criminal court was in existence, no other solution could be adopted than that of accepting the text and interpreting it in the sense that any State would have the right to refuse to grant the extradition of its own nationals if they were to be brought before a court of another State, regardless of the crime of which they stood accused.

50. Mr. CORDOVA thought that the Commission was bound to establish international crimes with the idea in mind that they would be punished. But it then came up against the impossibility of bringing the guilty persons to justice, unless it resolved the difficulty arising out of municipal law. It was for that reason that it affirmed that such international crimes were not political crimes, thus preventing a country from using the plea that the crime was a political one in order to avoid handing over the accused person.

51. If the Commission, while having an international crime in mind, made it possible for the accused person to find refuge in some country, it was abandoning the

idea of international crime, since the injured country would have no means of bringing the criminal to trial. When the international court was established, article IV would not automatically cease to exist. Would such acts then be allowed to go unpunished? They would remain unpunished, since the State was not obliged to grant extradition. The international court would be unable to exercise its jurisdiction.

52. Mr. KERNO, (Assistant Secretary-General) replying to Mr. Spiropoulos' request, said that Mr. Scelle had possibly interpreted his remarks too broadly. From the discussion in the General Assembly on the subject of extradition, the conclusion had appeared to emerge that article VII of the Convention on Genocide, and consequently also the first paragraph of article IV of the draft code, first of all forbade refusal to grant extradition on the ground of the political nature of the crime. As regards the rest of the article, it was in most cases a matter of procedure and the laws in force continued to be valid. The explanation given by Mr. Spiropoulos squared with the facts.

53. Mr. SANDSTRÖM said that, with regard to Mr. Córdova's statement, he must reply that it was not only the interest of the State desirous of punishing a crime which should be taken into consideration, but also the safety of the accused person. It would not be possible to go as far as Mr. Córdova wished. Mr. Scelle had said that the crime was punishable under the territorial system. He did not think it was proposed to rely on that system alone until such time as the international court was set up. He agreed with what Mr. Spiropoulos and Mr. François had said.

54. Mr. SPIROPOULOS, referring to Mr. Córdova's remarks, said that there was a misunderstanding. Article IV would apply so long as no international criminal court was in existence. As soon as that court had been set up, everything would be changed. The provision could not then be kept, otherwise the court would have no cases to try.

55. Mr. CORDOVA also thought there had been a misunderstanding. The article referred only to the period between the adoption of the Code and the establishment of the international court. It would not, however, cease to exist merely because that court had been set up.

56. Mr. SPIROPOULOS agreed. If the court was set up and not provided with a jurisdiction, the Code would prevent it from functioning. Clearly, the article would have to be changed, and provision made in the statute of the international court for extradition to be granted in all cases without exception.

57. Mr. CORDOVA thought it should be specified in the draft Code that article IV was only provisional.

58. Mr. EL KHOURY considered that the article was not in accordance with reality. In the first place, it stated that the crimes defined in the Code were not political crimes. Yet all such crimes were political crimes. It would be preferable to specify that the provision was an exceptional one.

59. Why did the article say " in accordance with their laws ", if the latter forbade extradition? He proposed that article IV be confined to the following text: " The parties to this Code pledge themselves to hand those accused of such crimes over to the international criminal court, irrespective of their laws and treaties in force."

60. The CHAIRMAN pointed out that it was necessary to draw up a text capable of application prior to the establishment of the international court and not only afterwards.

61. Mr. EL KHOURY replied that there would have to be an international court, otherwise there would be no extradition. To whom would the accused person be handed over? The rule should be imperative only if an international court existed. The exception could only be made in favour of an international court.

62. The CHAIRMAN pointed out that once the international court had been established, there would no longer be any question of extradition in the proper sense of the term; States would hand the accused persons over to the court.

63. After a discussion, in which the CHAIRMAN and Mr. CORDOVA, Mr. EL KHOURY, Mr. SCELLE, Mr. ALFARO and Mr. SANDSTRÖM took part, as to whether article IV referred to the period prior to the establishment of an international court competent to apply the Code, or whether it would apply only after the establishment of the court, Mr. CORDOVA proposed the following text: " The States adopting this Code undertake to hand over the accused to an international criminal jurisdiction in accordance with the procedure set forth in their laws and treaties." The text was not intended to replace article IV but to supplement it. Pending the establishment of the international court, the crimes would be punishable by a territorial jurisdiction and paragraph 1 of article IV would apply.

