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Summary record of the 96th meeting

Topic:
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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.

CONTENTS

Chairman: Mr. James L. BRIERLY
Rapporteur: Mr. Roberto CORDOVA

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. 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 ".

automatically whether aggression had taken place. The definition before the Commission did not do that.

6. Indeed the definition took the word " aggression " in a very narrow sense. It excluded various types of aggression. The Commission, for example, had expressly voted in favour of omitting the threat to use force — which was one method of resorting to force. Hitler had made successful use of threats time and time again. He was convinced that there were other forms of aggression which were not included in the definition. Hence he would vote against its adoption, as it would serve no practical purpose.

7. Mr. HUDSON suggested that an attempt be made to verify the definition before deciding finally as to its usefulness.

8. The CHAIRMAN observed that if the Commission adopted the amendment proposed by Mr. Hsu, it would be drifting towards the enumerative method, and there would no longer be any reason for not mentioning volunteers as well.

9. Mr. HUDSON said that the trouble with Mr. Hsu's proposal was that it was not in keeping with the last part of the definition.

10. Mr. HSU said that that was why at the previous meeting (para. 134) he had proposed that the last part of the definition bc deleted and replaced by the insertion in the first line of the word " illicit " before the word " use ".

11. The CHAIRMAN pointed out that in that case what Mr. Hsu was proposing was to recast the whole definition and the Commission could not decide to do that.

12. Mr. HSU thought that the important thing was to produce something which would enhance the Commission's reputation.

13. The CHAIRMAN pointed out that the proposal to insert the word " illicit " in the first line of the definition had been rejected on the previous day.

14. Mr. HSU said that actually he had withdrawn his proposal.

15. Mr. AMADO maintained that the problem under consideration by the Commission was not likely to be solved at the present moment, and that one might go on for ever arguing about the question of aggression. Possibly the Commission might see its way to extending the proposed definition at a later date. The text before it constituted a small beginning. One must not bite off more than one could chew.

16. Mr. HSU said that nevertheless the Commission should make headway whenever it had a chance.

17. Mr. CORDOVA said he would vote against Mr. Hsu's proposal (A/CN.4/L.11) on the grounds that he was opposed to the enumerative method, which the Commission had already rejected.

Mr. Hsu's amendment for the insertion of the words " by fomenting civil strife in the interests of a foreign State " was rejected.

18. Mr. CORDOVA pointed out that Mr. Hudson's objection to Mr. Hsu's amendment also applied to the words " or otherwise ", since the United Nations would never order the secret use of force. He suggested that the desirability of keeping the words " openly or otherwise " be examined.

19. Mr. HUDSON thought Mr. Córdova's suggestion was perfectly logical. One could of course say " whether openly or not ", but the same objection would arise. In practice, the use of the expression would not give rise to any difficulty.

20. Once the Commission had decided whether the words " openly or otherwise " were to be retained or deleted it might perhaps decide to put the words " is an act of aggression " at the end of the definition instead of " Aggression is " at the beginning. He was anxious to prevent the definition from being restrictive.

21. The CHAIRMAN too wondered whether there was any point in keeping the words " openly or otherwise ".

22. Mr. ALFARO explained that the reason why he had not voted in favour of Mr. Hsu's proposal was not that he was opposed to Mr. Hsu's argument that aggression could take the form of fomenting civil war, but because he felt that fomenting civil war in another country did not invariably constitute aggression and might be no more than propaganda. It was for the Security Council to decide when aggression had taken place and it would do so on the basis of the words " openly or otherwise ".

23. With regard to Mr. Hudson's suggestion that the words " is an act of aggression " be put at the end of the definition, he thought it would be grammatically awkward.

24. The Commission had to find a formula which covered every type of aggression. Perhaps he did not see clearly, but beyond the threat to use force, he could not envisage any form of aggression which was not included in the definition before the Commission. Mr. Sandström felt that the threat to use force constituted aggression and that the aims of aggression could be attained by threats. He personally thought that aggression was always accompanied by force. He referred to the example of a State mobilising 500,000 men and sending them into the territory of another State. That was an instance of the use of force.

25. Mr. CORDOVA explained that he was not submitting an amendment.

26. Mr. HUDSON asked whether the Commission would agree to the words " is aggression " or still better " is an act of aggression " being used at the end of the definition.

27. Mr. FRANÇOIS asserted that in that case the text would no longer be a definition. If the Commission were asked to describe the function of the United Nations and replied that codification was one of the functions of the United Nations, that would no longer be a definition. The Commission would then have to state, as Mr. Spiropoulos had stated, that it was impossible to give a definition.

28. Mr. HUDSON thought it might be better to relinquish the term " definition ".

Mr. Hudson's amendment was rejected.

29. The CHAIRMAN asked the Commission whether

it preferred the wording " or Government of another State " as Mr. Córdova had suggested, or to adopt Mr. Hsu's amendment, namely " or against a foreign State " with a view to ensuring that the definition of aggression should not apply to civil war, the intention being to refer exclusively to international aggression.

