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Summary record of the 62nd meeting

Topic:
Draft code of offences against the peace and security of mankind (Part I)

Extract from the Yearbook of the International Law Commission:-
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duty to refrain from giving assistance to any State which is acting in violation of article 9 or against which the United Nations is taking preventive or enforcement action." A State providing assistance in such circumstances specifically violated the terms of the draft Declaration and of the United Nations Charter. Such an act was not merely one of complicity. Once aggression had been committed, any assistance given to the aggressor made the party concerned, not an accomplice, but a principal in an act of aggression. He was of the opinion that the act contemplated in Part III of Mr. Pella's list should be examined and specifically defined as a crime.

135. The CHAIRMAN suggested that further consideration of Mr. Pella's list be postponed until the following day. He was of the opinion that this list served a very useful purpose in clarifying the Commission's views. The Commission could then go on to consider the bases for discussion contained in Mr. Spiropoulos' report.

136. Mr. KERNO (Assistant Secretary-General) expressed his great appreciation of Mr. Pella's work. Mr. Pella was amongst those who had been of great assistance to the Secretariat in preparing documents for the Commission.

The meeting rose at 1.10 p.m.

62nd MEETING

Thursday, 6 July 1950, at 10 a.m.

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Chairman: Mr. Georges SCELLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, 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).

Preparation of a draft Code of Offences against the Peace and Security of Mankind: report by Mr. Spiropoulos (General Assembly resolution 177(I) (item 3 (b) of the agenda) (A/CN.4/25) (continued)

LIST OF INTERNATIONAL CRIMES PROPOSED BY MR. PELLA IN HIS MEMORANDUM (*continued*) [1]

Section III

1. Mr. ALFARO, referring to the matters dealt with in section III, said that assistance to an aggressor after war had broken out was a different crime from complicity in a war of aggression; it was a crime in itself.

2. The CHAIRMAN considered that it was an illegal use of force which came under the definition of Crime No. I.

3. Mr. ALFARO replied that assistance could be furnished without any apparent use of force.

4. Mr. SANDSTRÖM recalled that Mr. Alfaro had stated that the act was consumated once an attack had taken place. But if there were continuous use of force, the crime would also be continuous. There could therefore be complicity throughout the whole period during which force was used.

The Commission decided by 5 votes to 4, with 3 abstentions, that the act referred to in Section III was not a separate crime for the purpose of the draft Code.

5. The CHAIRMAN suggested that the general report should mention that the matter had been raised.

6. Mr. HUDSON thought that the comments on Crime No. I should indicate that the definition of Crime No. X covered Mr. Alfaro's idea.

Section IV

7. The CHAIRMAN observed that there was nothing new in the proposals which remained to be considered. The act dealt with in Section IV did not constitute a crime. He asked whether two States committed a crime if they agreed to leave a dispute in abeyance.

8. Mr. YEPES thought that they did not, but that the question should be put in another form. States refusing to submit a dispute to peaceful settlement were committing a criminal act.

9. Mr. KERNO (Assistant Secretary-General) observed that the act referred to in Section IV was defined in a manner which might cause misunderstanding. He thought that it should be interpreted in conformity with Article 33 of the Charter. Refusal to settle a dispute by peaceful means was a violation of the undertakings contained in the Charter. Nevertheless, it remained to be decided whether a violation of any provision of the Charter was a crime under international law. It was a question of degree.

10. Mr. YEPES proposed the following wording: "Refusal by a State to submit a dispute to the competent organs of the United Nations in the cases provided for in the Charter". He asked the Commission to take a decision on that proposal.

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[1] See summary record of the 61st meeting, footnote 16.

11. The CHAIRMAN thought that it would be going rather far to class any violation of the Charter as a crime.

12. Mr. AMADO observed that all political disputes could not be eliminated by preparing an international criminal code.

13. Mr. HUDSON, referring to Mr. Yepes' proposal, wished to ask which were the competent organs of the United Nations. Article 33 of the Charter said: " The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, . . .". He asked who was qualified to say whether a dispute satisfied those conditions.

14. The CHAIRMAN replied that it was the Security Council.

15. Mr. HUDSON did not agree. Article 33 further stated that " the parties shall seek a solution . . .". In that connexion, he had in mind a certain dispute between two States, regarding which negotiations had been going on for 75 years. In that case it appeared that the parties had fulfilled their obligation to seek a peaceful settlement. They were not obliged to settle the dispute, but only to seek a solution. Article 34 of the Charter stated that " The Security Council may investigate any dispute, or any situation which might lead to international friction . . .". Thus intervention by the Council did not require any action by the parties.

15 a. Article 35 of the Charter stated that " Any member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly. " The Council could intervene even against the wishes of one of the parties. Article 37 stated that " Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council "; that provision duplicated Article 34, under which the Security Council could intervene of its own accord.

15 b. He had carefully read Chapter IV of the Charter and had found no provision making intervention by the Security Council dependent on a request from the parties. What other organ of the United Nations might be competent? Certainly the General Assembly. Moreover, article 36 of the Statute of the International Court of Justice provided that the Court might also be competent, but left the parties free to refuse or accept its compulsory jurisdiction. If one State that was a party to a dispute refused to appear before the Court, while the other party agreed to do so, it was no crime to exercise the freedom provided for under the Charter and the Statute of the Court.

16. Mr. el-KHOURY cited Article 33, paragraph 2: " The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means ". If, in such a case, the parties declared that they preferred recourse to war, was that considered to be an international crime ? The reply must be in the affirmative. Such refusal would be a crime if the parties had been invited by the Security Council to settle their dispute by peaceful means and had rejected that proposal.

17. Mr. HUDSON observed that Article 33, paragraph 2, left the parties free to decide. They might choose the peaceful means that suited them, especially from among those listed in the first paragraph. He thought it would be preferable to use the words: " Refusal by a party to a dispute to attempt to settle it in accordance with the provisions of Article 33 ".

18. Mr. el-KHOURY asked what would happen if the parties stated that they wished to settle their dispute by force.

19. Mr. BRIERLY and Mr. HUDSON replied that they would be guilty of Crime No. I.

20. Mr. CÓRDOVA thought that a distinction should be made between mere refusal to submit to arbitration, and refusal accompanied by a statement that the party concerned wished to have recourse to war. That was Crime No. I. He did not think it should be stated that it was a crime to violate a general obligation to have recourse to peaceful means for settling disputes. If according to the United Nations Charter refusal to carry out an arbitral award did not constitute a crime, how could a simple refusal to resort to arbitration be made a crime unless it was followed or accompanied by a threat or the use of force ? Refusal to accept an arbitral decision was not a crime. How then could mere refusal to submit to arbitration be treated as such?