64. Mr. KERNO (Assistant Secretary-General) thought that the situation was very complicated. A long time would pass before the court was set up, and, if no provision were made for the interim period, no one would have any idea what to do in the numerous cases which might arise. The possibility of a crime being committed in one country and its perpetrator managing to escape to another had been considered. During the discussion on the Draft Convention on Genocide, the representative of India had submitted a proposal to the effect that the Convention should safeguard the right of a State to prosecute one of its own nationals for acts committed outside its territory, and the representative of Sweden had also urged that the Convention should not limit the jurisdiction of a State over crimes committed against its own nationals outside its territory.[4]

65. He suggested that it would be a good thing to include provisions for the interim period. If Mr. Córdova wished to add a clause to apply after the establishment of the court, that was another matter.

66. Mr. ALFARO remarked that the further the Commission departed from the proposed text the more difficulties it encountered.

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[4] See *Official Records of the General Assembly, Third Session, Part I*, Sixth Committee, p. 683–685.

67. The discussions in the Sixth Committee on the Convention on Genocide had shown that the object of the article was to lay down the principle that in no case would the extradition of an accused person be refused because his crime was considered as a political one. Such was the sense of paragraph 1. The text did not, however, offer many advantages for the reason that, in many countries, there were other grounds for exception (prohibition of extradition of nationals, of aged persons, etc.). He thought it would be dangerous to leave out of the Code a text established to deal with the period preceding the establishment of the international criminal court, an event which might be delayed for a long time. The discussions in the General Assembly on the subject of genocide had shown what the general opinion on the point was. To depart from that opinion would be difficult and would merely mean that the same discussion would take place again in the General Assembly.

68. Mr. CORDOVA suggested that the sole assumption should be that no international tribunal had as yet been set up. Article III would provide the possibility of punishing the crimes enumerated. The Commission, when faced with a choice between two theories, i.e., that which entrusted the task of trying the criminal to the courts of the country in which the crime had been committed and that which placed him under the jurisdiction of the country in which he had been arrested, had decided in favour of the second. Accordingly, the obligation laid down by article III to enact the necessary legislation was sufficient. Provision would, however, have to be made for extradition during the period following the establishment of the international court.

69. Mr. EL KHOURY asked for Mr. Córdova's amendment to be submitted in writing.

It was so decided.

ARTICLE V

70. Mr. YEPES read out article IX of the Convention on the Prevention and Punishment of the Crime of Genocide:

> " Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of the State for genocide or any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

71. The CHAIRMAN noted that the Convention referred to: " the interpretation, application or fulfilment".

72. Mr. SPIROPOULOS thought that it came to much the same thing, since application meant fulfilment.

Article V was adopted.

In accordance with the decision taken at the 89th meeting (para. 79), the single paragraph of commentary was deleted.

ARTICLE IV (*resumed*)[4a]

73. Mr. SPIROPOULOS thought that the amendment proposed by Mr. Córdova arose from a certain confusion of ideas; Mr. Córdova seemed to consider that there was no further need for extradition once States were bound, under article III, to incorporate in their legislation the necessary provisions to enable those accused of crimes under international law to be brought to justice and have judgment passed on them. However, under article III, Greece, for instance, would be in no way obliged to bring to justice a Mexican who had committed a crime under international law in France and had then taken refuge on Greek territory. Only the Government of France, on whose territory the crime had been committed, was bound to bring the accused to justice. That was the answer which had been given to the question[5] after lengthy discussion in the General Assembly, in which he had had frequent occasion to take part. It was therefore absolutely necessary to provide for extradition to meet cases of that type.

74. Mr. FRANÇOIS wished to bring to the Commission's attention the provisions concerning extradition in the Conventions signed at Geneva, under the auspices of the Red Cross, in August 1949, since they seemed to him to furnish a possible solution to the question under consideration by the Commission. He would come back to the point when the question of the amendment proposed by Mr. Córdova had been settled.

75. Mr. YEPES said he wished to explain his intended vote. He thought that article IV, as in the report, was sufficiently clear and would vote for that text and against any other proposals.

76. The CHAIRMAN put to the vote the amendment proposed by Mr. Córdova to be substituted for the second paragraph of article IV.

Mr. Córdova's amendment was rejected.

77. Mr. SCELLE explained that the reason he had abstained from voting was that the international criminal jurisdiction was not yet in existence. He proposed that article IV be replaced by a clearer formula, more in harmony with the spirit of the Convention on Genocide, to read as follows: " As regards the offences defined in the present Code, the States which adopt this Code undertake not to refuse extradition on the ground that they are political crimes."

78. The adoption of such a text would of course entail the omission of the second paragraph. As a matter of fact, in the old text, the first paragraph, which established an exception to the provisions of internal legislation, seemed to contradict the second paragraph, according to which such legislation continued to have force.

79. The CHAIRMAN said that the text proposed by Mr. Scelle seemed a very good one.

80. Mr. CORDOVA pointed out that the text left out of account the question of extradition of a State's own nationals.

81. Mr. SCELLE said that he favoured extradition even where a State's own nationals were concerned but that he thought it preferable, in view of the voting in the General Assembly, to leave States freedom of choice in the matter.

