

YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1950

Volume I

*Summary records
of the second session*

5 June - 29 July 1950

UNITED NATIONS



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OF THE
INTERNATIONAL
LAW COMMISSION
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NOTE

The present volume contains the summary records of the second session of the Commission (39th to 81st meetings); in accordance with General Assembly resolution 987 (X) of 3 December 1955, they are printed in English only; they include the corrections to the provisional summary records which were requested by members of the Commission and such drafting and editorial modifications as were considered necessary; in particular, working papers submitted during the session were incorporated in the summary records.

Volume II contains the studies, special reports and principal draft resolutions presented to the Commission for or during its second session. In accordance with resolution 987 (X), they are printed in their original language only.

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INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE SECOND SESSION

39th MEETING

Monday, 5 June 1950, at 3 p.m.

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Chairman: Mr. Manley O. HUDSON; later Mr. Georges SCELLE.

Present:

Members: Mr. Gilberto AMADO, Mr. Ricardo J. ALFARO, Mr. James L. BRIERLY, Mr. Roberto CORDOVA, Mr. Shuhsi HSU, Mr. F. el-KHOURY, Mr. Vladimir K. KORETSKY, 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).

Opening of the session

1. The CHAIRMAN briefly welcomed the representatives, and suggested that the Commission add to the Agenda for the present meeting (A/CN.4/L.1)¹ the first two items on the provisional agenda for the session (A/CN.4/21).²

It was so decided.

Proposal by Mr. Koretsky concerning the presence of Mr. Hsu

2. Mr. KORETSKY said that the protest made by the Government of the Chinese People's Republic to the Secretary-General of the United Nations against participation in the work of United Nations organs by representatives of the vestiges of the Kuomintang reactionary clique applied equally to the International Law Commission. He read out articles 3 and 8 of the Commission's Statute.³ All the members of the Commission had been nominated by their governments and should represent a particular legal system, so that all the main legal systems in the world would be repre-

sented in the Commission. Mr. Shuhsi Hsu had been elected following nomination by the former Kuomintang Government which he thus represented, and hence he had clearly ceased to represent the Chinese legal system.

3. He (Mr. Koretsky) supported the demand of the Government of the Chinese People's Republic and called on the Commission to stop Mr. Shuhsi Hsu from taking part in its work and, in accordance with article 11 of its Statute, to elect a representative of the legal system of the Chinese People's Republic. If his proposal were not accepted, he (Mr. Koretsky) would take no further part in the work of the International Law Commission; moreover, any decisions taken by the Commission with the participation of the Kuomintang representative could not be regarded as valid.

4. The CHAIRMAN took note of Mr. Koretsky's remarks. He had carefully studied the question and the precedents, and was ready to give his decision on the point of order. Afterwards, all the members of the Commission would be free to appeal to the Commission against his decision.

5. Mr. HSU argued that the question should not have been raised, since he was not sitting in the capacity of representative of his Government, but as a member elected by the General Assembly. He mentioned incidentally that he had been nominated by the Government of India also.

6. The CHAIRMAN read out his decision as follows: "The members of the Commission were elected in 1948 to serve for three years. They do not represent states or government; instead, they serve in a personal capacity as persons of 'recognized competence in International Law' (article 2 of the Statute). Being a creation of the General Assembly, the Commission is not competent to challenge the latter's application of article 8 of the Statute. Nor can it declare a 'casual vacancy' under article 11 in these circumstances. Mr. Koretsky's proposal is therefore out of order. This decision follows a precedent established by the Advisory Committee on Administrative and Budgetary Questions."

7. Mr. KORETSKY maintained that the Chairman had not given a direct reply to his proposal concerning Mr. Hsu.

8. The CHAIRMAN said he had stated that Mr. Koretsky's proposal was out of order.

9. Mr. KORETSKY replied that he had quoted an article of the Commission's Statute proving that his proposal was in order. He requested the Chairman to submit his proposal in the form in which he himself had submitted it.

10. The CHAIRMAN said that Mr. Koretsky's proposal would not be submitted to the Commission unless one of its members appealed against his decision, in which case that decision would be put to the vote.

¹ The agenda for the meeting read as follows:

"1. Opening of the session

2. Election of officers

3. Adoption of the provisional agenda for the second session (A/CN.4/21)."

² See footnote 4.

³ United Nations publication, Sales No.: 1949.V.5.

11. Mr. KORETSKY thought that the members should answer the question he had raised, and that the Commission should not adopt a roundabout procedure. He protested against this procedure, and appealed to the Commission against the Chairman's decision.

12. Mr. SPIROPOULOS was surprised that the question had been raised in a Commission which was not a political body and where members had been elected on a personal basis. Reference had been made to article 8, but neither that article nor any other text called for representation in the Commission of all the legal systems of the world. As laid down in article 8, the principle legal systems "as a whole" were represented. Hence there was no reason why Mr. Hsu, who had been elected as an international law expert, should not sit on the Commission.

13. Mr. el-KHOURY was astonished that Mr. Koretsky should have raised such an objection, and recalled the method adopted by the General Assembly for the nomination of members of the Commission.

14. Mr. Hsu had been backed not only by China but also by India, and did not represent any government. He hoped that Mr. Koretsky would not persist in his objection.

15. Mr. SCELLE recalled that during the first session Mr. Koretsky had often emphasized that the International Law Commission was a General Assembly commission. It had in fact been set up by the General Assembly, and only the Assembly could lay down the conditions for the election of members to the Commission. The Commission itself had no competence to do so. He supported the view of Mr. el-Khoury, and hoped that Mr. Koretsky would withdraw his proposal.

16. Mr. ALFARO agreed with Mr. Spiropoulos, Mr. el-Khoury and Mr. Scelle. The terms of article 8 of the Statute had been complied with when the members of the Commission were elected, and the Commission was not at liberty to modify the results of that election. He supported the Chairman's decision.

17. Mr. CORDOVA thought there was some analogy between the election of members of the Commission and the election of members of the International Court at The Hague. The aim of that method of election was precisely, in his opinion, to avoid any influence exerted by political events which might occur after members had been elected. He too supported the Chairman's decision.

18. Mr. KORETSKY said that, since the Commission's task was to lay down rules of conduct for States, its members should represent actual governments; otherwise the rules they adopted would be illusory. He was quite familiar with the wording of article 8 of the Statute. He had never suggested that the appointment should be annulled, but that Mr. Hsu be suspended from the meetings, and the Chairman be instructed to report on the matter to the General Assembly.

The Commission approved the President's decision by 10 votes to 1.

19. The CHAIRMAN said that he would be sorry personally if this decision meant that Mr. Koretsky

could not continue to take part in the work of the Commission.

20. Mr. KORETSKY left the meeting.

Election of officers

ELECTION OF CHAIRMAN

21. Mr. CORDOVA, speaking on behalf of other members of the Commission as well as himself, thanked Mr. Hudson for the zeal and efficiency with which he had carried out the onerous task of Chairman during this first year of the Commission's existence. He felt that all the members of the Commission should share the honours and responsibilities, and that it was desirable that the Commission's officers should be changed each year.

22. He proposed Mr. Scelle for the Chairmanship.

23. Mr. SPIROPOULOS and Mr. YEPES seconded the proposal.

Mr. SCELLE was unanimously elected Chairman.

24. Mr. SCELLE thanked the Commission and took the Chair.

ELECTION OF VICE-CHAIRMAN

On a proposal of Mr. BRIERLY, seconded by Mr. HUDSON, Mr. SANDSTRÖM was unanimously elected First Vice-Chairman.

25. Mr. HUDSON proposed Mr. el-Khoury as second Vice-Chairman.

26. Mr. CORDOVA proposed Mr. Hsu.

27. Mr. HSU thanked Mr. Córdova for the honour he had done him, but could not agree to stand.

Mr. el-KHOURY was elected Vice-Chairman.

ELECTION OF RAPPORTEUR

28. On the proposal of Mr. HUDSON, seconded by Mr. el-KHOURY, Mr. SPIROPOULOS, Mr. AMADO and Mr. CORDOVA, *Mr. ALFARO was elected Rapporteur.*

Provisional agenda of the second session

29. Mr. HUDSON suggested that the Commission merely take note of General Assembly Resolutions 373 (IV), 375 (IV) and 374 (IV) (items 1 and 2 of the provisional agenda).

⁴ The provisional agenda (A/CN.4/21) read as follows:

1. (a) General Assembly resolution 373 (IV) of 6 December 1949: Approval of Part I of the report of the International Law Commission covering its first session.

(b) General Assembly resolution 375 (IV) of 6 December 1949: Draft Declaration on Rights and Duties of States.

2. General Assembly resolution 374 (IV) of 6 December 1949: Recommendation to the International Law Commission to include the regime of territorial waters in its list of topics to be given priority.

3. (a) Formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal: report by Mr. Spiropoulos.

(b) Preparation of a draft code of offences against the peace and security of mankind: preliminary report by Mr. Spiropoulos (General Assembly resolution 177 (II) of 21 November 1947).

30. Mr. KERN (Assistant Secretary-General) agreed with Mr. Hudson with regard to the first two of the resolutions; but he pointed out that Resolution 374 (IV) ended with a recommendation by the General Assembly to the International Law Commission, so that the Commission could not merely take note of it. The Commission should decide whether the item should be placed on the priority list.

31. Mr. HUDSON agreed.

32. The CHAIRMAN suggested that the Commission accept the General Assembly's recommendation. Replying to a question by Mr. Córdova, he explained that it would not be necessary to discuss the question of the Regime of Territorial Waters jointly with that of the Regime of the High Seas.

33. Mr. BRIERLY thought it would be difficult to take a decision on this matter in the absence of Mr. François, who had been asked to submit a report on the Regime of the High Seas. It would be advisable to have his opinion on the subject.

34. Mr. SANDSTRÖM thought the Commission might for the moment merely put the subject on the Commission's agenda.

35. Mr. KERN (Assistant Secretary-General) said that the intention of the Assembly's Sixth Committee in making its recommendation on the Regime of Territorial Waters was to leave it to the International Law Commission to decide in what order it should study priority matters. The Assembly had merely recommended the Commission to include it on its priority list.

36. Mr. CORDOVA argued that by using the words "considering that the topics of the regime of the high seas and the regime of territorial waters are closely related", the Assembly wished them to be treated together.

37. Mr. SPIROPOULOS, Mr. HUDSON, and Mr. AMADO on the other hand thought there was no

obligation involved, and that the Commission was entirely at liberty to decide as it went along what method it should follow. It was sufficient at present to include the question of territorial waters in its priority list.

38. The CHAIRMAN agreed with Mr. Brierly that it would be well to await the arrival of the Rapporteur for the question of the Regime of the High Seas before taking a final decision; he suggested that item 2 of the provisional agenda be merely included in the priority list.

39. Mr. HUDSON hoped that the Commission could complete certain items at the present session, so as to report on them to the General Assembly. It should be possible to complete the study of items 3 (a), 4 and 8. Item 8 was less complicated than the other two and involved no controversial issue, so it could be dealt with first.

40. Mr. SPIROPOULOS supported this proposal.

41. Mr. el-KHOURY thought that item 8 should be dealt with before fixing the order for dealing with the other items.

42. This was not the view of the CHAIRMAN, who thought that the order of priority for the other two items in question should be fixed at once. The study of item 3 (a) was well advanced, and it might be decided to complete it at once after dealing with item 8, and then to pass on to item 4 which also could be dealt with fairly quickly. Only then would the other substantive questions come up and they certainly could not be completed at the present session.

43. Mr. AMADO and Mr. SPIROPOULOS favoured taking questions 8, 3 (a) and 4 at the beginning of the session, in that order.

44. Mr. el-KHOURY thought it would be better to postpone the study of item 4 until later as being the most difficult of all.

45. Mr. LIANG, (Secretary to the Commission) said that at its third session, the Sixth Committee, referring to the question of genocide, had given instructions to the International Law Commission with regard to item 4. Hence it would seem that the Assembly wished for a report from the Commission on that subject as early as possible. It was difficult to postpone the item, and the Commission should consider examining it following its study of items 8 and 3 (a), so as to be able to report to the next session of the General Assembly.

46. This view was shared by Mr. AMADO and Mr. HUDSON, who argued that the Commission need not make any statement on the principle involved, and would not have to draft any text.

47. Mr. CORDOVA said that the General Assembly had given the Commission instructions which it must carry out. The Assembly must know whether, for the prosecution of crimes against international law — a question at present under consideration — any international criminal jurisdiction was necessary or not.

48. The CHAIRMAN thought that when the provisional agenda was adopted, should any difficulty arise

4. Desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions: working papers by Messrs. Alfaro and Sandström (General Assembly resolution 260 (III) B of 9 December 1948).

5. Law of treaties: preliminary report by Mr. Brierly.

6. Arbitral procedure: preliminary report by Mr. Scelle.

7. Regime of the high seas: preliminary report by Mr. François.

8. Ways and means for making the evidence of customary international law more readily available: working paper by Mr. Hudson (Article 24 of the Statute of the International Law Commission).

9. The right of asylum: working paper by Mr. Yepes.

10. Co-operation with other bodies:

(a) Consultation with organs of the United Nations and with international and national organizations, official and non-official.

(b) List of national and international organizations prepared by the Secretary-General for the purpose of distributing documents (Articles 25 and 26 of the Statute of the International Law Commission).

11. Date and place of the third session.

as to the order in which items should be dealt with, it would always be possible to make alterations.

49. Mr. SANDSTRÖM thought there was a connexion between item 3 (a) and the preparation of a draft code under item 3 (b). These matters would require considerable study, and hence it would be a good thing to discuss item 4 before item 3.

50. Mr. SPIROPOULOS pointed out that it was impossible to discuss two subjects at once, and that item 3 (a) would have to be studied first, and then item 3 (b), which would thus become the fourth question on the agenda.

51. Mr. SANDSTRÖM was agreeable to this.

52. The CHAIRMAN thought that the Commission seemed to be unanimously in favour of considering the items in the following order: Items 8, 3 (a), 4 and 3 (b). It was not necessary at present to decide as to the other three larger issues: Arbitral Procedure, Regime of the High Seas, and the Law of Treaties.

It was so decided.

53. Mr. KERNO (Assistant Secretary-General) urged the Commission not to wait until the end of the session to deal with item 11 of the agenda, "Date and place of the Third Session". For financial reasons this would have to be decided at the latest by the end of June. Two sessions had been proposed for next year so as to be on the safe side. But the Commission would have to decide whether it really wanted to hold two sessions in 1951.

54. In reply to a question by Mr. el-KHOURY, Mr. KERNO (Assistant Secretary-General) said that no definite date had been fixed for the end of the present session, but that the maximum period authorized by the budget was 8 to 10 weeks. Hence the present session would be due to close about the end of July.

The meeting rose at 5.20 p.m.

40th MEETING

Tuesday, 6 June 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 CORDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris el-

KHOURY, Mr. A. E. F. SANDSTRÖM, 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).

Ways and means for making the evidence of customary international law more readily available: working paper by Mr. Hudson (article 24 of the Statute of the International Law Commission) and Comments on Judge Hudson's working paper on article 24 of the Statute of the International Law Commission (item 8 of the agenda) (A/CN.4/16 and Add.1; A/CN.4/27).

1. Mr. HUDSON, introducing the Working Paper (A/CN.4/16) he had prepared, said that his study was necessarily incomplete, since he could not know every foreign language. He asked Mr. el-Khoury to forgive him for not having mentioned the literature of Islam.

The Commission approved the manner in which its task was set forth in paragraph 5.

2. Referring to paragraph 7, Mr. HUDSON pointed out that in article 38 of the Statute of the International Court of Justice, the judicial decisions and the teaching were actually made subordinate to other sources of law, since subheading (d) stated that they were a "subsidiary means for the determination of rules of law". He asked whether the Commission shared the view he had expressed in paragraph 8.

3. Mr. BRIERLY entirely agreed with Mr. Hudson.

4. The CHAIRMAN emphasized the importance of the connexion between conventional law and the customary law.

The Commission approved the substance of paragraph 8.

5. Mr. HUDSON thought that sub-heading (b) of article 38 of the Statute of the International Court of Justice was not very happily worded. It would be better to say "international practice, as evidence of a general custom etc." He had felt it would be useful to try to set down what should be understood by "customary international law". After giving in paragraph 10 a list of works published in various countries other than the United States, he had set forth in paragraph 11 a few guiding principles.

6. In the French text of sub-heading (a) he would prefer "*de manière concordante*" to "*manière identique*".

7. Nearly all the treatises on the subject were in agreement to accept the four elements enunciated in sub-headings (a), (b), (c) and (d).

8. The CHAIRMAN pointed out that practice was not enough. Some authors believed that the idea of international custom did not imply general acquiescence; he personally held the opposite view. He believed that *opinio juris necessitatis* was essential. He asked whether Mr. Hudson considered that the two sources

mentioned in sub-headings (c) and (d) corresponded to this *opinio juris necessitatis*.

9. Mr. HUDSON replied that they did, and explained that this "*opinio*" must be shared by the States establishing the practice. He thought sub-heading (d) was not well translated into French, and that they should understand "être généralement admis sans protestation de la part d'autres Etats".

10. The CHAIRMAN pointed out the great danger involved in confusing practice and custom. Professor Guggenheim had endorsed a doctrine which made practice and custom analogous. He personally thought that a practice must have received general acquiescence, as was stated in the English text.

11. In reply to a question by Mr. Yepes, he said that regional custom was not excluded but that here, too, acquiescence was necessary, in this case by the regional community.

12. Mr. FRANÇOIS was afraid there were two different matters involved, since the Chairman had spoken of acquiescence, whereas Mr. Hudson had merely mentioned absence of protest.

13. The CHAIRMAN said that as acquiescence could be tacit, absence of protest was sufficient for acquiescence.

14. Mr. CORDOVA enquired whether "a number of States" in sub-heading (a) meant the most powerful states or those faced with a particular situation.

15. Mr. HUDSON said he had tried to avoid introducing the idea of power. But he did not think that practice by a single State was sufficient to establish custom.

16. Mr. CORDOVA said that international law was established by States with more frequent international relations, and hence primarily by the great powers. He thought that acquiescence by all States was necessary, not merely tacit assent.

17. Mr. FRANÇOIS enquired whether acquiescence must be universal.

18. The CHAIRMAN thought that implicit general acceptance was sufficient. This did not mean "universal".

19. Mr. AMADO, referring to sub-heading (b), mentioned that a contemporary French author had stated that the element "*diuturnitas*" was not as important as had been thought hitherto, and that a single precedent could be sufficient to create international custom. He wondered whether that was the case.

20. Mr. el-KHOURY asked Mr. Hudson for an example of a concordant practice which had received the acquiescence of a number of countries. Absence of objection might amount to acquiescence, but if the new practice had not been applied to particular States, could the absence of protest on their part be considered as implying acquiescence?

21. Mr. HUDSON said that in regard to the continental shelf for example there was a concordant practice by a number of States since 1942, and he mentioned several treaties and laws.

22. He found it difficult to define what was meant by "over a considerable period of time" (sub-heading (b)). States with a practice in regard to the continental shelf considered that it was consistent with international law (sub-heading (c)). In sub-heading (d) he preferred the wording in English: "acquiescence generally by other States in the practice", with the French text altered accordingly, as "dans la pratique d'autres Etats", was incorrect. What was involved was consensus of opinion proved by acquiescence.

23. Mr. el-Khoury had asked for an example of a rule of customary international law created by a practice receiving the acquiescence of other States. With regard to the continental shelf he must ask Mr. el-Khoury to wait 25 years. A nascent rule of international law was in the making. Personally he would hesitate to delete sub-heading (d), as he felt the repetition was necessary.

24. Mr. el-KHOURY asked for clarification as to when a principle could be regarded as receiving "general acquiescence".

25. Mr. HUDSON said that absence of protest was the criterion.

26. Mr. el-KHOURY could not see why any particular State should protest against agreements which did not concern it, and he thought sub-heading (d) was unnecessary.

27. The CHAIRMAN thought it would be better not to spend time on exceptional cases, since the Commission's task was to give its opinion as to what constituted custom. The purpose of the working document before them was to define how it could be decided that a custom had been established.

28. Mr. AMADO asked whether sub-heading (c) was in keeping with *opinio juris necessitatis*.

29. Mr. HUDSON said that the stipulation referred to in sub-heading (c) was given by practically all the authorities he had consulted.

30. Mr. BRIERLY thought that some of the Members of the Commission might want to suggest alterations to Mr. Hudson's working paper. He himself was not convinced that sub-heading (b) was necessary; what was required was *opinio juris necessitatis*. It had been known for this to arise at a moment's notice. For example in regard to the air, the moment the 1914 war broke out, the principle of sovereignty, which had been a matter of opinion up to then, was settled at once. Generally speaking, *opinio juris necessitatis* did not arise for a considerable time, but there were exceptions to the rule.

31. Mr. el-KHOURY shared Mr. Brierly's view, and cited the example of the Nürnberg principles.

32. Mr. HUDSON wondered whether he should delete the word "considerable".

33. Mr. LIANG (Secretary to the Commission) said that since Mr. Hudson's working paper was not intended as a draft of the Commission's report to the General Assembly, it was not necessary to scrutinise every word minutely. The document submitted by the Secretariat (A/CN.4/27) had studied Mr. Hudson's concrete proposals. He entirely agreed with Mr. Hud-

son as to the close relationship between conventional law and customary law; and, on this point he referred also to the publication, *Ways and means of making the evidence of customary international law more readily available*.¹

34. Mr. SANDSTRÖM argued that *opinio juris necessitatis* was relative, and that particular circumstances—e.g., positive recognition by States—could shorten the period required. What the Commission had to do, without entering too closely into detail, was to establish a general conception of what constituted a rule of customary law.

35. Mr. KERNO (Assistant Secretary-General) said that he had listened with the greatest interest to the discussion of paragraph 11. The exchange of views had been most helpful, and had shown that there was a considerable measure of agreement. Perhaps it was unnecessary to define custom. All that was required at present was agreement in general terms, and if this could be reached, it would be a constructive achievement.

36. Mr. YEPES felt that the word “required” in sub-heading (c) could not stand. Moreover, if, as was stated in sub-heading (c), a custom must be consistent with international law, it ceased to be a source for that law. With regard to the continental shelf, the custom was contrary to the prevailing international law. That point would have to be cleared up. He wondered how a custom could be invoked before the International Court of Justice at The Hague if it must first “be established as a fact by a competent international authority” (end of paragraph 11). Did a rule of customary law not exist until it was so established?

37. Mr. HUDSON said his view had been that a single State could not decide of its own accord that the constituents of a custom were present.

38. The CHAIRMAN thought that public opinion in the various States should be regarded as an international authority. What was required was a consensus of opinion expressed by the authorities which in any given State had the power to establish custom.

39. Mr. HUDSON said that what he had had in mind was the International Court of Justice.

40. The CHAIRMAN felt that national courts of justice were equally competent, since any court could establish the existence of a custom.

The Members of the Commission as a whole shared Mr. Hudson's views, with some slight shades of difference.

41. Mr. HUDSON suggested that a sub-committee be set up to revise the document he had prepared.

42. The CHAIRMAN thought it would be sufficient for Mr. Hudson himself to make slight alterations to his text to satisfy the Commission.

43. Mr. AMADO wondered whether it would not be preferable to cut out the part of the document giving the author's personal opinions. To bring these into line with the opinions of all the other members, changes

would have to be made on which it would be difficult to reach agreement.

44. Sub-heading (c) used the word “required”. Did that mean that there must be a law prior to the custom? Custom was the primordial source of law; but to judge from sub-heading (c) it had ceased to be so. It would be preferable to seek practical conclusions.

45. Mr. HUDSON suggested for sub-heading (c) the wording: “conception that the practice is not inconsistent with prevailing international law . . .” He pointed out that the authors of article 38 of the statute of the International Court, and of article 24 of the statute of the Commission, had no very clear idea as to what constituted international custom. Hence it would be useful to lay down general principles so as to be able to comply with the provisions of article 24.

46. The CHAIRMAN thought it was somewhat contradictory to state on the one hand that custom is the basis of law, and on the other that it must be consistent with law. He did not agree that this part of the report should be suppressed. The Commission might ask Mr. Hudson to alter some of the expressions he had used, in the light of the discussion which had just taken place.

47. Mr. YEPES supported the suggestion that the task be left to Mr. Hudson. He thought that custom could depart from prevailing international law; otherwise it had no *raison d'être*. He mentioned that custom had tacitly discarded article 18 of the League of Nations Covenant, relating to the registration of treaties.

48. Mr. HUDSON suggested inserting paragraph 12 at the beginning of paragraph 11.

The Commission approved this suggestion.

Paragraphs 13 and 14 called for no comment, and the Commission turned to Part I of the Report.

49. Mr. KERNO (Assistant Secretary-General), referring to Section A, paragraph 18, explained that at present an attempt was being made to speed up the publication of the Treaty Series. Thirty volumes had now been published.

50. On a proposal by Mr. FRANÇOIS, it was decided that the *Recueil international des traités du XIX^e siècle* and the *Recueil international des traités du XX^e siècle* of Descamps and Renault would be mentioned in the report.

51. Mr. HSU thought that a number of Chinese works might also be mentioned.

52. The CHAIRMAN, taking up a remark made by Mr. Hudson, pointed out that treaties were only important in the establishment of custom to the extent that they were effectively in force, and of course it was often difficult to tell whether a particular treaty was still in force. He wondered whether the Secretariat could try to draw up a list of treaties in force, and keep it up to date.

53. Mr. HUDSON feared that it would be an impossible task, since it involved ticklish questions; and the various contracting parties concerned often hesitated to commit themselves.