21. Mr. KERNO (Assistant Secretary-General) recalled that he had been a member of the Sub-Committee which had drafted Chapter VI of the Charter at San Francisco. Article 2, paragraph 3, imposed an obligation to settle disputes by peaceful means. Chapter VI referred to the pacific settlement of disputes. That was an obligation; but Chapter VI provided no penalties. If the Security Council intervened, it did not do so as an arbitrator. Hence no provision was made for compulsory abritration. Chapter VII on the other hand did provide penalties. It might perhaps be possible to say that nonfulfilment of an obligation for which the Charter provided a penalty was a crime under international law. He would hesitate to make an international crime of a violation of the provisions of Chapter VI, such as refusal to have recourse to peaceful means of settlement.

22. Mr. HUDSON said that the Security Council had been set up to find a solution for international disputes.

23. The CHAIRMAN asked what would be the position if it were decided to apply Chapter VII and also to institute criminal proceedings? Refusal was only a crime if it was accompanied by an immediate threat.

24. Mr. YEPES asked the Chairman whether he did not think that the mere fact of refusing peaceful settlement endangered international security.

25. The CHAIRMAN did not know whether, in that case, it would be Chapter VII that was applicable and the matter would come within the competence of an international criminal court.

26. Mr. HUDSON pointed out that the Security Council was entitled to intervene on its own initiative. Moreover, he thought that if two parties were not in agreement on the method of submitting their dispute to

the Court, it could not be said that a crime was being committed.

27. The CHAIRMAN said that Mr. Yepes had been referring to a categorical refusal to have recourse to any peaceful settlement of a dispute.

28. Mr. SPIROPOULOS summed up the position; Mr. Yepes was prepared to accept any amendment to his proposal which did not impair the principle itself, but the Commission was unwilling to accept the principle.

The Commission rejected Mr. Yepes' proposal by 8 votes to 1.

Sections V and VI

29. The CHAIRMAN observed that the acts listed in Sections V and VI of the list prepared by Mr. Pella had already been considered.

Section VII, paragraph 1

30. Mr. YEPES recalled that when the Commission had discussed that point it had decided to revert to the matter with a view to including in the list of crimes the fact of permitting the organization of bands intending to invade a neighbouring State. He asked whether the Commission would examine that question now or when it came to discuss the general report.

31. The CHAIRMAN thought it preferable to await the discussion on the general report.

Paragraph 2

32. The CHAIRMAN remarked that there was a new element in the words " or the encouragement of one of the contending parties ".

33. Mr. SPIROPOULOS stated that there was a right, and perhaps even a duty, to support the legal government.

34. The CHAIRMAN associated himself with that statement.

35. Mr. el-KHOURY pointed out that it was sometimes difficult, in the event of a revolution, to know which party was in the right and which was in the wrong. In such cases it was difficult to distinguish between a lawful movement and an unlawful one. That was a question which came within domestic jurisdiction.

36. Mr. CÓRDOVA thought that if a State maintained relations with a government, it was its duty to help it in such circumstances.

37. Mr. AMADO said that that would be encouraging one of the contending parties. It was a question of belligerence.

38. Mr. YEPES thought that that provision was partly covered by the provision on the fomenting of civil strife (Crime No. III).

39. Mr. CÓRDOVA quoted the example of two parties contending for power when there was no established government; a foreign government must then remain neutral.

40. The CHAIRMAN thought that that was an entirely different idea.

Paragraph 3

41. Mr. AMADO observed that in that eventuality, the country concerned would request the recall of the diplomatic representative and there would be no crime.

Paragraph 4

42. The substance of that paragraph had already been considered.

Paragraphs 5, 6 and 7

42 a. The substance of these paragraphs had already been definitely rejected by the Commission.

Section VIII

43. Mr. AMADO observed that this referred to the *comitas gentium* which was not strictly a subject for international law.

Paragraph 1

44. Mr. HUDSON asked if this was really a crime.

45. The CHAIRMAN said that it was rather an embarrassing question for countries which had foreign legions.

Paragraph 2

46. The Commission did not consider that such acts were crimes.

Paragraph 3

47. The CHAIRMAN recalled that attention had already been drawn to that point on several occasions. The dissemination of false news was an act of propaganda.

Paragraph 4

48. The CHAIRMAN observed that the International Criminal Court would be very busy if flagrant insult of a foreign State were made a crime.

Paragraph 5

49. The CHAIRMAN pointed out that that question would arise again in connexion with Mr. François' report on the regime of the high seas.

50. Mr. FRANÇOIS said that this was not a crime against peace and security.

Sections IX and X

51. The CHAIRMAN reminded the Commission that those items had already been disposed of. He observed that the systematic list had enabled the Commission to review its previous work.

BASIS OF DISCUSSION NOS. 4 AND 5 [2]

52. The CHAIRMAN called upon the Commission to resume consideration of Basis of Discussion Nos. 4 and 5 contained in the report by Mr. Spiropoulos.

53. Mr. HUDSON considered that that question

[2] See A/CN.4/25, Appendix.

should be included in the Convention on the Code, and not in the Code itself.

54. Mr. ALFARO thought that the Code should be a mere list of crimes. With regard to Basis of Discussion No. 4, it seemed to him that the Commission should not give the impression that it was drafting a Convention on the national Codes of the parties, but a true international Code. That Code should define the international penalties without reference to domestic laws. He did not think that Basis of Discussion No. 4 should be included in the Convention or in the Code.

55. Mr. SPIROPOULOS pointed out that the proposal had been taken from the Convention on Genocide. For the time being there was no international tribunal, hence the Commission should adopt a provision similar to that in the Convention on Genocide, which constituted the maximum so far achieved in international criminal law. In his opinion, since all the crimes were of a political nature, no State would be willing for its officials to be tried by its own courts.

56. The CHAIRMAN suggested that it would be more appropriate to place that point under Basis of Discussion No. 5.

57. Mr. SPIROPOULOS replied that he had connected the two bases of discussion.

58. The CHAIRMAN observed that use could be made of Discussion No. 4. Crimes could be committed by mere private individuals. Basis of Discussion No. 4 might be useful if the Commission decided not to confine itself to a list of crimes.