[4a] See para. 69, above.

[5] Article VI of the Convention on Genocide.

82. Mr. FRANÇOIS considered the proposal acceptable but thought that the Commission could make a further step forward by taking over the provisions concerning extradition of one of the Geneva Conventions of August 1949. They read as follows: " Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to the other High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case." [6] The text was, in short, an application of the old principle enunciated by Grotius, " *aut punire, aut dedere* ". It went further than the proposal formulated by Mr. Scelle.

83. The CHAIRMAN pointed out that the Commission had three proposals before it: the text of Mr. Scelle, the formula borrowed from the Red Cross Convention, and article IV of the report.

84. Mr. SCELLE enquired whether the text of the Red Cross Convention permitted refusal to grant extradition for political crimes.

85. Mr. FRANÇOIS thought that it did but pointed out that, in such a case, a State must try the case itself. The system was admittedly different from that proposed either in the report or in the text submitted by Mr. Scelle.

86. The CHAIRMAN preferred the text proposed by Mr. Scelle.

87. Mr. SANDSTRÖM recognized that the text proposed by Mr. Scelle offered some advantages. He nevertheless felt some hesitation about accepting it and preferred the text of the report. It was always better to refer back to the General Assembly a text which it had already considered.

88. Mr. SPIROPOULOS announced his intention to abstain from the forthcoming vote. The adoption by the Commission of the text proposed by Mr. Scelle would mean expunging from the draft Code the obligation to grant extradition embodied in the Convention on Genocide. To take such a decision would not be in the interest of clarity and, in view of the concern for clarity shown by the Commission in connexion with other points, would also be illogical.

89. The CHAIRMAN proposed that the Commission first choose between the text submitted by Mr. Scelle and the text of article IV of the draft code, which differed only in their wording. He would then put to the vote the principle underlying the formula of the Red Cross Convention, the wording of which could be reviewed if the Commission adopted the principle.

Mr. Scelle's proposal for article IV was adopted by 7 votes.

The Red Cross Convention formula proposed by Mr. François was rejected.

[6] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, August 12, 1949, article 49, para. 2.

90. The CHAIRMAN said that the first reading of the draft Code on offences against the peace and security of mankind having been completed, he would like to state that it was thanks to the particularly clear presentation of the report that the Commission had been able to get ahead so well with its work. The Commission owed a great deal to Mr. Spiropoulos.

91. Mr. KERNO (Assistant Secretary-General) assumed that the Commission would subject the text it had adopted to a second reading. It would then be called upon to decide whether the draft code should be submitted to the General Assembly or to governments and to take certain decisions provided for under article 16 (*g*) of its Statute. He would request the members of the Commission to be good enough to reflect on the question of the publicity to be given to the draft, and the explanations and supporting material referred to in that article of the Statute. Would the commentaries accompanying the draft code be sufficient? Should a report be appended? Such were the questions which would need to be considered.

INTRODUCTION TO THE DRAFT CODE

Paragraphs 1 to 4 and sub-paragraphs 5 (a) *and 5* (b) (*i*)

92. Mr. SPIROPOULOS thanked the Chairman for his flattering references to the manner in which he had performed his task and added that, as the Commission was called upon to provide an introduction to the draft code, he had prepared a draft text and included it in his report (Section D). With a view to facilitating study, he had taken a large part of the text from the Commission's report on its second session. Paragraphs 1 to 4 inclusive and sub-paragraphs 5 (*a*) and 5 (*b*) (i) had been taken straight from the report and could be approved without examination.

It was so agreed.

93. The CHAIRMAN, replying to Mr. Hsu, pointed out that the first two lines of paragraph 5 assumed that the question to whom the Commission would submit the draft code had been settled. That question would, however, be discussed at a later stage.

Sub-paragraph 5 (b) (*ii*)

94. Following a discussion between the CHAIRMAN, Mr. SPIROPOULOS and Mr. SANDSTRÖM, it was decided that the first sentence be reworded as follows:

> " that the Commission was not bound to indicate the exact extent to which the various Nürnberg principles had been incorporated in the draft code ".

95. Mr. SPIROPOULOS, replying to the Chairman, explained that the divergencies of opinion referred to in the second sentence of the sub-paragraph under review were not only those within the Commission but also those which had come to light in the General Assembly.

96. Mr. ALFARO thought that what had been described as " considerable difficulties " was, in fact, an impossibility.

97. The CHAIRMAN remarked that the last sentence did, in fact, make that clear.

98. Mr. ALFARO thought it would be better not to

give the General Assembly too strong an impression of the divergencies of opinion between the members of the Commission. He proposed that the second sentence of sub-paragraph (*b*) (ii) be re-drafted as follows: " Such an attempt would have met with insuperable difficulties."