30. Mr. HUDSON thought Mr. Córdova's proposal was an improvement on the text as it stood, but he would like to go still further and to delete the words " or Government " in the second line.

31. The CHAIRMAN was not sure that that proposal did go further than Mr. Córdova's. It was rather different.

32. Mr. HUDSON explained that if the words " or Government " were kept, it would be necessary to say " or foreign Government ".

33. Mr. ALFARO thought that was asking for trouble, in view of the fact that the word " Government " was being kept in the first line. Supposing a State attacked Formosa or the Mao Tse-tung Government, that constituted an act of aggression. The best solution was that put forward by Mr. Hsu, namely to use the expression " or against a foreign State ", which excluded civil war. He would vote in favour of that proposal.

Mr. Hudson's amendment to delete the words " or Government " from the second line of the definition was adopted by 6 votes to 2.

34. Mr. EL KHOURY could see no difference between the text which the Commission was examining and the first paragraph of article I of the draft Code.[2] As he had already stated,[2a] he was of the opinion that aggression should be included in the draft Code and the fact mentioned in the report to the General Assembly.

35. Article I, paragraph 1, spoke of " the employment or threat of employment ". If the use of the word " threat " in the definition of aggression was not acceptable, a second paragraph could be devoted to it. Fundamentally the Commission was voting on a text similar to that of article I, paragraph 1. He wondered why it should spend so much time on what was already in the Code. It was not necessary to draw up a separate definition, and he could not see his way to voting for the proposed text.

36. Mr. HSU shared Mr. Sandström's view that the definition under consideration was incomplete and should include the mention of " threat ". He was of course aware that that proposal had been rejected at the previous meeting (para. 45). It had then been argued that it was unnecessary to include " threat " in the definition, on the grounds that the meaning given to the word " weapons " included threat.

37. Mr. SANDSTRÖM thought the definition as at present worded should be put to the vote.

38. The CHAIRMAN pointed out that if the Commission rejected the definition before it, the implication would be that the formulation of a definition, even an abstract one, was not desirable.

39. Mr. HUDSON did not feel very happy about voting in favour of the text; it was a trap for the innocent and was calculated to put the United Nations organs into a straitjacket.

40. If the Commission had agreed to put the words " is an act of aggression " at the end of the text, he could have supported it. As it was, he was alarmed by the definition for the reasons given the previous day by Mr. Kerno.

41. Mr. CORDOVA suggested as an amendment the inclusion of " threat " in the definition; Mr. Sandström's objection to the definition seemed to lie in the fact that " threat " was not mentioned.

42. Mr. SANDSTRÖM replied that that was only one of the reasons why he was against it; even if mention of " threat " were made in the definition, he would still vote against the proposed text.

43. Mr. CORDOVA still thought that " threat " should be included.

44. Mr. HUDSON suggested that if Mr. Córdova's amendment were rejected, it might be stated in the commentary that " threat of force " amounted to " the use of force ".

45. Mr. ALFARO modified Mr. Córdova's amendment in order to bring it into line with Article 2, paragraph 4 of the Charter, so that the text now read " aggression is the use, or threat of use, of force ".

Mr. Córdova's amendment, as modified by Mr. Alfaro, was adopted by 7 votes.

46. Mr. SANDSTRÖM pointed out that there was a further type of aggression, namely infiltration, which was not included in the definition.

47. Mr. ALFARO, on a point of order, recalled that on the first day on which the Commission had discussed the question, it had decided that it should undertake to draw up a definition of " aggression ", and that the definition should not be in the form of an enumeration. Was the Commission proposing to go back on that decision? If it decided not to adopt the formula before it, it should examine the formulas submitted by Mr. Hsu, Mr. Amado and Mr. Yepes.

48. The CHAIRMAN explained that the Commission had decided to attempt to draw up an abstract definition. It was at liberty to decide that it had not succeeded in doing so.

49. Mr. YEPES asked what was the Commission's opinion of the text. Did it consider that the use or threat of use of force were the only forms of aggression? If so, he could not vote for the text, since there were other and far more dangerous forms. It should be specified in the commentary that armed force was not the only form of aggression which had to be taken into account.

50. Mr. CORDOVA pointed out that the Commission had decided to include threat in the definition, and threat was not the use of armed force. It had thus accepted the idea that there could be aggression without the use of armed force.

51. Mr. KERNO (Assistant Secretary-General) referring to the question put by Mr. Yepes, said that the wording

[2] See A/CN.4/44, chapter I, D, II.

[2a] See summary record of the 94th meeting, paras. 32–36.

submitted to the Commission was an attempt at a definition which would cover all cases of aggression, and the advocates of that wording considered that it did so.

52. Mr. ALFARO drew the Chairman's attention to the fact that Mr. Scelle had submitted an extremely important amendment for the drafting of a second paragraph concerning the determination of the aggressor by the competent organ. He thought that proposal should be examined before the definition was voted on, since the latter would be incomplete without the paragraph — but not until all the members were present.

53. The CHAIRMAN asked whether, in Mr. Scelle's absence, any member of the Commission was willing to present the amendment Mr. Scelle had proposed.