59. Mr. CÓRDOVA pointed out that in his country a Commission was now revising the Penal Code and that it had before it a proposal for the insertion in the new code of an article similar to Basis of Discussion No. 4, so that international crimes could be punished if they had already been accepted as such in a convention signed by Mexico.

60. Mr. ALFARO did not think that the Convention on Genocide could be followed very closely. Article 1 of that convention read as follows: " The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish. " Thus genocide was recognized as a crime under international law by the parties to the Convention. On the other hand, where the international criminal Code was concerned, he thought that the Commission intended to bring the crimes under an international jurisdiction applying an international Code. If it accepted Basis of Discussion No. 4, the Commission would weaken the international character of the Code. He was prepared to accept the principle of Basis of Discussion No. 4 if international jurisdiction was mentioned at the beginning with the words " Pending the establishment of an international tribunal competent to try these crimes, the signatories . . .".

61. The CHAIRMAN considered that a most interesting suggestion. He thought that reference to the fact that domestic courts were only substitutes for the future international tribunal could be inserted in Basis of Discussion No. 5. As had already been pointed out, it would be useful to include that obligation of the various States. A State might prefer to bring the accused before an international tribunal, even if they were its own nationals. The Bases of Discussion would be very incomplete if they did not mention an international criminal jurisdiction.

61 a. It was a case of dual functions. The domestic courts would act as international tribunals pending the establishment of an international criminal jurisdiction. It was not possible to allude to domestic jurisdiction without mentioning international jurisdiction, for the Commission had advocated the establishment of a special international criminal jurisdiction. With regard to that question, he considered Basis of Discussion No. 4 to be of no value, since if a Code were drawn up it would be implicitly binding on all signatories, as international law took precedence over domestic law. The French and other constitutions contained provisions to that effect. But not all constitutions were so clear on the matter as that of France and it was better that it should be stated, as was done in Basis of Discussion No. 4.

61 b. He proposed leaving Basis of Discussion No. 4 as it stood and adding the following words to Basis of Discussion No. 5: " The Parties to the Convention undertake, pending the establishment of international jurisdiction or in its absence . . .".

62. Mr. BRIERLY had no objections to make to Bases of Discussion Nos. 4 and 5, but he thought that if the Commission adopted them that would imply that it was going to draft a convention; he wondered whether that would not be exceeding the instructions given by the General Assembly.

63. The CHAIRMAN was of the same opinion as Mr. Brierly, but thought that members of the Commission had agreed not to confine themselves to a mere list of crimes.

64. Mr. HUDSON said that it had been his understanding that members of the Commission did not intend to undertake the drafting of a Convention. Personally, he would prefer Bases of Discussion Nos. 4, 5, 6 and 7 to be omitted, since they went beyond the Commission's competence. He asked that the general principle should be put to the Commission.

65. Mr. SPIROPOULOS said that in considering the task entrusted to him by the Commission he had wondered what was expected of him. The drafting of a list of offences against the peace and security of mankind was in itself an advance. Was that what the General Assembly expected of the Commission? A Code was not merely a list, it might also contain procedural clauses. He would have preferred to confine himself to a list and to leave the General Assembly to explain whether it wished the Commission to go further. He was quite prepared to confine himself to a list of crimes, with a few general provisions on international responsibility. But if he had submitted a list to the Commission, he would have been asked why he had not submitted a complete Code. He had therefore decided to submit a complete Code, in the belief that

it would be easy to delete what the Commission considered unnecessary.

66. The CHAIRMAN thought that the majority was in favour of Bases of Discussion Nos. 5 and 6.

67. Mr. ALFARO thought it clear that the Commission had been instructed to draft a Code, but at the same time it seemed to him that if it stopped there, it would not be carrying out its general instructions regarding the progressive development of international law. The Commission could state in its report that a Convention was required to bring the Code into force. When the Commission submitted its draft Code to the General Assembly it should indicate how the draft could be used. In drafting the Convention, the Commission would incorporate therein the international Criminal Code. If the Assembly decided not to consider the Convention, the Code would remain. If that were the wish of the majority, they must first consider whether to undertake the drafting of a Convention and in the affirmative they must study Bases of Discussion Nos. 4, 5, 6 and 7. He did not feel that the Commission should confine itself to submitting a list of crimes to the General Assembly; it should add the general principles of criminal law that could only appear in a Convention.

68. Mr. KERNO (Assistant Secretary-General) pointed out that there were three ideas involved: a list of crimes, a Criminal Code and a Convention. It should be observed that the number of documents was increasing. In his view the General Assembly had wished to have a Criminal Code which was more than a list and would include Bases of Discussion Nos. 2, 3, 4 etc. A Convention would also contain procedural clauses. He believed that the General Assembly expected the Commission to prepare a draft Code, not that year, but the following year. If the Commission was in doubt, it could put the question to the General Assembly.

69. Mr. LIANG (Secretary to the Commission) wished to examine the question from another point of view. He recalled that since 1946, when the United States delegation had submitted the proposal which had finally resulted in the adoption of General Assembly resolution 177 (II) in 1947, it had been uncertain whether what was intended was the codification of existing international law or merely a proposal *de lege ferenda,* with a view to the introduction of new rules of law. It was recognized that in the latter case a Convention would have to be concluded in order to apply the new principles and the Code of Offences against the Peace and Security of Mankind. He wondered what would occur in practice if the Commission confined itself to submitting a draft Code. It was not clear whether the Code represented existing law or proposed new rules. He also reminded the Commission that at its first session it had been uncertain whether the draft Declaration of the Rights and Duties of States was intended to be a codification of existing international law or a proposal *de lege ferenda,* to be submitted in the form of a draft convention. The General Assembly had criticized the draft Declaration because it did not explain whether the articles set forth existing law or future law.

69 a. If the matter were considered in relation to the Commission's competence, as defined in article 15 of its Statute, it could be seen that there were two tasks: the progressive development of international law and the codification of international law. Article 15 read as follows: " In the following articles the expression ' progressive development of international law ' is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression ' codification of international law ' is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine." Personally, he could only envisage the work of drafting a Code of Offences against Peace and Security as being part of the progressive development of international law, since in that field there was not yet a sufficiently developed state practice.

69 b. In 1947, in the Committee on the Progressive Development of International Law and its Codification, the representatives of the United States and China had proposed that the task of formulating the Nürnberg Principles should be considered as part of the progressive development of international law, and that consequently a Convention should be drafted. In the Committee's report on that subject (A/AC.10/52) the words " draft convention " had been used. At the sixth session of the Committee the question had become still more vague. He thought it would help the work of the Commission to state that that task was part of the progressive development of international law, provided of course that the Commission did not decide that the codification of existing law was intended. If, on the other hand, it was thought that progressive development was meant, that must be stated, so that the General Assembly could form a clear idea of the Commission's work in the light of article 15.

