Document:-
A/CN.4/SR.97

Summary record of the 97th meeting

Topic:
Other topics

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

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.

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 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) *(continued)*

1. The CHAIRMAN asked the Commission to proceed with the elaboration of directives for the sub-committee it had decided to set up at its previous meeting (para. 148).

2. Mr. HUDSON had reflected on the problems that would arise if it were decided that the Commission should sit full time.

3. The term of office of its members should be studied. If they had to forego their professional activities, it would be very difficult to persuade men occupying a public office, the chair of a university, or who were practising a profession, to give up their work in exchange for a short-term appointment.

4. Another difficult question concerned the seat of the Commission. He himself did not see how the Commission could be set up anywhere else than at United Nations headquarters. If it wished to have the assistance of the Secretariat that solution was almost, though not absolutely, unavoidable.

5. It was also necessary to settle the question of members' salaries and of their pensions on retirement.

6. The number of the Commission's members had also to be determined. If appropriate salaries were provided and provision made for retirement, it might be advisable, in the interests of economy, to reduce their number. Again, it might be impossible to find fifteen persons with the necessary qualifications who were ready to forego their other activities.

7. As regards the method of electing the members, which Mr. Spiropoulos had considered sacrosanct, being of the opinion that the Sixth Committee would refuse to alter it, he felt that the Commission should put forward the proposal which in its opinion was in the best interests of international law. The General Assembly would then be free to adopt or reject it.

8. While leaving to the General Assembly the appointment of members by election, it might be suggested that the list of candidates should be drawn up by the President of the International Court of Justice. By providing for co-option in the case of a casual vacancy, article 11 of the Commission's Statute already departed in one particular instance from the principle of election by the General Assembly.

9. By referring to those various problems he had wished to show that a decision that the Commission should sit full time would have important implications which should be studied.

10. Mr. SPIROPOULOS recalled that, during the discussions in the Sixth Committee in connexion with the preparation of the Commission's Statute, a number of proposals had been submitted for filling casual vacancies.[1] One was that the Commission's members should be elected by the Court, but, as the result of a proposal he had submitted, the Sixth Committee had decided in favour of co-option. That was the system adopted by law faculties and it constituted the most practical solution.

11. Mr. HSU remarked that, at that time, it had been proposed to give the Commission a temporary character and that, furthermore, the members' term of office had then been three years. The problem of the appointment of new members to fill vacancies had therefore been of less importance.

(a) *Question of the Commission's seat*

12. Mr. SPIROPOULOS pointed out that, administratively, the Commission was a subsidiary organ of the General Assembly, to which it was subordinate. It was all the more necessary to maintain that relationship, as the Charter specifically made the General Assembly responsible for encouraging the progressive development of international law and its codification (Article 13, para. 1 a).

13. In view of the ties that bound it to the General Assembly, it might be considered that the Commission should sit in New York, where the Secretary-General and the Director of the Division for the Development and Codification of International Law and their staff were to be found. However, a special branch of the Secretariat might be attached to the Commission and follow it to any place where it might ultimately decide to sit.

14. The question of a seat need not be settled immediately. It was first of all necessary to know whether the General Assembly agreed to the Commission becoming a full-time body. To that end, it should be pointed out to it in general terms that if it desired the codification of international law to be completed within a reasonable period, say 10–15 years, a full-time organization was required. The General Assembly would weigh the matter with due regard to the expenditure entailed by such a change. It was preferable not to subordinate that proposal to other conditions, which would complicate the Assembly's choice. It should, however, be recommended that the members' remuneration should be the same as that of members of the International Court of Justice.

15. Mr. HUDSON hoped that for the time being members would confine their remarks to the question of where the Commission was to sit.

16. Mr. SPIROPOULOS said that, in his opinion, the Commission should not touch on that question in its report to the General Assembly.

17. Mr. HUDSON, on the contrary, felt that it was necessary to draw the General Assembly's attention to the implications of a decision in favour of a full-time Commission. The question of where it was to sit was very important. It should be stated that the Commission worked better at Geneva than in New York.

[1] See report of the Sixth Committee, *Official Records of the General Assembly, Second Session, Sixth Committee, Annexes*, document A/C.6/193, para. 8.

18. Mr. ALFARO recalled that, at its previous meeting, the Commission had heard a statement from Mr. Hudson on the amendments to be made to the Statute. It would appear that the nine points propounded in that statement had been generally acceptable to the Commission.

19. He expressly asked the Chairman to put up those various points for discussion in turn, so that the Commission might express its opinion on them and thus supply the sub-committee with directives for the preparation of a draft revision of the Statute, a report, or both.

20. Mr. CORDOVA read out the above-mentioned nine points which had already been enumerated at the previous meeting.[2]

21. Mr. HSU considered that the Commission should, at an appropriate moment, decide on the form of its report, since the course of the discussion might be affected by the choice. Did the Commission intend to submit its recommendations in the form of amendments to the Statute or otherwise?

22. The idea of converting the Commission into a full-time body had been accepted. That was a fundamental change which would involve others.

23. If, during the discussion, some members might consider that that was not the best solution, the Commission could submit alternatives in its report. It would then say that if the Commission were to work full time there would be difficulties in regard to where it was to sit, since it was so closely linked to the Legal Department, and that financial problems would arise, as it would need larger credits. Finally the Commission would say that it was making alternative suggestions, in case the solution of full-time work were not approved by the General Assembly.