54. Mr. EL KHOURY pointed out that he had been the first to suggest that a second article be added specifying the method of determining the aggressor, and he would present the amendment.

55. Mr. CORDOVA suggested the wording, " The competent organ of the United Nations would be empowered to determine the aggressor in accordance with the definition of aggression ".

56. Mr. SPIROPOULOS, who, for reasons already made clear, had not taken part in the discussion, considered the suggested wording unsuitable. It was not for the Commission to tell United Nations organs what they should do. That was laid down in the Charter. The question was altogether outside the duties of the Commission.

57. The CHAIRMAN thought Mr. Spiropoulos was quite right; but if any member of the Commission asked for the proposal to be put to the vote, he would do so.

58. Mr. ALFARO said he was prepared to submit a proposal based on Mr. Scelle's idea and embodying a directive as to the method of determining the aggressor in accordance with the definition.[3] Then, if a given case of aggression did not come within the definition, the gap would be filled.

59. Mr. SANDSTRÖM asked whether it would not be better first of all to ascertain whether aggression could be defined. The definition of aggression was the Commission's primary task. If it did not define aggression, the secondary question was left in the air.

60. Mr. FRANÇOIS, after hearing Mr. Alfaro's explanation, found the proposal more risky than he had thought. It amounted to a statement that, whatever the tenor of the definition, the competent organs would be entitled to declare that there were other forms of aggression. His own view was that a definition should be produced to which the United Nations authorities would be bound to adhere. On the other hand, it was not for the Commission to state what those organs should do. He would oppose the amendment.

61. Mr. CORDOVA was in favour of an explanation along those lines, since several members of the Commission felt that the definition of aggression would tend to restrict the powers of United Nations organs and the International Court. In his opinion the definition should be interpreted in the light of the circumstances in any given case. Account must be taken of the actual facts. That was the distinction made by Mr. Scelle between the definition of aggression and the determination of the aggressor. The determination of the aggressor was not the function of the Commission. It was not for the Commission to say when a United Nations organ was faced with a case of aggression. It was for the organ itself to decide, just as any judge decided, whether the facts came within the scope of the definition. That was self-evident, but it could be mentioned in the text or in the commentary if it were so desired.

62. Mr. KERNO (Assistant Secretary-General) did not quite see the point of Mr. Scelle's proposal which had been taken over by Mr. el Khoury and Mr. Alfaro. It could have several meanings. Obviously the application of the definition to any concrete case would come within the competence of the United Nations organs, but Mr. Scelle's proposal could also be interpreted as meaning: " We are supplying you with a definition, but you are at liberty to define other cases of aggression not included in our definition ".

63. Mr. AMADO held the same view as Mr. François — there was no point in going out of one's way to look for further difficulties. Mr. Scelle had stated that the Commission should try to define aggression in abstract terms and then endeavour to determine the aggressor. That was going rather far. As long ago as 1921, Brazil had proposed to the League of Nations that the task of determining which party was the aggressor be left to the Permanent Court of International Justice.

64. Any attempt to go beyond the minimum already adopted might mean reopening the discussion, and there was no knowing where that would lead.

65. Mr. EL KHOURY said that the previous year the Commission had recommended the creation of an international criminal court. The Assembly had accepted the proposal and had set up a committee to make recommendations on the subject. The Code would be examined by the court. It had been stated that the Security Council would decide which party was the aggressor; but was not the proposed court competent to do so? Who was to decide, the Security Council, the General Assembly or the court? He thought the court was the proper authority to state who was the criminal in any given case. The Commission should state that the court was the authority competent to determine the aggressor.

66. The CHAIRMAN thought Mr. el Khoury was possibly going too fast. The Assembly had not yet decided to establish a court. All it had done was to set up a committee to prepare one or more preliminary draft conventions and proposals.

67. Mr. HUDSON suggested that the Commission might find its task less difficult if it had a definite text before it. He might then propose a slight amendment which would make the definition more flexible. With regard to Mr. Kerno's suggestion, the Commission might state that " The application of this definition, in any situation which may arise, is to be determined by the competent organ of the United Nations ".

[3] See summary record of the 95th meeting, para. 56.

68. Mr. ALFARO said that it was by reason of two paragraphs in the draft resolution on the definition of aggression submitted by the Soviet Union (A/C.1/608) that the question had come up before the Commission. He was thinking particularly of paragraph 1, which read as follows: " Considering it necessary, in the interests of general security and to facilitate agreement on the maximum reductions of armaments, to define the concept of aggression as accurately as possible, so as to forestall any pretext which might be used to justify it "; and paragraph 4: " Considering it necessary to formulate essential directives for such international organs as may be called upon to determine which party is guilty of attack ". The text drawn up by Mr. Hudson was in keeping with those two aims of the Soviet Union proposal. He would vote in favour of that text and would not attempt to interpret what Mr. Scelle had in mind.