69 c. It might also be considered that the Commission's task in this matter was the result of special instructions, which were not governed by the procedure laid down in the Statute for the Commission's two tasks, namely: (1) the progressive development of international law and (2) its codification. The Commission had decided at its first session that its task of drafting a declaration on the rights and duties of States was the outcome of such special instructions. But he did not think that that view found favour with the General Assembly.

69 d. In practice, since the Commission had to carry out its instructions before the General Assembly's 1951 session, he wished to support Mr. Alfaro's suggestion that if the Commission regarded its work as part of the progressive development of international law and consequently did not reject the idea of preparing a draft convention, that convention should be prepared; for otherwise the question would be referred back to the Commission for the drafting of implementation and

procedural clauses, which could not be completed until after the end of the first stage of the Commission's work and after the election of new members.

70. Mr. SPIROPOULOS was prepared to accept any decision by the Commission. As he had said in paragraph 151 of his report: " General Assembly resolution 177 (II) which directed the International Law Commission to prepare the Draft Code of Offences against the Peace and Security of Mankind does not contain any guidance as to whether the Code must contain rules concerning the implementation of its provisions. Neither does the history of the above resolution. Consequently, the International Law Commission must be considered free to give to this problem the solution it thinks most appropriate." He thought that it was for the Commission to decide. In doing so, it should of course take into account the observations of Mr. Kerno and Mr. Liang.

70 a. In paragraph 24 of his report it was stated that " Mr. Biddle, expressing the opinion that it seemed opportune to advance the proposal that the United Nations ' reaffirm the principles of the Nürnberg Charter in the context of a general codification of offences against the peace and security of mankind ', adds that such action would, in his opinion, not only perpetuate the vital principle that war of aggression is the supreme crime but also in addition ' afford an opportunity to strengthen the sanctions against lesser violations of international law '."

70 b. If merely a list of crimes were drawn up, there would be no sanctions. It might of course be presumed that, if there were a Code, there would also be an international tribunal and sanctions. He had thought it preferable to submit proposals and ask the General Assembly to take a decision. The Commission had a complete document before it and could decide whether it wished to discuss that document forthwith, or to revert to it the following year. He did not think that the draft Code could be submitted to the General Assembly the following year, since in his opinion it should be submitted to governments and therefore could not come before the General Assembly until two years later.

71. Mr. SANDSTRÖM considered that the implementation of the draft Code was connected with the question of whether an International Criminal Court was to be set up. It would therefore be useful to know whether the draft relating to that court would be submitted to the General Assembly that year.

72. Mr. KERNO (Assistant Secretary-General) thought that the Commission had decided to reply to the General Assembly that it would be desirable and possible to establish an international criminal tribunal and to submit to the General Assembly, in 1950, a report containing replies to the two questions asked.

73. The CHAIRMAN explained that the replies meant were those to the questions of principle, but that there was no intention of submitting a draft statute for the tribunal.

74. Mr. CÓRDOVA emphasized that the General Assembly had shown that it wished the Code to be applied. The Commission had received no instructions to draw up rules for applying the Code, but its Statute allowed it to do so. It would be most useful for the General Assembly to have before it the draft Code and proposals regarding its application. Otherwise, if the Code were adopted, the General Assembly would ask the Commission to draft the Convention. In drafting the Code the Commission would be carrying out its instructions, but it might think fit also to prepare a convention and provisions for the establishment of an international jurisdiction. In so doing, it would be advancing its work and that of the General Assembly.

75. Mr. el-KHOURY considered it necessary to prepare a draft convention based on the draft Code. Without a convention the Code would remain a dead letter. He therefore thought that the Commission should prepare a draft convention, at least in its main outlines. He was certain that the General Assembly would not blame the Commission for doing so. It was more likely that if the Commission did not prepare a draft convention the Assembly would request it to do so. With regard to the form of the draft Code and the draft Convention, he noted that the Convention on Genocide was of a dual nature. The first articles constituted the Code proper, and the later articles contained provisions giving it the form of a convention. Without those later provisions, the stipulations of the Code proper could not be applied by States.

75 a. In his opinion, it was unimportant whether the draft Code and the draft Convention to be prepared by the Commission were contained in one document or two. The essential thing was that both texts should be prepared. He added that, in order to prepare a draft convention, the Commission should further study the bases of discussion proposed by Mr. Spiropoulos.

76. The CHAIRMAN wished to put a previous question to the Commission: did it wish to go ahead and decide itself whether or not it would prepare a draft convention or did it wish to ask the General Assembly for new instructions ?

77. Mr. HUDSON did not consider it necessary for the Commission to consult the General Assembly, but he thought that for the time being it should not prepare the text of a draft convention.

78. Mr. CÓRDOVA considered that article 16 of its Statute gave the Commission the necessary competence. What it had to decide was the manner in which it wished to carry out its task.

79. The CHAIRMAN said that he had put the previous question in view of the explanations given by Mr. Liang and of the requests made to him by various members of the Commission. Personally, he agreed that the Commission was competent to prepare a draft convention. He therefore proposed that it should examine, to that end, Bases of Discussion Nos. 4-7 contained in Mr. Spiropoulos' report, which had not yet been discussed.

The proposal was adopted by 9 votes to 2 with 1 abstention.

80. Mr. SPIROPOULOS noted that the Commission had decided to examine Bases of Discussion Nos. 4-7 and to prepare a draft convention. He asked it to pro-

ceed to a general discussion without entering into details and to await the report which would be submitted to it, in order to decide how far the texts it contained should be amended or retained.

81. The CHAIRMAN pointed out that the Commission was only called upon to take decisions of principle, and was not required for the time being to concern itself with questions of drafting.

82. The CHAIRMAN suggested that it might be possible to combine Bases of Discussion Nos. 4 and 5 in a single text. He proposed that at the beginning of Basis of Discussion No. 4 the following words should be added: " Pending the establishment of an International Criminal Court, the signatories to the Convention undertake . . .". The remainder of the text would remain unchanged down to the words " punishable by the Code ", after which the words " they further undertake to try . . ." would be inserted to link up with the text of Basis of Discussion No. 5, which would be retained without amendment. He wondered, however, whether paragraph 2 of Basis of Discussion No. 5 was appropriate in that place, and whether it should not be omitted entirely.