24. It was from that point of view that the question of the form to be given to the report arose.

25. The CHAIRMAN felt that the question of form might be left to the discretion of the sub-committee, which would necessarily have to point out the advantages and disadvantages of a full-time Commission. It would certainly be premature to draw up a complete draft Statute, based on such a change, so long as it had not been approved by the General Assembly. Pending that decision the Commission could prepare a partial revision that could be adopted immediately.

It was so decided.

26. Mr. KERNO (Assistant Secretary-General) remarked that transformation of the Commission into a full-time body would raise budgetary, administrative and other problems. It would be the first time that the General Assembly had given such a form to one of its subsidiary bodies, and it was doubtful whether it would give a favourable reception to such a proposal.

27. In the circumstances the Commission should, in addition to the above proposal, draw up draft recommendations for amendments and improvements that could usefully be introduced into the Statute, without changing the Commission's essential character.

28. As regards the Commission's place of meeting, the longer its sessions lasted the greater would be the necessity for it to meet at United Nations headquarters.

29. It was not only a question of the Secretariat, but also of the indispensable contact with the daily life of the United Nations. A full-time Commission established elsewhere would progressively and rapidly acquire a different mentality from that of the organization.

30. In the Codification Committee of 1947, the idea of a full-time Commission had been opposed for two reasons. It had been argued, on the one hand, that it would not be possible to secure the participation of men of the highest calibre (the answer to that was of course that they could be found if the financial inducement were sufficient) and, on the other that the Commission's members must keep in touch with real life, and that, if they sat full-time, they would gradually get out of touch and become just a group of specialists living in an ivory tower. Those were the arguments that had been employed at the time the Commission was established.[3]

31. Mr. FRANÇOIS considered that the work of codification could only be efficiently accomplished by a full-time Commission. The facts spoke for themselves: so far the results obtained had not been satisfactory. If the Assembly wanted a really efficacious solution, it must ask the members to devote their whole time to the work of the Commission. Naturally that course would involve expense. The members' emoluments should be roughly the same as those of the judges of the International Court of Justice. If the expense were considered too heavy, the solution of a full-time Commission would have to be abandoned and, with it, the hope of carrying out the codification.

32. The success of the Commission would depend on its prestige in the world and on the ability of its members. If it remained simply a commission of experts there would be no codification.

33. He did not share Mr. Kerno's opinion as regards the seat. The Commission should not be set up in one of the world's political centres. The arguments that had led to the establishment of the Court away from the large centres, also applied against the establishment of the Commission at New York. In his opinion, the seat of the Commission should be The Hague or Geneva: Geneva, because the European Office of the United Nations was located there; at The Hague, because of the possibilities of contact with the judges of the Court and of access to the Peace Palace Library.

34. If it worked full-time, the Commission would need its own secretariat. It could not be satisfied, as it was at present, during its two-months' sessions, to call on members of the general Secretariat. Just as the Court had its Registry, so the Commission should have its secretariat.

35. The members' term of office might be nine years, as in the case of the judges of the Court. The Court

[2] See summary record of the 96th meeting, para. 149.

[3] See *inter alia, Report of the Committee on the Progressive Development of International Law and its Codification* (A/AC.10/51), para. 6; see also A/AC.10/SR.11, A/AC.10/SR.23 and A/AC.10/SR. 24.

was composed of jurists of the first rank, who could be re-elected. Their term of office of nine years gave them sufficient security of tenure, and, as they were not appointed for life, they did not lose contact with the outside world. Why should members of the Commission lose such contact under the same conditions? Why should a system that was suitable for the Court be unacceptable for the Commission?

36. The CHAIRMAN earnestly requested members not to allow themselves to be drawn into another general discussion. They should endeavour to formulate directives for the sub-committee.

37. Mr. AMADO said that, so far as he was concerned, Mr. François' statement had been very helpful. In discussing a question, it was often very difficult to keep scrupulously to a narrow theme.

38. He was entirely in agreement with Mr. François. How could it be said that if the Commission sat full time its members would lose contact with real life? What human being could, at the present day, remain aloof from life?

39. Mr. SANDSTRÖM also approved the general trend of Mr. François' remarks.

40. The CHAIRMAN wondered whether it would not be sufficient to point out to the General Assembly that, if the Commission were to sit as a full-time body, the question of its seat was bound to arise.

41. Mr. HUDSON considered that the Commission should submit precise and alternative solutions to the Assembly. By its resolution 484 (V) the General Assembly had asked the Commission to make recommendations.

42. As a member of the sub-committee, he had asked for directives on certain points. Mr. François had just added another: the question of a special secretariat.

43. He noted that some members considered it essential that the Commission should be established at United Nations headquarters. Others, on the contrary, considered that its seat should be in Europe.

44. The CHAIRMAN was of the opinion that the question of the Commission's seat, if it were to sit as a full-time body, had been sufficiently discussed. He proposed to take a vote.

45. Mr. SPIROPOULOS was afraid the Commission was about to make a mistake. It should confine itself to explaining the implications of the possible transformation of the Commission into a full-time body. The choice of a seat was not bound up with that change and there was, therefore, no need to vote on the question. It would be better to await the Assembly's decision.

46. Mr. HUDSON remarked that the candidates for a post on the Commission should know in advance where they would be called upon to reside.

47. The CHAIRMAN put to the vote the question whether, in the event of the Commission's becoming a full-time body, its seat should or should not be in New York.

As there were 5 votes in favour of New York and 5 votes against with 1 abstention, the question was not settled.