69. The CHAIRMAN pointed out that Mr. Hudson had merely suggested a wording.

70. Mr. ALFARO said that in that case he would propose the text. Some of the members of the Commission considered that none of the texts was satisfactory. Others, including himself, felt that the definition before them, adopted tentatively after amendments had been made to it, embraced every conceivable form of aggression. Infiltration for example was covered by the words " or otherwise ". There might possibly be other acts which had not occurred to him, but they were all included in the definition, since it was a flexible one. It had been argued that the competent organ of the United Nations would be the final judge; but he could not see how any case of aggression could arise to which one part or the other of the definition did not apply.

71. Mr. HUDSON pointed out that Mr. Alfaro was using, in support of the text which he (Mr. Hudson) had drawn up, an argument at variance with what had been in his mind when he prepared it. His intention had been to state that there were cases not provided for, and that the competent organ should endeavour to apply the definition to them.

It was decided by 5 votes to 4, not to insert the text drawn up by Mr. Hudson and proposed by Mr. Alfaro.

72. Mr. SPIROPOULOS intimated that he had voted because the question was completely independent of the definition. He had abstained from voting on the previous occasions.

73. The CHAIRMAN put to the vote Mr. Sandström's proposal that a vote be taken on the definition before the Commission, which ran as follows:

> " Aggression is the threat or use of force by a State or Government against another State, 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."

At the request of Mr. Córdova, *the vote was taken by roll call;* votes were:

In favour: Mr. Alfaro, Mr. Córdova and Mr. François;

Against: The Chairman, Mr. Amado, Mr. Hsu, Mr. el Khoury, Mr. Sandström, Mr. Spiropoulos and Mr. Yepes;

Abstained: Mr. Hudson;

Absent: Mr. Scelle.

The text of the definition of aggression was thus rejected by 7 votes to 3, with 1 abstention.

74. Mr. YEPES said that while he was in favour of the establishment of a definition, and felt it both desirable and feasible, he had voted against the proposed text as it did not include aggression which took the form of unlawful intervention in the affairs of another State which the aggressor was anxious to subjugate; that was the form of aggression of which Czechoslovakia had been the victim in 1938 and 1939.

75. Mr. AMADO said that his vote need not surprise anyone. In the memorandum (A/CN.4/L.6) he had submitted, he had expressed his doubts. He had argued that it was impossible to define aggression, but that a minimum definition was feasible, and by " minimum " he meant " general ". Since the Commission had got bogged down in that difficulty, he saw no reason why he should be a hypocrite and vote in favour of the definition, which was a meagre contribution to international law.

76. Mr. EL KHOURY explained that the reason why he had voted against the definition was that it seemed to him pointless in view of the fact that Article I, paragraph 1 of the draft code had been adopted unanimously and that the " threat " factor had been added to the definition of aggression, making the two texts virtually identical.

77. Mr. HSU said he had voted against the proposed text not because of any technical defect but because it was inadequate to achieve the end in view. Moreover, in view of the definition of the crime in article I, paragraph 1 of the draft code, and the General Assembly resolution entitled " Peace through Deeds " (380 (V)), it had no point.

78. Mr. HUDSON said that the reason he had abstained was that he was very doubtful whether the Commission had been asked by the General Assembly to undertake to draft a definition of aggression. He had done his best to suggest improvements to the text, and if it had been so cast as to cover all cases he would have voted for it. But in view of the vague terms in which it was worded, he had felt that its usefulness was questionable.

79. Mr. ALFARO again recalled that the Commission had decided by a large majority to try to produce a formula for a definition of aggression. Now that it had rejected the version produced as a result of a great deal of effort, he thought it should either try to find another, or else decide that it was useless to make the attempt. He suggested examining in turn the draft definitions submitted by Mr. Amado, Mr. Hsu and Mr. Yepes, to see whether they would fill the bill. He suggested taking Mr. Amado's text first, unless Mr. Amado wished to withdraw it.

80. Mr. HUDSON pointed out that there was also Mr. el Khoury's suggestion (see *supra*, para. 34) that the definition given in article I, paragraph 1 of the draft

Code be brought into line with the Commission's conception of what constituted aggression.

81. The CHAIRMAN said that if the Commission decided not to produce a definition, it should consider what reply was to be given to the General Assembly.

82. Mr. SPIROPOULOS thought the Commission should explain what had happened in the course of its discussions. He had submitted a report; then four proposals had been submitted, and an attempt had been made to find an abstract formula; but unfortunately the conclusion reached had been that the formula produced was not satisfactory.

83. The CHAIRMAN said that the Commission should decide whether to declare that the study of the definition of aggression was completed or to follow Mr. Alfaro's suggestion and examine the other draft definitions submitted to it.

84. Mr. HSU thought that, in view of the long discussions already devoted to the proposals in question, the Commission should be able to complete the examination rapidly.

85. Since it had not succeeded in drafting an abstract definition, the Commission might evolve a concrete definition. Any such definition must not be in the form of an enumeration, since the Commission had voted against that; but it could include examples. It was at any rate an attempt worth making.

86. A vote was taken by roll call to ascertain whether the Commission wished to continue the search for a definition of aggression by examining one by one the various proposals before it. Votes were:

In favour: Mr. Alfaro, Mr. Córdova, Mr. Hsu, Mr. Yepes;

Against: The Chairman, Mr. Amado, Mr. François, Mr. Hudson, Mr. el Khoury, Mr. Sandström;

Abstained: Mr. Spiropoulos.