¹ United Nations publication, Sales No.: 1949.V.6.

54. Mr. KERNO (Assistant Secretary-General) was of the same opinion. He regretted that the General Assembly's ruling on the registration of treaties, under which contracting parties should also register certified statements regarding any subsequent action which involves a change in the parties thereto, etc. was not applied more strictly by Member States.

55. Mr. LIANG (Secretary to the Commission) said that the point raised by the Chairman was not new in the experience of the United Nations. As early as 1946, efforts had been made to seek information in that direction. With regard to multilateral treaties, the task was fairly simple. But he was extremely doubtful as to the possibility of such a survey in the case of bilateral treaties.

56. Mr. YEPES wondered whether multilateral treaties not ratified by all signatory states did nevertheless constitute evidence of established custom. He himself was inclined to believe that they did. In his opinion, a multilateral treaty signed but not ratified by a given State, but ratified by a large number of other signatory States, constituted evidence of the existence of custom; in virtue of that custom, such a treaty could be invoked even against States which had not yet ratified it, not as a treaty but as evidence of established custom. He asked that these remarks be included in the Report.

57. Mr. HUDSON agreed that conventions, even when not ratified, could constitute valuable material for establishing the existence of custom. This opinion would be recorded in his report.

58. Turning to Section B, Mr. Hudson regretted that, generally speaking, the works containing the decisions of international courts were not more widely distributed. This applied for example to the "Analyses of Decisions" published by the International Bureau of the Permanent Court of Arbitration.

59. In Section C, Mr. FRANÇOIS suggested modification of the second sentence of paragraph 37, as being rather too narrow in meaning. Actually, according to another theory, the judge must apply international law as being higher in the hierarchy than national law.

60. The CHAIRMAN asked Mr. Hudson to embody a reservation on this subject in his report.

Sections D and E did not give rise to any discussion.

61. Mr. HUDSON proposed adding to paragraph 46 the Mirkine Guetzevitch and Peaslee collections;¹ and he regretted that material on diplomatic correspondence was lacking.

61a. Mr. KERNO (Assistant Secretary-General) referring to paragraph 60, said that the Secretariat was often asked to publish its legal opinions. Since these were based exclusively on international law, the reserve recommended by Mr. Hudson in regard to opinions given by legal advisers to governments would not be necessary. However, an account of the historical background of the subjects involved in the opinions would be

required; and this would make the publication too bulky. 62. Turning to Part IV, Mr. HUDSON laid special emphasis on the following sentence in paragraph 66 as being especially important: "Indeed, in some capitals—particularly those of some of the newer States—it seems possible that no library of international law exists."

63. Part V, he explained, dealt with questions on which the International Law Commission would have to make recommendations. The Secretariat might study the question raised in paragraph 74 and report to the Commission.

64. Mr. LIANG (Secretary to the Commission) thought that in regard to paragraph 74, the Commission should confine its discussion to the question of publishing documents not yet printed, rather than consider the problem of distribution. It was extremely difficult to expand distribution of the *Treaty Series* for budgetary reasons, since the General Assembly would have to allocate more money for the purpose.

65. Mr. HUDSON considered that the budgetary aspect of the question need not concern the Commission, which would merely note that the distribution of certain documents was inadequate and report to that effect. That was as far as its duty went. The General Assembly could then take whatever action it thought fit on the recommendation.

66. The CHAIRMAN agreed, and regretted that international law was treated in the budget as a poor relation.

67. Mr. KERNO (Assistant Secretary-General) added that actually the budgetary question did present great difficulty, but that the Commission's task was to carry out the principle stated in article 24 of its statute. If it made any recommendation involving expenditure, it was for the Fifth Committee to decide as to the budgetary aspect. In point of fact, the present mailing list of the *Treaty Series* was under revision, and the arrangement might be made more efficacious even within the present budgetary allocation.

68. Mr. el-KHOURY thought it would be well to make a concrete recommendation to the General Assembly, giving a list of documents for distribution and a mailing list. A request in this form would have more chance of acceptance. On the other hand, it would have to be stated whether any given volume should be printed by the United Nations or bought from the publisher. Also, the mailing list should be drawn up carefully, as a number of States received from the United Nations whole boxes of documents which they did not even open.

69. The CHAIRMAN pointed out that at the moment the Commission had only to deal with the question of distribution of the *Treaty Series*. There seemed to be no difference of opinion on this, and paragraph 74 could be approved, especially as it merely called on the Secretariat to submit a report on the matter.

70. In reply to a question by Mr. François, Mr. KERNO (Assistant Secretary-General) thought he could submit a brief report during the present session. In-

¹ Boris Mirkine-Guetzevitch, *Les Constitutions Européennes*, Paris, Presses Universitaires de France, 1951. 2 Vols; Amos J. Peaslee, *Constitutions of Nations*. The Rumford Press, Concord, N.H. 1950, 3 Vols.

cidentally, United Nations publications were available for sale to the general public and could thus be acquired by any one who did not receive them free of charge. In any case, it was impossible to distribute the *Treaty Series* to every law professor in the world.

Paragraph 74 did not give rise to any comment. The Commission approved the Secretariat's suggestion (A/CN.4/27 end of paragraph 4) that a complete index of the League of Nations Treaty Series be prepared.

71. Mr. HUDSON turned to paragraph 76, which contained two suggestions he felt to be very useful.

72. Mr. LIANG (Secretary to the Commission) argued that these suggestions would also involve budgetary and administrative considerations, since the divisional staff was insufficient for such a task. But obviously only the United Nations library was competent to carry it out.

Paragraph 76 was approved.

73. In reply to Mr. Hudson, Mr. KERNO (Assistant Secretary-General) said that on the subject of paragraph 78 the Secretariat might get in touch with the International Court of Justice to enquire as to the distribution of the Court's publications.

Paragraphs 79, 80, 81 and 82 were approved.

74. Mr. LIANG (Secretary to the Commission) asked Mr. Hudson whether, when stating, as recorded in paragraph 83, that the Commission might wish to urge that the publication of Professor Lauterpacht's *Annual Digest* be continued, he had taken into consideration the financial difficulties involved in printing this collection.

75. Mr. HUDSON replied that it was no part of the Commission's duty to deal with financial considerations, but that if the report mentioned the Commission's wish, it could be quoted in support of any application for possible financial assistance to that publication.

76. Mr. SANDSTRÖM was afraid that the action suggested in paragraph 83 would overlap with Professor Lauterpacht's *Annual Digest*.

77. A similar objection was raised by Mr. KERNO (Assistant Secretary-General) in respect of paragraph 85 and the Peaslee collection. It was agreed that such a collection should include the Constitutions of all States Members and non-members of the United Nations.

78. Referring to paragraph 86, Mr. LIANG (Secretary to the Commission) pointed out that the Secretariat was at present making a collection covering national legislation on the regime of the high seas and on treaties.

79. Mr. KERNO (Assistant Secretary-General) said on the subject of paragraph 91 that the Secretariat already had in hand such a *répertoire*, in the form of a commentary on the Charter.

80. With regard to paragraph 92, Mr. HUDSON considered the reply from UNESCO on the subject of a possible revision of the Brussels Convention of 1886 for the Exchange of Official Documents (See A/CN.4/16/Add.1) as unsatisfactory. He felt that a

world convention on the subject would be most valuable.

Paragraphs 83, 84, 85, 86, 87, 88, 89, 90, 91, 92 and 93 were approved.

81. The CHAIRMAN declared that the Commission had now dealt with all the recommendations, and thanked Mr. Hudson for the working paper he had submitted.

The meeting rose at 1.10 p.m.

41st MEETING

Wednesday, 7 June 1950, at 10 a.m.

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Desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions (item 4 of the agenda) (A/CN.4/15; A/CN.4/20)	8

Chairman: Mr. Georges SCELLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. Roberto CORDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi Hsu, Mr. Manley O. HUDSON, Mr. Faris el-KHOURY, Mr. A. E. F. SANDSTRÖM, 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).

Desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions: working papers by Messrs. Alfaro and Sandström (General Assembly resolution 260 (III) B of 9 December 1948) (item 4 of the agenda) (A/CN.4/15; A/CN.4/20)

1. The CHAIRMAN thought, as did the Rapporteurs, that the more negative view, that of Mr. Sandström (A/CN.4/20), should be taken first.

2. Mr. SANDSTRÖM said that the question before the Commission admitted of some diversity of opinion. One of the chief factors, to his mind, was the present political situation.

Mr. SANDSTRÖM began the reading of his report.

3. After paragraph 2 of the report had been read, Mr. CORDOVA pointed out that Article 2, paragraph 6, of the Charter extended the provisions of the Charter

to non-member States. He wondered whether the composition of the proposed court could not be extended to include States not members of the United Nations.

4. Mr. SANDSTRÖM replied that he had considered the court only as within the framework of the United Nations, because he regarded the United Nations as universal in principle. In paragraph 2 (b) he had spoken of a "jurisdiction universal in principle".

5. The CHAIRMAN remarked that Mr. Sandström seemed inclined to the conclusion that the International Criminal Court must necessarily be established within the framework of the United Nations. Later on, the report considered whether the court should be regarded as one of the principal organs of the United Nations.

6. He personally did not think that the interpretation of the General Assembly resolution had necessarily such implications. The resolution did not state that the international judicial organ must necessarily be a United Nations organ. Its establishment might be decided by a convention concluded by a group of States. Mr. Sandström had postulated a dilemma; either the court will be established in such and such a way, or it cannot be established at all. The question at issue was whether it was desirable to establish a criminal court.

7. Mr. HUDSON agreed with the Chairman. The main question was whether it was desirable and possible to establish the proposed organ. The General Assembly resolution did not stipulate that court must be a principal organ of the United Nations. In fact, the Charter alone could set up a principal organ of the United Nations. He hoped the Commission would leave aside the question of method.

8. Mr. KERNO (Assistant Secretary-General) referred to the discussions in the Sixth Committee at the third session of the General Assembly, on the draft Convention on Genocide and the vicissitudes of the question of an international criminal jurisdiction. The initial vote had rejected the idea of establishing such a jurisdiction.¹ Later, a formula had been adopted referring to national courts or an international criminal court,² and at the same time a draft resolution had been submitted³ asking the International Law Commission to consider whether it was desirable and possible to establish an international criminal jurisdiction. The wording of Article VI of the Convention on Genocide ("... such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction") was very conservative, as a number of States had indicated that they could not accept the Convention of Genocide if the jurisdiction of the international tribunal were compulsory. The wording of resolution 260 (III) B, likewise left the International Law Commission free to make whatever proposals it thought fit regarding the establishment of the tribunal. Any criminal court it might have in

mind was not necessarily to be an organ of the United Nations.

9. The CHAIRMAN wondered whether it would not be wise to postpone the question, and to take it up again after the Commission had considered whether it was desirable and possible to set up an international criminal jurisdiction. These were the two essential points.

10. Mr. SANDSTRÖM pointed out that in paragraph 2 (a) he had discussed the possibility of establishing the court outside the framework of the United Nations. He found it difficult to imagine how such a court could have its jurisdiction limited. The Convention must be open to all States willing to sign it.

11. The difficulty was to know in what circumstances States would be prepared to establish such a court with jurisdiction which in principal would be universal.

12. The CHAIRMAN also felt that the jurisdiction of the court must be universal. Any State, even if not a member of the United Nations, should be at liberty to accede to the Convention.

13. Mr. HUDSON had been surprised to read that the first alternative interpretation of resolution 260 (III) B presented very few difficulties (paragraph 2 (a) of Mr. Sandström's report). He personally felt quite the opposite—that it presented a great many difficulties. The question was to decide whether it was desirable and possible to establish some form of judicial organ.

14. The CHAIRMAN pointed out that the Commission had also been invited to study the question of conferring criminal jurisdiction on a Chamber of the International Court of Justice. Hence, it would also have to choose between a special court and a Criminal Chamber of the International Court. But the two main questions were whether the establishment of such a jurisdiction was desirable and whether it was possible.

15. Mr. CORDOVA said that the question was whether a tribunal was to be established which would be independent of the United Nations, or a tribunal within its framework. He felt that Mr. Sandström had only considered the second alternative. Having once decided this point, the establishment of a tribunal would present no difficulties. Did that mean it was desirable to establish it? And Mr. Sandström had not discussed the possibility of establishing the tribunal outside the framework of the United Nations.

16. Mr. SANDSTRÖM said he had not discussed that possibility because he had felt that it was for the States signatories to the Convention setting up the tribunal to do so.

17. Mr. CORDOVA said that the question was whether it was desirable to establish the tribunal within the framework of the United Nations or outside it.

18. Mr. AMADO thought it would be better to decide first the preliminary question whether it was desirable to establish such a tribunal or not.

19. Mr. BRIERLY also felt that the Commission might adjourn discussion of this point. The problems with which the General Assembly resolution was concerned would be just the same whether a judicial organ

¹ See *Official Records of the General Assembly, Third session, part I, Sixth Committee*, 98th meeting, page 381.

² *Ibid.*, 129th meeting, page 684.

³ By the Netherlands and Iran. *Ibid.* Annexes, page 27 Doc. A/C.6/248 and A/C.6/248/Rev.1.

were set up within the framework of the United Nations or outside it.

Mr. SANDSTRÖM went on with the reading of his report.

20. Mr. HUDSON remarked that paragraph 2 (c) inverted the order of the question raised in the General Assembly resolution.

21. Mr. SANDSTRÖM replied that the reason was explained in paragraph 3.

22. Mr. HUDSON thought the question might be approached by considering the need for establishing such a jurisdiction. First of all, was such an organ necessary? If in fact it were, then it might perhaps be desirable. Later the possibility of supplying that need could be studied.

23. Mr. SANDSTRÖM thought that the principle of the desirability of the tribunal was beyond discussion. But would its establishment be desirable? That was an entirely different matter, depending on the efficacy of the tribunal proposed.

24. Mr. HUDSON thought on the contrary that the question whether the tribunal were desirable must be discussed.

25. Mr. SANDSTRÖM regarded the question of desirability as one of objective assessment of facts.

26. The CHAIRMAN said he was struck by the fact that the Rapporteur tended to identify desirability with possibility. The tendency seemed to arise from Mr. Sandström's argument that a tribunal would not be desirable unless it were feasible. He personally believed that the tribunal might be desirable if it were wanted on general ethical grounds. The question was whether in international society there existed a need arising from the lack of an international penal court.

27. Mr. SANDSTRÖM said he had not wished to take up an abstract position; his object had been to study the question from the practical standpoint.

28. The CHAIRMAN replied that the whole development of the report was concerned with the second issue, that of possibility. The first issue was a question of ethics.

29. Mr. FRANÇOIS suggested that Mr. Sandström present the whole of his report, and that the discussion be continued after it had been read.

30. Mr. CORDOVA also felt that the Commission would save time by completing the reading of the report and then coming back to the first point which was obviously the preliminary one.

31. Mr. el-KHOURY said he had gathered from a reading of the report that its author took it for granted that an international judicial organ was desirable. But Mr. Sandström's thesis was that it was impossible to establish it, and had argued that to desire something which was impossible would be futile. The Commission should go on with the study of Mr. Sandström's report, and examine the possibility of establishing the court.

32. The CHAIRMAN was less convinced than Mr. el-KHOURY that the question of desirability was a foregone conclusion; but one thing he was sure about,

was that the General Assembly had asked the Commission to give its opinion on the point.

33. Mr. YEPES thought Mr. François' proposal was the most logical. Obviously the question of possibility was secondary, and the question of desirability was the main one.

34. Mr. SANDSTRÖM, continuing with the reading of his report, said that for the sake of clarity it would be preferable to deal first with the question of establishing a special penal court and then to discuss the establishment of a criminal chamber under the International Court of Justice. He read out paragraphs 4, 6, 7 and 8, and referred to his view already expressed, that the terms of reference given by the General Assembly covered only the establishment of a tribunal which would be a United Nations organ.

Mr. SANDSTRÖM next read paragraphs 9 and 10.

35. Mr. ALFARO did not think it would be necessary for the Charter to be amended in order for the General Assembly to establish a criminal court of justice, whether open to non-member States or not. It was a question of nomenclature. Supposing that a convention, signed at the suggestion of the United Nations by its Members, were to set up an international criminal court and the convention were open for signature by any country in the world, it would not be necessary to determine whether that constituted a special organ or a principal organ of the United Nations. It might be a separate organ; it need not be specified. If such a court were set up as a universal organ, it would constitute a new body created by the various States in the world, and not included in the list given in Article 7 of the Charter. Hence it was not necessary to amend the Charter in order to set up an international criminal court. But it would be necessary to amend the Statute of the International Court of Justice if a new chamber were created within its framework.

36. Mr. HSU agreed with Mr. Alfaro.

37. The CHAIRMAN informed Mr. Alfaro that the Statute of the International Court of Justice had become an integral part of the Charter and hence it could not be modified without modifying the Charter. He felt that the discussion was most useful, as the Commission would have to return to that point.

38. Mr. CORDOVA thought that if, in considering how to establish the tribunal, the Commission decided that it should come under the United Nations, it would be faced with two possibilities; either the establishment of an organ independent of the International Court of Justice, which would necessitate amending the Charter; or the creation of a special chamber of the International Court, which would involve modification of its Statute, which had the same legal status as the Charter. To carry out the latter measure, the same procedure would have to be followed as for amending the Charter; though of course it was not precisely the same thing as amending the Charter.

39. Mr. HUDSON did not think it necessary to discuss the point. Article 68 laid down a different procedure for amending the Statute from that required for

amending the Charter, since it contemplated that this procedure would be followed by non-member States which had accepted the Court's Statute.

40. Mr. SANDSTRÖM recalled that this report started from the assumption that the tribunal to be established would be an organ of the United Nations.

41. Mr. KERNO (Assistant Secretary-General) pointed out that to set up a principal organ of the United Nations, an amendment to the Charter would be required. Mr. Sandström seemed to wish to stress in his report that to oblige Members to accept an international penal court, such an amendment would be essential. But a General Assembly decision could set up an organ having jurisdiction over the States signatories to the relevant convention.

42. Mr. HUDSON thought the Commission was straying away from the question without discussing it.

43. The CHAIRMAN agreed that the point under discussion was not the main point at issue; but the Assembly had asked the Commission to deal with it. Before it could decide on one particular procedure, it must examine them all. The third question to be discussed was what authority would establish the jurisdiction concerned.

Mr. SANDSTRÖM read paragraphs 11 and 12 of his report.

44. Mr. CORDOVA thought Mr. Sandström held the view that the General Assembly was not competent to make the jurisdiction binding, and could not establish the court as an organ of the United Nations; but if the various States decided to make the competence of the court binding, they could easily do so by means of a convention.

45. Mr. SANDSTRÖM replied that he had not supposed that the court could not be established because its jurisdiction could not be made binding. He had stated that if the court were created, its jurisdiction would not be binding on Members of the United Nations without their consent.

46. Mr. YEPES suggested that a liberal interpretation be given to the Statute of the International Court of Justice; he argued that, in virtue of article 26, paragraph 2 of that Statute, it could be regarded as itself constituting a criminal chamber.

47. Mr. HUDSON objected that under article 34, paragraph 1, only States and not individuals may be parties in cases before the Court, and that under General Assembly resolution 260 (III) B, the Commission at the moment was concerned with the trial of individuals.

48. The CHAIRMAN said that the point raised by Mr. Yepes touched on the question of the criminality of States.

49. Mr. KERNO (Assistant Secretary-General) had had the same notion as Mr. Yepes with regard to the advisory opinion which could be requested of the Court under Article 96 of the Charter "on any legal question". He wondered whether it would not be possible to include under the provisions of Article 96 questions of international criminal law—e.g., the question

of the criminality of States. But at the moment the question at issue concerned the trial of individuals.

50. Mr. CORDOVA pointed out that the tribunal under discussion would have the power to pass sentence, which was not the case with an advisory opinion.

51. Mr. YEPES said he had raised this general question for the Commission to think over.

52. The CHAIRMAN said there was no question but that the jurisdiction of the penal court must be compulsory. The analogies drawn between the criminal court and the present International Court of Justice were unsound since recognition of the competence of the International Court was optional.

53. Mr. ALFARO said that the question of jurisdiction to be studied by the Commission was determined by the way it was put in resolution 260 (III) B. Hence the question raised by Mr. Yepes was not before the Commission.

54. Mr. HUDSON supported this view.

Mr. SANDSTRÖM read paragraph 13.

55. The CHAIRMAN said that the second conclusion must not be taken literally. The jurisdiction of the court would be binding on signatory States with respect to their own nationals.

56. Mr. SANDSTRÖM said he had regarded the jurisdiction as not compulsory on the grounds that it would only be compulsory for States signatories to the convention.

57. Mr. HUDSON thought that the first conclusion did not help matters. The question was whether the court could function. With regard to the second conclusion, the jurisdiction of the court would be such as the Convention conferred on it, and might be compulsory in so far as individuals were concerned. There was no point in discussing that particular question.

58. The CHAIRMAN agreed that the question had not arisen; but he felt that a court with competence dependent on a compromise was inconceivable. It would seem to conflict with the notion of a criminal court.

59. Mr. CORDOVA cited Article 2, paragraph 6 of the Charter. If the Charter were amended so that a criminal court could be set up within the framework of the United Nations, such a court would help to maintain international peace and security. Thus Article 2, paragraph 6 would be applicable. There would be an obligation on all States, even if they were not members of the United Nations; and if, for example, a guilty person took refuge on the territory of a non-member State, the latter would have to hand him over for trial by the court.

60. Mr. SANDSTRÖM did not accept this interpretation as correct. Such an obligation could not be deduced from Article 2, paragraph 6. In any case, he saw no point in raising the question.

61. Mr. HUDSON shared this view.

62. The CHAIRMAN considered that it was useful all the same to examine one of the consequences of establishing the court.

63. Mr. YEPES thought the first conclusion of paragraph 13 was too broad in conception. All that was needed was already stated if the paragraph stopped at "the International Court of Justice". In order to create a chamber of the International Court, it was not necessary to amend the Court's Statute, as article 26 of that Statute provided for the establishment of a new chamber.

64. The CHAIRMAN thought Mr. Yepes' remark was significant; but the Commission was not called upon at the moment to make any decision on Mr. Sandström's report.

65. Mr. HUDSON reserved his attitude on paragraph 14.

66. Mr. YEPES asked what were Mr. Hudson's objections to paragraph 14; but the CHAIRMAN felt that such matters could be raised when Mr. Alfaro's report was presented.

67. Mr. SANDSTRÖM continued with the reading of his report, and replying to a question by Mr. Hudson, pointed out that the discussion in the League of Nations mentioned in paragraph 25 was that referred to on page 11 of the *Historical survey of the question of international criminal jurisdiction*.⁴

68. Mr. HUDSON did not think that the second sentence in paragraph 27 gave a true picture of the situation. He wondered whether there really was any international customary law on the subject at present.

69. Mr. KERN (Assistant Secretary-General) thought that the General Assembly resolution re-stating the principles of the Nürnberg trial was of some importance for the development of custom.

70. This was also the opinion of Mr. BRIERLY, who thought the members of the Commission were bound by that resolution, even if they did not endorse it.

71. Mr. ALFARO, supported by Mr. YEPES, argued that the resolution had brought about a sudden growth of customary law which could not be disregarded.

72. Mr. CORDOVA, on the other hand, wondered how a single act, even though it brought about a change in the legal situation, could establish custom, which essentially involved repetition.

73. The CHAIRMAN pointed out that it was not a single act that was involved; the Assembly resolution, in conjunction with the Charter and judgment of the Nürnberg Court, and the manifestations of public opinion, constituted a series of acts of a similar nature. In any case, in certain circumstances, a single act could establish custom, where it was unanimously accepted by world opinion.

74. Mr. ALFARO shared this view, adding that customary law was not necessarily a practice which had gone on for years. It might arise out of a series of acts which had taken place within a short space of time, and from which a number of general rules had been evolved.

75. Mr. CORDOVA argued that the Charter and the

judgment of the Nürnberg Court had not created custom but had modified the law.

76. Mr. BRIERLY thought that this point of view disregarded the fact that the Nürnberg Court had declared that custom already existed—e.g., the Briand-Kellogg Pact—and that no new rule of law was involved.

77. Mr. HUDSON replied that the Nürnberg Court had nevertheless disregarded the very significant reservations made on the subject of the Briand-Kellogg Pact, reserving the right of legitimate defence and the right to choose that defence.

78. Mr. CORDOVA agreed with Mr. Hudson, adding that while the Briand-Kellogg Pact had designated aggressive war as a crime, it had not proposed any international sanction against it.

79. The CHAIRMAN thought that the Pact did propose a sanction, by allowing any State to go to the assistance of any other State which was a victim of aggression.

80. With regard to paragraph 28. Mr. Sandström said in reply to a question by Mr. Hudson that there were at present a number of rules of international criminal law which could be applied by a tribunal, so that such a tribunal could be established forthwith.

81. Mr. ALFARO pointed out that in paragraphs 14 and 28 Mr. Sandström examined the question whether it was desirable and also possible to establish an international criminal jurisdiction. Those two paragraphs showed that there was no obstacle from the legal point of view.

82. With reference to paragraph 29, the CHAIRMAN wondered whether crimes which were not inter-state in character could be regarded as coming under Article 7, paragraph 2 of the United Nations Charter.

83. Mr. YEPES made a reservation regarding the last two lines of paragraph 30.

84. A propos of the same article. Mr. BRIERLY pointed out that the Commission should deal with the criminality of individuals and not of States.