48. Mr. SCELLE, in explanation of his vote, said that in his opinion New York was the last place where the Commission should sit. If it were in New York it would be entirely engrossed in the debates of the political organs of the United Nations. After a very short time it would assume a purely political mentality, whereas the desired aim was the exact opposite.

49. The only possible criticism of the International Court of Justice was that it showed too strong a tendency to associate itself with political events. It was even more inevitable, if the Commission were to sit at New York, that its work should rapidly lose its scientific and purely objective character. To a lesser degree all the other big capital cities would have similar disadvantages.

(b) *Members' term of office*

50. Mr. HUDSON recalled that he had been in favour of continuing the present term of office of five years, whereas Mr. François had advocated nine years, by analogy with the system adopted for the Court.

51. The CHAIRMAN asked whether it would not be enough to say that a short term of office would not provide future members with sufficient security of tenure and would not permit of their recruitment under satisfactory conditions.

52. Mr. HUDSON considered that it would be preferable to submit a definite proposal to the Assembly. In his opinion a term of seven years might be suggested. It was not advisable to copy the Court's system too closely.

53. After a discussion in which Mr. ALFARO took a prominent part, the CHAIRMAN proposed that the Commission recommend to the General Assembly that the term of office of the members of the Commission be not less than seven years.

The recommendation was adopted by 7 votes.

(c) *Number of members*

54. Mr. HUDSON considered that the number of members ought to be sufficient to enable the work to proceed satisfactorily whatever the method of appointment. He noted that so far the whole of the 15 members of the Commission had never been present at the same time. A reduction in the number of members would lessen the additional financial burden resulting from possible reorganization. He proposed a membership of 11.

55. Mr. EL KHOURY proposed a membership of five. In his opinion five highly competent experts would, by themselves, do better than a larger body.

56. Mr. HSU pointed out that 15 had been the number decided on to ensure that all legal systems were represented.

57. Mr. HUDSON pointed out that a membership of five could not be adopted for that reason.

58. Mr. SPIROPOULOS was of the opinion that the number of the Commission's members should remain unchanged. He recalled that, during the discussions on the establishment of the Commission, the United Kingdom delegation had proposed a membership of nine.[4] As a of fact it was very difficult to reduce the number matter

[4] See A/AC.10/SR.11 and A/AC.10/SR.23.

of members, since the five great Powers would insist on their legal system being represented by one of their own nationals, while the Latin American countries would ask for three or four representatives, and the Arab countries for one or two more. That already made a fairly high total, and any number less than 15 would not therefore leave much room for the representatives of European legal systems.

59. Moreover, the members of the Commission could be divided into three working parties of five for the separate examination of a rapporteur's conclusions, and that would speed up the work.

60. Mr. HUDSON pointed out that Mr. Spiropoulos had made no mention of budgetary considerations.

61. Mr. CORDOVA said that, according to Mr. Spiropoulos, the Big Powers would necessarily be represented on the Commission. Nevertheless the concept underlying its composition was that of a harmonious balance and integrated work. When neither the Soviet Union nor any other eastern European countries were represented on the Commission, the four Big Powers whose nationals were present could easily control its decisions.

62. Mr. SANDSTRÖM considered that the Commission could avoid taking a final stand by saying in its report that, should it be necessary to reduce the number of members, the total should not be less than 11.

63. Mr. EL KHOURY had proposed a membership of five because he considered that the work would be done better and more quickly by a smaller Commission. It was not necessary that all legal systems should be represented, since the Commission was only an advisory body and did not take final decisions. It was the Assembly where all the members of the United Nations were represented that had the last word. The Commission was merely doing the work of experts and only submitted draft recommendations.

64. Mr. ALFARO considered that the report should state that the Commission advocated the retention of a membership of 15, which could be divided into working parties, for the sake of greater efficiency; but that if, for budgetary reasons, the Assembly decided to reduce the membership the Commission recommended that it should not be smaller than 11.

65. The CHAIRMAN put to the vote the question whether the existing number of members should be maintained.

The recommendation was adopted by a majority of 7.

66. The CHAIRMAN explained that he had voted in favour not because 15 seemed to him the best number — actually he considered it too large — but because, looking at the matter realistically, he knew that the General Assembly would not approve a smaller number.

67. Mr. HSU and Mr. AMADO explained their votes in the same way.

68. After the CHAIRMAN had asked whether reference should be made in the report to the number of members, Mr. AMADO formally proposed that the possibility of a reduction in the membership be not mentioned in the report.

69. Mr. HUDSON was of the opinion that the question would necessarily be brought up in the General Assembly. After advocating the maintenance of the existing number of members, the Commission might say that should the General Assembly for budgetary reasons consider it necessary to reduce that number, it should not fall below 11.

70. After a discussion in which Mr. EL KHOURY and Mr. SPIROPOULOS took part, the CHAIRMAN put to the vote Mr. Amado's proposal not to refer to the number of members in the report.

Mr. Amado's proposal was adopted by 7 votes.

(d) *Incompatibilities*

71. Mr. HUDSON asked whether, in the event of the commission becoming a full-time body, a provision should be adopted similar to that in article 16, paragraph 1 of the Statute of the Court, defining incompatibility in the case of judges.

72. The CHAIRMAN considered that in such an eventuality, the incompatibility of the functions of a member of the Commission with any other professional activity would be almost a matter of course.