99. The CHAIRMAN agreed that it would be advisable not to mention the divergencies of opinion. He thought, however, that the term " insuperable " was too strong.

The Rapporteur was instructed to modify the text in the light of the discussion.

Sub-paragraph 5 (c) (*i*)

Sub-paragraph 5 (c) (*i*) *was adopted without comment.*

Sub-paragraph 5 (c) (*ii*)

100. Mr. SPIROPOULOS thought that the Commission would have some objections to that passage. The text of the draft code which it had adopted departed considerably from the draft of the Rapporteur who had only envisaged a single category of crimes under international law, which might be committed either by the authorities of a State or by private individuals.

101. All crimes under international law should involve the responsibility of the State authorities and of private individuals, except declarations of war or annexations, which, of course, could only be acts of States. Thus, a violation of the military clauses of a treaty could be perpetrated by individuals members of a party. The draft code, on the other hand, provided only for the responsibility of the State which had permitted that violation contrary to an international treaty.

102. The Commission, on the contrary, had established three categories: crimes which were the acts of the authorities of a State, crimes which might be committed equally by the authorities of a State or by private individuals, and, finally, crimes committed by private individuals only. In the case of each crime it had specified by whom it might be committed.

103. He considered the distinctions established by the Commission to be arbitrary. It was, for instance, arbitrary to say that terrorist activity did not involve the international criminal responsibility of its authors but only that of the authorities of the State which had tolerated or facilitated it.

104. The Commission could omit the passage in question, if it so desired.

105. Mr. SANDSTRÖM thought that the Commission might leave the text in question as it stood, in order to draw the General Assembly's attention to the matter.

106. The CHAIRMAN remarked that the lay reader would have some difficulty in grasping the meaning of the text; he would propose its deletion, if Mr. Spiropoulos agreed.

It was decided to delete sub-paragraph 5 (c) (*ii*).

Sub-paragraph 5 (d)

107. The CHAIRMAN read out the text, pointing out that the words " such an international criminal court " could be replaced by the words " such an organ " and that, in the English text, the words " would be the only practical procedure " might be substituted for the phrase " would practically be the only possible procedure ".

Sub-paragraph 5 (d) *was adopted with the above amendments.*

Paragraph 6

108. Mr. ALFARO thought that, in paragraph 6, the Commission might refer to the fact that it had defined as punishable inhuman acts committed for " cultural " reasons.

109. Mr. SPIROPOULOS thought that a crime committed for cultural reasons bore no relation to the protection of historic monuments and other works of art which was the subject of the communication from the United Nations Educational, Scientific and Cultural Organization (UNESCO).

110. Mr. ALFARO considered that the destruction of the Cathedral of Rheims or of the Library of Louvain were cultural crimes against the civilian population. Crimes committed for cultural reasons, such as, for example, the suppression of the use of a language, were akin to the matters with which UNESCO was concerned.

111. The CHAIRMAN considered that the acts of destruction referred to were not really " inhuman acts ".

112. Mr. SCELLE recalled that the inscription on the tablet commemorating the library of Louvain described its destruction as barbarous. He did not see what difference there was between inhuman and barbarous.

Paragraph 6 was adopted subject to changes covered by a previous decision.[7]

113. Mr. YEPES wished to make an observation applying to the draft Code as a whole. He thought that the commentaries accompanying the articles of the Code were extremely brief. Their conciseness might well come as a surprise to the reader if he compared them, for example, with those of the Harvard draft. He thought that it would enhance the prestige of the Commission if they were expanded somewhat and would like to make that suggestion to the Rapporteur.

114. The CHAIRMAN considered that it would be difficult to reopen discussion on texts which had already been approved. It would upset the Commission's work. However, if, during the second reading, Mr. Spiropoulos had any additions to propose the Commission might consider them.

115. Mr. SPIROPOULOS thought that the commentaries should be kept as short as possible in order to facilitate their study and acceptance by the Commission. The draft Code was not a doctoral thesis but an official document. Since the Commission's Statute provided that drafts could be accompanied by supporting material (article 16 (*g*)), the Commission might append to its draft Code the report of the Rapporteur and all the summary records of the discussions. Governments would thus have the documentation necessary to enable them to follow the stages through which the draft Code has passed before its adoption by the Commission.

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[7] See summary record of the 90th meeting, paras. 146 *et seq.* and in particular the decision recorded after para. 164.

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

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

It was so decided.

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

GENERAL DEBATE

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

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

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

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

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

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

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

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

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

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

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

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

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

The meeting rose at 12.50 p.m.

[8] Chapter II, B, II.

[9] Chapter II, B, III.

93rd MEETING

Thursday, 31 May 1951, at 3 p.m.

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