85. Mr. SANDSTRÖM agreed to omit from paragraphs 30 and 31 any mention of States as defendants.

86. With regard to paragraphs 30 and 31, the CHAIRMAN pointed out that various proposals had been made in the past to set up an international organ for public prosecution. A commission set up by the French Foreign Ministry, for example, had studied the possibility of establishing an international public prosecutor's department. No such organ existed at the present time, but the possibility could be contemplated.

87. Mr. SANDSTRÖM explained that paragraph 30 of his report was not concerned with a prosecuting body, but with means for bringing an accused person before a tribunal.

88. The CHAIRMAN thought that paragraph 37 was chiefly of interest to South American and other States where criminal legislation did not provide for judgments *in contumaciam*.

⁴ United Nations publication, Sales No. 1949.V.8.

89. Mr. CORDOVA agreed that the question of contumacy should be given special attention.

90. Mr. YEPES felt that the arguments put forward by Mr. Sandström against the establishment of an international criminal court showed that while it was difficult, it was not impossible. The International Law Commission could not abandon a project merely because it was difficult to put into execution.

91. Mr. SANDSTRÖM asked whether an international tribunal of the type contemplated could hope to attain the proposed objective—e.g., the suppression of the crime of genocide.

92. The CHAIRMAN mentioned that Mr. Sandström's report included a number of arguments against the setting up of an international tribunal. Yet his conclusion was not that the establishment of such an organ was impossible. With regard to genocide, for example, some States would wish to keep their domestic jurisdiction, whereas others (France, for example) favoured an international jurisdiction.

93. The question of judgment *in contumaciam* arose in national legislations also, but these continued to function all the same.

94. Mr. el-KHOURY thought that all the disadvantages of an international criminal jurisdiction cited by Mr. Sandström were to be found in national jurisdictions as well. Possibly some of them were more obvious in relation to international jurisdiction, but that was no argument for challenging the usefulness of an international judicial organ with competence in the criminal field.

95. Replying to a question by the Chairman concerning paragraph 38, Mr. SANDSTRÖM said he would prefer, if the circumstances arose, to see the defects of the Nürnberg trial repeated, rather than have an international tribunal incapable of pronouncing a judgment and punishing the guilty parties.

96. Mr. ALFORA argued that world opinion had demanded the establishment of an international court long before the Nürnberg trial. He mentioned as an example the "International Association of Criminal Law" set up immediately after the First World War. Hence the argument that the desire to establish an international criminal jurisdiction had originated in certain criticisms of the Nürnberg trial was unacceptable.

97. Mr. CORDOVA shared this view. Moreover, as he pointed out, at Nürnberg the victors had tried the defeated, a fact which had been criticized the world over. They were now contemplating the establishment of a court which would try criminals on both sides. In a war, crimes against humanity might be committed by both sides, and the Nürnberg Court in trying only the defeated had not shown an absolute regard for justice.

98. Mr. AMADO wondered whether, in the event of another war, both sides would summon their respective criminals to appear before an international tribunal.

99. Mr. KERNO (Assistant Secretary-General) agreed that the Nürnberg Court had only been able to function by reason of the total defeat of one of the parties to

the conflict, and a complete agreement between the victors; but the Commission must not start out from the assumption that aggressors might be the victors, as that would mean the negation of all international law.

100. Mr. YEPES thought that all the arguments now raised against the establishment of an international criminal jurisdiction were brought out whenever there was any question of taking a step forward in the field of international law.

Paragraphs 39 and 40 gave rise to no discussion, and the CHAIRMAN ruled that the study of the report was concluded.

The meeting rose at 12.55 p.m.

42nd MEETING

Thursday, 8 June 1950, at 10 a.m.

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Chairman: Mr. Georges SCALLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L. BRIERY, Mr. Roberto CORDOVA, Mr. J. P. A. FRANCOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris el-KHOURY, Mr. A. E. F. SANDSTRÖM, 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).

Communication by Mr. Hudson, retiring Chairman, concerning a telegram from the Minister of Foreign Affairs of the People's Democratic Republic of China

1. Mr. HUDSON said that about 7 p.m. on 6 June he had received a telegram from the Secretary-General of the United Nations, addressed to the Chairman of the International Law Commission. The telegram had been sent in error to The Hague, and had been forwarded from there. It was dated 5 June. He did not know whether it would have arrived in time for the opening meeting of the present session if it had not been wrongly addressed.

2. In the telegram, the Secretary-General of the United Nations, at the request of the Minister for

Foreign Affairs of the People's Democratic Republic of China, transmitted a cable from the Minister, dated 5 June. As the Commission had already taken a decision¹ on the question raised in the telegram, and had rejected the proposal that Mr. Hsu cease to be one of its members, he wondered whether there was any point in reading the telegram, which was very long. The ending read: "Please note and reply by cable, and transmit the telegram to the International Law Commission".

3. Mr. BRIERLY proposed that the telegram should not be read out, since it contained a personal attack on Mr. Hsu.

4. Mr. HUDSON said he saw no personal attack against Mr. Hsu in the telegram.

5. Mr. FRANÇOIS stated that if he had been present at the first meeting, he would have supported the Chairman's ruling that Mr. Koretsky's proposal was out of order, for the reasons given by the other members of the Commission.

Desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions: working papers by Messrs. Alfaro and Sandström (General Assembly resolution 260 B (III) of 9 December 1948) (item 4 of the agenda) (A/CN.4/15; A/CN.4/20) (continued)

6. Mr. ALFARO, the Rapporteur, said he would confine himself to dealing directly with the questions before the Commission, and if necessary refer to certain passages in his Report (A/CN.4/15).

7. General Assembly resolution 260 (III) B put three distinct questions to the Commission. The first was: "Is it *desirable* to establish an international judicial organ for the trial of persons charged with genocide and other crimes?" This question was of the utmost importance. If "*desirable*" meant "*useful*", the question was not difficult to answer. But could the Commission say that it was not of advantage to the peace and security of the world to institute an international criminal jurisdiction vested with power to try and to punish those persons who, acting for the States they ruled, destroyed the peace and security of mankind? Any answer which could be given in respect of the community of States must be given also in respect of any national community. In both classes of community, there might be aggressors and disturbers of the peace, and it was necessary and desirable that some form of criminal jurisdiction exist, aimed at the punishment of disturbances of the public order.

8. Even if it were considered that the establishment of such a jurisdiction was not feasible, it was difficult to admit that it was not desirable. For that reason, at the previous meeting he had called attention to paragraph 14 of Mr. Sandström's Report (A/CN.4/20), written by Mr. Sandström after he had pointed out the serious obstacles to its realization to be found, in his opinion, in the political situation of our day.

9. His own answer to the question of desirability was given, in paragraph 128 of his Report, and in support of that answer he had referred to the universal mobilization of public opinion on behalf of the establishment of an international criminal jurisdiction which had taken place in the last thirty years (see A/CN.4/20, Part II: "Evolution of the Idea of an International Criminal Jurisdiction"). He cited article 227 of the Treaty of Versailles in which that sentiment was crystallised.

10. Since 1920, the idea of an international criminal court had had the support of a series of eminent jurists. An imposing amount of literature had been devoted to it, and many decisions in its favour taken by the official or unofficial groups listed in paragraphs 117-119 of his Report and in the remarkable work of the Secretary-General entitled "The Background of the Problem of International Criminal Jurisdiction" could be cited.

11. He then read out the end of Part III of his Report (from paragraph 120) in which he had quoted M. Raymond Poincaré and M. J. A. Roux as favouring the idea of an international criminal jurisdiction. He suggested, in conclusion, that the Commission might answer the first question contained in resolution 260 (III) B by expressing the opinion that it was desirable to establish an international judicial organ for the trial of persons charged with genocide and other crimes, with jurisdiction conferred by international conventions.

12. The CHAIRMAN observed that Raymond Poincaré was one of the most practical-minded statesmen France had ever had, and that J. A. Roux was an equally practical-minded criminal lawyer. He made this point to anticipate any criticism that the quotations were from mere theorists.

13. Mr. SANDSTRÖM said he was not a cynic, and he agreed that the ideal would be to establish an international criminal jurisdiction. But it was not enough that such a jurisdiction was desirable. He was only too well aware of the difficulties involved, and he was anxious that such a jurisdiction should be efficacious. Otherwise, it was doubtful whether it would be desirable to establish it. As J. A. Roux had put it: "Time works for it", but he was not convinced that the moment had yet come.

14. Mr. AMADO paid tribute to the work of Mr. Alfaro as evidence of his faith and optimism. He was sure he was expressing the feelings of all the jurists in his country in saying that unquestionably it was desirable to establish such a jurisdiction. Mr. Alfaro had cited an impressive list of organizations in support of his thesis. A still longer list could be drawn up of organizations desiring peace. If wishing alone were sufficient, the task would be easy. He did not see how the type of court in question would function; nor could he accept the statement in the last paragraph of Part II, Section 3, of the report (para. 17). He could not believe that establishment of the court could prevent war. Unquestionably it was desirable, but he did not see how it was possible.

15. Mr. FRANÇOIS entirely agreed with Mr. Alfaro as to the establishment of an international criminal

¹ See Summary record of the 39th meeting, para. 18.

jurisdiction being desirable. But he wondered whether Mr. Alfaro was not being too optimistic when he said that the feeling that such an institution was desirable was evident throughout the world. A jurisdiction was certainly desired, but to judge the actions of opponents.

16. He wondered whether Mr. Alfaro could produce evidence that there had been a desire on the part of the Allies in the recent world war to submit to international jurisdiction war crimes committed in the ranks of the Allied forces. Obviously the seriousness of such crimes could not be compared with that of the crimes committed on the side of the Axis; but it could not be denied that war crimes were committed on the Allied side. Yet he had never seen any evidence of a desire to submit those crimes to an international jurisdiction.

17. Mr. ALFARO felt that the question put by Mr. François referred to the application of the principle rather than to the principle itself. He contemplated a situation in which the judicial organ under discussion would judge crimes committed by victors and defeated alike, as well as crimes committed in peacetime, genocide for example. He did not know of any publication which had called for the indictment of members of the Allied forces who had committed war crimes. But any person guilty of war crimes would have to be tried by the international tribunal.

18. Mr. el-KHOURY pointed out that Part I of Mr. Alfaro's report dealt only with the question whether the establishment of a court was desirable, and concluded that it was. The Commission too had to answer that question. He himself was anxious that such an organ should be established. It might transpire that what he desired was impossible, but that did not prevent him from desiring it.

19. Mr. HUDSON paid tribute to Mr. Alfaro for his most valuable report, though he wondered whether the list in paragraphs 116 and 118 of the report was not presented in an unduly impressive manner. Certainly, the idea had evolved within the last few years, and people who were strong advocates had had resolutions adopted by organizations. But the value of such resolutions must not be over-estimated. He knew by personal experience that often enough they mean very little.

20. He would remind them that the Convention for the Creation of an International Criminal Court, opened for signature at Geneva in 1937 (see A/CN.4/15, para. 26), had never been ratified, although signed by thirteen States. Professor Giraud had pointed out that in certain circumstances, for political reasons, a State might be anxious not to prosecute particular individuals in its own courts, preferring to hand them over to an international court. That was a notion which might open up new avenues. The Committee on the Progressive Development of International Law and its Codification convened in 1947 expressed itself very conservatively in its report: "Its judgment... may render desirable the existence of an international juridical authority to exercise jurisdiction over such crimes" (A/CN.4/15, para 45). He had given some thought to the questions involved, and he felt that what was 'desirable' was what answered a need. The Commission had to give an opi-

nion on this, bearing in mind the notion of the end in view.

21. He did not wish to see the Commission present to the public, as coming from men with special competence in international law, a notion which was completely illusory. If the Commission had to decide whether the establishment of the proposed court was desirable, its decision must not be mere airy nothings. He referred to paragraph 2 of the Preamble to resolution 260 (III) B. With regard to the possibility, this depended on the Commission's capacity to envisage the organization of an international court which could function effectively.

22. In paragraph 100 of his report, Mr. Alfaro had stated that "the international criminal jurisdiction *may* have to deal with the following crimes:..." Mr. Hudson surveyed the need for an international court in relation to each of the crimes listed by Mr. Alfaro: with regard to crimes against the peace, he would welcome an international court which would deal with such crimes. It had been stated that crimes of this kind had been defined at the Nürnberg Trial; but the definition given had been only in respect of acts committed in the name of the Axis Powers (Article 6 of the Charter of the International Military Tribunal). It was an extremely limited definition, formulated with reference to the specific case involved.

23. He would also like to have a definition of "aggressive war". In the world today, each side would argue that the other was the aggressor. It was impossible to define an aggressor. Attempts to do so at San Francisco had proved vain. The only definition he knew was the one adopted in 1933 by the Geneva Conference for the Reduction and Limitation of Armaments² and incorporated in the treaties signed between the Soviet Union and her neighbour States. If either side could adopt its own definition, the other side would always be the aggressor, which would mean that the victor would always judge the defeated. However, an aggressor could not be defined before there was a war.

24. It was difficult to set up a tribunal in advance. If for example this had been done in 1930, the members of the tribunal would have included nationals of a number of States which world public opinion could have deemed unfit for membership during the last war.

25. With regard to war crimes, the question raised by Mr. François was very much to the point. But he would like to know what constituted war crimes. It was a point which caused great concern to the members of the armed forces he had had occasion to meet recently. Possibly the Nürnberg Charter could throw some light on this point.

26. With regard to genocide, he would like to hear the views of members of the Commission on the inadequacy of national jurisdictions to deal with this crime.

27. Referring to sub-heading (e) "Other undetermined crimes", he did not understand what Mr. Alfaro meant by this.

28. Mr. ALFARO explained that he had used the

² See League of Nations document Conf. D/C.G.108.

word "undetermined" because resolution 260 (III) B mentioned genocide as a specific crime, and then spoke of other crimes which were undetermined.

29. Mr. HUDSON recalled that he had devoted a great deal of study to the question of piracy in his capacity as director of the Harvard Research in International Law at Harvard. He had reached the conclusion that piracy was not a crime under international law. It had been duly dealt with by national jurisdictions under national laws, simply because international law had granted all States universal competence to judge it. The Harvard Research in International Law had established that the repression of that crime was adequate. Hence there was no need for an international court on that account.

30. Slave trade had never been declared an international crime. It was not necessary to submit it to an international tribunal. Traffic in women and traffic in narcotics were not international crimes. At the international conference on counterfeiting no one had suggested that it was an international crime or that any international jurisdiction was called for. Obscene publications were difficult to define. An international jurisdiction was not necessary in respect of them, any more than for damage to submarine cables. With regard to terrorism, there was a Convention signed in 1937.³ But France had not found it necessary to appeal to an international jurisdiction to condemn the terrorists responsible for the Barthou murder in 1934.

31. It was where national jurisdiction was inadequate, that it could be said an international jurisdiction was called for, and therefore desirable. He did not know whether this analysis would appeal to members of the Commission, but he had felt that he must make it.

32. Mr. ALFARO said he had intended to note the statements of members of the Commission as to the desirability in general of an international criminal jurisdiction; but as Mr. Hudson had devoted so much time to "other undetermined crimes over which jurisdiction might be conferred upon the International Criminal Court", he would like to refer to paragraph 100 of his report. In sub-headings (a), (b), and (c) he had listed the crimes which the Commission had been requested to include in the prospective international penal code; in sub-heading (d) Genocide, for which there was a Convention; and under sub-heading (e) the "Other Undetermined Crimes" commonly referred to as "international crimes".

33. Mr. HUDSON repeated that he could not accept the designation of these crimes as international crimes.

34. Mr. ALFARO said he had mentioned them because in various places they were referred to as international crimes. Whether they were or not was a question to be decided. He referred to his statement in paragraph 102 of his report (A/CN.4/15). The Commission might take note of the lucid exposition given by Mr. Hudson in order to delete from the proposed

criminal code any reference to the crimes listed under sub-heading (e); but the question was purely incidental.

35. Mr. HUDSON argued that the essential point at the moment was to determine if necessary whether national jurisdiction were inadequate to deal with the crimes mentioned in the report, and whether there was a need for an international jurisdiction. If these two points could be proved, the question of the possibility of establishing an international jurisdiction could then be examined. Thus the desirability and the need for setting up an international jurisdiction were one and the same notion.

36. The CHAIRMAN agreed that the point called for examination by the Commission.

37. Mr. BRIERLY could not share Mr. Alfaro's view, but he commended his impartiality. Two kinds of international court could be envisaged, the one with strictly voluntary jurisdiction, and the other binding in character. The international court envisaged in the Convention of 1937 belonged to the first category, and States were free to try any of their nationals accused of crimes, or to hand them over to the international court. In certain instances, a government might prefer to hand over an accused person to the court. It was conceivable for example that France would have preferred to hand over to an international court the individuals guilty of the murder of the King of Yugoslavia in 1934.

38. But while the establishment of an international court with voluntary jurisdiction gave rise to no great difficulties, it ran the risk of being more or less useless, since it would not prevent the crimes condemned by the Nürnberg Court, nor the crime of genocide. But the establishment of an international court whose jurisdiction was to be binding, and which was to prevent such crimes, was a more difficult matter.

39. The only concern of the Commission was the establishment of an international court binding in its jurisdiction. If it were certain that such an organ would maintain peace, there could be no hesitation in agreeing that it was desirable; but the question was whether an international court could achieve that object. If an international court were established but could not function, it would be not only ineffectual, but it would also create dangerous illusions among the nations. Hence the question of possibility must be examined first. On page 42 of his report, Mr. Alfaro had set out his arguments in favour of establishing an international jurisdiction. But he had quoted a series of attempts which had never produced any result whatsoever and could not be regarded as precedents. As to the Nürnberg and Tokyo Tribunals, those were not real international courts, but tribunals set up by States which were victors and in occupation. Only the defeat of their enemies enabled them to function incidentally in a unilateral manner. If the defeat of the Axis had not been so complete, the German and Japanese leaders would never have agreed to collaborate in such an undertaking.

40. Hence he felt it was impossible to draft a convention under which all States would undertake to bring their nationals accused of crimes before an international

³ Convention for the Creation of an International Criminal Court, see text in *Historical survey of the question of international criminal jurisdiction*. United Nations publication. Sales No.: 1949.V.8.pp.88-97.

tribunal. Even if they did undertake to do so, it was extremely probable that when the time came they would not honour their signatures. And after all, crimes against humanity were committed by individuals not of their own accord, but with the acquiescence of their governments. How then could it be hoped that those governments would agree to the accused persons being summoned before an international tribunal? Would the establishment of such an organ in 1930 have prevented the crimes of genocide perpetrated by Germany? An international criminal court would not be required to judge cases covered by national laws since if a government disapproved of the criminal activities of one of its nationals, it could summon him before a national tribunal. On the other hand, if it approved of his activities, it would not bring him before an international court. To prosecute a criminal without the co-operation of his government, an international court would have to have at its disposal, in the international sphere, a full-scale police organization comparable to that possessed by States on the national scale for the prevention of crimes. It was impossible to reconcile all those factors.

41. The CHAIRMAN said that the Commission had to decide whether it was desirable, and also whether it was possible, to establish an international judicial organ. Certain speakers were inclined to link the two questions closely together.

42. Mr. HUDSON doubted whether it was possible to separate two aspects of a single problem.

43. The CHAIRMAN reminded him that the General Assembly resolution put the two questions separately. Hence the Commission must inquire whether the international community desired the establishment of an international judicial organ. Whether such a desire was legitimate was another question. The fears expressed by certain members of the Commission that public opinion might be disappointed amounted to an implicit admission that public opinion did harbour such a desire. The world was anxious that the lacuna caused by the fact that the civil International Court of Justice had no parallel International Criminal Court should be filled. He would suggest that the two questions be put to the vote separately: (1) Was the establishment of an international criminal jurisdiction desirable? and (2) was it possible?

44. Mr. CORDOVA also thought that two distinct questions had been put to the Commission. It was even possible to distinguish three: (a) whether the establishment of an international criminal tribunal was desirable and possible; (b) whether it was desirable, but not possible; (c) whether it was possible but not desirable. There was some confusion in the discussion; those who felt that the establishment of a tribunal was not desirable had to use arguments proving that it was not possible. He did not agree with Mr. Hudson's view that the need for establishing an international court should be proved in order to show that its establishment was desirable. In Mr. Alfaro's report, certain crimes were specified for which an international judicial organ seemed absolutely essential; whereas other crimes

could usefully be judged by it, even though it might not be necessary. It seemed to him obvious that only an international court would be in a position to try persons responsible for bringing on an aggressive war. These obviously would not be summoned before the courts in their own countries, since after a conflict, the victor would never admit having been the aggressor, while the defeated side would always maintain that the other side was the aggressor. Furthermore, it was quite conceivable that there were still countries whose laws conferred on the Head of the State the right to make war, and where it would be impossible to have him condemned by a national tribunal. For cases of that kind, an international tribunal was essential.

45. Mr. HUDSON wondered whether an international judicial organ could judge a party accused by another party of preparing an aggressive war, before the conflict actually broke out.

46. The CHAIRMAN agreed that this was an important question, but was a matter rather for the International Court of Justice, and was one on which the Commission was not asked for its opinion. People complained that the United Nations had not at present at its disposal an executive organ capable of preventing war. If a government were accused of preparing for war, the Security Council might be incapable of activity owing to the veto and its present lack of armed forces; but if an international tribunal existed, the guilty parties might be able to be brought before it. Whatever type of organization were contemplated, it could always be objected that it would be unable to function. But should the Security Council be abolished on the grounds that the veto prevented it from working, or that Chapter VII of the Charter could not be applied? The establishment of an international criminal court could be desirable even though in certain circumstances such an organ would be incapable of functioning.

47. Mr. CORDOVA pointed out that there were those who maintained that an international jurisdiction was not necessary since national jurisdiction could deal with all cases. But it could be argued on the other hand that often enough crimes would be repressed more effectively by an international organ than by the national tribunal. Several speakers had maintained that a State would never summon its nationals guilty of crimes to appear before an international court. That was possible. But all States would be required beforehand to undertake that obligation, as being the only way of preventing the repetition of acts such as took place during the last war. It had been argued too that the Nürnberg and Tokyo Tribunals were military and unilateral in character. That was a further reason for setting up an international criminal court with power to give a fair trial to victors and vanquished alike, so as to avoid unilateral judgments such as they had witnessed after the second World War.

48. Mr. AMADO thought that before deciding on the question of "desirability", it would be as well to know precisely in what sense the word was being used. Was it to be interpreted as reflecting "aspiration" or "need"—two very different things? He himself thought

that the word should be understood to signify the "ideal".

49. Mr. HUDSON inclined to the sense of "need", since he could not say that such a desire existed generally in the world. There was no point in considering the desire to establish something if the need for it was not felt. He suggested that a single question be put to the vote: was the establishment of an international court desirable and possible?

50. Mr. YEPES was in favour of the establishment of the court, and agreed with Mr. Hudson. If the advocates of the view that it was desirable to establish an international criminal court could prove that its establishment was impossible or dangerous, they would drop their argument. The two questions should be examined together, though they might be voted on separately.

51. The CHAIRMAN thought that the General Assembly resolution made it quite clear that there were two separate questions involved. The first—to which he would answer yes—was whether world public opinion desired the establishment of an international judicial organ.

52. Mr. HSU supported this view, and thought it was desirable to establish such an organ even if all States might not have the same opinion. The international community had reached a point where the creation of an international criminal court was a necessary development. It was a moral issue. But as manifold difficulties would arise when an international court was established, those difficulties must be pointed out to the General Assembly and practical suggestions made for overcoming them.

53. As Mr. SANDSTRÖM and Mr. BRIERLY were afraid they would be unable to answer with a plain "yes" or "no" to the question, the CHAIRMAN pointed out that any explanation of the voting would be included in the summary record.

54. Mr. BRIERLY felt that the two questions were so closely bound up that it was extremely difficult to separate them.

55. Mr. HUDSON was rather concerned about the possibility of voting on the two points separately. It would create a bad impression throughout the world if a majority of the Commission admitted that it was desirable to establish an international Court, and then went on to declare that it was impossible to do so.

56. Mr. ALFARO maintained that the two problems could be discussed separately, as they had been in his report; and then put to the vote together.

57. The CHAIRMAN said he would ask the Commission to decide the point at the next meeting.

The meeting rose at 1 p.m.

43rd MEETING

Friday, 9 June 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 CORDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris el-KHOURY, Mr. A. E. F. SANDSTRÖM, 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).

Desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions: working papers by Messrs. Alfaro and Sandström (General Assembly resolution 260 B (III) of 9 December 1948) (item 4 of the agenda) (A/CN.4/15) (continued)

1. The CHAIRMAN asked the Commission whether it felt that the problem had been sufficiently discussed at the previous meeting for a vote to be taken.

2. Mr. SANDSTRÖM considered that to vote merely yes or no would be of little value. He suggested that a member of each of the two groups which had emerged be asked to give a reasoned opinion, which the Commission would then discuss. Those members of the Commission who found themselves unable to agree with either would then have an opportunity to explain why.

3. The CHAIRMAN pointed out that in that case there would be a majority report and a minority report. At the previous meeting the suggestion had been rather to ask the Commission whether it wished to vote separately on the two questions at issue or to vote on one question combining the two points; he felt that it was on this that the Commission should decide first. There was no point in stating in advance that there would be two opinions. Although there was no precedent for presenting a majority and a minority report, obviously it was possible to do so.

4. Mr. YEPES remarked that the two reports already prepared answered Mr. Sandström's requirements.

5. The CHAIRMAN thought that the best method would be to consult the Commission as to how it wished to vote.

6. Mr. FRANÇOIS asked that the vote be postponed until the Commission had listened to a reading of the part of Mr. Alfaro's report dealing with the possibility of establishing an international judicial organ.