73. Mr. SPIROPOULOS remarked that, though a plurality of professions was inadmissible in the case of a judge, it was a rather different matter for members of a codification commission. In his opinion the latter could quite well take part in the work of some of the United Nations organs, or accept the role of arbitrator.

74. Mr. HUDSON recalled that, during the first years of the Permanent Court's existence, one of the judges, a United States national, had continued to be very active in his profession as a lawyer. It was to prevent the recurrence of such a state of affairs that a provision regarding incompatibility had been inserted in the Statute of the Court. It had not become final until 1936.

75. It appeared to be essential that the revised Statute should expressly prohibit pluralism.

76. Mr. YEPES considered that there should be complete incompatibility between the functions of a member of the Commission and those of a Government official. Those two posts could not be held simultaneously.

77. Mr. SANDSTRÖM was also of the opinion that, if the Commission were to work full time, the incompatibility of the functions of its members with the holding of any other office should be laid down. A single exception might perhaps be made in regard to arbitration.

The principle of incompatibility was adopted.

(e) *Emoluments*

78. Mr. HUDSON asked whether the report should refer to the salaries of judges of the Court.

79. In reply to a question by Mr. Alfaro, Mr. HUDSON said that the pension he had in mind was, as in the case of the members of the Court, a retirement pension, payable in the event of the non-re-election or voluntary retirement of a member.

80. Mr. KERNO (Assistant Secretary-General) suggested that the Commission refrain from going into too much detail and, for instance, simply recommend to the General

Assembly that members of the Commission working full time should be adequately remunerated.

81. Mr. SPIROPOULOS considered that the words " under the same conditions as the Court " should be added.

82. After a discussion in which the Chairman and Mr. Córdova took part, Mr. AMADO remarked that the report should draw the General Assembly's attention to the fact that, if it desired a codification of international law, it should not overlook the fact that men capable of doing the work should be adequately paid. The matter should be presented clearly and eloquently, so as to carry conviction.

83. Mr. ALFARO would vote against any reference to the emoluments of the judges of the Court. In his opinion it would be sufficient to speak of appropriate remuneration. He considered it preferable not to stress the question of a pension. That was a factor that might give pause to the General Assembly.

84. Mr. CORDOVA stated that, in voting for the recommendation regarding full-time work for the members of the Commission, he had been under the impression that the method of remuneration would be the same as that laid down in the Statute of the Court. If he had known that that would not be so, he would have voted against the recommendation.

85. Mr. EL KHOURY had voted against the recommendation for a full-time Commission and would vote against any reference to remuneration whatsoever.

86. The CHAIRMAN put to the vote the question whether the report should merely contain a general recommendation to the effect that the members of the Commission should receive an adequate salary.

The proposal was rejected by 6 votes to 5.

87. The CHAIRMAN asked whether the report should state that the remuneration of members should be the same as that of judges of the Court.

88. Mr. ALFARO proposed that the Commission recommend to the General Assembly that, when determining the emoluments of the Commission's members, it should take into consideration the conditions of remuneration applicable to the Court.

89. Mr. HUDSON pointed out that it was a question of drafting which might be left to the sub-committee.

It was so decided.

90. Mr. HUDSON stressed the importance of the pension question. It had not been settled when the Permanent Court of International Justice was established, but had been, in 1945, in the case of the International Court of Justice. It was desirable that a candidate should know in advance both what his obligations and also what his rights would be, expecially as he could not exercise other functions.

91. Mr. SANDSTRÖM thought the question of a pension was included in the concept of adequate remuneration, and it was therefore unnecessary to mention it separately.

It was so decided.

(f) *Method of election*

92. The CHAIRMAN asked whether that question was bound up with that of the possible transformation of the Commission into a full-time body.

93. Mr. HUDSON remarked that it might be considered a separate question, but that it would take on greater importance should the Commission sit full time. He asked what the Commission thought of his suggestion that the President of the Court should appoint the members.

94. Mr. ALFARO considered it very dangerous to leave the choice of the members of the Commission to a single individual. Moreover, the General Assembly would not lightly abandon its right of election, together with its complement, the observance of a balanced geographical distribution.

95. Mr. YEPES was entirely of Mr. Alfaro's opinion. The election of members by the General Assembly was in consonance with the spirit of the Charter which, in Article 13, had entrusted to the Assembly the task of encouraging the development and codification of international law.

96. Mr. SPIROPOULOS was also of the opinion that no change should be made in the method of election. As the Commission took its orders from the General Assembly, it was natural that the latter should determine its composition.

It was unanimously decided not to propose any change in the method of electing members.

(g) *Nomination of candidates*

97. Mr. HUDSON thought that the President of the Court should be made responsible for drawing up a list of names, two for each seat to be filled. Under the existing system, it was doubtful whether a sufficient number of individuals with the necessary qualifications could be found for a full-time Commission.

98. From the moment the Commission sat full time, its character would be changed and a greater intrinsic importance would attach to the personal qualifications of its members.

99. The President of the Court enjoyed considerable prestige and took his decisions after consulting the other judges. Similar functions were entrusted to him in a number of treaties and agreements.

100. Mr. SANDSTRÖM wondered whether such a course would make any real difference to the procedure. Would not the President consult governments?

101. Mr. HSU was of the opinion that no change could be made in the method of nominating candidates, if the existing method of election were adhered to.

102. Mr. SCELLE considered that it would be doing the President of the Court a disservice to make him responsible for choosing the members of the Commission.

103. Mr. SPIROPOULOS proposed a compromise solution, whereby half the list would be drawn up by governments and the other half by the national groups of the Permanent Court of Arbitration, which already nominated candidates for election as members of the Court.