83. Mr. SPIROPOULOS said that he had inserted paragraph 2 in conformity with a proposal that had been discussed during the drafting of the Convention on Genocide.[3]

84. Mr. BRIERLY also asked what was the significance of paragraph 2. In his opinion, it had no meaning. He did not see which provision of the Convention on Genocide corresponded to that paragraph.

85. Mr. SPIROPOULOS replied that the question dealt with in that paragraph had been discussed at length by the United Nations General Assembly which had even adopted a resolution on it. That was why he had inserted the text in the Basis of Discussion.

86. Mr. HUDSON also remarked that the Convention on Genocide contained nothing similar and that he saw no sense in such a provision.

87. The CHAIRMAN agreed with Mr. Brierly and Mr. Hudson. Moreover, paragraph 2 added nothing to paragraph 1. Consequently, he again proposed that the two bases of discussion be combined in a single text, paragraph 2 of Basis of Discussion No. 5 being deleted. He thought he could assume that the Commission agreed to that proposal. He merely wished to ask if it agreed to leave the Rapporteur, Mr. Spiropoulos and Mr. Hudson, to draft the next text in conformity with the amendments he had proposed.

The proposal was adopted by 9 votes to none with 3 abstentions.

BASIS OF DISCUSSION NO. 6 [4]

88. The CHAIRMAN asked the Commission to turn to the examination of Basis of Discussion No. 6. He read the text and observed that the words " for the purpose of extradition " at the end of paragraph 1 seemed open to misunderstanding. In his opinion it would be better to substitute the words " for which extradition is resfused ", which would naturally refer to the words " political crimes ".

89. Mr. YEPES asked whether it would not be better merely to delete the words " for the purpose of extradition ".

90. Mr. BRIERLY considered that the words " in accordance with their laws ", which appeared in paragraph 2, did not correctly express the idea they were intended to convey. He thought that the extradition of perpetrators of crimes under the draft Code should be guaranteed under the terms of the draft Convention, even in cases where the laws of a State did not permit the extradition of criminals who were its nationals.

91. *Mr. YEPES also favoured the deletion of the* words " in accordance with their laws and the treaties in force ".

92. Mr. SPIROPOULOS explained that on that point also there had been a long discussion at the 1947 General Assembly. The Assembly had been unwilling to delete those words from article VII of the Convention on Genocide because certain delegations wished to retain them. That was why he had inserted the words in his text, following the terms of the Convention on Genocide. If the Commission wished to delete those words and thus go further than the Convention on Genocide, that decision would certainly constitute an advance in international law, but there was a danger that the General Assembly would not approve the draft Convention.

93. Mr. KERNO (Assistant Secretary-General) confirmed the fact that the words in question appeared in the Convention on Genocide, in which they had been inserted in view of certain fears regarding the principle of state sovereignty.

94. Mr. ALFARO thought that paragraph 2 would be of some value, provided that it was amended so as to leave no doubt regarding the fact that a State could not refuse to extradite a criminal because he was its own national. Subject to that amendment, the Basis of Discussion would constitute a whole, of which paragraph 1 would represent the general principle and paragraph 2 would refer specifically to the duty of extradition regardless of nationality.

95. Mr. BRIERLY considered that if States were not obliged to extradite their own nationals, paragraph 2 would have no significance, and he proposed that it be deleted.

96. Mr. HUDSON thought that the ideal that States would extradite their own nationals was an illusion, like the idea that their national courts would try their governments.

97. Mr. FRANÇOIS considered that the principle of non-extradition of nationals would be maintained as long as persons accused of crimes under the Code were tried by the courts of a particular State. But the establishment of an international criminal jurisdiction would give the matter an entirely different aspect.

[3] See *Official Records of the General Assembly, Third Session, Part I, Sixth Committee, Annexes,* document A/760 and Corr. 2, p. 500.

[4] See A/CN.4/25, Appendix.

98. The CHAIRMAN said that in his opinion Bases of Discussion Nos. 4 and 5 governed Nos. 6 and 7. He recalled that the Commission had decided to insert, at the beginning of the combined text of Nos. 4 and 5, the words " Pending the establishment of an International Criminal Court, the signatories of the Convention undertake . . .". In view of that fact, he thought that paragraph 2 of Basis of Discussion No. 6 could be retained.

99. Mr. FRANÇOIS believed that it would always be possible for the Convention to be applied by domestic courts. He thought it preferable not to be bound, at that stage, by a provision such as paragraph 2, in respect of the proceedings which should, or could, take place before a national tribunal.

100. Mr. SPIROPOULOS said that it was Basis of Discussion No. 5 which concerned the trial of citizens of a State for crimes committed in the territory of that State. Basis of Discussion No. 6 concerned cases in which such crimes had not been committed in the territory of the country of which the criminal was a national. For example, if an Englishman committed a crime in France, he must be tried by a French court under French law. But the following case might arise: an Englishman might commit a crime in Switzerland, but be in France at the time of his arrest. France was not then obliged to bring him to trial before a French court, but rather to extradite him. That was the type of case to which Basis of Discussion No. 6 applied.

101. Mr. YEPES thought that the last phrase of the Basis of Discussion made it possible to refuse extradition.

102. Mr. SANDSTRÖM asked whether, in order to give meaning to that provision, the words " in accordance with their laws and the treaties in force " should not be interpreted as a mere indication of the procedure to be followed.

103. Mr. HUDSON thought that the provision contained in paragraph 2 did not go far enough. There were countries which refused extradition unless there was a treaty. The United States of America, for instance, had extradition laws under which extradition could not take place unless there was a treaty. Cases in which there were no treaties should also be included. He thought that the text of the paragraph should be clarified in that sense.

104. The CHAIRMAN recalled that under French law applications for extradition must be heard by a court. Mr. Hudson had referred to countries which required a treaty. But there were also countries which adopted the principle that extradition should be granted even without a treaty. In any case, all the possibilities should be covered by the draft Code.

105. Mr. ALFARO had thought that the words in question referred only to extradition formalities. But there was some doubt; many countries refused to extradite their own nationals, while others did not. That was a question of domestic jurisdiction. But the Commission was dealing with the problem of international jurisdiction, and it seemed absurd to retain the principle of paragraph 2 when considering the matter from that point of view. He considered that the words " in accordance with their laws and the treaties in force " should be deleted, in order to establish clearly the duty of every State to grant extradition of all persons guilty of crimes under the Code. The draft code referred primarily to crimes by governments. It would be absurd to permit non-extradition of nationals. The Commission had made it perfectly clear that the crimes covered by its draft Code were not political crimes for which extradition could be refused. In his opinion, the conclusion to be drawn from that principle adopted by the Commission was that every State was required to deliver a criminal under international law, regardless of nationality or type of government.