7. Mr. el-KHOURY said that if the Commission thought the establishment of a court was not desirable, there was no point in considering the possibility of setting up such a court.

The Commission decided to hear the rest of Mr. Alfaro's report.

8. Mr. ALFARO asked whether he should assume that the discussion on the first question was now closed. If so, he would read the part of his report dealing with the "possibility" (A/CN.4/15, Part IV).

9. The CHAIRMAN felt that the first question had been sufficiently thoroughly discussed, but as the debate on the second question would have repercussions on the first, he thought Mr. Alfaro might be asked to go on with the reading of his report.

10. Mr. BRIERLY thought it was difficult to separate the two questions.

11. Mr. ALFARO said that in accordance with the civil code of countries which had adopted the Napoleonic Code, the terms employed in laws should be given their manifest sense unless it was indicated *expressis verbis* that the legislator was using them in a technical sense. He had used the words "desirable" and "possible" in their ordinary sense, the sense given in dictionaries such as Webster and Littré.

12. He read out the first two sentences in paragraph 128 of part IV of his report (page 42). He was well aware that the 1937 Convention for the creation of an international court had not been ratified, but the fact that thirteen States had signed it did show that they considered the creation of an international judicial organ possible. That could not be ignored.

13. Reading the next two sentences, he said that he was aware of the criticisms made against the Nürnberg Charter and Tribunal; but he had wished to show that an international tribunal could function and fulfil its mission. The Nürnberg Tribunal had fulfilled an ardent desire on the part of humanity for justice.

14. After reading the statement that an international court was indispensable, he remarked that this had been recognized in 1948 after long discussion, when the General Assembly had adopted the text of the Convention on Genocide. He concluded that it was possible to set up a tribunal if States so decided in a convention. The establishment of a new chamber of the International Court of Justice had been the subject of a number of drafts (see A/CN.4/15, para. 132).

15. He did not think a negative reply could be given to the question in hand on the grounds that there were or could be factors against it—e.g., the possibility of refusal by a State to bring its nationals before the jurisdiction of the Court in the event of aggression in which the aggressor was victorious. As a body of jurists, the Commission must deal only with the legal aspects of the question in hand. Its reply must be based on the hypothesis of the establishment of a new international

order under the supremacy of law. It was for the General Assembly and Members or non-members of the United Nations to decide when and how they would create an international criminal jurisdiction. The Commission had only to answer the question: Is it possible to establish such a jurisdiction?

16. He saw no legal reason which would justify a negative reply. On the contrary, criminology and international law provided the countries of the world with a solid basis for the establishment of an international system for the repression of crimes against the peace and security of the world and against humanity. He urged the Commission to answer yes to the question whether it was possible to establish an international criminal jurisdiction.

17. Mr. AMADO said that Mr. Alfaro's main argument to prove that it was possible to create the jurisdiction was the historical precedent of the establishment and functioning of the Nürnberg and Tokio Tribunals. He was not convinced by that argument. The Nürnberg and Tokyo Tribunals were not technically similar to the international court which the Commission was discussing. Those tribunals represented examples of national jurisdiction, the only form of criminal justice which had ever been effectively applied, and the essential characteristic of which was the power of compulsion exercised over criminals by the State. The Allied States possessed this power in virtue of *debellatio*, of their complete victory over Germany and Japan. He was not going to discuss the justice of the Nürnberg and Tokyo judgments, but rather the possibility of regarding them as precedents. The administration of international justice could not be entrusted to the caprice of Mars.

18. International law was unfortunately not sufficiently mature to enable an international criminal court to be established, since it was not in a position to endow it with the power of compulsion. For the moment he did not see how he could support Mr. Alfaro's arguments, which were not based on the facts.

19. Mr. FRANÇOIS wondered whether, in its discussion of the possibility of creating an international judicial organ, the Commission was not tending to lose sight of the fact that such a possibility depended to a considerable degree on the task to be conferred on the organ. It was not necessary in the first instance to entrust the whole body of international criminal jurisdiction to it. They could proceed gradually.

20. It was impossible to confer on it right away the responsibility for judging crimes against the peace, since such crimes at once implied the necessity for a definition of aggression. They were crimes in which governments had taken part as governments. No victorious State would be prepared to agree to allow an international tribunal to decide whether it had been an aggressor. Mr. Alfaro had said that it was not merely a question of wars of aggression, but of all wars. He had maintained that article 11 of the League of Nations Covenant already outlawed all war. But only aggressive wars had been outlawed, and the report gave a wrong interpretation of article 11 (A/CN.4/15, para. 67). At the present stage of international law, it was impossible

to submit to an international organ the question whether a war was actually a war of aggression. War crimes were different: they were crimes committed by subordinate agents, often without the knowledge or against the wishes of governments. If it were proved that its military authorities had committed acts contrary to the law of nations, even a victorious State could agree that they should be punished by an international tribunal. Objections had been raised to the Nürnberg Tribunal; Mr. Hudson had stated that in military circles there was some apprehension lest in future the defeated side would always be brought before the tribunals of the victors. He (Mr. François) was aware that military authorities felt some concern about the findings of the Nürnberg trial, but it was precisely for that reason that an international tribunal had its advantages. They were afraid they might be brought to trial by the victorious side, but an impartial international jurisdiction would be less objectionable. The same argument applied as regards crimes against humanity and the crimes mentioned on page 35 of Mr. Alfaro's report, under (a), although in the latter case the problem was not so vital.

21. Thus up to a point he agreed with Mr. Alfaro as to the possibility of establishing an international jurisdiction, but he could not share his opinion that the possibility was proved by experience. It could not be argued that the possibility was proved simply because an organ had been planned by an international convention. If no State was prepared to ratify that convention, it could not be said that the convention was proof of the possibility of creating the organ which the convention had contemplated.

22. Nor could he agree with Mr. Alfaro on the subject of the Nürnberg trial. Here he shared the opinion of Mr. Brierly. The Nürnberg Tribunal was not an instance of an international criminal jurisdiction. It might be called a national jurisdiction exercised jointly by the belligerent powers, no doubt with greater safeguards than hitherto; but it still meant no more than the application of the right of any State to judge enemy soldiers who have committed crimes during the war. The international criminal jurisdiction on the other hand would be an organ of international society as a whole.

23. Mr. YEPES thought that the problem which the General Assembly had put to the Commission was one of the most important with which the Commission would have to deal. It was a noble idea which the timidity of men would try to prevent being realized. The Commission should act boldly.

24. There were two aspects of the question: was it desirable, and was it possible to establish an international criminal jurisdiction? The interpretation given by Mr. François to article 11 of the Covenant of the League of Nations seemed to him rather narrow. The Covenant could be interpreted as proscribing all war. But of course, when a State took up arms against an aggressor, it was merely exercising the right of legitimate self-defence authorized by natural law, the League of Nations Covenant, and the United Nations Charter.

25. It had been said that it would be unwise to create illusions by giving the impression that the proposed court would remove any danger of war. That was a dangerous sophism. No one suggested that the creation of an international criminal jurisdiction would have the effect of abolishing war. National tribunals had, after all, not succeeded in abolishing all crime. Such a jurisdiction would, however, be another stone in the edifice which the Charter was endeavouring to build. It would be a warning to war-mongers that they would have to answer for their crimes. If the creation of this court succeeded in lessening the possibility of war and staving it off, the effort would not have been wasted. If this idea were added to other ideas such as the compulsory peaceful settlement of disputes, etc., the initiative might bring the world forward along the road to peace. It was not for a Commission of jurists to discourage such efforts. The court would be a juridical means by which wars would be less likely to break out.

26. States might be recommended to try the experiment on a small scale, and to bring before the court individuals guilty of crimes against peace in cases where, for political reasons, they preferred not to try them in their own courts. If the court were created, it would no doubt have little to do during the early years of its existence, but it would help to prevent certain crimes. If an ideal criminal court could not be established, at least the way should be prepared for it. It had been stated that the creation of such a court was neither desirable nor possible, because no State would ever be willing to bring its criminals before it. Yet by setting up a permanent tribunal, all the anti-juridical factors in the Nürnberg Tribunal would be removed.

27. The same arguments had been brought forward in the past against arbitration. They were now no longer heard, and there was no State at present so cynical as to refuse to accept arbitration. The same would be found of the court. It was argued that the project was not sufficiently realistic, that it was a plan put forward by idealists; but since when was it wrong to be an idealist? Realistic policies were responsible for a great many evils. It had been said that on realistic grounds the Nazis must be appeased every time. Nowadays people were again beginning to talk of appeasement. It was to be feared that behind such talk was a new threat to peace. This spurious realism must be distrusted. The Commission's task was to show that the creation of an international criminal court was a means of reaffirming that international security that the Charter recognized as one of the essential goals of organized society.

28. Mr. el-KHOURY recalled that the preamble of General Assembly resolution 260 (III) B stated that there would be an increasing need for an international judicial organ for the trial of certain crimes under international law. The proof of the existence of that need was given in the Secretariat's *Historical Survey*¹ and in Mr. Alfaro's report. A way must be found to satisfy that need. The General Assembly had asked the

¹ *Historical survey of the question of international criminal jurisdiction*. United Nations publication, Sales No.: 1949.V.8.

Commission to give its opinion as to whether it was desirable and possible to create such a jurisdiction. The reports that had been submitted enabled the Commission to study the question with full documentation at its disposal. An international tribunal of the type envisaged would be valuable. Hence it could be argued that it was desirable. As to whether it was possible, that was another question.

29. There were always obstacles to the execution of any plan. If the obstacles were superhuman, it would be impossible to overcome them. But such was not the case here. It had been objected that the project might be vetoed if the Charter or the Statute of the International Court of Justice had to be amended. But was it certain that the veto would be used against the project? It was assumed to be probable. Should the study of the question therefore be abandoned? If the project did come up against the veto, those who opposed it must face their responsibility in the eyes of public opinion. Why should a commission of jurists take the responsibility of stating that the creation of the court was impossible because it might be vetoed? Second objection: If the international criminal court were set up by an international convention, would the various States accede to it? The fact that the Commission was not in a position to predict the future must not make it hesitate. Third objection: Supposing the tribunal were established, and asked for certain individuals to be summoned before it, would States hand them over? It was possible that they might. If States signed the convention, it must be assumed that they would fulfil their undertakings. Experience might prove that this assumption was not borne out by the facts; but that was no reason for holding back.

30. With regard to the Nürnberg and Tokyo Tribunals, he entirely agreed with Mr. Amado. The judgments of those jurisdictions, particularly those of the Nürnberg Tribunal, had not been endorsed by world opinion. They had made a very bad impression in the Middle East. The way in which the Nürnberg trial had been conducted was not a good precedent. The tribunal had consisted of judges from countries which were enemies of the countries to which the accused belonged. The first essential in a judge was that he be impartial. The composition of the Nürnberg Tribunal was irregular; and it had passed judgment in virtue of a law which was not in force when the acts with which the accused persons were charged were committed. That was contrary to the principle of law. Undoubtedly aggressive war had always been regarded as a crime, but no penalty had ever been prescribed for it.

31. If the Commission was to recommend the establishment of a court, it must endeavour to prevent these mistakes from being repeated. The General Assembly was not asking the Commission to give an opinion on how the tribunal should be constituted; it merely asked whether it was desirable and possible to constitute it. The Commission could, of course, qualify its opinion; it could state that, even though it considered the establishment of a tribunal desirable and possible, there were obstacles in the way of its establishment, and the utmost

precautions should be taken to remove them. The creation of such an organ would not prevent all war, since there were always aggressors in the world, and so long as that was so, they would have to be repelled. Nor should it be argued that it was no longer necessary to discuss the laws of war, since war was proscribed. After all, wars did happen, and Chapter 7 of the Charter assumed their existence.

32. The International Court of Justice had not prevented the last war, since the moment the sovereignty and honour of States was at stake, such a court was powerless. Yet it had made it possible to settle minor issues. The projected international criminal court might perhaps not prevent a future war; but it might lessen the risk of conflict. Its existence might have some effect on possible aggressors, since the court would be in a position to define aggression and give its ruling as to responsibility—and that had never been possible in a war hitherto. Even if the court's judgments were given in *contumaciam* and remained for practical purposes inoperative, public opinion would know where the responsibility lay in any conflict which might arise, and the court's decisions would thus have a not inconsiderable moral effect. The decisions taken by the court could be accepted by all, just as all the decisions taken by a conclave were recognized by all Catholics. All these reasons were proof that the creation of an international judicial organ was useful. Of course there was no precedent for an international judgment in the past being crowned with success, but success was only achieved by perseverance, as in the case of the spider which, by trying and trying again to climb up the sheer face of a wall, set an example to a king of England.

33. It would be better to set up a court which could denounce criminals in the eyes of public opinion, than to allow them to escape from their responsibilities before history. That was why an international judicial organ was necessary.

34. Mr. SANDSTRÖM explained that he had raised the question of the veto not as an obstacle to the establishment of the proposed court, but to bring out every aspect of the problem. If the United Nations was anxious to promote justice by making it compulsory for an accused person to appear before an international tribunal, the existing statutes would have to be modified, and that implied certain conditions which he had felt it necessary to state. On the other hand, if it were decided to give the international court the restricted jurisdiction proposed by Mr. François, it was legitimate to ask what would be the impression on public opinion, when it saw its hopes disappointed.

35. He could not support the view that the safeguarding of peace depended on the establishment of an international criminal tribunal, which he felt was merely an auxiliary organ. The main responsibility for the maintenance of peace lay with the Security Council and the General Assembly. If those bodies succeeded in their task, the international court was unnecessary. If they failed, the court could not hope to do better. In the face of all the difficulties involved in the establishment

of an international criminal organ, it was better not to consider it at present.

36. Answering Mr. Alfaro, he thought it might not be impossible one day to contemplate the creation of such an organ, whenever it became possible to confer on it wide powers of jurisdiction and the support of the necessary conventions.

37. Mr. HUDSON said he need not speak again, as during the previous meeting Mr. Brierly had made the points he himself had intended to make.

38. Mr. KERNO (Assistant Secretary-General) recalled that in point 10 of his Peace Programme, the Secretary-General advocated the "active and systematic use of all the powers of the Charter and all the machinery of the United Nations to speed up the development of international law towards an eventual enforceable world law for a universal world society".¹ The Commission was part of that machinery. Under its Statute its task was the progressive development of international law, and the General Assembly had put to it several extremely important questions. It must promote the development of international law. Progressive development undoubtedly meant going forward, in accordance with the growing needs of organized international society.

39. The CHAIRMAN declared the general discussion closed and put to the vote the question whether the Commission should vote separately on the two points, "desirability" and "possibility", of setting up an international criminal jurisdiction, or whether it would vote on them jointly.

By 6 votes to 4, with 1 abstention, it was decided to vote separately on the two issues.

40. Before putting the first question to the vote, the CHAIRMAN said he would like to give his own views as a member of the Commission. He felt it was desirable to set up an international criminal court, not only because public opinion was anxious for it, but because public opinion was right to be anxious for it. The court in question would be extremely useful. It seemed to be generally recognized that public opinion desired such an organ, and as Mr. el-Khoury had pointed out, the General Assembly itself appeared to desire it. If that were not the case, the General Assembly would not have asked for the opinion of the Commission on the way in which such a court could be set up.

41. Consequently, if it should decide that the creation of an international judicial organ was not desirable, the Commission would be running counter to the General Assembly's wish. Moreover, if such an organ were not set up, what would be the point of defining the Nürnberg principles or establishing an international penal code, when there would be no organ to apply them? He feared that if the Commission refused to create an international court, the future would witness other trials like that of Nürnberg, at which the victors would judge the vanquished. If, as a preliminary step, an international organ were created, there would be

some chance of a real court of international justice being established which would be competent to judge all war criminals, to whichever side they belonged. The Commission was faced with a heavy responsibility. Often enough, governments would benefit by the existence of an international court which would enable them to have cases, difficult and even dangerous for themselves, settled by a non-national organ. He mentioned as instances where the existence of an international jurisdiction would have been useful the assassination of the King of Yugoslavia in France, and the attempt on the life of a diplomat in Switzerland. Moreover, the crime of genocide could not be judged by a national tribunal.

42. Replying to Mr. HUDSON—who could not understand why, if the General Assembly desired the establishment of an international court, it had asked the opinion of the Commission—the CHAIRMAN reminded him that the Commission was composed of jurists, and it was the opinion of those jurists which the Assembly had wished to ascertain. A Commission whose task was to promote the development of international law must not put obstacles in its way. The Commission would have no cause to congratulate itself if it hampered progress by yielding to objections whenever there was a question of taking a step forward.

43. Mr. ALFARO, also replying to Mr. Hudson's objection, tried to show that the two texts indicated the General Assembly's desire to see an international judicial organ established. The Assembly had asked the opinion of the Commission on the legal aspect of the problem only. Referring to Assembly resolution 260 (III) B and to article VI of the Convention on Genocide, he pointed out that the Assembly had only achieved its results after long discussion, in the course of which many objections had been raised. Yet 59 nations had approved the texts—which proved the Assembly's desire to see an international criminal court established. A negative vote on the part of the Commission would therefore amount to a refusal to comply with the manifest wish of the General Assembly of the United Nations.

44. Mr. HUDSON wondered whether the expression "those Contracting Parties which shall have accepted its jurisdiction" in article VI of the Convention on the Prevention and Punishment of the Crime of Genocide,² implied the idea of persons or of States.

45. Mr. ALFARO referred him to pages 41-43 of the *Historical survey of the question of international criminal jurisdiction*.³ The sentence to which Mr. Hudson objected had been drafted by a sub-Committee which included representatives of Belgium and the United States. The original text spoke of a competent tribunal which did not yet exist; that was why it had been found necessary to re-draft it.

46. The CHAIRMAN saw no necessity to try to interpret a text which was clear in its intention and which,

¹ A/1304. *Memorandum of points for consideration in the development of a twenty-year programme for achieving peace through the United Nations.*

² United Nations publication, Sales No.: 1949.I.10.

³ United Nations publication, Sales No.: 1949.V.8.

in the mind of those who voted for it, reflected the desire to create an international court.

47. Replying to a further query from Mr. HUDSON as to how it could be deduced from article VI that the General Assembly was in favour of an international tribunal, the CHAIRMAN took note of his objection before putting to the vote the question whether it was desirable to establish an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction would be conferred upon that organ by international conventions.

By 8 votes to 1, with 2 abstentions, the Commission decided that it was desirable to establish an international judicial organ.

48. Mr. SANDSTRÖM said he had abstained from voting because a mere Yes or No would not have given a true picture of his views, which he proposed to submit later in writing.

49. Mr. BRIERLY said he had voted against the motion on the grounds that the projected court would exist only on paper, and so prove ineffectual.

50. Mr. HUDSON said he had abstained because the question of desirability and possibility were one and the same thing.

51. Mr. el-KHOURY said that, in voting for the motion, he had had in mind the weaker nations and those national minorities which at times were persecuted by stronger majorities. The existence of an international judicial organ would reassure the weak, and give them some recourse if they were unable to obtain satisfaction in any other way.

52. The CHAIRMAN next put the question of the "possibility" of establishing an international judicial organ. The General Assembly had not asked the Commission to decide on the competence of such a court, but merely to give an answer to a very general question.

53. Mr. HUDSON took the idea of "possibility" as meaning: Did an international judicial organ if established offer the possibility of being in a position to fulfil a need—i.e., of being able to function effectively?

By 7 votes to 3, with 1 abstention, the Commission decided that the establishment of an international judicial organ was possible.

54. Mr. AMADO, after referring to the attitude of the Brazilian representative at the third session of the General Assembly, when the establishment of an international criminal court was being discussed,⁴ said he had voted against, on the grounds that there was as yet no international police force to enforce the judgments of such a court. The veto was not, as some people held, the cause of disagreement between parties, but rather the symptom of that disagreement, and without agreement among the great powers there would be no international police.

55. Mr. FRANÇOIS said he had voted in favour on the understanding that the decision of the Commission

in no way prejudged the scope of the jurisdiction which the court would have.

56. Mr. SANDSTRÖM, in voting against the motion, had taken the word "possibility" in the sense given to it by Mr. Hudson, and would submit the explanation of his vote in writing later.

57. Mr. HSU said he had voted in favour in the hope that the General Assembly would make a sincere effort to surmount the present difficulties.

58. The CHAIRMAN said that the Rapporteur would submit a draft report to the Commission in the usual way on the two questions on which a vote had been taken at the present meeting. He next recalled that the General Assembly had further asked the Commission whether it was possible to set up a Criminal Chamber of the International Court of Justice.

59. Mr. el-KHOURY was in favour of such a chamber, as likely to increase the prestige of the International Court.

60. Mr. HUDSON, as one who for thirty years had exerted every effort on behalf of the Court at The Hague—one of the essential organs of international life—feared it might mean the utter destruction of the Court's prestige if an international criminal jurisdiction were added to it. The International Court should remain an instrument solely for the settlement of disputes between States, and for giving advisory opinions. They must avoid any step which might make that great institution a centre of grave controversy.

61. The CHAIRMAN entirely agreed with Mr. Hudson.

The meeting rose at 2.55 p.m.

44th MEETING

Monday, 12 June 1950, at 3 p.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 CORDOVA, 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.

⁴ See *Historical survey of the question of international criminal jurisdiction*, p. 37. United Nations publication, Sales No.: 1949.V.8.

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).

Desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions: working papers by Messrs. Alfaro and Sandström (General Assembly resolution 260 B (III) of 9 December 1948) (item 4 of the agenda) (A/CN.4/15 and corr. 1; A/CN.4/20) (continued)

1. The CHAIRMAN reminded the Commission that it had to give an opinion on a third question put by General Assembly resolution 260 (II)B: whether it was possible to create a criminal chamber of the International Court of Justice. Mr. Hudson had already suggested that it was highly desirable to take no step which might be harmful to the International Court of Justice.

2. Mr. ALFARO read out the third sub-heading of Part IV of his report (A/CN.4/15, paras. 132-134), emphasizing that his conclusion that it was feasible to establish a criminal chamber of the International Court of Justice, provided the Court's Statute were modified, did not mean that he was in favour of establishing such a chamber. On that point he shared the view of Mr. Hudson and the Chairman. He had merely considered the possibility of setting up a criminal chamber of the Court, which was the only question the Commission had been invited to study.

3. Mr. SANDSTRÖM admitted the force of Mr. Hudson's reasoning, and withdrew the proposal made in the final paragraph of his report (A/CN.4/20).

4. Mr. FRANÇOIS agreed with Mr. Hudson and Mr. Alfaro. There were three arguments against the creation of a criminal chamber of the International Court of Justice. Mr. Hudson had given the first of them. The second arose out of article 9 of the Court's Statute. A single chamber would not be enough to represent the principal legal system. In any case, the chamber system had not been found satisfactory. The criminal judicial organ would have to have equal authority with the Court itself. It was to be feared that, if nothing more than a chamber were to be set up, it would increase the lack of confidence in the Court which was already apparent. It would be better to set up a new court in which all legal systems would be represented. The third argument was that the functions of the two courts were essentially different. Not only would the new organ be called upon to judge individuals instead of settling disputes between States, but the field of its activities too would be quite different from that of the International Court of Justice. It would require specialists not in international law, but in criminal law, i.e. "magistrates", since its task would be to try individual persons. That did not mean that a court on the lines of the International Court of Justice must be set up right away. A modest beginning might be made with a court which would not sit permanently, the members

of which would perhaps not be precluded from holding other offices or following other pursuits, just as in the case of the members of the permanent International Court of Justice when it was established in 1920. He was against the establishment of a criminal chamber of the International Court of Justice.

5. Mr. HUDSON said he had been led by Mr. Alfaro's conclusion to wonder whether the General Assembly actually had put a third question to the Commission. After reading the last paragraph of resolution 260 (III) B, he felt that it would be sufficient to state that the Commission had paid attention to the possibility of establishing a criminal chamber of the International Court of Justice, and to give the Commission's views on that possibility, but to do so as it were in parentheses. There was no third question involved.

6. The CHAIRMAN thought it made no great difference whether there was a third question or not. The General Assembly had drawn the attention of the Commission to the possibility of setting up a criminal chamber of the Court, in order to have the Commission's advice. The Commission must state whether it was favourable or unfavourable to the establishment of the chamber. But the question might be presented as Mr. Hudson had suggested, mentioning that the Commission had paid attention to the possibility and had reached this or that conclusion.

7. Mr. KERNO (Assistant Secretary-General) agreed with Mr. Hudson. It was not an essential question, but a subsidiary one. At the General Assembly, some representatives had thought it might simplify matters if the Commission were invited to examine this possibility, as a solution which might be easier and more economical than the establishment of a new tribunal.

8. The CHAIRMAN thought nevertheless that, in view of the fears expressed by Mr. Hudson, members might wish the Commission to express a definite opinion on the point.

9. Mr. ALFARO thought there was an implicit question put by the General Assembly, which wished to be informed of the findings of the Commission's study of the problem. Once it had decided the question whether it was desirable and possible to create an international judicial organ, the Commission would intimate that it had given its attention to the possibility of creating a criminal chamber of the International Court of Justice, and had formed an affirmative or negative opinion.

10. Mr. YEPES shared the view of Mr. François regarding the disadvantages of setting up a special chamber, but he saw nothing to prevent entrusting criminal jurisdiction to the Court itself. The Statute would of course have to be amended accordingly. The judges at present constituting the Court were incidentally the best qualified persons who could be found; and the duties of the Court were not particularly heavy.