It was decided by 6 votes to 4 with 1 abstention not to continue the search for a definition of aggression.

87. Mr. EL KHOURY explained his vote. The Commission had devoted almost a week to examining Mr. Alfaro's draft definition. It was to be feared that it would take as long again to exhaust each of the other four proposals submitted. Hence he had voted against the proposal in order to spare the Commission what was likely to be an unduly lengthy task. He was content with article I, paragraph 1 of the draft Code.

88. The CHAIRMAN observed that the Commission had still to give the rapporteur directives for the drafting of his report. In the first instance, the report would be prepared by the special rapporteur. The general rapporteur would then have the task of incorporating it in the Commission's report on its third session.

89. Mr. CORDOVA thought that the functions of the two rapporteurs should be carefully defined.

90. Mr. SPIROPOULOS agreed to prepare a report on those lines for submission to the General Assembly, provided the Secretariat could assist him. Once the report had been accepted by the Commission, the general rapporteur would include the gist of it in the report on the third session to be examined by the General Assembly's Sixth Committee. The special report was a matter for the First Committee.

91. The CHAIRMAN pointed out that the Commission reported to the General Assembly without knowing in advance to which of the Assembly's main Committees the study of the reports would be referred.

92. Mr. SPIROPOULOS said that the Chairman's remark was quite correct, but that the special report referring to the definition of the aggressor was presumably a matter for the First Committee.

93. Mr. KERNO (Assistant Secretary-General) said that the International Law Commission had found itself in a similar situation on a previous occasion. In connexion with the draft Declaration on the rights and duties of States and the formulation of the Nürnberg principles, it had incorporated in its reports on its sessions sections specially devoted to those topics. It was for the Assembly's General Committee to apportion the study of the various sections of the Commission's report among the main Committees of the Assembly as it thought fit.

94. In the present instance, the question of the definition of aggression might occupy one section of the general report to be prepared by the rapporteur and the general rapporteur in collaboration.

95. Mr. SPIROPOULOS agreed to Mr. Kerno's suggestion. He was prepared to collaborate with Mr. Córdova in the drafting of the special section of the general report dealing with the definition of aggression.

96. Mr. CORDOVA pointed out that the Commission had not yet decided whether the draft Code of Offences should be sent to governments or to the General Assembly. If it were to be sent to governments, did the Commission propose to send them a special report or the general report in which the arguments on the draft Code would be inserted?

97. Mr. SPIROPOULOS thought that, by the terms of article 16 (*g*) of its Statute, the Commission was called upon to submit to governments a special report on the draft code, along with the relevant documents. The text of the draft code might also be given in the general report, in the section in which the Commission reported on the progress of its work, or in an annex.

98. Replying to a remark by Mr. CORDOVA to the effect that the adoption of such a course would presuppose that the Commission had decided in favour of transmitting its report on the draft code to governments, Mr. HUDSON and the CHAIRMAN considered that the Commission should postpone its decision on that point until the final reading of the draft code.

It was so decided.

99. The CHAIRMAN asked Mr. Spiropoulos what he considered should be included in the report. In particular, how much space should be given in the report to the historical background of the question, which Mr. Spiropoulos had gone into at great length in his own report (A/CN.4/44).

100. Mr. SPIROPOULOS thought the report should intimate that the Commission had first of all ruled out

the possibility of evolving a definition by enumeration, giving the reasons for that decision; it should then list the various proposals; and finally it should indicate that the Commission had endeavoured to draw up an abstract definition, and state that the attempt had been unsuccessful.

101. Mr. CORDOVA asked Mr. Spiropoulos whether, in the special report, he was in favour of keeping some of the material in the dogmatic part of his report.

102. Mr. SPIROPOULOS saw no reason why that should not be done. But he thought the passages in the special report devoted to the rapporteur's report should be brief.

103. Mr. ALFARO was anxious that the question of the definition of the aggressor should not be treated lightly. A careful account must be given of the Commission's decisions, with the underlying reasons. The special report should borrow any necessary material from the rapporteur's report.

104. Mr. HUDSON thought that the part dealing with the historical background of the definition should be summarized, with a reference to the detailed account given in chapter II of Mr. Spiropoulos' second report (A/CN.4/44); whereas the sections devoted to the course of the Commission's debates should be given in full detail.

105. The Commission instructed the rapporteur to prepare the special report on the question of the definition of aggression, bearing in mind the directives resulting from the discussions.

106. Mr. HUDSON observed that, in resolution 378 B (V), the General Assembly had instructed the Commission to examine the question of the definition of aggression in conjunction with the question of the draft Code of Offences. Hence he would like to know whether the Commission proposed to take up the question again when the draft code was given its final reading.

107. The CHAIRMAN thought that the Commission might indicate in its report that when it drew up the draft code it had borne in mind resolution 378 B (V).