106. Mr. HUDSON pointed out that some members of the Commission were not in favour of establishing an international criminal jurisdiction.

107. The CHAIRMAN thought that a distinction should be made between the interim period during which there was no international criminal court, and the time when there would be an international criminal jurisdiction.

108. Mr. CÓRDOVA agreed that the Commission should make that distinction. But he thought that in both cases it should impose on domestic courts the obligation to extradite persons who had committed crimes under international law. The Commission should not adopt a text which might be interpreted as limiting the State's obligation to extradite a criminal under international law merely because he was its own national. The Commission should set aside all question of nationality. That was the logical consequence of its decision to describe the acts to which the draft Code related as crimes under international law.

109. Mr. AMADO said that the principle of the territoriality of criminal law was clearly established in Basis of Discussion No. 5. The only exception was extradition. The problem stated by Mr. Córdova would arise when the International Criminal Court came into being. From that time onward, States would be required to extradite their nationals when application was made. He did not believe that that obligation could be imposed immediately, and he proposed that the question be left in abeyance.

110. Mr. CÓRDOVA repeated that the purpose of his proposal was to establish the principle that a person committing one of the acts to which the Code related must be extradited, and that no State should have the right to refuse the extradition of its nationals. That principle should be stated in the draft Code. Otherwise it was useless to define the acts as crimes under international law.

111. Mr. HUDSON thought that the importance of the principle of the territoriality of criminal law should not be exaggerated. There were States which did not apply that principle rigorously. Austria and Italy, for instance, punished their nationals for crimes committed abroad, and although they refused extradition, they themselves put them on trial. Those countries might be prepared to extradite their nationals if they did not punish them themselves.

112. Mr. AMADO said that the present position in law should not be confused with the future position. The members of the Commission wished the universality of the right to punish to be established. The universal prevention of crime was an entirely different aspect of the problem. He thought that for the time being it would be better to conform to the present situation and to take existing treaties and laws into account.

113. The CHAIRMAN agreed that it would be wiser to conform to the present situation pending the establishment of the International Criminal Court. With regard to the prevention and punishment of the crimes, Mr. Córdova was quite right; but in practice, he did not believe that the Commission was in a position to overthrow existing legislation and treaties. It would only be able to do so when the International Criminal Court was established and universal extradition became possible.

114. Mr. SPIROPOULOS said that the question of the universality of crime had been discussed at great length at the General Assembly Third Session in 1948. The question had been raised by the representative of Iran who had asked that it should be possible for a crime committed in one country to be prosecuted in any other country, regardless of the nationality of the person who had committed it.[5] That proposal had not been adopted because the Assembly had considered that recognition of the principle of the universality of crime would give rise not only to difficulties but also to injustices. He had himself considered the repercussions that recognition of such universality might have in many cases. He had imagined what his own position might be if, for instance, he had spoken in the Sixth Committee of the General Assembly against Albania and that country had applied for his extradition because it had found his remarks displeasing. He thought that in the present circumstances he would be unable to accept the universality of crime; if he did so, he would in future be afraid to travel. That was one of the reasons why he had been unable to support the idea of the universality of crime in his report.

115. Mr. AMADO said that universality of punishment had existed in the Middle Ages. He recalled the concepts held in the city-states of Italy at that time. Criminals, "*latroni*" or "*assassini*" were punished by the "*judex apprehensiomis*". It was only later that the idea of the territoriality of crime had gradually been reflected in judicial practice. Perhaps they would one day revert to the principle "*aut dedere aut punire*". Now that the world was progressing towards unity, the tendency towards universality was again appearing and certain modern criminal lawyers wished to see it re-established. The Commission wished to go still further and arrive at the punishment of international crimes by an international criminal court. When such a court came into being and international law was established, the world would have passed the stage of universality and established the international unity of law.

116. Mr. CÓRDOVA observed that the extradition treaties concluded by the United States of America did not authorize the extradition of United States citizens and that in fact they were never extradited.

117. Mr. LIANG (Secretary to the Commission) read the following passage from the report of Mr. Spiropoulos, rapporteur of the Sixth Committee at the third session of the General Assembly on the Draft Convention on Genocide:

> "At its 131st meeting, the Committee had agreed to insert in its report to the General Assembly the substance of an amendment to article VI submitted by the representative of India, according to which nothing in the article should affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside the State. Following this, the representative of Sweden had requested that the report should also indicate that article VI did not deprive a State of jurisdiction in the case of crimes committed against its nationals outside national territory. After some discussion of the questions raised in this connexion, the Committee, at its 134th meeting, adopted by 20 votes to 8, with 6 abstentions, an explanatory text for insertion in the present report."[6]

118. Mr. SPIROPOULOS said that it was on the basis of the decisions mentioned by Mr. Liang that he had drafted his text. He nevertheless agreed with Mr. Brierly, who had proposed the deletion of the paragraph.

119. The CHAIRMAN thought that the discussion had already clarified the position to some extent.

120. Mr. CÓRDOVA proposed that paragraph 2 at least should be drafted in such a way as to show clearly that if a State did not punish a criminal who was its citizen, it had the obligation to deliver him to the country in which the crime had been committed. Thus the Commission could be certain that international crimes would be punished.

121. Mr. HUDSON said that the Harvard draft contained a very long study on jurisdiction over crimes committed by nationals of one country in the territory of another.[7] He thought that that study would certainly be of great interest to the Rapporteur.

122. The CHAIRMAN thought that the Commission was approaching closer and closer to the principle of Grotius, to the effect that States should either punish criminals or deliver them up.

123. Mr. el-KHOURY pointed out that it still remained to establish an International Criminal Court. He did not understand the difficulties that had been re-

[5] See *Official Records of the General Assembly, Third Session, Part I, Sixth Committee*, 97th and 100th meetings, pp. 368 and 394-396.

[6] The explanatory text reads as follows: "The first part of article VI contemplates the obligations of the State in whose territory acts of genocide have been committed. Thus, in particular, it does not affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside the State." See *Official Records of the General Assembly, Third Session, Part I, Sixth Committee, Annexes*, document A/760 and Corr. 2, p. 500.