11. Mr. el-KHOURY agreed with Mr. Yepes. The Court was not overworked and could quite well undertake this new task. Moreover the criminal jurisdiction would have a moral effect. The Court's prestige would be a warning and a deterrent to warmongers. From the financial point of view, it would be inadvisable to

create a new item for the United Nations budget; the cost of another court, with its own registry, would be considerable. Mr. Hudson had been anxious not to endanger the prestige of the Hague Court. He did not know how far such fears were well-founded. So far, the Court's activities had not been very startling. World public opinion had no great confidence in the Court, and few States had accepted its jurisdiction. The criminal jurisdiction would be compulsory and would increase the Court's prestige. He maintained that it would be better to amend the Court's Statute and place the criminal jurisdiction under its auspices.

12. The CHAIRMAN noted that agreement was not the foregone conclusion he had anticipated. One of the strongest arguments, in his opinion, was that if the International Court of Justice was to be given criminal jurisdiction, the Court's Statute and the San Francisco Charter would have to be revised, since the Statute was an integral part of that Charter. That was a decided drawback. If it was desired to create an international jurisdiction it would be better to adopt a convention laying down the court's organization. A revision of the Charter was unlikely, since certain Powers which were against an international criminal jurisdiction had the right of veto. He was afraid it was illogical to postulate that a criminal jurisdiction should be established and to recommend a procedure which was known in advance to be impracticable. He could not see how a criminal chamber of the Court could be set up without having to revise the Statute and the Charter.

13. Mr. ALFARO thought that, as resolution 260 (III) B spoke of the establishment of a judicial organ and of a criminal chamber of the International Court of Justice, it was not the intention of the General Assembly to confer this jurisdiction on the existing plenary Court at The Hague.

14. Mr. YEPES felt that the Chairman's argument against amending the Statute and the Charter applied to any organ which the General Assembly might propose to establish. The Commission might examine the question from another viewpoint. He recalled that when individuals had been involved before the permanent International Court of Justice, as in the *Mavrommatis* case, it had been admitted that the Court could not deal with cases in which either of the parties were individuals, but it had been agreed that the State of which the accused was a national could appear on his behalf. A method might be found of conferring criminal jurisdiction on the Court without modifying the Statute.

15. The CHAIRMAN disagreed with Mr. Yepes on this point.

16. Mr. YEPES regretted this, explaining that he had put forward his proposal as a matter for consideration; he himself was in favour of the establishment of an international criminal jurisdiction.

17. Mr. AMADO thought that if an international judicial organ was to be set up, a comprehensive court should be established without regard to the cost. He personally intended to abstain from voting.

18. The CHAIRMAN replied that there was no question of establishing a court, since that would be outside

the Commission's competence. The General Assembly had asked the Commission whether it was in favour of the establishment of a special court distinct from the International Court of Justice, or a chamber of that Court. He thought the difficulties would be less great if a special court were created by means of a convention than if a system were followed which involved modification of the Charter.

19. Mr. el-KHOURY thought that the provision in the Charter (Article 7, para. 2) under which subsidiary organs could be established referred only to minor and temporary organs, and therefore did not apply. If a Criminal Court of Justice were to be established, it would be a permanent body, on a par with the International Court of Justice. The court in question would be regarded as a principal organ, and its establishment would necessitate amendment of the Charter. The creation of a criminal chamber of the International Court of Justice would involve only the modification of its Statute. It would obviously be possible to adopt the method of a convention signed by a number States, as Mr. Sandström had stated on the first page of his report. But the intention was to have an organ whose jurisdiction would be accepted by all Member governments. The only method would be to create a criminal chamber of the Court of Justice or to confer criminal jurisdiction on the Court.

20. Mr. HSU thought the Commission might advise the General Assembly that it was desirable to create a criminal chamber of the Court of Justice, and he personally was very much in favour of that; but the Commission ought to point out that from the point of view of possibility—on which the Commission was invited to give its opinion—it was almost out of the question.

21. Mr. HUDSON was disappointed that the problem he had raised previously had not come under discussion. If the Commission pronounced its opinion, it should be on a question of principle. It would be most unfortunate for the authority of the International Court, which was set up to settle disputes between States, if it were to be associated with the idea of a police court. The International Court had a mission to fulfil. To create a criminal chamber of the Court or to confer criminal jurisdiction on the Court would be a fatal blow.

22. Mr. BRIERLY shared the view of Mr. Hudson, who he felt had put the question into its true perspective. With regard to the argument that a revision of the Statute would be impossible because of the veto, it might be argued that the Commission had no special competence to assist the General Assembly to decide on that point. The real reason why it would be unwise to confer criminal jurisdiction on the present International Court had been given by Mr. Hudson. The exercise of that jurisdiction would discredit the Court and the United Nations. That was something he was most anxious to avoid. It would be disastrous if such discredit spread to the Court.

23. The CHAIRMAN thought that the argument used by Mr. Hudson and Mr. Brierly went further than they had stated, since it implied that the International Court of Justice must never deal with individuals. If he had

properly understood the two speakers, the Court had been set up to settle disputes between States and should be confined to that function. That was in contradiction to what Mr. Yepes had said. In the *Mavrommatis* case¹ the Court had connived at a special arrangement by admitting that a State might only be the ostensible litigant; and it had acted in a similar way in the episodes of the Serbian and Brazilian loans.²

24. Mr. HUDSON said that he had not gone so far as the Chairman thought.

25. Mr. BRIERLY also refuted this interpretation of his statement. In any modification of the Court's Statute, the background of the question which merited the modification must be examined. In the present instance, a modification of the Statute was not merited. As to the question of granting individuals the right to appear before the Court of Justice, he had no opinion to offer at the moment. That was a separate issue which the Commission had not been called upon to consider.

26. Mr. CORDOVA said he had been greatly impressed by Mr. Hudson's argument, but Mr. Hudson and Mr. Brierly had merely stated in a general way that it would be damaging to the Court's prestige to confer on it the function in question.

27. Mr. HUDSON explained that what he had said was that it would be damaging to its prestige as a body set up for the settlement of international disputes.

28. Mr. CORDOVA thought that to enable the Court to judge who was the aggressor in a dispute—in the strongest sense of the word, i.e. in a war—was to increase rather than lower its prestige. The Court must pronounce judgment on that point before it could judge the individuals responsible.

29. Mr. HUDSON remarked that the Commission must confine itself to the question of individual persons accused of committing crimes.

30. Mr. CORDOVA thought that the first step was to decide that aggression had taken place, otherwise there could be no crime.

31. Mr. el-KHOURY asked the Chairman if he agreed with Mr. Brierly that it would be injurious to the Court to confer criminal jurisdiction on it. He could not see why the Court's prestige should be lowered.

32. The CHAIRMAN thought that was a rather free interpretation of the statement by Mr. Brierly, who had not gone so far. Mr. Hudson and Mr. Brierly were anxious to safeguard the Court of Justice from criticism. They did not maintain that criminal jurisdiction would be unworthy of the Court, but that the Court was not set up to deal with such questions. It had been set up to settle disputes between States. This question of dignity did not arise in the present instance. He would like to see the criminal court established in the near

future, and he thought it would be easier to bring this about by means of a convention than by adopting a procedure in which the veto could be applied. That was a thoroughly realistic point of view. He did not think that the fact of giving jurisdiction in criminal matters to the Court would diminish its prestige. In the national sphere, it frequently happened that criminal jurisdictions had greater prestige than others.

33. Mr. YEPES requested Mr. Hudson and Mr. Brierly to put forward definite arguments against conferring criminal jurisdiction on the Hague Court.

34. Mr. HUDSON thought that any international criminal jurisdiction was bound to become deeply embroiled in political controversies. This would mean less frequent recourse to the Hague Court in a sphere in which it had done admirable work, namely, in disputes between States; and even if States still submitted their disputes to the Court, its prestige would nevertheless be lowered.

35. The CHAIRMAN shared Mr. Hudson's view, adding that while he hoped the Commission would not take his remarks in a derogatory sense, he had a feeling that the present Court had no special competence in criminal matters. The French judicial system had been criticized on the grounds that it had several kinds of court; but he personally believed that a good civil judge was not necessarily a good criminal judge. He pointed out that States were tending to set up various types of jurisdiction. Speaking to an eminent criminal lawyer, it soon became quite clear that he was a criminal lawyer rather than international lawyer; and it was obvious, too, that the members of the Commission were international lawyers rather than criminal lawyers. He would like to see the International Criminal Court a special jurisdiction, and that for a practical reason which carried weight.

36. Mr. AMADO thought that the suggestion of bringing discredit on the Court arose from the idea of establishing a Court which would be unable to function for want of an international police force. That was how he had understood Mr. Brierly's statement. He would find it most embarrassing to have to explain to the various official bodies in his country that the Commission had created a court which was unable to function.

37. Mr. CORDOVA pointed out to Mr. Amado that the same argument might be used against the present International Court of Justice, which had no power to enforce its judgments.

38. Mr. ALFARO said he had been impressed by Mr. Yepes' proposal because it was practical, although it did entail difficulties. But to adopt it would be to answer a question which had not been asked of the Commission. The members of the International Court, who were specialists in international law, and had been elected under Article 2 of the Court's Statute, could not be expected to become criminal lawyers overnight. All the suggestions made for establishing a criminal court assumed that its members would be specialists in criminal law. The outlook of the international lawyer was not the same as that of the criminal lawyer.

39. Mr. KERNO (Assistant Secretary-General) noted

¹ *The Mavrommatis Palestine Concessions*. Judgment No. 5, March 26, 1925. Publications of the P.C.I.J. Series A, No. 5, pp. 6-51.

² *Payment of various Serbian loans issued in France*. Judgment No. 14, July 12, 1929. Publications of the P.C.I.J. Series A, Nos. 20/21, pp. 5-89.

Payment in gold of Brazilian federal loans issued in France. Publications of the P.C.I.J. Series A, Nos. 20/21, pp. 93-155.

that the Members of the Commission appeared to agree that the functions involved were so different that it would be unwise to entrust them to a single body.

40. Mr. HSU thought that the best argument was the difference in the jurisdiction involved. He thought the Commission's answer to the question which had been put should be that the difficulties involved were insurmountable.

41. Mr. CORDOVA remarked that if the Commission decided to propose that criminal jurisdiction be conferred on a chamber of the Hague Court, the General Assembly would have to decide the matter when the new Members of the Court were being elected, and to take the fact into account when making the elections. It would thus be possible to avoid altering the organization of the International Court of Justice, and to request the Assembly to elect specialists in criminal law and to set up a criminal chamber of the Court.

42. The CHAIRMAN asked the Commission to state whether, now that it had given consideration to the question in hand, it felt or did not feel that it was possible to set up a criminal chamber of the International Court of Justice.

43. Mr. ALFARO said that in his Report he had reached the conclusion that it was possible to establish such a chamber, provided the Court's Statute were modified. But for the reasons already given the Commission, he did feel that it was not desirable to establish a criminal chamber of the International Court of Justice. He thought the question of possibility might be settled right away, before going on to examine whether it would be desirable to set up such a chamber. After that Mr. Yepes' proposal might be examined—namely, that criminal jurisdiction be conferred on the Hague Court.

44. The CHAIRMAN said that the question at issue was: Is it possible to create a criminal chamber of the International Court of Justice? But he wondered whether the Commission was not at liberty to state that in its opinion it was not desirable. The question was whether the Commission would give its opinions separately on possibility and desirability, or on the two questions simultaneously.

45. Mr. YEPES said that he had made no definite proposal; he merely suggested that the Commission take a decision as to the possibility of creating an international judicial organ for the trial of persons charged with genocide or other crimes. He personally was in favour, whatever form the organ might take—whether it should be a special criminal chamber, or whether the suggestion were made that the International Court of Justice should deal with such cases along with the rest.

46. The CHAIRMAN said that Mr. Hudson had drafted a text which might win the support of the entire Commission.

47. Mr. HUDSON said that the text he had proposed was a simple statement to the effect that the Commission had carried out its task and had examined the question whether it was possible to create a criminal chamber of the International Court of Justice; and had

reached the conclusion that this was possible; but that the Commission did not recommend it, on the grounds that it did not consider it desirable.

48. Mr. FRANÇOIS recalled that it had been stated that the establishment of such a chamber was possible by amendment of the Statute of the International Court of Justice. He enquired what was to be understood by the word "possible".

49. Mr. HUDSON agreed to insert the words "by amending the Court's Statute".

50. Replying to a comment by Mr. François that on that basis anything was "possible", Mr. KERNO (Assistant Secretary-General) specified that the word "possible" had already been used in a particular sense, whereas here it had the meaning of possibility of, as it were, a physical or material kind. The Commission might thus omit the expression and state simply that such a chamber could be created by amending the Court's Statute, but that the Commission did not recommend this.

51. Mr. HUDSON, in reply to a question by Mr. Alfaro, said he had not made up his mind whether his text was a point of order or a resolution.

52. Mr. ALFARO thought that the decision to be taken was not a resolution proper, and that the whole discussion would be summarized in his report.

53. Mr. CORDOVA wondered what would be the significance of the decision taken by the Commission. If it declared that it would not be possible to establish a criminal chamber of the International Court of Justice, did that mean that the creation of an international criminal jurisdiction would be possible outside the international court? The Commission must outline the method, since it had replied affirmatively to the other two questions put by the General Assembly.

54. The CHAIRMAN recalled that the terms of reference of the Commission were to study the desirability and the possibility of establishing an international criminal jurisdiction. If, in regard to the method to be followed, it did not recommend the establishment of a criminal chamber of the International Court of Justice, there would be nothing contradictory in its decision.

55. On the invitation of the Chairman, Mr. HUDSON read out his draft resolution:

"In making the foregoing answers to the question which the Commission was invited to study, the Commission has paid attention to the possibility of establishing a Criminal Chamber of the International Court of Justice. That course is possible by amendment of the Court's Statute, but the Commission does not recommend it for practical reasons as well as reasons of principle."

56. Mr. el-KHOURY and Mr. CORDOVA suggested that the end of the final sentence—"as well as reasons of principle"—be deleted. The CHAIRMAN felt that unless these words were kept the text did not give a true picture of the discussion.

57. Mr. ALFARO suggested deleting all mention of reasons in the text to be voted upon. The report would record the opinions expressed by the members of the

Commission, thus emphasizing the reason why the majority had felt that it should not recommend the establishment of the chamber.

58. Mr. HUDSON accepted this suggestion.

59. The CHAIRMAN thought that in view of the amendments proposed, it would be useful to vote separately on the various parts of the text submitted by Mr. Hudson.

60. After some discussion on the voting procedure Mr. KERNO (Assistant Secretary-General) pointed out that on the first two sentences of Mr. Hudson's text, and the beginning of the third sentence "But the Commission does not recommend it", members were in agreement. He suggested that the remaining phrase ("for practical reasons as well as reasons of principle") be treated as a separate proposition, and a vote taken on its two halves separately and then on the whole text as far as it had been adopted, in accordance with Rule 128 of the General Assembly rules of procedure. Thus, members who preferred that the two types of reasons should be mentioned, but did not agree that just a single type should be mentioned, would still be at liberty to vote against the proposal as a whole, as amended by the separate voting.

It was so decided.

61. *The Commission adopted the words "for practical reasons" without a vote.*

The Commission decided by 6 votes to 5 to delete the words "as well as reasons of principle".

In the vote on the proposal as a whole as amended by the previous votes, *the Commission decided by 6 votes to 4 to delete the words "for practical reasons"*.

62. The CHAIRMAN noted that the final part of the resolution had been deleted, and that the resolution now ended with the words "but the Commission does not recommend it"; that the Rapporteur would give an account of the discussion on the point.

63. Mr. ALFARO said that it was not for him, as Rapporteur, to decide what should be included in the report. The Commission would discuss the text and make the final decision.

Invitation from the Government of the Principality of Liechtenstein

64. Before passing on to another item of the agenda, the CHAIRMAN informed the Commission of the invitation to members to visit the Principality of Liechtenstein. He undertook to write to the Liechtenstein Government to the effect that some of the members of the Commission would be happy to accept the kind invitation, and that the date of the visit would be fixed at one of the next meetings.

Formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal: Report by Mr. Spiropoulos (item 3(a) of the agenda) (A/CN.4/22)

GENERAL

65. The CHAIRMAN invited Mr. Spiropoulos to present his report.

66. Mr. SPIROPOULOS said that the report had already been distributed to the Commission, so that members would have had an opportunity to note its contents. He did not think it was necessary to expatiate on it, but he would be glad to answer any questions.

67. Mr. HUDSON drew the Commission's attention to paragraph 36 of the report, and read the paragraph. The Commission had been instructed to formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in its judgment. But it seemed particularly difficult to formulate principles of international law without taking a stand and deciding whether or not these principles were in fact principles of international law. The text of resolution 177 (II)³ of 21 November 1947 of the General Assembly was ambiguous. He did not think that resolution prevented the Commission from examining whether the Nürnberg Principles were principles of international law. The paragraph of the report which he had read did not seem to him to have any point. He would be glad to have the matter cleared up.

68. Mr. SPIROPOULOS said that the section of his report mentioned by Mr. Hudson was taken almost verbatim from the report submitted a year previously to the General Assembly. The Commission had decided that its task was not to establish principles of international law, but merely to formulate the principles recognized in the Charter of the Nürnberg Tribunal and in its judgment, and already affirmed in General Assembly resolution 95 (I)⁴ of 11 December 1946.

69. Mr. HUDSON emphasized that he was not criticizing Mr. Spiropoulos' report, but wondering how the Commission could formulate principles of international law if it could not decide whether they were or were not principles of international law. The point required further discussion.

70. The CHAIRMAN agreed that it was difficult to decide without knowing whether the principles were principles of international law or not.

71. Mr. CORDOVA replied that the question had already been discussed at the first session. He had asked the same question and it had been answered by all the members of the Commission as follows: it was not the duty of the Commission to examine whether the principles were or were not principles of international law. He recalled having expressed the view that the General Assembly, in restating the Nürnberg Principles, had not made them principles of international law since the Assembly itself was not an international legislative body. Its decision had only a political character. The Commission had decided that its only instructions were to formulate the principles; but it would be useful to re-open discussion on the point.

72. Mr. FRANÇOIS did not understand the passage in paragraph 36 of the report which stated that "the conclusion of the Commission was that, since the Nürn-

³ See *The Charter and judgment of the Nürnberg Tribunal. History and analysis*. United Nations Publication, Sales No. 1949.V.7, p. 14.

⁴ *Ibid.*, p. 32.

berg Principles 'had been affirmed' by the General Assembly in its resolution 95 (I), it was not the task of the Commission to examine whether these principles were or were not principles of international law." That was not the reason why the Commission should not examine the principles, but simply because its only instructions were to formulate the principles. He agreed with Mr. Córdova that affirmation by the General Assembly of the Nürnberg Principles had not made them principles of international law.

73. Mr. CORDOVA recalled that the sentence in question had appeared in the draft report discussed by the Commission a year previously. The Commission had been unable to modify the sentence at that time, because it represented a previous decision by the Commission. Hence he hoped that the discussion would be taken up again, and that the Commission would not formulate the principles until it had decided whether they were principles of international law.

74. The CHAIRMAN asked the Commission whether it wished to re-open the question. He himself would be glad to have it re-opened, as he had always been of the opinion that it was the Commission's duty to examine whether the Nürnberg Principles were really principles of international law.

75. Mr. AMADO asked the Chairman if he had considered the procedure for discussion. He thought the most practical method would be discussion principle by principle.

76. The CHAIRMAN thought that what was in Mr. Hudson's mind was that the Commission should decide whether it would regard each principle it formulated as really a principle of international law.

77. Mr. HUDSON said that the question was of the utmost concern to him. He had consulted a number of persons to ascertain their views. Some had maintained that the Charter of the Nürnberg Tribunal contained no principle of international law, any more than the London Agreement of 1945. The Nürnberg Tribunal was a military tribunal, and not strictly a court. The Secretary-General's Memorandum⁵ on pages 37-38 examined the legal nature of the Charter. The question was raised again on pages 79-80. The report by Mr. Spiropoulos scarcely mentioned this point. Would it not be advisable first of all to examine the legal character of the Tribunal and the judicial significance of its judgment? Some of the persons he had consulted were of the opinion that, from the legal point of view, the value of the Charter and the London Agreement of 1945⁶ as documents formulating principles of international law was contestable. The London Agreement of 1945 had been concluded by the four governments appointed for the occupation of Germany. The Agreement was not subject to ratification. It came into force the moment it was signed, for the period of a year, and was then extended. The four governments had instructed the Tribunal to act in the name of all the Allied governments. Nineteen other Allied governments

had signed the London Agreement. It was based on the notion that occupying Powers have legislative powers in occupied territory. The constitution of the Tribunal was an executive act by the occupying Powers based on their legislative powers arising from the fact of occupation. The Tribunal had only a limited jurisdiction namely, over occupied territory and war criminals of the European Axis countries. The execution of the Tribunal's decisions was entrusted to the Control Council for Germany (article 29 of the Charter) and the expenses of the Tribunal were charged against the funds allotted for the Control Council (article 30). Thus it was an executive act by occupying Powers. It was difficult to consider it as significant for international law in general. On the other hand, there were others who maintained that the principles established by the occupying Powers and by the Nürnberg Tribunal could be international in application, and that the question as a whole constituted a legal precedent. If the Commission considered these opinions, they might to some extent influence its views on the Charter and judgment of the Nürnberg Tribunal. He felt that the question could be summarized as follows: How far is the Tribunal's judgment in conformity with the Charter, and how far has it international competence?

78. Mr. KERNO (Assistant Secretary-General) thought the question whether the London Agreement and the judgment of the Nürnberg Tribunal had created an international customary law might be left aside. But in any case, by resolutions 95 (I) and 177 (II) adopted in 1946 and 1947, the General Assembly had unanimously affirmed that there were principles of international law in the Charter and judgment of the Court. It did not seem possible to interpret those resolutions differently to-day. Moreover at that particular moment the progress shown by the establishment of the Nürnberg Court had been a matter of great pride. On the other hand it must not be forgotten that the Commission a year ago had decided that its concern was not whether such principles were in conformity with the international law, but simply to formulate the principles. It had communicated that decision in its report to the Assembly, and the report had been formally approved by the Assembly in 1949.

79. Mr. BRIERLY wondered where Mr. Hudson's argument was likely to lead the Commission. It might lead to the conclusion that there were no principles to be formulated. Resolution 177 (II) debarred the Commission from adopting that point of view. Public opinion was no doubt divided as to whether international law had been created in Nürnberg and Tokyo, and whether it could be applied internationally. But the Commission's task was not to discuss the substance of the Nürnberg Principles. As a body created by the General Assembly, it was not at liberty to criticize the actions of the Assembly; its task was to formulate principles, according to its terms of reference.

80. Mr. el-KHOURY, supplementing Mr. Kern's statement, said that in 1947 no representative had called in question that there were principles of international law in the Charter and judgment of the Nürnberg Tri-

⁵ *Ibid.*

⁶ *Ibid.*, pp. 89-91.

bunal. The Commission could now accept such principles as were really principles of international law and reject such as were not.

81. The CHAIRMAN asked the Commission if it agreed that in formulating the principles, it would formulate only such as were in the Charter or judgment of the Tribunal, on the implicit understanding that such of the principles as it formulated would constitute principles of international law.

82. Mr. CORDOVA pointed out that the discussion had in point of fact been re-opened, and that the Commission should now consider what were the Nürnberg Principles of international law, with a view to formulating them in due course. The Charter and judgment of the Tribunal contained principles which some recognized as principles of international law, while others did not. For example, there was agreement that aggression was unlawful, but there was no agreement as to whether aggression implied individual responsibility on the part of the aggressor. He recalled that after the First World War, Kaiser Wilhelm II was to be prosecuted under the provisions of the Treaty of Versailles. But the Netherlands had refused to hand over the Kaiser on the grounds that his individual responsibility was not recognized in international law. As a result of the Nürnberg trial, was individual responsibility recognized henceforth as a principle of international law? The Commission should assess what was recognized as international law in the principles under consideration, and formulate those principles.

83. Mr. SPIROPOULOS thought he was right in saying that the Commission was studying the question differently today from the way it studied it a year previously. Then, the Commission had taken decisions of which his report was the outcome, while today the Commission seemed anxious to take up the entire question again from the beginning.

The meeting rose at 6.20 p.m.

45th MEETING

Tuesday, 13 June 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 CORDOVA, Mr. J. P. A. FRANÇOIS,

Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris el-KHOURY, Mr. A. E. F. SANDSTRÖM, 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).

Formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal: Report by Mr. Spiropoulos (item 3(a) of the agenda) (A/CN.4/22) (continued)

GENERAL (continued)

1. Mr. BRIERLY recalled that at the previous meeting the Commission had discussed at some length the relationship between the Charter of the Nürnberg Tribunal and international law. Practically all the jurists in the world had expressed their opinions on the subject, and he wondered whether the Commission would be likely to find a fresh solution. He suggested that for the moment abstract notions be abandoned and the study of the principles formulated in the report by Mr. Spiropoulos be taken up. Possibly the Commission might decide that some of those principles were not principles of international law.

1a. Messrs. AMADO, YEPES, ALFARO, el-KHOURY, SANDSTRÖM, and the CHAIRMAN supported this suggestion.

2. The CHAIRMAN asked whether Mr. Brierly meant that the principles to be formulated by the Commission would be formulated as principles of international law and the others would be rejected as not being principles of international law.

3. Mr. BRIERLY suggested passing on to examine the principles in the hope that this embarrassing question might be avoided.

4. The CHAIRMAN thought the Commission would be prepared to adopt the five principles enumerated by Mr. Spiropoulos as principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal.

The Commission decided to proceed with the reading of the report.