104. Mr. EL KHOURY thought that article 4 of the Statute could be amended. Instead of four, each State Member of the United Nations should nominate not more than two candidates, of whom one might be a national of the State concerned and the other of another State. Actually, under article 9, paragraph 2 of the Statute there could not be more than one member of any given nationality.

105. Mr. HSU considered that all States should be able to nominate candidates. In practice, a region might comprise a considerable number of countries and each of them should have the right to nominate a candidate, even though it might know that he would not be elected.

106. Mr. HUDSON feared that nomination by the national groups of the Permanent Court of Arbitration would not give very different results from nomination by States.

107. Mr. SCELLE was in favour of nomination by the International Court of Justice, should the latter be prepared to undertake that task. It might nominate twice as many candidates as there were seats to be filled.

108. The CHAIRMAN pointed out that the question only arose if the Commission was not satisfied with the existing system. Possibly the majority of the members were in favour of maintaining the *status quo*.

109. Mr. CORDOVA wished to know whether the International Court of Justice or any other authority entrusted with the nomination of candidates would be under the necessity of nominating one from each country or whether it would have a free hand in the matter. That was a very important point.

110. Mr. HUDSON was of the opinion that freedom of choice should be restricted.

111. Mr. EL KHOURY proposed the retention of the existing system.

It was decided by a majority of 10 to recommend the retention of the existing system.

(h) *Special Secretariat*

112. Mr. HUDSON did not believe that the Commission would need a special secretariat even if it were turned into a full-time body. It would be sufficient if some members of the general Secretariat were attached to it.

113. Mr. KERNO (Assistant Secretary-General) stated that he had had occasion to discuss the question with Mr. François. The Registry of the International Court of Justice was an independent body, but was the only case of its kind; with that exception, the Secretariat was one and indivisible. Naturally, should the General Assembly decide that the Commission was to work full time and that its seat should not be in New York, the Secretary-General would take the necessary measures, probably by seconding members of the Secretariat to the Commission's headquarters.

114. Mr. ALFARO considered that the matter should be left until the Assembly had taken a decision on the main question.

115. Mr. HUDSON added that, if the Commission were to sit full time, it would need a much larger secretariat, but he supposed it was unnecessary to mention the fact.

It was so decided.

(i) *Division of the Commission into working parties*

116. The CHAIRMAN remarked that such division was a matter of internal organization.

117. Mr. ALFARO thought that budgetary considerations would come into it. If the Commission were to sit full time, it would not continue to work as at present. Better results would be obtained if it were divided into working parties, and, should the Assembly decide that the members were to work full time, that was what the Commission intended to do.

118. Mr. YEPES said that the matter was best dealt with under the Commission's rules of procedure.

119. Mr. CORDOVA felt that, if the matter were bound up with the question of amendments to the Statute, it should be given consideration, otherwise it could be left until later.

120. The CHAIRMAN thought that the question was connected with the problem the Commission was studying.

121. Mr. AMADO pointed out that, if the Commission worked full time, its members would become officials and that the Head of their Department would require their presence. They would therefore no longer have the independence they enjoyed at present, but it was too early to discuss that question.

122. Mr. EL KHOURY thought that it would be sufficient to state in the Statute that the Commission would establish its rules of procedure.

It was decided to leave in abeyance the question of the division of the Commission into working parties.

(j) *Possible course of action to be taken by the General Assembly*

123. Mr. SPIROPOULOS proposed that the Commission forthwith appoint a rapporteur who, in the event of the General Assembly deciding that the Commission should sit full time, could, at the next session, submit a report on the amendments to the Statute necessitated by that decision; otherwise a year would be lost.

124. The CHAIRMAN thought that the General Assembly would itself appoint a commission to examine that question.

125. Mr. HSU suggested that the Commission should take into account the possibility that the General Assembly might refuse to make the Commission a full-time body; otherwise their discussions would have been in vain. The idea of a full-time Commission had been rejected in 1947, owing to the expense involved. It could not be said that the world economic situation had improved since that date. That being so, he very much doubted whether the proposal would find acceptance at the present time. The Sixth Committee would probably be in favour, but the Fifth Committee would reject it.

126. He recalled that the Commission's Statute had been based on the assumption that it would work full time. When a contrary decision was taken, the Statute had not been changed. That was why difficulties had arisen.

Without pressing the point, he would like to see suggestions put forward for certain amendments to the rules, on the assumption that the Commission would continue to sit in sessions.

127. Mr. CORDOVA said that the General Assembly would not, of course, be obliged to adopt all the Commission's proposals. Some of them might be rejected for budgetary reasons. The General Assembly might decide to allow the Commission to work full time, but state at the same time that it was unable to provide the credits the Commission asked for.

128. The CHAIRMAN said that if the General Assembly were to take such a decision, it would find that it was unable to recruit properly qualified persons to serve on the Commission.

129. Mr. HUDSON pointed out that new elections would be held in 1953 and that, in consequence, when the Commission met in 1952 and 1953, its membership would be the same as at present. He thought it would be possible to put the question of principle to the General Assembly. Once that had been decided the General Assembly might prefer to revise the Statute itself. He therefore suggested that some questions of principle be put to it. When it had replied or, in the event of its instructing the Commission to submit draft proposals for the revision of the Statute, a rapporteur might submit a report at the Commission's fourth session, which would enable the latter to submit its own report at the seventh session of the General Assembly in 1952. Any amendments should be adopted before June 1953, so that the candidates nominated could be informed of the conditions under which they would be required to serve before intimating whether they were prepared to accept election as a member of the Commission.