[7] "Research in International Law under the auspices of the Faculty of the Harvard Law School." Part II. Jurisdiction with Respect to Crime. In *Supplement, American Journal of International Law*, Vol. 29 (1935), pp. 519-539.

ferred to during the discussion. As long as no such court existed, the application of the Code would necessarily be confined to domestic courts or to special courts set up for each case; but once the International Criminal Court came into being and applied the Code, it would have to be granted certain privileges as the result of which any application it made would obtain extradition from the State to which the application was sent, regardless of the place where the crime had been committed and of the nationality of the accused. The text in question would have to be so drafted that the distinction between the position of the domestic courts and of the International Court was clearly established. But he thought that even when that court came into being, there would still be cases which would have to be tried before domestic courts.

124. Mr. HUDSON thought that if the International Criminal Court could be established, the question of the extradition of criminals would no longer arise, since countries would be required to deliver them on a mere summons from the Court. But at present they were only concerned with extradition from one State to another.

125. Mr. FRANÇOIS wondered whether, if Albania demanded the trial of Mr. Bevin for having spoken harshly of that country, the United Kingdom would be required to extradite him. It seemed to him that certain limitations should be provided.

126. The CHAIRMAN replied that that was Mr. Córdova's opinion, but he himself considered it impossible in practice. An international court would not be subject to the will of a single country and it would be for the judges of the court to decide on all applications.

127. Mr. KERNO (Assistant Secretary-General) thought that the Commission was in agreement on the principle of paragraph 2, and that the discussion had only concerned the words " in accordance with their laws and the treaties in force ". As long as there was no international jurisdiction but only extradition between States, that restrictive formula was desirable. Once the International Court had been established there could be no question of extradition, since States would be under an obligation to deliver the accused on a mere summons from the Court.

128. The CHAIRMAN said that the Commission seemed to agree that Basis of Discussion No. 6 should be retained, with the proviso that the principle would only apply as long as there was no international court.

BASIS OF DISCUSSION No. 7 [8]

129. The CHAIRMAN called upon the Commission to begin consideration of Basis of Discussion No. 7.

130. Mr. HUDSON noted that the text of that Basis of Discussion was modelled on article IX of the Convention on Genocide. He did not think that sub-paragraph (b) was suitable for inclusion in the draft Code, since the Commission had not accepted the criminal responsibility of a State; with regard to sub-paragraph (a) he thought it unnecessary to insert both the words " application " and " fulfilment ", which he considered synonymous. He was glad to note that in the last paragraph Mr. Spiropoulos had used the words " A dispute may be brought before the court " rather than the words " shall be submitted to the International Court of Justice ", which appeared in article IX of the Convention on Genocide and had given rise to a reservation by the U.S.S.R. delegation at the General Assembly in 1948. In the English text he also wished the words " at the request of any one of the parties to the code " to be replaced by the words " at the written application of any party to the dispute ". in accordance with the terms of article 40 of the Statute of the Court.

131. Mr. SPIROPOULOS said that he had carefully considered the matter before drafting his text. By the terms he had chosen, he had sought to eliminate the difficulties that had arisen during the drafting of the Convention on Genocide. He had sought a formula which would not permit of reservations such as those made by the U.S.S.R. when that Convention had been signed. He had wished to avoid all ambiguity. That was why the last paragraph of his text stated that a dispute " may be brought " before the court whereas the Convention on Genocide said " shall be submitted ". He had reproduced the terms of the Statute of the International Court of Justice.

132. The CHAIRMAN asked Mr. Hudson whether he found the jurisdictional procedure provided for in Basis of Discussion No. 7 acceptable.

133. Mr. HUDSON replied in the affirmative.

134. Mr. SPIROPOULOS pointed out that Mr. HUDSON had requested the deletion from sub-paragraph (a) either of the word " application " or of the word " fulfilment ". He himself had been doubtful whether to insert both words or only one of them, since he had also felt that they had approximately the same meaning and that the three terms " interpretation ", " application " and " fulfilment " were rarely used together. But since those three words appeared in the Convention on Genocide he had decided to reproduce them in his text. He was nevertheless prepared to retain only the words " interpretation " and " fulfilment ".

135. Mr. HUDSON observed that the Commission was now discussing a question of drafting which could be left to the Rapporteur. But Basis of Discussion No. 7 contained another principle which he found questionable. Sub-paragraph (b) referred to the responsibility of a State. He supposed that civil financial liability was meant. But many of the acts to which the draft Code related could hardly involve the responsibility of a State.

135 a. In reply to Mr. Spiropoulos who pointed out that a similar provision appeared in article IX of the Convention on Genocide, he said that he did not understand the meaning of that part of article IX.

136. The CHAIRMAN said that the Commission should draft a clear text of paragraph 2, in order to show exactly what it meant. In his opinion it did not refer to the criminal responsibility of a State, but to its civil liability, which might be involved in certain cases. He thought it would be useful to retain that provision

[8] See A/CN.4/25, Appendix.

in a clearer form, since it would enable the court to decide whether the civil liability of a State was involved in any given case.

137. Mr. HUDSON proposed that that provision should be included in a separate basis of discussion, with a clear explanation of the meaning attached to it by the Commission.

138. Mr. BRIERLY supported Mr. Hudson's proposal. If sub-paragraph (b) were retained in Basis of Discussion No. 7, there would be a danger of endless confusion and discussion. He had no objection to a clearer draft of that provision being inserted in a separate basis of discussion. He pointed out, however, that the draft Code being examined by the Commission had nothing to do with the civil liability of States.

139. Mr. ALFARO considered that it would nevertheless be useful to mention the question of civil liability of States, as had been done in the Convention on Genocide.

140. The CHAIRMAN said that it would be for the International Court of Justice to determine, when a case was brought before it, whether the civil liability of the State was involved. When the International Criminal Court was established, it would have to make that decision. It was in that connexion that he thought the provision valuable.

141. Mr. ALFARO considered that the formula contained in article IX of the Convention on Genocide " including those (disputes between the contracting parties) relating to the responsibility of a State " was not very clear.

142. The CHAIRMAN observed that in authorizing the International Criminal Court or the International Court of Justice to determine whether the civil responsibility of a State was involved in addition to the criminal responsibility of persons committing crimes under the Code. the Commission was introducing nothing new, but merely reproducing an idea that had been very widely accepted.