5. Mr. KERNO (Assistant Secretary-General) was glad that the Commission had taken this wise decision. He recalled that it was at the instigation of the United States delegation that the General Assembly had first taken up the question of the Nürnberg Principles, and that in his speech to the Assembly during the second part of the first session, President Truman had said:

“In the second place, I remind you that 23 Members of the United Nations have bound themselves by the Charter of the Nürnberg Tribunal to the principle that planning, initiating or waging a war of aggression is a crime against humanity for which

individuals as well as States shall be tried before the bar of international justice.”¹

6. Mr. CORDOVA thought the Chairman's proposal would imply that the Commission was unanimously of the opinion that the principles of the Charter and judgment of Nürnberg were now established principles of international law affirmed by the General Assembly resolution. At the Commission's first session, this question had given rise to a discussion which was quite clearly reported in the summary records. Hence he felt that it would be preferable to abide by the previous year's decision.

7. The CHAIRMAN said that Mr. Córdova's attitude tended to distort the decision just taken. He could not declare that everything in the Nürnberg Charter and judgment constituted principles of international law. The Commission would specify that those which it retained were principles of international law, thus answering the request put to it to formulate the principles. It was not for the Commission to ascertain whether those principles existed already or whether the Nürnberg Tribunal had established them. That would involve research. With regard to the Charter, there would be no difficulty; whereas there would be regarding the judgment. Several of the principles applied by the Tribunal had not been accepted by the Rapporteur. For example, the Tribunal had affirmed that it was not obliged to apply the principle “*nullum crimen sine lege*”. If the Commission recorded all the principles applied in the judgment, it must accept that too; but it had felt that this was not desirable. There were principles in the Nürnberg judgment that the Commission did not wish to adopt.

8. If it did adopt principles, they would be principles of international law. There was no call to inquire whether they already existed before Nürnberg. That would in any case be too difficult, and the General Assembly had not asked the Commission to do it.

The Commission took up the study of Part IV of the report by Mr. Spiropoulos.

9. Mr. HUDSON could not understand why the words “*stricto sensu*” were used in the heading of Section A.

10. Mr. SPIROPOULOS explained that he had used the expression “The principles *stricto sensu*” because he mentioned crimes as well, and crimes could not be called principles. The Commission had been requested to formulate the principles; but the report spoke also of crimes. That was why he had made the distinction. He mentioned first of all principles, and then crimes not defined in the form of principles.

11. The CHAIRMAN suggested that the words “*stricto sensu*” be translated in French as “*proprement dits*”.

12. Mr. SPIROPOULOS pointed out that in Section B he spoke of crimes. Hence under Section A he had formulated principle in the strict sense. That was the only way of making the distinction. But crimes could

be defined by formulating a principle and stating, for example: “any person . . . committing a crime”.

13. Mr. HUDSON felt that the words “*stricto sensu*” might create some confusion in the minds of some people. There was a heading already; why enlarge on it?

14. Mr. SPIROPOULOS said he was prepared to alter the wording, but he pointed out that the expression “the principles of international law recognized . . . etc.” included both principles and crimes.

15. Mr. YEPES suggested that the words “*stricto sensu*” be deleted.

16. The CHAIRMAN remarked that if that were done the distinction between the two things would no longer be made.

17. Mr. CORDOVA asked how crimes could be included under the heading “The principles of international law recognized . . .” if crimes were not regarded as principles.

18. Mr. SPIROPOULOS recalled that the Commission the year previously had decided to distinguish between crimes and principles. He asked his colleagues to be good enough to state what they wanted, rather than merely criticize the terms used.

19. Mr. BRIERLY did not think it was essential to make the division into principles and crimes. He suggested that the Commission examine all the principles laid down in Part IV, and decide whether they were acceptable.

20. The CHAIRMAN objected that it would still be necessary to draw up the list of crimes.

21. Mr. BRIERLY replied that the crimes could be formulated as principles.

22. The CHAIRMAN thought it would be difficult to maintain that the definition of a crime was a principle. In a national penal code there were principles—e.g., an accused person was regarded as innocent until he was proved guilty. On the other hand, it was laid down that murder was a crime, that was not a principle.

23. Mr. BRIERLY considered that if it was declared that murder was unlawful, that constituted a principle.

24. Mr. SPIROPOULOS pointed out that in penal codes both principles and crimes were to be found. The Charter of the Nürnberg Tribunal spoke only of crimes and not of principles. It stated that “The following acts . . . are crimes. . .” The task of the Commission was to deduce the principles contained in the Charter of the Nürnberg Tribunal and in its judgment, and it must make a distinction between the principles and the crimes.

25. Mr. AMADO pointed out that the heading “The principles *stricto sensu*” logically demanded the enunciation of principles *lato sensu*. If there were no principles *lato sensu*, there was no point in specifying that the principles were principles *stricto sensu*. He suggested that the terms “the principles” and “the crimes” be used for the headings of Sections A and B.

26. Mr. SPIROPOULOS had no objection to the deletion of the words “*stricto sensu*”.

¹ *The Charter and judgement of the Nürnberg Tribunal. History and analysis.* United Nations publication, Sales No. 1949.V.7, p. 11.

27. Mr. FRANÇOIS said that the General Assembly had asked the Commission simply to formulate principles. He agreed with Mr. Brierly that whatever was formulated must be in the form of principles.

28. The CHAIRMAN recalled that sub-paragraph (b) of General Assembly resolution 177 (II) provided for a draft code of offences against the peace and security of mankind.

29. Mr. ALFARO thought that technically the opinions of Mr. Spiropoulos and Mr. Amado were quite acceptable. The Commission was dealing with principles and with definitions of crimes which were not strictly principles. Obviously the General Assembly had regarded all these rules as principles, but it must be admitted that the definition of a crime in a penal code was not a principle. Yet that mistaken notion could be found in the second part of the Nürnberg Charter. The best solution was that advocated by Mr. Brierly. The Commission must not adopt a classification which seemed to exclude one part of the Charter.

30. The CHAIRMAN said that logically he had appreciated what Messrs. Brierly, François and Alfaro had said. But he thought it would be a pity if the distinction were to disappear from the excellent arrangement of the report. In Section II there were the elements of a penal code, and sub-paragraph (b) of resolution 177 (II) asked the Commission to prepare a draft code. Hence the Commission must establish a list of crimes and define them, and then find the place in the penal code to be accorded to the principles formulated under the directions given in sub-paragraph (a) of the resolution. Sub-paragraph (b) could only have that meaning. The Rapporteur had made this distinction on the model of the most recent draft adopted. He suggested that the general title be kept, as it satisfied everyone, and that Part IV be divided into two sections: (a) The principles and (b) The crimes.

31. Mr. SANDSTRÖM asked whether Mr. Brierly wanted the heading of Section A deleted and the introductory sentence retained, namely: "The Charter and judgment of the Nürnberg Tribunal recognize the following principles."

32. Mr. BRIERLY explained that his suggestion was that the beginning of the text be deleted from "A. The principles..." as far as "... the following principles".

33. The CHAIRMAN asked whether the Commission intended to formulate a principle in respect of each crime.

34. Mr. BRIERLY thought that it would be best to discuss this when the Commission came to deal with the crimes. He thought the Commission might inform the General Assembly that in carrying out its instructions under sub-paragraph (a) of resolution 177 (II), it had refrained from discussing the question of crimes, as it proposed to discuss them in connexion with the penal code.

35. Mr. ALFARO thought that the best way out of the difficulty would be to make use of the suggestion contained in the decision taken the previous year in regard to the formulation of principles.

36-37. Mr. SPIROPOULOS felt that the Commission was wasting time. When the General Assembly had instructed it to formulate principles it had asked the Commission to formulate all that was contained in the Nürnberg Charter, since the principles without the crimes meant nothing. The General Assembly had been concerned with the crimes, and therefore they could not be disregarded. According to Mr. Alfaro they had two tasks in hand; the formulation of the Nürnberg principles and the drafting of a penal code. But it was possible that the latter would not be accepted by the General Assembly. Hence the formulation of the Nürnberg principles must be as complete as possible. The crimes were the essence of the matter, and it was because of the crimes that the General Assembly had decided to refer the question to the Commission. The words "*stricto sensu*" might be deleted. As they could never hope to find the ideal solution they must try for the second best. The Charter made the distinction, and the obvious thing was to follow it. But in deference to the misgivings of his colleagues he would agree to the deletion of the words "*stricto sensu*".

The Commission decided by 7 votes to 0, with several abstentions, to delete the words "stricto sensu" from the heading of Section A.

38. Mr. HUDSON pointed out that General Assembly resolution 177 (II) spoke of the Charter and the judgment of the Nürnberg Tribunal. He wondered whether it would not be advisable to give both of these their proper titles, namely, the Charter of the International Military Tribunal and the Judgment of the International Military Tribunal. There were other tribunals at Nürnberg.

39. The CHAIRMAN referred to sub-paragraph (a) of the resolution and to the heading of Part IV of the report; he saw nothing to choose between what Mr. Hudson suggested and the formula adopted by the Rapporteur.

40. Mr. SPIROPOULOS had wondered why the General Assembly had repeated the name of the Tribunal. It was correct to say the Charter and judgment of the Nürnberg Tribunal.

41. Mr. CORDOVA took it that the intention behind Mr. Hudson's objection was that the Commission should not forget that the Tribunal under discussion was the International Military Tribunal and should bear in mind the nature of that tribunal.

42. The CHAIRMAN did not agree. When mention was made of a military tribunal, it was often in a pejorative sense—i.e., it implied that it was not altogether an ordinary law court. But that was wrong, at any rate in France. Why should the Commission try to let it be supposed that the Nürnberg Tribunal was not an ordinary law court? It was after all the first example of an International Criminal Court. At the previous meeting Mr. Hudson had tried to show that the Nürnberg Tribunal was a chance phenomenon in international law. He personally held the opposite view, that it constituted a very important precedent. Was the Commission going to try to minimize that? The General Assembly had not set the example in that

direction. Incidentally, there had been very few military men on the Nürnberg Tribunal. It had included Professor Donnedieu de Vabres, who was decidedly not a military man. He would oppose the proposal.

43. Mr. SPIROPOULOS said he had constantly wondered what to call the Tribunal. He had felt that if he spoke of the "International Military Tribunal" he would not be understood. The name by which the world knew it was the "Nürnberg Tribunal", and the General Assembly, which was a political body, had been well advised to use that term.

44. Mr. HUDSON pointed out that there had been many tribunals at Nürnberg, whereas there had been only one International Military Tribunal. He preferred in all cases to use the correct title for the institution he was speaking about.

45. Mr. SPIROPOULOS saw no reason to correct the term used by the General Assembly.

46. Mr. HUDSON argued that there was every reason, as the Commission was composed of persons competent in international law. It was a matter of draftsmanship.

47. Mr. CORDOVA thought that future generations would refer to the "Nürnberg Tribunal", and would never dream of calling it the "International Military Tribunal". Nürnberg would be a landmark in history, indicating that, from that date onwards, aggressive war was a crime for which the authors would be held responsible. The name should be kept. An example of a similar title was the "Geneva Conference", which did not lead to confusion.

48. Mr. SANDSTRÖM saw no danger of confusion. The name was the one by which the Tribunal would be known to history. The terms used in the General Assembly's resolution should be kept.

49. Mr. SPIROPOULOS suggested that the discussion be closed.

50. Asked by the Chairman whether he wished to submit a formal proposal on the point, Mr. HUDSON said he did not.

51. Mr. LIANG (Secretary to the Commission) remarked that the author of an article in the *American Journal of International Law* referred to tribunals other than the Nürnberg International Military Tribunal as "non-Nürnberg tribunals".² He saw no objection to the name "Nürnberg Tribunal" as used in the General Assembly resolution.

PRINCIPLE I

52. The CHAIRMAN read out Principle I.

53. Mr. el-KHOURY asked whether the term "a crime under international law" did not refer to something which had not yet been decided at the time when the acts in question were committed. He thought it would be better to say "an international crime". The Charter of the Tribunal constituted the law which it must apply. Approval by the General Assembly or by

a special convention was what would make them crimes under international law.

54. Mr. SPIROPOULOS saw no difference between an international crime and a crime under international law. If Mr. el-Khoury would read the summary records of the first session, he would find that Mr. Brierly had proposed the definition given in the report before the Commission. So that he was not responsible for it, though it seemed to him perfectly sound.

55. Mr. HUDSON pointed out that in the preamble to Article I of the Convention on Genocide, the same expression "under international law" was used.

The Commission decided to proceed with the examination of the report.

56. The CHAIRMAN read paragraph 1 of the Commentary on Principle I.

57. Mr. HUDSON thought the second sentence was rather short, and did not give the reasons why the principle was drafted in general terms.

58. Mr. SPIROPOULOS replied that the principle adopted was drafted in general terms.

59. Mr. CORDOVA thought it should be stated why the Commission had adopted the principle in general terms. The Commission had to draft a general principle not limited just to a few specific individuals, as the Nürnberg Charter was limited to the chief war criminals of the European Axis countries.

60. The CHAIRMAN reminded the Commission that its instructions were to state not what were the Tribunal's decisions, but the principles on which those decisions were based. The Commission had surely recognized a year previously that the judgment did not contain any declaration of principle. It was not for the judges to enunciate principles. That was the legislative task of the Commission.

61. The CHAIRMAN read out paragraph 2 of the Commentary on Principle I.

62. Mr. HUDSON thought that possibly footnote 45 was unnecessary. The Commission should let the text speak for itself and not give references to preparatory studies.

63. Mr. SPIROPOULOS had no objection to the footnote being deleted.

64. Mr. CORDOVA thought that nothing in Mr. Spiropoulos' report must be deleted. It was its substance that was being discussed, not the report itself.

65. Mr. SPIROPOULOS thought that there was a very important question of principle involved; what report was to be submitted to the General Assembly, the report of the special rapporteur or the general report of the Commission? He assumed that the general report would mention the discussions and decisions taken and the special report would be sent to the General Assembly. But he had no objection if the Commission decided otherwise.

66. Mr. HUDSON thought that the question of the Nürnberg Principles would have comprised one of the chapters of the general report. The commentaries on the principles formulated would have to be adopted by

² Willard B. Cowles, "Trials of War Criminals (Non-Nuremberg)", *American Journal of International Law*, Vol. 42 (1948), pp. 299-319.

the Commission, and it was most important to quote them in the general report.

67. Mr. KERNO (Assistant Secretary-General) said that there was a question of form and a question of substance involved. With regard to form, the various special reports were reports by individual members of the Commission for the Commission's use, whereas the general report was a report from the Commission itself to the General Assembly. A general rapporteur had been elected by the Commission for the purpose of drafting this general report. The special reports would thus become chapters of the general report. With regard to the substance, the contents of the general report would have to be approved by the Commission, which would thus have to pass an opinion on the substance of the special reports to decide what should be kept and what modified for the purposes of the general report. That would require the collaboration of the general rapporteur and the special rapporteurs. In the case of the special report at present under discussion, the Commission should give its opinion, not only on the principles, but on the commentary on those principles.

68. Mr. LIANG (Secretary to the Commission) recalled that the terseness of the previous report to the General Assembly on the Commission's first session had been very favourably commended. It comprised a Part I—"General" dealing with administrative matters and the stage of progress reached in the study of the various topics; and a Part II consisting of the draft Declaration on Rights and Duties of States. The General Assembly had felt that this was a very convenient arrangement, as it could thus figure as a single item in its agenda with a division into two or more paragraphs. He suggested that the same form be adopted for the report on the Commission's second session. With regard to the formulation of the Nürnberg Principles, it was thus not necessary for a special report to be submitted, to constitute a separate item in the General Assembly's agenda. The question would be dealt with in one of the chapters of the general report.

69. Mr. SPIROPOULOS repeated that the question was most important from the point of view of method. What had happened last year could not be taken as a precedent, since at that time the Commission had no special rapporteurs. But the Commission had involved its Statute and nominated several such rapporteurs. The question now was whether a special report should be submitted, and whether that report would still be the report of the Commission. It was important to decide that point. Actually, if he had known that his conclusions were to be embodied in a general report, he would not have taken the trouble to arrange his report as he had done, but would have confined himself to enunciating the principles and giving his comments. In a comprehensive report to the General Assembly, this historical background ought to appear, as it was essential for a proper understanding of the subject. On the other hand, if the special report was intended for the Commission, he would not have drafted the first part, since all the members of the Commission were familiar with the background of the question. He had imagined

that the special report would be forwarded to the General Assembly as the Commission's report.

70. Mr. CORDOVA thought the special rapporteurs had been nominated to provide the Commission with a basis for discussion. If all the special reports were submitted to the General Assembly, there would have been no point in electing a general rapporteur. The special reports might of course be annexed to the Commission's general report, which was the work of the Commission as a whole.

71. The CHAIRMAN agreed with Mr. Córdova. The report which the Commission would draft would be the general report on the debates which had taken place in the Commission, and it would include an annex giving the various documents, including the report presented to the Commission by Mr. Spiropoulos.

72. Mr. HUDSON did not altogether agree with the Chairman's suggestion. He thought that the whole significance of the Nürnberg principles as formulated in the report depended on the comments made by the Commission. As the Commission's report should reflect the opinion of the members of the Commission, it was for the Commission to decide what parts of Mr. Spiropoulos' report it wished to keep, and what parts it would like to alter or delete. To take an example, footnote 45 was not essential for the understanding of the text, whereas footnote 47 was most important as a commentary on the text, and should be included in the general report.

73. Mr. SPIROPOULOS was agreeable to this procedure.

74. Mr. CORDOVA thought it was essential to put before the Members of the General Assembly all the documents on which the general report was based; those documents should be distributed along with the report.

75. Mr. LIANG (Secretary to the Commission) recalled that all the reports on special topics were for general distribution, like other United Nations documents. The report by Mr. Spiropoulos retained its full value as a report submitted to the Commission, and would be mentioned along with the other special reports in the report to be adopted by the Commission and submitted to the General Assembly. They might be treated as annexes to the general report, but that would make the report too bulky. The special reports would always be available to members of the General Assembly.

76. Replying to a question by Mr. Spiropoulos, Mr. LIANG said that, as a general rule, only the summary records of the main committees of the General Assembly were printed. The records of other committees and commissions were mimeographed, but their distribution was not restricted, and they were available to all members of the Assembly, who received copies. A great many libraries also received them.

77. At the request of Mr. Yepes, the CHAIRMAN read out footnote 45.

78. Mr. SPIROPOULOS thought the footnote should be retained, as showing that the extension to the provisions of the final paragraph of Article 6 of the Nürn-

berg Charter, which Principle I gave by laying down the responsibility of accomplices in crimes under international law, as well as accomplices in a common plan or conspiracy, had already been contemplated when the text of the London Agreement was drafted.

79. Mr. ALFARO thought the Commission was anticipating the drafting of its report. If it decided to retain the footnote in the report, he would abide by this decision. But when the Commission did not take a definite line on what should be included in its report or what omitted, it should authorize the Rapporteur to decide for himself. He asked the Commission to give him that much latitude. He would try to bring out in all instances points of substance mentioned in the footnotes or other parts of the special report presented to the Commission. In the case under discussion, he would mention the fact that the Commission recognized the responsibility of accomplices in any crime under international law, although the Nürnberg Charter had only recognized this responsibility in the case of conspiracies.

80. Mr. SPIROPOULOS thought the Commission had before it two possible procedures; either it could decide to retain the footnote as it stood in the report which the Commission would draw up, or it could omit it. A third possibility would be to leave it to the Rapporteur to make use of parts of the text submitted to the Commission, or to omit them. With regard to footnote 45, he suggested that it be inserted in the Commission's report as it stood.

81. Mr. HUDSON thought the Commission should establish principles on which the general report was to be drafted. It would be sufficient to indicate what points it would like to see inserted or omitted.

82. The CHAIRMAN put to the vote the question whether footnote 45 should be inserted. There were 5 votes in favour, and 5 against. To avoid any misgivings which might arise from the outcome of the vote, the Chairman and Mr. Spiropoulos said they would vote against it.

The proposal to insert footnote 45 was therefore rejected.

83. The CHAIRMAN proceeded with the reading of paragraph (ii) under Principle I.

84. Mr. HUDSON drew attention to the fact that the quotation in the English text beginning: "The Tribunal, commenting on the last paragraph of Article 6..." was incorrect, and that the inverted commas before the quotation in the last sentence—preceding the words "these words were designed"—should be deleted and inserted in front of the words "establish the responsibility..." Moreover, he thought that the official text from which this quotation was taken should be given—i.e., the official proceedings of the Nürnberg Tribunal—rather than the publication entitled "Nazi Conspiracy and Aggression, Opinion and Judgment".

85. Mr. SPIROPOULOS explained that he had quoted the text given him by the Secretariat, and that when he drafted his report he had not had the official publications at his disposal. He agreed that the report should be altered as suggested by Mr. Hudson.

The Commission decided to retain footnote 47 for insertion in the general report.

86. The CHAIRMAN proceeded with the reading of the text of the report, and passed on to paragraph (3) of the commentary on Principle I (in Part IV). He drew the attention of the Commission to an error in line 2, which should read "*interpretation* of domestic law" instead of "interposition".

87. Mr. HUDSON pointed out that the term "domestic law" was incorrect and should be replaced by "national law" or "internal law".

88. The CHAIRMAN agreed to this alteration to the English text; the expression "droit interne" in the French text was correct.

89. Replying to a question by Mr. Hudson, Mr. SPIROPOULOS said that the second sentence of the paragraph: "A conception which in theory is considered as involving the 'international personality' of individuals" had been inserted to meet the views expressed the year previously by some of the members of the Commission. In drafting it, he had been extremely careful to state that it was a conception "in theory" considered as involving the international personality of individuals. He had hesitated to go further than that, as he was aware that this view would be challenged by some of the members of the Commission.

90. The CHAIRMAN recalled that the year previously he had made a considerable concession to the Commission in that he had not insisted that the idea of an individual being subject to international law should be specified in the report with the utmost precision. He personally felt that such a specification was of the greatest importance; and he therefore proposed that the following sentence be added after the final words of Principle I: "Thus the individual is subject to international law, at least in criminal law." This idea had often been expressed; in fact, it was implicit in Principle I, and it must be agreed that those who committed criminal acts were men. However, if the Commission did not share his views, he was prepared this year again to make a concession by adding the words "at least in criminal law".

91. Mr. CORDOVA thought a distinction should be made between passive personality and active personality, and a formula must therefore be sought giving the precise meaning of the notion which the Commission wished to express. He could agree to the idea of passive personality, but not that of active personality.

92. Mr. YEPES thought the Commission might accept the Chairman's proposal.

93. Mr. SPIROPOULOS recalled the saying about giving and inch and taking a yard. A year previously the Chairman's proposal had been rejected. However, so as not to disregard completely the idea behind that proposal, he had inserted into his report the sentence he had just mentioned. Before inserting it in the report, he had given it a good deal of thought; and it was because he felt it would give rise to objection on the part of certain members of the Commission that he had drafted it in very conservative terms, and not tried to

enunciate it as a universally recognized principle. If an individual could be regarded as subject to international penal law, it was a theoretical and doctrinal question on which there was no likelihood of unanimity in the Commission. He thought the Commission should be content with what was stated in his report.

94. The CHAIRMAN, speaking as a member of the Commission, thought there was no necessity to study the philosophical significance of what "subject to law" implied. A definition of the term "individual" acceptable to all would be roughly: "a person possessing free will and capable of committing acts". He was now to be forbidden by international law to commit certain acts. Hence he was subject to international law. From a strictly logical point of view, individuals were directly subject to international law and international law prevailed over national law. He mentioned that the new French constitution provided that if an internal law was contrary to international law, the internal law was automatically null and void. He wondered why the Commission should not state explicitly in the principle formulated what was implicitly admitted in the commentary—namely, that the individual is directly subject to international law. Was it the unconscious fear of stating something which had long been in the minds of a great many people, although it had not been explicitly formulated as yet? Or was it that the Commission still harboured the notion that only States were subject to the law of nations?

95. Mr. SPIROPOULOS recalled that the question had been thoroughly discussed the year before, and that his report was a reflection of that discussion. This year, the Commission had just discussed it again, and he felt that it would be well to proceed to the vote, and to put an end to a discussion which was unproductive.

96. Mr. SANDSTRÖM said that although he appreciated Mr. Spiropoulos' point regarding his report, he thought it would be more striking to insert in the Commission's next report the affirmation of the concept formulated by the Chairman. He thought it would be better not to attach it to the principle itself, which should be short and concise.

97. Mr. ALFARO felt that in any case the individual was subject to established international law. In various places in the San Francisco Charter there were references to the individual and his duties and rights. Hence he agreed with the Chairman's proposal, though he feared that the words "at least . . . etc." weakened the sense. The fundamental principle to be affirmed was that the individual was subject to international law. He therefore suggested that the Chairman's proposal be adopted, with the deletion of the words "at least in criminal law". The principle might even begin with the above-mentioned affirmation.

98. Mr. BRIERLY agreed to the proposal as stated by the Chairman. What was needed was a clear and explicit statement of what was in the mind of the Commission.

99. Mr. CORDOVA thought it was not for the Commission to give an opinion on the principles based on the Charter, which contained nothing very specific, and

in which everything was stated by implication.

100. The CHAIRMAN said that the Charter was not altogether silent but spoke in a whisper, and much of what should be said explicitly had to be read between the lines. He noted that Mr. Alfaro was prepared to sponsor the proposal he himself had just made as a further concession—in the sense that he had accepted an inch in the hope that in due course he would be given an ell.

101. Mr. BRIERLY thought the wording proposed by Mr. Alfaro was inappropriate to the formulation of the Nürnberg Principles, whereas the Chairman's wording expressed an idea implicitly recognized in the Nürnberg Charter.