130. The Commission could authorize the Chairman to appoint a rapporteur as soon as the Assembly had taken its decision.

131. The CHAIRMAN preferred Mr. Hudson's proposal to that of Mr. Spiropoulos.

132. Mr. SPIROPOULOS said that revision could not be effected by improvisation, and that somebody should be made responsible for paving the way for the Commission's work. It would therefore be wise to decide that, in the event of the Assembly's adopting the Commission's proposal, the Chairman should appoint a rapporteur. In his opinion that rapporteur should be Mr. Hudson.

It was decided to leave to the Chairman the appointment of a rapporteur.

(k) *Distinction between the progressive development and the codification of international law*

133. Mr. HUDSON wanted the drafting committee to be given directives on that point also. The day before, he had suggested that it was desirable to try to minimize the existing distinction between the progressive development and the codification of international law. He did not himself believe that it was necessary to have a Part A dealing with progressive development and a Part B with codification. A single procedure would suffice. That would avoid the Commission's having to decide in each case whether the subject dealt with was progressive development or codification.

134. Mr. KERNO (Assistant Secretary-General) said that whatever suggestions might be made for a full-time Commission, it would still be necessary to consider amendments to the Statute that would hold good in both eventualities. The question of bringing the two procedures laid down, the one for progressive development and the other for codification, more into line with each other was not new, but possibly constituted the most important problem with which the Commission had to deal. It would also be necessary to consider how the above procedures could be made more flexible. The existing procedure was perhaps too rigid in certain cases.

135. The fundamental difference between progressive development and codification was that, in the case of the former the initiative lay with the General Assembly alone, while in regard to the latter it was shared with the Commission.

136. While studying that question, the Commission could also examine the problem raised by Mr. el Khoury, who wanted it to be in a position to put forward proposals for legislation. The Commission could say whether it wished to be allowed a measure of initiative in regard to progressive development also.

137. Mr. SCELLE was entirely in agreement with what the preceding speakers had said. From a legal standpoint it was very difficult to differentiate between progressive development and codification. Codification represented a step forward. It was an act of legislation by means of which existing provisions were systemized and very often amended. When the French Civil Code was drawn up the existing norms had been retained, but had been rearranged and amended. No useful purpose would be served by submitting proposals for codification if such proposals did not constitute a legislative advance. In his opinion the Statute should be amended so that the Commission would not be held up by doubts as to whether it was dealing with progressive development or of codification.

138. Mr. LIANG (Secretary to the Commission) explained that the existing system was the result of the work of an *ad hoc* committee, of which Mr. Brierly had been the rapporteur, and of the examination of the question by the Sixth Committee in 1947. At that time the main preoccupation had been to avoid holding a codification conference, like that of 1930, or having necessarily to prepare conventions for the adoption of the proposed texts. In the end a distinction had been made, although it was hardly defensible scientifically. The method of concluding conventions had been laid down for the progressive development of international law, but, as regards codification, there were various possibilities.

139. He saw no objection to a change of system, especially since, during the past few years, there had been little or no occasion to apply the part of the Statute relating to progressive development. It had been assumed that other organs might ask the Commission to study special questions in that field, but few problems had in

fact been submitted to it. The Commission had been mainly concerned with codification.

140. He wished to emphasize that article 23, which had been adopted in 1947, after lengthy and detailed discussion, was the keystone of the Statute. The intention had been to make the procedure flexible, and to avoid the necessity of convening a conference or adopting a convention. He repeated that the article had been the result of mature reflection, and it should not be deleted without due consideration of the work that had gone to its preparation.

141. Mr. FRANÇOIS felt that the Commission should not lose sight of the fact that the distinction between progressive development and codification was based on weighty considerations. There was more reason to consult Governments in regard to new laws than when it was a question of codification. The practice of the preliminary consultation of Governments had been a failure in 1930. An attempt had therefore been made to restrict such consultations, particularly as regards codification. If the distinction between progressive development and codification were removed and if, in selecting one or other of the two procedures laid down in the Statute, the choice should fall on the one applicable to progressive development, all the difficulties involved in consultation with Governments would recur.

142. The prestige enjoyed by members of the Commission would give their decisions greater authority than was attached to the work of committees of experts. He did not share Mr. el Khoury's view that the Commission was only an advisory body. It was proposed that the Commission be composed of such eminent personalities that Members of the United Nations would be forced to accept their decisions, even against their will. Prior consultation with Governments should not be pushed too far, since that might mean courting failure.

143. He considered that the procedure laid down for codification should be adopted, as it offered adequate guarantees to Governments, while possibly reducing the formalities laid down for preliminary consultation.

144. Mr. EL KHOURY read out article 1, paragraph 1 of the Commission's Statute: "The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification." It would be seen that those were the terms used in Article 13 of the Charter. Did the words "promotion of the progressive development of international law and its codification" mean that the Commission had the right to encourage the progressive development of international law by establishing new principles, or was its role merely to watch over such progressive development and record it? If it were considered that its duty was merely to record, its powers were limited. He proposed that the existing text be clarified.

145. In a study submitted by the Secretariat, it was stated that encouraging the progressive development of international law and its codification meant that the Commission was entitled to submit new proposals. That was not clear from article 1 of the Statute. Codifying did not mean adopting new provisions. In order to render the work of the Commission more fruitful he would propose the following text: "The Commission may discuss and submit to the General Assembly proposals of a legislative character".