143. Mr. SPIROPOULOS recalled that those words had been inserted in the Convention on Genocide at the request of the United Kingdom representative in order to show that the State had criminal responsibility.[9] He added that in many international conventions there was a reference to the Court's competence in respect of disputes between the parties regarding the interpretation of the convention. For example, apart from the criminal responsibility of governments, a State incurred civil responsibility when an armed band from its territory invaded the territory of another State, as envisaged under Crime No. II. In that instance there was no doubt that the criminal responsibility of officials was involved, in addition to the civil responsibility of the State for not having prevented the invasion. He thought that that provision should be retained, but the Commission might well decide to make it a separate basis of discussion.

144. The CHAIRMAN observed that by adopting that provision the Commission was making compulsory something that was perfectly natural.

145. Mr. HUDSON said that those words had survived in article IX of the Convention on Genocide as a result of a proposal by the United Kingdom delegation supporting the theory of the criminal responsibility of the State.

146. The CHAIRMAN thought that the Commission was agreed that the small committee consisting of the Rapporteur-general, the Rapporteur and Mr. Hudson, should be instructed to draft a text which the Commission could examine when the general report was submitted to it. He noted that the Commission had completed its examination of the main points of the draft Code.

147. Mr. SANDSTRÖM recalled that a question raised by Mr. ALFARO had not yet been settled; namely, the question of penalties.

148. The CHAIRMAN thought it hardly possible for the Commission to discuss that matter, and he considered that the Court should merely be authorized to determine the penalties itself.

149. Mr. el-KHOURY did not agree. He thought that certain sanctions and penalties should be prescribed. If that were not done, the Code would be of no value as an instrument for the prevention and punishment of crimes.

150. The CHAIRMAN thought that at that stage the Commission could hardly do more than decide on a very general formula providing that sanctions might range from fines to the death penalty.

151. Mr. SANDSTRÖM read out para. (2) of the French Government's reply to the Commission's request that it propose crimes to be added to those included in the draft Code. Para. (2) read as follows:

> " With regard to crimes against peace, to affirm the criminal nature of aggressive war and thus to preclude in the future any possibility of presenting a defence based on the principle of the legality of offences and penalties (*nullum crimen, nulla poena sine lege*). " [10]

That was a most laudable desire which the Commission should take into account.

152. The CHAIRMAN asked the Commission if it wished to consider the question of the penalties to be prescribed in the draft Code.

The proposal was rejected by 6 votes to 4.

153. Mr. ALFARO pointed out that the vote was contrary to a decision previously taken by the Commission. He had requested the Commission to include penalties in its report on the formulation of the Nürnberg Principles, and the Commission had decided that the proper place for penalties and sanctions was in the draft Code. If it did not wish to go into the details of the penalties it could prescribe at that stage, it should at least consider the principle " *nullum crimen, nulla poena sine lege* ". It should not lightly dispose of so important a question as penalties. It should state its

[9] *See Official Records of the General Assembly, Third Session, Part I, Sixth Committee,* 92nd and 97th meetings, pp. 302-303 and 370-371.

[10] Sec A/CN.4/19, Part II.

opinion on the matter and say that it wished penalties to be prescribed and applied.

154. Mr. el-KHOURY proposed that the discussion should be deferred until the Commission considered the report on the Code of Offences.

155. The CHAIRMAN thought it would be dangerous to give immediate consideration to the question of including penalties in the draft Code, and agreed with Mr. el-Khoury that the matter should be deferred until the report on the Code of Offences was examined.

156. Mr. AMADO did not agree with Mr. ALFARO regarding the legal basis of crimes and penalties. The application of the maxim " *nullum crimen sine lege* " to international political crimes was a question which required fuller consideration. He agreed with the view expressed by the Chairman at the 49th meeting (paras. 47 and 51) that the great criminals of aggressive wars might go unpunished, since in order to achieve their nefarious purpose they used methods which had hitherto been unknown, and consequently were not yet prohibited by international law.

The meeting rose at 1.10 p.m.

63rd MEETING

Friday, 7 July 1950, at 10 a.m.

CONTENTS

Chairman: Mr. Georges SCELLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, 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).

Regime of the High Seas: Report by Mr. François (item 7 of the agenda) (A/CN.4/17 and A/CN.4/30)

GENERAL DEBATE

1. Mr. FRANÇOIS stated his report was somewhat different in nature from the others. In the first place, it was necessary to select the subjects which the Commission wished to study, and in the second place, since most of the questions were not yet ripe for codification, it was too early to attempt to establish precise texts. He thought that questionnaires would have to be sent to governments to learn their views on the subjects selected by the Commission, and he felt that the Commission's first task should be to draw up those questionnaires.

1 a. He had omitted from his report a number of subjects which were of a purely technical nature and which had already been regulated by international conventions, as well as other subjects which could, of course, be studied by the Commission, but were not sufficiently important.

1 b. He had kept three questions—collision, the right of pursuit and the continental shelf. His report also dealt with pollution of the sea, but information which he had received from the Secretariat (A/CN.4/30) after writing his report made it clear that other United Nations organs were already dealing with that question and that it should not therefore be included among the questions to be studied by the Commission. He had inadvertently omitted piracy, thinking that that was also one of the subjects selected by the Commission for independent codification. The Commission could consider whether the subject was important enough to deserve study within the framework of the report.

1 c. With regard to the special question of territorial waters, he recalled that The Hague Conference for the Codification of International Law in 1930 had almost reached agreement on the regime of territorial waters, but, as differences of opinion still existed as to the breadth of territorial waters, had considered that the question of breadth was so important that if an agreement were not achieved in regard to it, it was not desirable to submit a draft convention on the regime of territorial waters. The previous year, the Commission had considered that there would probably be no more success than in 1930 in reaching an agreement on the question of the breadth of territorial waters, and that it should be dropped provisionally. The regime of territorial waters and the regime of the continental shelf were related questions, and it was possible that, if the principle of the continental shelf were accepted, that might constitute a basis of agreement which would make it possible to fix the breadth of territorial waters at a figure below that desired by certain States.

1 d. The General Assembly had requested the Commission to consider whether the question of territorial waters should not be included in the study of the regime of the high seas. He proposed to leave on one side the question of the regime of territorial waters, as it now presented few controversial points. With regard to the breadth of territorial waters, the Commission could include a question on that subject in the questionnaire sent to governments, study the governments' replies the following year, and determine whether the question of the breadth of territorial waters could be taken up with some chance of success.

1 e. The question of the continental shelf was of interest to the whole world. The Commission should not