102. Mr. ALFARO once more expressed his misgivings at the words "at least", which seemed to be at variance with the Declaration of Human Rights.

103. The CHAIRMAN and Mr. BRIERLY agreed that these words should be deleted, the proposal to read as follows: "Thus the individual is subject to international criminal law."

On a vote being taken, the addition of this sentence was rejected, 5 votes being cast in favour and 6 against.

Paragraph 3 of the commentary to Principle I in Part IV of the report was adopted.

The meeting rose at 1 p.m.

46th MEETING

Wednesday, 14 June 1950, at 10 a.m.

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Chairman: Mr. Georges SCALLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. Roberto CORDOVA, 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. Yuenli LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal: Report by Mr. Spiropoulos (item 3(a) of the agenda) (A/CN.4/22) (continued)

PRINCIPLE II

1. The CHAIRMAN read out Principle II (A/CN.4/22, part IV).

2. Mr. HUDSON thought that texts drafted by the Commission should serve as a model of drafting for members of the legal profession. If an idea was expressed in a particular way in one place, it must be expressed in the same way elsewhere, otherwise a suspicion might arise in the reader's mind that the different terms referred to different ideas. That was why he had tried to recast Principle II, so as to make it more precise and similar in form to Principle I. He presumed that the Commission would have to take a decision on the expression "domestic law". It meant the law of the country where the act was committed. Article 6 (c) of the Nürnberg Charter read "domestic law of the country where perpetrated". He would prefer to say "a person" rather than "any person". The expression "does not punish an act", was also unsatisfactory, as it was the person who was punished, and not the act. He proposed the following wording: "A person who commits an act which constitutes a crime under international law is not relieved of responsibility under international law because the act is not made punishable by the domestic law (local law) of the country in which the act was committed."

3. Mr. ALFARO noted that Mr. Hudson used the expression "domestic law".

4. Mr. HUDSON replied that it had been used at the previous meeting. It would be better to say "local". The use of the word "national" would create difficulties in certain federal States where the criminal law was not federal. Alternatively, one might say "by the law of the country...."

5. Mr. SPIROPOULOS thought the Commission should discuss separately each of the points raised by Mr. Hudson. The expression "domestic law" was a current expression which everyone understood. He asked the Commission to give its opinion on the point. The Commission incidentally had decided at its previous session to adopt the term "any domestic law" (A/CN.4/22, para. 40).

6. Mr. HUDSON maintained that the expression should not be taken out of its context. He was proposing to say "the domestic law of the country in which it was committed", whereas the Commission had decided a year previously to say "any domestic law".

7. The CHAIRMAN asked Mr. Hudson whether, as a matter of accurate terminology, it was really better to say "the law of the country in which the act was committed". The law applicable might conceivably not be the law of the country where the crime was committed. That was the case, for example, with crimes committed on the high seas. In the "Lotus" case,

Mr. Basdevant had held an opinion contrary to the opinion that prevailed.

8. Mr. HUDSON replied that the Nürnberg Charter had gone to great pains to use that expression. He quoted the text adopted by the Commission at its first session (A/CN.4/22, para. 40): "All persons committing any of the acts above referred to shall be responsible under international law, whether or not such acts are punishable under any domestic law." There was a fallacy here. Let him imagine a case where an act punishable under the law of Liberia had been committed in France by an American. A relationship must be established to the law of the country where the crime was committed, or to the law of the country of which the author of the crime was a national. The particular law referred to must be specified. But it was a question of draftsmanship. Referring to the phrase "Without discussing the new text" in paragraph 42, he observed that it was not the Commission, but the Sub-Commission, that was involved.

9. The CHAIRMAN thought Mr. Hudson's opinion differed from that of the Commission. He did not wish to theorize, but he liked the expression "any national law" as indicating the supremacy of international law over any national law.

10. Mr. HUDSON suggested the wording "because the act is not regarded as a crime by the law of a particular country".

11. Mr. SPIROPOULOS could not accept this amendment. If the text read "the law of a particular country", there would be no improvement. He had merely used the wording of the Charter of the Tribunal; the term was a current one.

12. The CHAIRMAN pointed out that the only consideration was to make the wording as far as possible fit the concept. Mr. Hudson followed the wording of Principle I much more closely, and his version was more strictly logical.

13. Mr. SPIROPOULOS considered that Mr. Hudson's proposal destroyed the uniformity of the texts included in his report. It could be seen from the final page of the report that all the principles began with the same wording. He had used uniform drafting for the three principles (II to IV), laying down that certain facts did not constitute a defence. If the sentence began as proposed by Mr. Hudson, it would be much weaker.

14. Mr. LIANG (Secretary to the Commission) thought that the term "domestic law" used in Principle II was ambiguous. It might mean any national law, the national law of a particular country, or even internal law as a concept. It might be advisable to link the idea of "domestic law" with the author of the crime, by taking account either of his nationality or of the place where the crime was committed. He did not consider that the term used in Principle II was as clear as that which had been employed in the first text submitted to the Commission at its first session (see A/CN.4/22, p. 40).

15. Mr. HUDSON stressed that that was his view.

16. Mr. CORDOVA believed that the Rapporteur's drafting was the best. The Commission wished to

emphasize that the crime was punishable regardless of the fact that it was not held to be a crime under certain domestic laws. It was not a matter of repeating the terms of the charter, which was limited by the facts which the Tribunal had to judge, but of trying to extract therefrom general principles of international law.

17. Mr. SANDSTRÖM proposed using the term "law applicable" and saying "an otherwise applicable national law"; that would take account of the Chairman's comment that it was not necessarily the law of the country in which the act had been committed. In Swedish law, it might happen that an act committed abroad by a Swede, and prejudicial to another Swede, was subject to Swedish law.

18. The CHAIRMAN thought it important to adopt a formula which avoided any kind of conflict of laws.

19. Mr. HSU thought it necessary first to decide the preliminary question raised by Mr. Hudson—namely, whether the texts adopted must be uniform. Personally, he would prefer it, but he thought that uniformity was not essential and might even result in monotony. The report had a general plan, and a change in one part would necessitate changing the whole; there was no justification for that, since the proposed texts were not unsatisfactory.

20. Mr. HUDSON thought Mr. Hsu's view amounted to stating that it was useless to try to improve the text.

21. Mr. CORDOVA asked whether the Commission was discussing the text of the report or Mr. Hudson's amendment.

22. The CHAIRMAN replied that it was discussing both, but must choose between them.

23. Mr. ALFARO suggested the following amendment to the amendment proposed by Mr. Hudson, in order to bring it closer to the text of Principle III: "The fact that an act which constitutes a crime under international law is not made punishable by the law of any particular country, does not relieve the person who committed the act of responsibility under international law."

24. Mr. HUDSON proposed the wording "is not held to be a crime under the law of any particular country..." He added that the two wordings meant the same thing.

25. Mr. ALFARO accepted that amendment.

26. The CHAIRMAN preferred the former wording, since an offence under domestic law might be involved.

27. Mr. BRIERLY observed that in English law there was no distinction between crimes and offences.

28. The CHAIRMAN explained that in French law, it was the gravity of the offence which made it a crime.

29. Mr. ALFARO pointed out that in Latin-American law the term *acto punible* (punishable act) applied to both crimes and offences.

30. Mr. SPIROPOULOS still considered his text the best. Mr. Alfaro had relied on the text of Principle III, which, however, used the words "acted as head of State". There, it was a quality attaching to the person. Principle II, on the other hand, merely referred to the simple fact that an act was not contrary to domestic

law. Nevertheless, he did not oppose the proposal.

31. Mr. el-KHOURY considered that the wording of the report was good. The applicable domestic law, whatever its nature, was replaced by international law, which was declared to take precedence over it.

32. Mr. AMADO was entirely satisfied with the decision taken on that point at the first session, and with the drafting of the report, for which he would vote. He did not think that the text proposed by Mr. Hudson was an improvement. With regard to Principle II, he wished to point out that popular language, which was important in the drafting of laws, used the expression "to punish an act".

33. Mr. YEPES took the same view.

34. The CHAIRMAN said that the Commission must choose between the Rapporteur's text and that of Mr. Alfaro, which Mr. Hudson appeared to support.

35. Mr. ALFARO said that he had tried to meet the wish expressed by Mr. Hudson and other members of the Commission by referring to a particular domestic law, but above all, he had also wished to conform to the wording of Principles III and IV. He was quite prepared to accept the text of Principle II as it stood, subject to a very slight drafting amendment, if his own amendment were not accepted.

36. Mr. el-KHOURY pointed out that, in Arab countries where French concepts were adhered to, the word "crime" was translated by one special term, and the word "delit" (offence) by another. He asked whether it was desired that the word "crime" in Principle II should signify strictly crime, or both crime and offence.

37. The CHAIRMAN referred to the words "crime international" in the French text, and remarked that French people might wonder what would happen in the case of an offence (*délit*).

38. Mr. SPIROPOULOS replied that the wording should be "an act punishable under international law", which applied both to crimes and offences. He observed that the term "international crime" was in conformity with the terminology usually adopted.

39. The CHAIRMAN objected that the dissemination of obscene publications was only an offence.

40. Mr. SPIROPOULOS replied that no such distinction was made in international law.

41. Mr. AMADO pointed out that the Nürnberg principles were only concerned with crimes.

42. The CHAIRMAN admitted the justice of that observation, and said that the doctrine of the Commission was clarified.

The amendment proposed by Mr. Alfaro was rejected by 6 votes to 5.

43. Mr. HUDSON proposed that the Rapporteur's text should be amended by deleting the words "an act which is an international crime", and substituting the words "an act which constitutes a crime under international law".

44. Mr. SPIROPOULOS accepted that amendment.

45. Mr. ALFARO believed the word "act" to be essential, and thought that the English text of Principle

II should be amended to read "the person who committed the act".

46. Mr. HUDSON and Mr. BRIERLY approved of that amendment.

47. Mr. SPIROPOULOS agreed.

48. Mr. HUDSON proposed the wording "that the domestic law of any particular country" instead of "that domestic law".

The amendment was rejected by 6 votes to 3.

The Rapporteur's text was adopted with the amendments proposed by Mr. Hudson and Mr. Alfaro and accepted by Mr. Spiropoulos.

It was decided to entrust the final drafting of the text of Principle II to Mr. LIANG (Secretary to the Commission).

49. The CHAIRMAN read out paragraph (1) of the comment on Principle II.

50. Mr. BRIERLY proposed that in lines 6 and 7 of that paragraph, the words "cannot keep in check the international responsibility of individuals" be replaced by the words "cannot free individuals from their international responsibility".

51. Mr. SPIROPOULOS accepted the proposal.

52. Mr. HUDSON stated that he did not consider the first sentence strictly accurate. The paragraph should be amended to take account of the difference between the text of Principle II and that of article 6 (c), which mentioned only the domestic law of the country where crimes against humanity had been perpetrated. The deviation from the Nürnberg Charter should be explained in the comment.

53. Mr. CORDOVA considered that Mr. Hudson was quite right, and that the idea should be expressed more fully; otherwise it would never be known why the Commission had not adhered to the Nürnberg Principles.

54. Mr. SPIROPOULOS requested that a formal proposal should be submitted.

55. Mr. HUDSON explained that Principle II was based on article 6 (c), but differed from it. Sub-paragraph (c) referred to the "domestic law of the country where [crimes had been] perpetrated" and only applied to crimes against humanity. He proposed that the first two sentences of the paragraph be deleted.

56. Mr. SPIROPOULOS thought that it was implicitly admitted that the Nürnberg Principles, which had been enunciated in view of special facts, were to be formulated for general application. He did not think it necessary to state the fact expressly.

57. Mr. YEPES and Mr. SANDSTRÖM supported the amendment proposed by Mr. Hudson.

58. The CHAIRMAN announced that the Commission would rely on its Rapporteur to amend the drafting of the paragraph in question. He read out paragraph (2) of the comment on Principle II.

59. Mr. ALFARO pointed out that the third line of the French text contained the words "les dispositions de la loi nationale", whereas the English text, also in the third line read "the attitude of domestic law". He thought it would be preferable to say "the provisions

of domestic law", which corresponded exactly to the French text.

The amendment was adopted.

60. Mr. HUDSON asked whether, when domestic law made no provision that an act should be punishable, international law would nevertheless take precedence.

61. Mr. SPIROPOULOS replied in the affirmative.

62. The CHAIRMAN believed that that, too, was a question of supremacy. There was a general principle according to which anything that was not prohibited was permitted. If domestic law made no provision, it gave implicit permission. Where international law prohibited, its prohibition took precedence.

63. Mr. BRIERLY asked whether it was any use dealing with that philosophical question. He thought that only the quotation at the end of paragraph 2 should be retained in the general report. The other sentences were unnecessary.

64. Mr. SPIROPOULOS recalled that the previous year, a considerable minority had supported the view of their present Chairman. He had wished to satisfy that minority and that was the idea underlying Principle II.

65. Mr. BRIERLY asked the Chairman whether he found paragraph 2 satisfactory.

66. The CHAIRMAN replied that he did. On behalf of the previous year's minority, which he represented, he asked that paragraph (2) should remain unchanged.

67. Mr. ALFARO reminded the Commission that the first proposal regarding the supremacy of international law had been rejected. Nevertheless, article 14 of the draft Declaration on Rights and Duties of States, adopted by the Commission at its first session, proclaimed the "supremacy of international law".¹

68. Mr. HUDSON pointed out a slight difference in the last sentence of the paragraph between the English wording "characteristic of the above inference is the following passage of the Court's findings", and the French wording "Le passage suivant des conclusions du Tribunal vient à l'appui de cette déduction" (the following passage of the Court's findings supports this inference).

69. Mr. BRIERLY considered that the French text was preferable and should be translated into English.

PRINCIPLE III

70. The CHAIRMAN read out Principle III (A/CN.4/22, part IV).

71. Mr. HUDSON proposed adhering to the form adopted for the preceding principles and suggested the words "The fact that a person who committed an act constituting a crime under international law etc."

72. Mr. SPIROPOULOS accepted that amendment.

73. Mr. HUDSON considered that the final words "or

¹ Article 14 read as follows: "Every State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law."

mitigate punishment" should be deleted. Such a question was always for the Court to decide.

74. Mr. SPIROPOULOS recalled that, in the final draft adopted at the first session by the sub-committee responsible for revising the text, the words in question had been placed in brackets (A/CN.4/22, para. 41). He had retained the words in his report, but was agreeable to deleting them. He pointed out that that provision appeared in Article 7 of the Charter.

75. The CHAIRMAN proposed the words "or constitute an extenuating circumstance".

76. Mr. CORDOVA wondered whether the concept of extenuating circumstances was recognized in Anglo-Saxon countries.

77. Mr. BRIERLY replied that in English law it was a matter for the Court to decide, and was not governed by any rule of law. On this point the report followed Article 7 of the Charter. However, he did not approve of the words in question; the fact of being an official might just as well be an aggravating circumstance as an extenuating one.

78. Mr. KERNO (Assistant Secretary-General) thought it would be preferable to retain the words in question in order to bring out the different application of the idea of mitigation of punishment in Principle IV.

79. Mr. SANDSTRÖM favoured the retention of that concept in the formulation of the Nürnberg Principles. It would be possible to revert to the point when discussing the draft Code of Offences against the Peace and Security of Mankind.

80. The CHAIRMAN noted that the Commission would then certainly have more freedom in making its decisions. In this case, it was bound by the precedent of the Charter.

87. Mr. FRANÇOIS said that it would be most important to decide whether the Commission should merely give a new form to the principles adopted by the Tribunal or whether it could express itself freely regarding them. He could support the proposed text of Principle III, but when the draft Code was discussed he would oppose the unconditional adoption of the Nürnberg text in respect of the matters dealt with in Principle IV.

82. Mr. SPIROPOULOS recalled that it was the duty of the Commission to formulate the principles recognized by the Charter. As that document contained the words "mitigation of punishment", there was no choice.

83. Mr. YEPES did not consider that the Commission's task was to ratify the provisions of the Charter. It was not obliged to adopt them as they stood. The Commission might well delete the words "or mitigate punishment".

84. Mr. HUDSON and Mr. CORDOVA took the same view.

85. The CHAIRMAN agreed that it was the Commission's duty to formulate the principles as principles of international law and to incorporate them in the code it was going to draw up. It was free to delete the reference to mitigation of punishment if it so desired.

86. Mr. CORDOVA thought that, in certain cases, a court might consider mitigation of punishment. For example, a legislative assembly might have declared war against the wishes of the Head of State. Because that case had no arisen in connexion with the great war criminals of the totalitarian countries of the Axis, the authors of the Charter had not taken it into consideration. But for the formulation of principles which would apply in future, it must be borne in mind.

87. Mr. el-KHOURY also thought that the Charter had been drafted with a view to punishing certain persons. They should try to formulate the principle in such a way that it could be applied in the future. It should be left to the court to decide whether there were aggravating or extenuating circumstances. He thought that the words in question should not be retained.

88. Mr. AMADO emphasized that the Commission's duty was to formulate the principles of international law as derived from the Charter and judgment of the Nürnberg Tribunal. Nevertheless, he thought that to accept those principles as at present formulated was a serious decision. After considering the matter, he felt that he should support the proposal to delete the words "or mitigate punishment" at the end of Principle III, since on that point the Charter had rejected a fundamental principle of law.

89. Mr. BRIERLY, while observing that it was the Commission's duty to formulate the principles of international law, did not consider it a principle of international law that the facts dealt with in Principle III could not mitigate punishment.

90. Mr. FRANÇOIS did not understand how the fact of acting as Head of State could mitigate punishment. There might, of course, be extenuating circumstances, but he doubted whether the mere fact of being Head of State could be considered as such.

91. Mr. SPIROPOULOS proposed the closure of the debate, since all members had now had an opportunity of expressing their opinions.

92. The CHAIRMAN asked the Commission to take a decision on the deletion of the words "or mitigate punishment" in Principle III.

It was decided by 8 votes to none to delete the words in question.

93. Mr. HUDSON noted that Principle III used the words "public official" (in French, "fonctionnaire") whereas article 7 of the Charter of the Nürnberg Tribunal used the term "responsible officials" (in French, hauts fonctionnaires). He considered the terms of the principle too broad, and thought that the Commission would agree to state that responsible officials—i.e., those of high rank—were meant.

94. Mr. SPIROPOULOS asked whether there could be any official who had no responsibility and requested the Commission to clarify its meaning.

95. Mr. HUDSON and Mr. CORDOVA thought that the Commission should understand by the term "public official", as used in Principle III, all officials having real responsibility, whereas Principle IV referred to officials having lesser responsibility.

96. Mr. SPIROPOULOS accepted that definition of the term "public official".

97. Mr. KERNO, Assistant Secretary-General, thought that Principle III certainly referred to officials of high rank, who thus had heavy responsibility, as distinct from officials or persons acting on the orders of their government, or of a superior. As used in Principle IV, the term had a very broad meaning.

98. The CHAIRMAN proposed the word "gouvernant" (responsible ruler) instead of "public official". It was certainly a neologism, but the use of the term was accepted and had become frequent since the work of the Bordeaux Commission. The distinction between *gouvernants* and public officials was that the former had no superiors in rank whereas a public official had superiors and acted on their orders.

99. Mr. HUDSON thought that the meaning of the term "responsible official" was very broad. He recalled that article IV of the Convention on Genocide read as follows: "Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." Under the terms of that article of the Convention, the meaning of the words "public officials" was certainly very broad. He preferred the term "responsible government officials".

100. The CHAIRMAN thought he was right in assuming that Principle III applied to superiors and to "gouvernants", whereas Principle IV applied to public officials.

101. Mr. BRIERLY asked that the term "public official" should be understood to mean a responsible official attached to the government of his country, as suggested by Mr. Hudson.

102. The CHAIRMAN asked Mr. Alfaro and Mr. Spiropoulos to find an English equivalent for the word "gouvernant".

103. The CHAIRMAN read out the comment on Principle III (A/CN.4/22, part IV). He observed that the words "actes condamnés" (English: which are condemned as criminal) were not correct and should be replaced by the words "actes considérés" (acts held to be criminal).

104. Mr. SPIROPOULOS accepted that amendment to his text.

105. Mr. HUDSON wondered whether it was correct to say, as stated in the first line of the paragraph, that the text of Principle III reproduced in a more precise form the principle laid down in article 7 of the Charter. He proposed deleting the words "in a more precise form" which did not appear to be strictly accurate.

106. Mr. SPIROPOULOS replied that he would consult the text of the Charter to see how far the passage could be amended.

107. Mr. BRIERLY suggested the words "principle based on article 7 of the Charter" instead of "principle laid down in article 7". He suggested that the Commission should give the General Assembly some explana-

tion of the reasons which had led it to delete the words "or mitigate punishment".

108. Mr. SPIROPOULOS thought that his text was more precise than that of the Charter of the Tribunal, which read: "The official position of dependants... shall not be considered as freeing them from responsibility or mitigating punishment"; whereas the formula used in his report stated that the fact of having acted as Head of State or public official "does not free him from responsibility under international law or mitigate punishment".

109. Mr. BRIERLY referred to the second sentence of the paragraph which read: "If, according to a general rule, a person acting as a State organ is considered as acting on behalf of the entity 'State', and as such not responsible for his actions, in cases of acts constituting international crimes, according to the Charter and the judgment, the fact that an individual acted in an official capacity does not free him from responsibility under international law." He did not find that sentence clear, and could not attach any precise meaning to it.

110. Mr. SPIROPOULOS said that he had wished to explain that persons acting in a public capacity would be fully responsible for their acts under international law.

111. Mr. SANDSTRÖM found some difficulty in accepting the words "according to a general rule" at the beginning of the second sentence of the paragraph.

112. Mr. SPIROPOULOS said that he would explain his idea. If a Head of a State declared war, he might not be held personally responsible under domestic law, since he was performing an act of State in his capacity as head of State; but under international law he was responsible. That was the meaning he had intended to convey by the sentence in question.

113. Mr. BRIERLY thought that that implied that the Charter of the Nürnberg Tribunal had created a new rule of international law providing for the responsibility of Heads of State.

114. Mr. SPIROPOULOS objected that it could not be affirmed forthwith that the Charter had created a new rule of international law.

115. Mr. HUDSON proposed deleting the first part of the sentence from the words "If, according to a general rule..." down to and including the words "responsible for his actions"; the sentence would then begin "In cases of acts etc."

116. Mr. CÓRDOVA thought that comment on Principle III contained in the report might give the impression that it was intended to free from responsibility those who had authority to act as Head of State, and he wondered whether the terms of the Charter were really intended to grant certain Heads of State the benefit of traditional immunity. The last sentence of the comment appeared to confirm that impression.

117. Mr. SPIROPOULOS explained that he had wished to point out that a Head of State or high official who, under customary international law, could invoke the responsibility of the State as a defence, could not

do so in the case of a crime under international law. If, for example, the chief of police of a city such as Geneva were to arrest a person enjoying diplomatic immunity, he would be violating international law but not committing any criminal act, either under domestic law or under international law, provided there was no rule of international law making such an act punishable, but if that act were held to be a crime under international law, the chief of police would be responsible under international law. In order to avoid any misunderstanding, he proposed the deletion of the last sentence of the comment.

118. Mr. HUDSON saw no reason for deletion.

119. Mr. AMADO said that he favoured the retention of the sentence, since he thought that the Commission should stress what had been done by the Nürnberg Tribunal in respect of Heads of State and responsible officials.

120. Mr. KERNO (Assistant Secretary-General) thought that the Commission was in agreement that the first sentence of the comment should be amended by deleting the words "in a more precise form" and by explaining the reasons why Principle III had been formulated as it was. The Commission also appeared to consider that the first part of the second sentence should be deleted down to and including the words "responsible for his actions".

121. Mr. SANDSTRÖM pointed out that, under Swedish law, the sovereign enjoyed immunity for all acts performed in his capacity as Head of State. He had thought that the second sentence under discussion had been inserted in the comment to recall the principle stated in numerous constitutions, according to which the sovereign or Head of State enjoyed such immunity.

122. The CHAIRMAN stated that there was a difference regarding the exercise of authority. That was the difference between the case of Hitler and that of Wilhelm II. He thought that the interpretation of the Charter given by Mr. Spiropoulos was correct, and that a chief of police would in fact be responsible for an act he performed, if he had thereby committed a crime under international law.

123. Mr. HUDSON requested the deletion from the third sentence of the comment on Principle III of the words "under certain circumstances", which weakened the idea expressed. He also asked that the word "court" should be replaced throughout by the word "tribunal".

The comment on Principle III was adopted as amended.

PRINCIPLE IV

124. The CHAIRMAN read out Principle IV and the comment thereon (A/CN.4/22, part IV).

125. Mr. YEPES stated that he would be obliged to vote against that principle and asked the Commission to reject it. The report transcribed the principle contained in article 8 of the Charter of the Nürnberg Tribunal. The reason why that principle had been included in the report was that the resolution of the General

Assembly had instructed the Commission to formulate it. But the International Law Commission consisted of independent international jurists and its members should act in that capacity. So far as he personally was concerned, he could not subscribe to principles that were contrary to all legal concepts. Was it possible to say that an official who received a formal order from his superior could avoid carrying out that order? Such an official was in reality faced with a *force majeure* from which there was no escape and he could not possibly avoid obeying the order. One of the essential principles of law was free will; before he could be held responsible for his acts, a man must be free to choose and to act according to the dictates of his conscience. In this case, the Commission appeared to be maintaining the contrary. He fully understood that a high official who was a member of the higher councils of governments might be free to perform or not to perform an act determined by the government; but that did not apply, for example, to an officer, a non-commissioned officer or a soldier who received an order from his superior and must carry it out because he would otherwise be in danger of losing his life. In his opinion, a man must be morally free to make his choice if he was to be held responsible for it and consequently he was obliged to vote against anything that was contrary to all ethical principles.