146. If the Commission had the power to do that it would achieve better results.

147. Mr. YEPES was entirely in favour of the proposal that the distinction between progressive development and codification should be made more flexible. It was often very difficult and at times impossible to draw a hard and fast line between them.

148. As regards Mr. el Khoury's proposal, he also believed that the Commission's field of activity should be enlarged by enabling it to submit to the General Assembly proposals calculated to promote the development of law.

149. The CHAIRMAN noted that, generally speaking, and with the possible exception of Mr. François, the members of the Commission were of the opinion that the distinction between progressive development and codification should be minimized or attenuated.

150. Mr. HUDSON was in favour of having only one procedure in the Statute.

151. Mr. SPIROPOULOS took a different view from most of his colleagues. He considered that the distinction between progressive development and codification should be maintained, as they were two totally different things. The object of codification was to establish a text embodying existing law and filling some gaps. Progressive development consisted in the establishment of new rules. There was a fundamental distinction between the two subjects. As regards codification, the General Assembly had left the initiative to the Commission and, in his opinion, had been right in so doing. In respect of progressive development, the Assembly alone had the initiative and that again, in his view, was justified. Actually it was for the General Assembly, which was a political body, to instruct the Commission to prepare a legislative text for its use. However, he agreed with Mr. el Khoury that the Commission should be in a position to submit suggestions to the General Assembly. But it was not the distinction in question, which had hardly been applied, that had hampered the Commission's work hitherto. The disadvantage of the system was its rigidity. He considered that article 16 should be expanded to read:

> "When the General Assembly refers to the Commission a proposal for the progressive development of international law, the Commission shall, failing a decision on its part to the contrary, follow a procedure on the following lines:"

152. Mr. HSU was always in favour of making the Statute more flexible and simplifying procedures. He therefore supported Mr. Hudson's suggestion to combine or modify the two procedures. In his opinion the distinction between progressive development and codification was artificial. To codify was to develop, and development implied codification. However, as Mr. Liang and Mr. François had pointed out, a distinction had been drawn for practical reasons. The procedure

should be made more flexible so as not to stultify part of the Commission's work by making it necessary to have recourse to the method of conventions.

153. Mr. SANDSTRÖM recalled that Mr. el Khoury had proposed that the Commission be given the right to submit proposals of a legislative nature, and that Mr. Spiropoulos had supported that proposal. He wished to know whether that power would be given to the Commission in all cases, or only in regard to codification.

154. Mr. LIANG (Secretary to the Commission) considered that Mr. el Khoury's notion was already expressed in article 15 of the Statute, which was a key article, like article 23. The beginning of that article 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."

155. As regards legislative principles, if no change were made in the general structure of the Statute and it was merely a question of simplifying the prescribed procedures, Mr. el Khoury's point might be met by a reference to article 15. If, however, a specific provision was contemplated, an addition should be made to article 17 to the effect that the Commission could submit drafts to the General Assembly; that would be the procedural solution.

156. He pointed out that, as Mr. François, Mr. Spiropoulos and Mr. Hsu had already stated, the system might not be scientifically perfect, but it had been adopted after two and a half months of reflection, and its adoption had been the only means of obtaining Mr. Koretsky's support, as the latter had viewed the matter from a different angle and advocated the preparation of conventions in all cases. His views on the matter had been met in Part 1, relating to progressive development. As regards codification, Mr. Koretsky had been induced to give way to the extent of agreeing to the adoption of the scientific procedure, among others, as codification was not essentially a legislative task. That was how the present text of the Statute, which laid down several procedures for codification, had been arrived at.

157. He suggested that the Commission confine itself to simplifying the part of the Statute having reference to procedure.

158. Mr. AMADO remarked on the difference between the mentality of those who had taken part in the preparation of the Statute and the outlook of the other members of the Commission. Mr. Hudson had an untrammelled mind, which was lacking in the authors of the Statute. He recalled the obduracy of the Swedish representative, who had been unwilling to accept any procedure other than that of conventions. The compromise solution had only been reached with the greatest difficulty. Mr. Liang had summarized the situation very accurately. Reforms were necessary, but they had to be made slowly.

159. The CHAIRMAN recalled that he had been a member of the Committee. It was a delicate question and he considered that the distinction should be maintained, but that the Statute should be improved by making the procedure laid down for the two cases more flexible. He suggested that points of detail be left to the sub-committee.

160. Mr. CORDOVA asked that the Commission be consulted with regard to Mr. Spiropoulos' proposal to add a phrase to article 16, and again as regards amendments to be made to the procedure laid down. Should only one be retained, or should both be amended?

161. The CHAIRMAN thought it was unnecessary to go into details of the directives given to the sub-committee.

162. Mr. HUDSON asked why the Commission should not merely submit the question of principle to the General Assembly.

163. The CHAIRMAN replied that the question did not take quite the same form as the preceding one.

164. Mr. CORDOVA remarked that the procedure had, in any case, to be amended. The reform should therefore be examined in detail.

165. Mr. KERNO (Assistant Secretary-General) said that the most expeditious procedure might be to leave points of detail to the sub-committee. There were various ways of making the procedure more flexible. Should the Commission decide to amend article 16, as proposed by Mr. Spiropoulos, the two procedures could be left practically unaltered, as the Commission would be free to decide in each individual case what it wished to do. Moreover, as regards codification, the Statute was already very flexible. Article 19, which was liable to be overlooked provided that: "The Commission shall adopt a plan of work appropriate to each case".