108. Mr. SANDSTRÖM did not think the definition given in article I, paragraph 1 of the draft code embodied everything the Commission would wish to insert in a definition of aggression. Paragraph 3 (incursion by armed bands) and paragraph 4 (fomenting of civil strife) were matters which should have a place in such a definition.

109. The CHAIRMAN thought that problem might be examined later.[3a]

General Assembly resolution 484 (V): Review by the International Law Commission of its Statute with the object of recommending revision thereof to the General Assembly (item 1 of the agenda) *(resumed from the 83rd meeting)*

110. The CHAIRMAN invited Mr. el Khoury and Mr. Hudson, who had been absent during the general discussion on that item of the agenda, to submit their comments.

111. Mr. EL KHOURY said that he had been Chairman of the Sixth Committee when it had drawn up the Statute of the International Law Commission. Since then, article 13 of the Statute had been amended, and could possibly be amended still further.

112. As there was now an opportunity of revising the Statute, it might be advisable to insert, following paragraph 1 of article 1, a statement that the Commission itself might also, when appropriate, propose some principles of a legislative character. It might see fit to do so when international practice was not clear on any given point. Its task should not be confined to the mere recording of existing law; it should be empowered to propose the adoption of principles presenting certain new features, but based of course on cognate principles already established.

113. Replying to a question put by the Chairman, Mr. EL KHOURY said that if the Commission's sole function was to record existing law, an annual session of two months would be enough. There seemed no reason to ask its members to give up all their time to it.

114. Mr. HUDSON thought that the General Assembly's invitation to the Commission to revise its Statute gave it an opportunity to consider what was the most appropriate procedure from the point of view of international law. It was hardly likely that the permanent nature of the Commission would be questioned by the General Assembly, even if the work it was accomplishing were not all that could be desired.

115. It could hardly be expected that the Commission would achieve rapid results. The study of important issues demanded a great deal of time. However, the present arrangement, based on a two months' session every year, was not satisfactory. At the end of fifteen years under that system, by which time the members of the Commission would have been replaced twice, the progress achieved would still be very meagre.

116. At the eighty-third meeting of the Commission, various members, including Mr. Spiropoulos, had expressed the opinion that the Commission should sit all the year round. Obviously, if that course were adopted, it would have financial implications. To minimize them, the possibility might be considered of reducing the membership of the Commission. A working session of nine to ten months a year might produce excellent results. Of course, members would not then be able to carry on other occupations which called for a great deal of work. Men would have to be found whose working methods and competence would ensure efficiency.

117. Possibly such men could not be found under the electoral system. For example, it was purely by chance that he himself had been nominated by the United States Government as a candidate, when other men of equal ability might just as well have been proposed. With regard to election by the General Assembly, the fact of being able to muster a majority of votes was not necessarily the best guarantee of efficiency.

118. The Commission might look around for some other method of appointment, e.g. the list of candidates might be drawn up by the President of the International

[3a] See summary record of the 108th meeting, para. 115.

Court of Justice following consultation with the judges of the Court, and others. The choice would be governed by concern to put forward condidates likely to make a real contribution to the Commission's work. The list could be either a list of candidates to be voted on by the General Assembly, or, if the General Assembly consented, a list of appointments.

119. At a time when so much research was going on in other fields, research work in international law should be carried on energetically and competently. For that reason, Mr. Spiropoulos' suggestion, to which he had just referred, merited careful consideration by the Commission.

120. The Commission's Statute established a very sharp distinction between the development of international law and its codification. But in practice, there could be no codification without development. He would be in favour of minimizing the distinction by adopting the same procedure for both. In the United States, in the course of the research work concerning the development and codification of law, carried out under his direction at Harvard University, a great deal of time had been taken up unnecessarily over the question whether that type of research came under the heading of development of law or codification. A sub-committee might perhaps be set up to see how far it was possible to combine the two aspects of the Commission's task by making the distinction less rigid.

121. Mr. EL KHOURY said that, when the statute was drawn up, he had suggested to the Sixth Committee that it should not establish a special commission to promote the development of international law, but should hand over the task to the International Court at the Hague.[4] The Court consisted of fifteen judges whose time was not entirely taken up by their judicial functions and who would have more than two months at their disposal to deal with the development of international law. They were recognized jurists with all the necessary qualifications in respect of competence and integrity. Such a solution would save money.

122. The CHAIRMAN having pointed out that the Commission was not empowered to propose amendments to the Statute of the International Court of Justice, Mr. EL KHOURY considered that the Court could take over the functions of the Commission without any change in its terms of reference. The Commission's functions were not legislative in character, and in any case, as it was, the Court did give advisory opinions.

123. Mr. SPIROPOULOS said that Mr. el Khoury's proposal would involve the amendment of the Charter, of which the Court's Statute formed an integral part. The Commission had no authority to propose any such amendment. In any case, he was very much against Mr. el Khoury's proposal.

124. Mr. CORDOVA also considered that the amendment of the Court's Statute did not come within the province of the Commission. During the discussions at which the proposals leading to the adoption of General Assembly resolution 484 (V) had been put forward, no such possibility had even been contemplated.