166. Should the Commission decide that the procedure laid down in its Statute should be made more flexible, it might leave it to the sub-committee to decide how that should be done.

167. As regards progressive development, should the Commission wish to take up Mr. el Khoury's proposal and say that it could submit suggestions to the Assembly, it would have to adopt a new text. Perhaps the Commission might be consulted on that point.

168. Mr. SPIROPOULOS thought that, even without a text, there was certainly nothing to prevent the Commission from informing the General Assembly that it considered it advisable to take up the study of such and such a question.

169. Mr. HUDSON said that, supposing the Commission was examining a concrete case, that of the continental shelf, for instance, and decided that legislation was necessary. Would it have to obtain the General Assembly's consent before preparing its draft?

170. Mr. SPIROPOULOS thought that that was so, and rightly, since the Commission was not a legislative organ. The point at issue was that the Commission should be allowed to take the initiative in requesting the General Assembly to authorize it to establish legislation.

171. The CHAIRMAN did not share that view. Actually the subject came under the régime of the high seas.

172. Mr. CORDOVA pointed out that, in that particular

case, it was a question of new legislation and not only of codification. To fill gaps was to legislate.

173. Mr. LIANG (Secretary to the Commission) said there could be no question but that the work of legislation and of codification overlapped. The continental shelf, for instance, came under the régime of the high seas. The latter might be codified, and should the Commission consider that practical measures regarding the continental shelf were not sufficient and wish to submit a report to the General Assembly on the provisions to be adopted, it would be a matter of international legislation. As, moreover according to the positivist doctrine, the consent of States was necessary, the draft would have to take the form of a convention.

174. As regards other questions already covered to a large extent by existing law and of which only a small part remained to be regulated, the Commission could decide in what form it would submit its conclusions to the General Assembly.

175. Mr. HSU again called the Commission's attention to article 23 of the Statute, which was very important. He considered that, in matters of codification, it was necessary to fill in the gaps. The Commission could terminate its work without consulting the General Assembly, and then ask the latter whether it considered that the draft could be adopted without convening a conference. Should the General Assembly reply that the Commission's draft contained new material, it might be wise to recommend recourse to a convention. Article 23 was the keystone of the system.

176. Mr. CORDOVA did not consider that there was much difference between the respective procedures for progressive development and codification. It was in regard to the organ initiating draft proposals that a distinction could be made.

177. Mr. HUDSON noted that the Commission was of the opinion that the complete amalgamation of the two procedures was undesirable.

178. The CHAIRMAN gathered that the Commission considered the procedure should be made more flexible in both cases. It might therefore direct the sub-committee to simplify the procedure, possibly in both cases, while maintaining a not too sharp distinction.

179. Mr. ALFARO considered that that would be very difficult. The distinction was impossible from a scientific standpoint and could only be observed in practice.

180. Mr. CORDOVA remarked that if the two procedures were identified there would no longer be any difficulty. The provision of two procedures reflected the manner in which the Statute had been drafted. It did not say anything about the material distinction between codification and progressive development and confined itself to setting out the two heads.

181. Mr. AMADO said that there was a *jus conditum*, corresponding to the practice of States, and a *jus condendum*, with which the members of the Commission were concerned. The question was whether, in the case of the latter, the Assembly's authorization had to be requested. The problem should be solved, without abolishing that distinction. The practice of States was a concrete fact, and that was why article 15 had been drafted in such a way as to make it clear that it was for the sake of convenience that the expressions, " progressive development of international law and codification of international law ", had been used to cover the cases in question.

182. The CHAIRMAN considered that the Commission should retain certain discretionary powers in the matter. That was what the Statute had attempted to give it. There was always a proportion of *lex ferenda* and of *lex lata.*

183. Mr. CORDOVA thought that the Commission might leave it to the sub-committee to study the question and see whether the procedures could be unified.

184. Mr. KERNO (Assistant Secretary-General) recalled that some members of the Sixth Committee had been in favour of restricting the right given to other organs under article 17 to entrust the International Law Commission with the examination of special drafts. He said that paragraph 2 of that article allowed the Commission a certain measure of discretion but not complete freedom. The Commission might say that it had received certain requests, but had not taken any action because they were not timely, or because the question was not ripe. It could not, however, say that it had not had time to examine them. The Drafting Committee should study the matter.

185. Mr. HUDSON pointed out that some of the Statute's provisions no longer had any justification. That applied in particular to paragraph 1 of article 18, seeing that the search for appropriate topics for codification had been completed; and to paragraph 3 of article 26, on General Assembly resolutions concerning Franco Spain which had been withdrawn. The sub-committee should consider them as such.

186. In his opinion the Committee should confine itself to submitting suggestions in fields where quick results could be obtained. He did not think that it should examine all the questions in every detail. The day's discussion had done a great deal to enlighten the Committee.

187. Mr. SANDSTRÖM drew attention to the matter of the special report to the General Assembly.

188. Mr. CORDOVA pointed out that the Commission had not discussed the printing of its summary records, the powers of the Chairman to appoint a rapporteur, the powers of the Commission and of the Chairman to change its meeting place or, finally, the representation of the Commission at the General Assembly.

189. The CHAIRMAN considered that those matters should be left to the Committee. He declared the discussion on the Statute closed.

The meeting rose at 1.05 p.m.