125. Mr. HUDSON said that for as long as the Permanent Court of International Justice and the International Court of Justice had been in existence, the constant endeavour had been to make their functions strictly judicial. Even the Court's "opinions" were in the nature of actual judgments. A few years after it had been established, there had been suggestions that the Court's opinions should not be published. One such proposal had been rejected on the grounds that it would have weakened the judicial nature of the opinions. If the Court went outside its purely judicial functions, its entire character would be changed for the worse.

126. The CHAIRMAN observed that the notion put forward by Mr. el Khoury had found little support in the Commission.

127. Mr. ALFARO said he had been greatly impressed by the soundness of Mr. Hudson's arguments, and he would be grateful if Mr. Hudson could embody them in a written proposal which might serve as a basis for drawing up a scheme for the revision of the statute.

128. Mr. HUDSON thought it would be better for the Commission to formulate a series of directives to be given to a sub-committee with instructions to produce a text for subsequent examination. The directives in question might be as follows: (*a*) the minimizing of the distinction between the development of international law and its codification, and (*b*) a change in the Commission's structure to enable its members to serve on a full-time basis, as previously suggested by Mr. Spiropoulos.

129. Mr. HSU agreed with Mr. Hudson that it would be a good thing to minimize the distinction between the two types of functions given to the Commission under its Statute, by making certain changes which would bring the procedure proposed for each of them into line.

130. With regard to the other point, namely the suggestion that the members of the Commission should serve on a full-time basis, he was willing to support the underlying principle; but he did not think it feasible to waive the procedure of election of members by the General Assembly. The procedure was similar to that followed for the appointment of the members of the International Court of Justice. The General Assembly would not give a favourable reception to a proposal to change it. Moreover, it was important that the various legal systems of the world should be represented on the Commission, that it should not consist exclusively of spokesmen of the western legal system, and furthermore, that its various members should belong to different professional groups — professors of law faculties, high government officials and practising lawyers. That professional distribution was not actually laid down in the statute, but it was the practice followed within the framework of the statute.

131. Hence it was important to maintain in the Commission representation of the various legal systems of the world and a sufficiently wide professional distribution.

132. He mentioned that he had been joint author with Mr. Jessup, the United States representative, of a proposal

[4] *Official Records of the General Assembly, Second Session, Sixth Committee*, 37th meeting, p. 5.

(A/AC.10/33) submitted to the so-called Codification Committee in 1947. The proposal had been used as a basis for that Committee's discussions and for its report. The gist of it was that the members of the proposed Law Commission should be appointed on a full-time basis.

133. That method of organizing the Commission's work would be satisfactory from one point of view, since it would not affect the representation of the various legal systems; but it would affect the representation of the different professions. If members drawn from official circles or who were practising lawyers were to devote their whole time for five years to the work of the Commission, they would tend to lose touch with the every-day realities of legal life, and their work might take on a more academic character.

134. While he was not in principle opposed to such a system, he suggested that the Commission might consider another. The length of the sessions would remain as at present, but the Secretariat would play a more direct part in the Commission's work. In recruiting members of the Secretariat, as the considerations to be borne in mind would not be the same, the choice would be freer. The work of the Commission would be expedited if the decisions to be taken by it were drafted by the Secretariat in such a way as to prevent waste of time. Without being an optimist by nature, he thought that if the Secretariat were made responsible for drawing up reports, the loss of time would be considerably reduced.

135. What took up most of the time during sessions were the replies and rejoinders and the successive proposals for amendments. If a reinforced Secretariat submitted for the Commission's attention on a given subject a series of proposals, indicating that such and such a proposal was sounder juridically, another more in line with tradition etc., the Commission could quickly make a choice between the various versions. At its second session, when the question of an international criminal jurisdiction was being discussed, the Commission had found itself faced with two reports based on opposite points of view, and had thus been able to reach a decision very quickly. The Secretariat could be instructed to present a series of variants. Obviously a rapporteur selected from the members of the Commission itself could not be expected to do that.

136. The CHAIRMAN thought the Commission should set up a sub-committee to avoid turning the plenary meetings into a drafting committee. The sub-committee should be given directives.

137. Mr. SPIROPOULOS agreed that a sub-committee should be set up. Its directives should include in particular the transformation of the Commission into a body whose members would be appointed on a full-time basis. At the eighty-third meeting he had pointed out that it was the duty of the United Nations to present to the world a comprehensive code of international law within a definite period, say ten years. The only way of doing that quickly was to spread the work of the Commission over the whole year.

138. The Commission's directives might also include the following points: it should be laid down in the Statute that the Commission's documents and the summary records of its proceedings should be printed. There was too little knowledge of the work done by the Commission. All that the average jurist knew was thal it existed and who were its members. Publication of alt the documents, and especially of the summary records, would be a useful contribution to the development of international law and to the Commission's prestige. The moment seemed opportune to insert a provision to that effect in the statute. The expense would not be heavy, and the Sixth Committee of the General Assembly would not be averse to giving its consent. On the other hand, if the suggestion were put in the form of a separate concrete proposal, it would meet with opposition in the Fifth Committee, where it would normally come up.

139. The General Assembly had had occasion to refer to the Commission questions such as, for example, that of the definition of the aggressor, which required a speedy and even immediate answer. In the case in point, as the question was bound up with that of the draft code, a rapporteur had already been nominated and there had been no difficulty. But if there were no rapporteur, none could be appointed until the following session, so that two years might go by before the reply asked for by the General Assembly was forthcoming. To prevent any such delay, the Statute should give the Chairman the right, subject to approval by a number of members to be specified, to nominate a rapporteur in special cases.

140. It would be a good thing for the Commission to be represented at the General Assembly by its special rapporteurs. The previous year, the formulation of the Nürnberg Principles by the Commission had been strongly criticized by the Assembly. As he had been present at the discussions, he had been able to exert pressure to prevent the Sixth Committee from referring the question back to the Commission, a course which would have been harmful to the Commission's prestige.

141. Hence, another provision in the Statute might stipulate that the Commission's special rapporteurs should attend, in that capacity, the meetings of the General Assembly at which the subjects on which they had reported were dealt with, with instructions to defend the Commission's attitude. It was important that the Commission's work, which at times give rise to a great deal of criticism, should be vindicated by its rapporteurs.

142. As the Commission's Statute stood at present, the Secretary-General's approval was required if the Commission wished to choose a meeting-place outside New York (article 12 of the Statute). It was desirable that that article should be replaced by a provision authorizing the Commission to hold each of its sessions at whatever place it chose. However, he would not press that point, lest it be thought that the members of the Commission preferred Geneva to New York.

143. In the interval between its sessions, generally speaking, the Chairman should, where necessary — and there again subject to the approval of a considerable number of the members of the Commission, say two-thirds — be given the powers granted *in jure* to the Commission under article 12 of its Statute in connexion with change of meeting place.

144. He felt that there should be no interference with the geographical distribution of the Commission and the method of election of its members. The General Assembly would always want itself to appoint the members of the Commission and would invariably bear in mind the question of geographical distribution. It would be quite easy for the Latin-American countries and the Arab States or other groups by voting in a body to obtain a majority, if the necessity for ensuring representation of the various legal systems were not borne in mind.

145. A suggestion put forward at the eighty-third meeting had advocated simplification of the Commission's procedure, and had urged that reports should cease to be sent to governments. But after all, governments did want to be consulted, even if they had no intention of submitting comments. That had been seen when the Commission's reports on the rights and duties of States and on the formulation of the Nürnberg Principles had been sent direct to the General Assembly. The various delegations had urged that their governments be consulted. The fact that they did not offer any comments was in itself an argument which the Commission could use if governments subsequently raised objections.

146. The CHAIRMAN was not in favour of the proposal that the summary records be printed. It would make it possible for anyone on the look-out for such things to find in statements taken out of their context or outstripped by new developments, remarks which would make the speakers appear to contradict themselves.

147. Mr. HUDSON thought that to print the summary records would deprive the discussions of one essential feature: they would no longer be free exchanges of views.

148. On the CHAIRMAN's proposal, *it was decided to set up a sub-committee.* After some discussion, *it was decided that the sub-committee consists of three members, namely: Mr. Hudson, Mr. Córdova and Mr. Sandström.*

149. Mr. CORDOVA said he had noted nine items which the sub-committee should take up, namely: the membership of the Commission; procedure for elections; organization of the work to enable the members of the Commission to devote their whole time to it; minimizing the distinction between development of international law and its codification; printing of the Commission's documents and summary records; right of the Chairman to appoint a rapporteur in case of emergency; right of the Chairman to change the meeting place during the interval between sessions; assignment of members of the Commission to the General Assembly to defend reports; and the question of communication of the Commission's reports to governments.

150. The Commission should make known its wishes in regard to each of those items before the sub-committee set to work.

151. Mr. EL KHOURY requested the addition to the list of the Commission's right to put forward suggestions on principles of a legislative nature.

152. After some discussion in which the CHAIRMAN, Mr. HUDSON and Mr. CORDOVA took part, Mr. HSU pointed out that Mr. el Khoury's suggestion was tantamount to giving the Commission the right to propose fresh topics for study.

153. The CHAIRMAN asked the Commission to decide first of all whether the members should serve on a full-time basis, or more accurately, whether it was desirable to recommend that solution to the General Assembly.

The proposal was adopted by 8 votes.

154. Mr. FRANÇOIS pointed out that, at the eighty-third meeting, it had been suggested that only some members of the Commission should be appointed on a full-time basis, while the remainder would continue to serve as at present.

155. The CHAIRMAN thought that question had been sufficiently discussed and could be settled without further debate.

156. Replying to a question by Mr. HUDSON, he said he thought that, if the occasion arose, the General Assembly was the body which would have to appoint members serving on a full-time basis.

157. Mr. CORDOVA pointed out that, as a matter of fact, the special rapporteurs already gave up a considerable part of their time to the Commission.

The suggestion revived by Mr. François was unanimously rejected.

The meeting rose at 1.0 p.m.

97th MEETING

Wednesday, 6 June 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. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.