126. Mr. FRANÇOIS, speaking on a point of order, said he thought the Commission was about to discuss a question with which it would have to deal again when examining the report submitted by Mr. Spiropoulos on the draft Code of Offences Against the Peace and Security of Mankind; he thought it advisable for the Commission to adjourn the discussion of Principle IV and the comment thereon until it had finished examining the other report of Mr. Spiropoulos.

127. The CHAIRMAN partly agreed with the objections raised by Mr. Yepes, but reminded the Commission that it was called upon to formulate the Nürnberg Principles. He thought, however, that Principle IV, as stated in the report, could be examined at once, with the addition of a few words expressing the idea that the court could take account of the fact that a person committing a crime had acted on the order of a government or of a superior, not only to mitigate punishment but also as grounds for acquittal, if justice so required. With that addition, the Principle could be considered immediately, without subsequent decisions of the Commission being prejudiced by its decision on the point. Mr. Yepes had stated that the essential principle of all law lay in the free choice of the individual. If he was not acting freely he might not have *mens rea*. That condition might also be lacking if he were subject to *force majeure*—i.e., if he were confronted by an event which prevented him from taking a decision and he had to obey an order.

127a. He (the Chairman) recalled that a matter which had aroused very strong feeling was then before the French courts; he was referring to the Oradour incident, which was an appalling crime against mankind. Old men, women and children had been shut in the church at Oradour, to which the Germans had set fire.

The non-commissioned officers and soldiers guilty of this act were at the present time appearing before a French military tribunal. It had been asked whether some of those soldiers and non-commissioned officers could be acquitted. Certain criminal lawyers held that the men had not acted freely, that they had been faced with the choice of obeying or being killed, and that that fact must be taken into account; other jurists took the opposite view. That was the situation in fact. It had aroused strong feeling, and he thought it would be difficult to tell the Commission in which cases there might be an acquittal—i.e., in which cases one or other of the men was not responsible. Consequently, he asked the Commission to consider whether it did not think fit to add to Principle IV a provision not only for mitigation of punishment but also for possible acquittal. The additional clause might be in the following terms: "... in mitigation of punishment or even as grounds for acquittal if justice so requires". He considered that the Commission was not bound to adhere strictly to the principles applied at Nürnberg, but that in formulating the principles it should take care to avoid contradictions. It must, after all, be free to choose. In these circumstances, he thought that—as Mr. François had pointed out—the question raised in Principle IV was bound up with the question raised in the other report submitted by Mr. Spiropoulos, and he proposed that the Commission decide whether to adjourn the discussion as just proposed, or to take an immediate decision by which it would be bound when it came to examine the other report.

128. Mr. BRIERLY thought that a way out of the dilemma might be found in the words contained in the judgment of the Nürnberg Tribunal, according to which the true test of criminal responsibility was "whether moral choice was in fact possible" (A/CN.4/22, part IV).

129. Mr. CORDOVA thought that there was a certain analogy between an officer who ordered torture and a gangster chief who compelled one of his men to commit a criminal act. In both cases, the subordinate was acting under constraint, but that did not relieve him of personal responsibility; for in his opinion a man must act rightly even if it meant losing his life. There was no obligation to obey the order of a criminal or to obey a criminal order when it was known that a criminal act was involved. The declaration or conduct of war was a different matter. In political crimes such as the conduct of war, an officer, non-commissioned officer or soldier could not be held personally responsible if he acted in conformity with the laws of war; but a distinction must be made between such acts and crimes against mankind for which such men must be held responsible.

130. Mr. SPIROPOULOS said that during the last two or three days he had thought a great deal about the Commission's work. He believed that the difficulties with which it was faced were due to the fact that it was carrying on its business and discussions without members being in full agreement as to its task. Some thought that the Commission should formulate the

Nürnberg Principles independently of the fact that they might or might not be considered as principles of international law. Others considered that it should concern itself exclusively with the principles contained in the Charter and Judgment of the Tribunal, which were principles of international law. If they were right, how had the commission been able to adopt chapter III of the first part of its report on the first session? The previous year, the Commission had decided that it was not called upon to determine whether the Nürnberg Principles were principles of international law. If the Commission could not now reach agreement it could, it was true, adopt principles, but each member would interpret them as he pleased. Consequently, the Commission should first decide whether it intended merely to formulate principles or to discuss those principles as principles of international law. In his report, he had reproduced the principles adopted the previous year. Mr. Yepes was now asking that the principles be re-examined. That was an entirely new departure. If the Commission accepted the principles as recognized principles of international law, its task would be easy. But if it did not, there would be interminable discussions with no solid foundation.

131. The CHAIRMAN paid tribute to the care and conscientiousness shown by the Rapporteur. He reminded the Commission that it must carry out the task assigned to it by the General Assembly—namely, to formulate the principles of international law recognized in the Charter and Judgment of the Nürnberg Tribunal, and that it must then incorporate those principles in the draft Code of International Law. In the circumstances, he did not think that the Commission could include in its code principles on which it was not in agreement. Could a jurist affirm something which was contrary to the evidence, and was the Commission going to affirm something which it was not prepared to incorporate in the Code? That was the question with which the Commission was now faced. It had acted too hastily the previous year and had made a mistake. In his opinion, it was that mistake which was now hampering the debates.

132. Mr. SPIROPOULOS asked whether the Commission intended to adopt Principle IV and the comment thereon contained in his report. If so, it should decide on the attitude it wished to adopt as a basis for discussion.

133. Mr. FRANÇOIS thought it possible to formulate the principles as contained in the Charter and judgment of the Nürnberg Tribunal; on that point, the whole Commission seemed to be in agreement. Moreover, in formulating those principles, it would not be stating that it supported them. In his opinion, the Commission's first duty was to formulate the principles, considering them as principles of international law as the Nürnberg Tribunal had done. The list of principles had been drawn up, and it was from that point of view that the Commission should decide on their adoption. The second duty of the Commission was itself to examine the principles from the viewpoint of international law, and to decide whether it could incorporate them in the draft

Code of Offences against the Peace and Security of Mankind.

132. Mr. BRIERLY did not think that that was the problem. In no country did the law recognize superior orders as a defence when a crime had been committed.

133. Mr. el-KHOURY explained that under the law of his country, which was based on Islamic law, an order given by a superior did not in itself free from responsibility the person to whom the order was given. The order of a chief who had power to enforce the execution of his order might remove that responsibility. He observed that the text of Principle IV, which was based on the text of article 8 of the Charter of the Nürnberg Tribunal, had been established by the Commission the previous year. But as he had not then been able to attend the meetings of the Commission, he could give no opinion on its intentions at that time. He thought, however, that the Commission must now examine the extent to which the Nürnberg Tribunal had utilized and implemented the provisions of article 8 of the Charter. The crimes in question were listed in article 6. He wondered how many subordinates had committed such crimes in Germany. There were certainly millions of them. But how many of such persons had been brought before the Nürnberg Tribunal and sentenced by it? Perhaps twenty, one hundred, or even a thousand. Since the Nürnberg Tribunal, which was responsible for applying article 8 of the Charter, had failed to do so by limiting itself to a certain number of cases, the Commission should not formulate that principle, which would be binding upon other courts in future.

134. Mr. SPIROPOULOS emphasized that he had not decided any issue in the principle and the comment he had formulated. He had merely confined himself to the task assigned to the Commission by the General Assembly.

135. Mr. KERNO (Assistant Secretary-General) did not consider it absolutely essential for the Commission to take a formal decision at that stage on the exact interpretation it placed upon the words "principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal", which appeared in General Assembly resolution 177 (II). The Commission had already adopted the text of Principles I to III. Principle V would probably raise no difficulty. It therefore only remained to formulate Principle IV. The Rapporteur's text and Mr. Brierly's amendment might perhaps form the basis for a solution.

136. The CHAIRMAN thought that the Commission should adjourn in order to form a definite opinion on the policy to be followed in respect of the principles it was to state in its report.

137. Mr. SANDSTRÖM reminded the Commission that the principles it was to formulate must be in conformity with the Charter and judgment of the Nürnberg Tribunal. He considered that article 8 of the Charter was drafted in very categorical terms, but the judgment was not so clear.

138. Mr. SPIROPOULOS thought that the Commis-

sion must now decide whether or not it wished to adopt the principles that an order given by a superior made the subordinate responsible; that was the first question it would have to decide.

139. The CHAIRMAN again requested the Commission to consider the matter and to form an opinion so that it could adopt a definite position with regard to the decisions it was about to take.

The meeting rose at 1 p.m.

47th MEETING

Thursday, 15 June 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 CORDOVA, 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).

Formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal: Report by Mr. Spiropoulos (item 3(a) of the agenda) (A/CN.4/22) (continued)

PRINCIPLE IV (continued)

1. The CHAIRMAN was convinced that it was useless for the Commission to decide in a purely theoretical way how it was to interpret the task entrusted to it. The drafting of Principle IV was acceptable. There might seem to be some contradiction between Principle IV and what the Commission intended to include in the draft criminal code. But it was only apparently so; there was no real contradiction. The Charter merely spoke of mitigation, and if the Commission wished to include mitigation or even absolute defence in the criminal code, it could do so without contradiction. It could even allow a judge to acquit the accused. The criminal code would enlarge on the Nürnberg principles. The Nürnberg principles referred to "justice"; he personally would prefer to say "equity", though the idea

was exactly the same. He felt that, provided certain alterations were made in the wording of the French text, Principle IV could be accepted as it stood.

2. Mr. ALFARO agreed. There was every reason to maintain that the Commission had the power to determine what principles recognized in the Charter and judgment constituted principles of international law when the Tribunal was set up and what principles did not. However, it had decided to adopt the principles as enunciated in the Charter. These could be found in its report which had been approved by the Sixth Committee and the General Assembly. If the Commission went back on this, it would amount to an attempt to revoke the General Assembly's decision. If it admitted that it had made a mistake, it would automatically imply that the Assembly had also made a mistake; and possibly the Assembly might maintain that the Commission was wrong in the present instance and not previously. That would utterly destroy the Commission's prestige. He could not see how the Commission could refuse to recognize principles solemnly affirmed by the General Assembly; it would be unwise, therefore, to become involved in a discussion likely to lead to that end, especially as only one of the five principles had given rise to further discussion on the question already settled at the first session. Without prejudice to a thorough discussion of Principle IV, and with due regard to the view that this principle was not a rule of international law at the time when the Tribunal was set up, it would be better to concentrate on deciding whether the principle was acceptable or not, in view of the provisions of Article 8 of the Nürnberg Charter and the decision taken a year ago by the Commission.

2 a. From a purely legal point of view, he was convinced that the principle that superior order did not free a person from criminal responsibility was a sound one, especially when supplemented by a proviso that superior order could be considered in mitigation of punishment, if justice so required. Man was endowed with free will, and even the most ignorant person in the civilized world could judge whether an act was criminal or not. Moreover, with regard to the crimes referred to in the Charter, obviously if superior order exonerated a person from criminal responsibility, in most cases such crimes could be committed with impunity. This was particularly true where criminals belonged to a totalitarian government. In a totalitarian State, all acts involved superior order. The system was like a pyramid in which the will of the dictator was at the apex, and was handed down from one category of officials to another until it reached the lowest strata of the population. Where the dictator happened to be a monster of the Hitler type, it was obvious what the expression "superior order" meant; and that, with the exception of Hitler himself, everyone could fall back on superior order to exculpate himself.

2 b. It was also true that, even within a totalitarian state, an individual could disobey a criminal superior order when he exercised his power of option. He cited the example of Rommel, the Commander of the Africa Corps during the last war. Rommel had thrown in the

fire an order issued by Hitler on 18 October 1942, under paragraph 3 of which any enemy troops on commando operations in Europe or Africa taken prisoner by the Germans, even if soldiers in uniform or demolition squads, and whether armed or unarmed, in action or in flight were to be massacred to the last man. The order added that even if they gave themselves up, such prisoners were not to be spared. Rommel's action was revealed through the cross-examination at Nürnberg on 18 June 1946 of General Siegfried Westphal (see D. Young: *Rommel*, London, 1950, pp. 152 and 153). Thus, even in a totalitarian State choice could be exercised. He would vote for the principle, with the amendment proposed by Mr. Brierly, which brought it more into line with the end in view.

3. Mr. YEPES considered that the Commission was bound to rectify its decisions of the previous year if it felt that a mistake had been made. Hence he could not agree with Mr. Alfaro's argument. By admitting its mistakes, the Commission would increase its prestige with the scientific world. What Mr. Alfaro had said of the totalitarian State merely confirmed his own argument at the previous meeting. The individual was swallowed up by the Leviathan. A soldier could not be made entirely responsible for his acts. The order just quoted showed how far the decisions of heads of States such as Hitler could go. Theoretically, subordinates were free to disregard such orders; humanly they were not. It would be contrary to ethical principles to make minor officials and soldiers shoulder full responsibility when they had acted under orders. He suggested that the second sentence of Principle IV should be worded as follows: "It may, however, be considered in mitigation of punishment, or he may be acquitted, if justice so requires."

4. On a point of order, Mr. SPIROPOULOS said he had drawn attention to the fact that there could be no discussion without method; and the Commission was again falling into the same error. If the Commission stood by the decision of a year previously, it had only to consider whether the text he had proposed was consistent with the Nürnberg Charter and judgment. Only by reversing that decision could the Commission consider whether the principle recognized by the Charter and judgment was in keeping with the principles of international law.

5. Mr. BRIERLY clarified his proposal as being concerned rather with the drafting of the principle. Where there was no moral freedom there could be no guilt. Where the accused had any option, superior order was no defence.

6. Mr. YEPES suggested that, in certain cases, a superior order could be an absolute defence. That was the contention of Mr. Alfaro and himself, with the difference that they had specified the particular case. It was a question of drafting.

7. Mr. FRANÇOIS was prepared to accept the Chairman's proposal. The text drawn up by Mr. Spiropoulos would thus be adopted and Mr. Brierly's amendment rejected as altering the sense of the Charter. If the Commission decided that it had to formulate the prin-

ciples contained in the Charter, it must preserve them as enunciated in the Charter—i.e., superior order was not an absolute defence but merely a mitigating circumstance. Mr. Brierly was endeavouring to camouflage this decision under a formula which did not decide the issue. He could not share Mr. Alfaro's opinion that the Commission was bound by the principles adopted by the General Assembly.

8. Mr. BRIERLY did not understand Mr. François' criticism. The principle was formulated in accordance with the Charter and judgment. What he had proposed was based on the latter. His only modification was the addition of words to be found in the last sentence of the commentary on Principle IV.

9. Mr. FRANÇOIS was under the impression that Mr. Brierly had wished to make a substitution.

10. Mr. HUDSON explained that Mr. Brierly had suggested the addition of the words: "Provided a moral choice was in fact possible to him" (see A/CN.4/22, part IV). He considered that, under its terms of reference, the Commission could decide that certain principles were principles of international law recognized either in the Charter or in the judgment, or in both. He hoped the Commission would share this view. Mr. Brierly's proposal was based on the judgment, which mitigated the severity of the Charter.

11. The CHAIRMAN read out the amended text: "The fact that a person acted pursuant to order of his Government or of a superior, does not free him from responsibility under international law, provided a moral choice was in fact possible to him. It may, however, be considered in mitigation of punishment if justice so requires."

12. Mr. CORDOVA considered that the text implied that obedience to a specific order could constitute an absolute defence. Under its terms of reference, the Commission could not so decide. Neither in the Charter nor in the judgment of the Tribunal could a superior order be regarded as an absolute defence.

13. Mr. SPIROPOULOS urged the Commission not to decide for Mr. Brierly's amendment, as it would be a mistake. It was an important question which he had again studied for the purposes of his second report, on the draft code of offences against the peace and security of mankind (A/CN.4/25). He had also discussed it with several qualified persons. He had been greatly puzzled as to the sense of the passage quoted by Mr. Brierly. For a while he had interpreted the passage as Mr. Brierly interpreted it. But a thorough study of the text of the judgment had brought to light two passages which he had inserted in his report (footnote 54). Those passages were quite categorical. They stated that article 8 of the Charter prohibited the doctrine of superior orders being used as a defence. That meant that Principle IV must not be given a different sense from article 8 of the Charter. Mr. Pella, the author of a book on the subject, with whom he had had a long conversation, had reached the same conclusion. In preparing his second report he had studied the jurisprudence of local English, American and French military tribunals which had had the same problem to deal with.

They had applied "Control Council Law No. 10" containing the same rule as the Charter; and they had likewise decided that the argument of superior order could not be used as an absolute defence (See Brand, *Law Reports of Trials of War Criminals*, Vol. XV, p. 157). He read out the last part of his commentary on Principle IV as showing that what was involved was degree of responsibility and not absolute defence. In paragraph 120 of his second report (A/CN.4/25) he had quoted a passage from the Jackson Report on the London Conference. How, in view of that passage, could it be maintained that superior order constituted an absolute defence?

14. Mr. el-KHOURY argued that Principle IV recognized and defended by Mr. Spiropoulos was clear, and that superior orders were not an absolute defence. No one denied that, but Mr. Brierly sub-divided the question. There was first of all superior order. Secondly, there was the moral choice open to the person committing the act. If such a person had a choice, superior order could not be argued as an absolute defence. At Nürnberg, article 8 had not been applied correctly, since hundreds of thousands of persons who committed under orders the atrocities set out in article 6 (c) had been let go scot free, which implied that they were implicitly recognized as not guilty. The true criterion of criminal responsibility had nothing to do with orders received, but lay in moral liberty and the possibility of choice on the part of the person committing the act alleged. The judgment could be interpreted in this sense; and he supported Mr. Brierly's proposal.

15. Mr. AMADO said he had listened to the Rapporteur's statement with attention and profit. But Mr. Spiropoulos had not quoted footnote 55 of his report, to the effect that at the London Conference there was agreement that superior orders should not be an absolute defence. That passage led him to agree with Mr. Brierly's proposal.

16. Mr. HUDSON said he had read very carefully the passage in the judgment referring to this question; and he could find no justification for the beginning of the first sentence of the final paragraph:

"Finally as regards the criterion for the determination of the degree of responsibility of a person acting pursuant to superior command . . .".

This would be true only if degree of responsibility were understood to mean the possibility of invoking a defence. Mr. Spiropoulos had said that it was a question merely of determining the gravity of the punishment. He personally felt that what was at issue was the extent to which absolute defence could be invoked. The passage quoted in the last part of his commentary on Principle IV was taken from the judgment. He felt that Mr. Spiropoulos was contradicting his own argument in stating that only the degree of responsibility was at stake, ignoring the fact that the last part of his commentary followed the ante-penultimate sentence. He suggested that the two sentences be placed one immediately after the other in the commentary.

16 a. He recalled the very significant proposals of the International Red Cross Committee for the revision of

the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. He read out article 40 (a):

"The fact that the accused acted in obedience to the orders of a superior or in pursuance of a law or regulation shall not constitute a valid defence, if the prosecution can show that in view of the circumstances the accused had reasonable grounds to assume that he was committing a breach of this Convention. In such a case the punishment may nevertheless be mitigated or remitted, if the circumstances justify."

This text, however, was not embodied in the final text of the Convention of 12 August 1949.

17. Mr. SANDSTRÖM said he would willingly have supported Mr. Spiropoulos if the Commission had not already departed from the Charter in formulating Principle III. In Principle IV it was still more justified in doing so. He read out the last part of the Commentary; where there was no moral choice, there should be no responsibility. He supported Mr. Brierly's proposal.

18. Mr. HSU said he could not support Mr. Brierly's amendment. The Commission had already retreated from its former position with regard to one of the principles. It could make a similar decision here, though if the Commission had made a mistake, it need not repeat it. The adoption of Mr. Brierly's amendment would constitute a serious alteration of the principle involved in the Statute, and would weaken it.

19. Mr. SPIROPOULOS said he had the impression that the members of the Commission were travelling along parallel paths. Most of them were anxious to adopt a principle which they could recognize as binding in international law, whereas he wished merely to formulate what was to be found in the Charter and judgment of the Nürnberg Tribunal. In his second report, he went further than them and argued that this Nürnberg principle should be abandoned. He had referred to two passages from the judgment in which it was stated that superior orders could not constitute an absolute defence.

20. The CHAIRMAN repeated that there was no point in adopting a theoretical attitude. The Commission's task was to take a decision on Principle IV.

21. Mr. HUDSON asked for the vote to be taken in sections.

22. Mr. KERNO (Assistant Secretary-General) said that the basic text was the Rapporteur's version; that constituted the proposal before the Commission. To it Mr. Brierly had proposed an amendment to add at the end of the first sentence: "provided a moral choice was in fact possible to him." A vote would have to be taken first on Mr. Brierly's amendment, then on the Rapporteur's text, sentence by sentence.

23. Mr. YEPES recalled that he had proposed an amendment with the following wording: "It may, however, be considered in mitigation of punishment, or he may be acquitted, if justice so requires."

24. The CHAIRMAN said that this amendment was similar to Mr. Brierly's.

25. Mr. BRIERLY also thought that Mr. Yepes'

amendment, though more general than his own, amounted to the same thing.

26. Mr. YEPES withdrew his amendment in view of the opinion of the Commission that Mr. Brierly's amendment was equivalent to his own.

The amendment proposed by Mr. Brierly was adopted by 9 votes to 3.

The amended first sentence of Principle IV was adopted by 8 votes to 2, with 2 abstentions.

27. Mr. HUDSON suggested that the words "if justice so requires" at the end of the second sentence be deleted as being meaningless.

The vote on this amendment resulted in a tie, 6 votes for and 6 against. The phrase therefore stood.

The second sentence of Principle IV was adopted by 10 votes in favour, with 2 abstentions.

Principle IV as a whole was adopted by 8 votes to 2, with 2 abstentions.

28. The CHAIRMAN read out the commentary on Principle IV and footnote 54.

29. Mr. HUDSON thought that the wording of the first part of the commentary called for revision. With regard to footnote 54, pp. 148 - 151 of the publication, *Nazi Conspiracy and Aggression: Opinion and Judgment*¹ gave some interesting details on the mitigation of penalties which the Tribunal had had to make; he suggested that these details be taken into account and in part reproduced in the footnote. He emphasized particularly that, in the case of General Jodl, the Tribunal had found nothing to justify a reduction of his penalty in the fact that Jodl had acted, as he himself had stated, on superior orders. He also suggested that in the interests of consistency with the decision previously taken by the Commission, footnote 55 should not be retained in the Commission's report. The Commission was not called upon to deal with preparatory studies.

30. Mr. SPIROPOULOS agreed with Mr. Hudson, provided the Commission did likewise.

31. Mr. HUDSON also suggested that the quotation given at the end of the commentary be placed immediately after the quotation at the end of the first paragraph, on the grounds that they constituted one single passage.

32. Mr. CORDOVA suggested that the text of the second sentence of the commentary be altered, to keep closer to the text given in article 8 of the Charter of the Nürnberg Tribunal: "The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility"; whereas, the principle as just adopted admitted absolute defence where the accused had no moral choice.

33. The CHAIRMAN thought the sentence could have remained as it stood, though he had no objection to its being altered.

34. Mr. SPIROPOULOS agreed to the sentence being modified on the lines indicated by Mr. Córdova.

¹ Published by the United States Government Printing Office, Washington, D.C., 1947.

35. Mr. BRIERLY suggested that it be left to the Rapporteur to decide what wording he should use for the commentary in the general report, and whether footnotes should be incorporated. At present it would be difficult for the Commission to decide on the precise wording of the commentaries. What it should concentrate on was the way in which the principles themselves were formulated.

36. The CHAIRMAN agreed with Mr. Brierly; though it might be useful for the members of the Commission to give their views for the benefit of the Rapporteur.

37. Mr. YEPES said that the Commission at the previous meeting had decided that Principle III applied to governments, whereas Principle IV referred to persons of subordinate status who had acted on orders from a superior. But Keitel was a general, and he wondered whether Keitel did not therefore come under Principle III.

38. The CHAIRMAN pointed out that, although he was a general, Keitel was not one of the rulers; hence Principle IV would apply to him. In a totalitarian state, no distinction could be made between a ruler, an official or even a private individual, since all of them acted under orders from the head of the totalitarian government.

39. Mr. CORDOVA once again drew attention to the footnotes in the report. In their present form, they no longer gave support to Principle IV as adopted. Hence, he thought that footnote 54, at any rate, should be deleted.

40. Mr. BRIERLY thought that with the addition suggested by Mr. Hudson, footnote 54 did support Principle IV.

41. Mr. CORDOVA said that in some cases the Tribunal had expressly declared that it could not reduce the penalty—e.g., in the case of heinous crimes. But Principle IV now admitted the possibility of exoneration from responsibility.

42. Mr. ALFARO said that the principle as adopted established the general rule that the existence of a superior order did not constitute a defence. Mr. Brierly's amendment was the exception to the rule. Hence he saw no reason why the footnotes should be deleted.

43. Mr. SPIROPOULOS agreed that the report should omit anything likely to prove risky or to constitute a contradiction between the theories advocated by the Commission and the principles enunciated in the judgment of the Tribunal.

44. The CHAIRMAN thought that, as the Rapporteur was agreeable, the footnotes should not be inserted in the Commission's report. He then read out the final paragraph of the commentary.

45. Mr. HUDSON said that the wording of the paragraph called for alteration. The text of the judgment of the Tribunal should be quoted in the precise form given in the official proceedings, and not as given in the publication, *Nazi Conspiracy and Aggression: Opinion and Judgment*.²

² *Ibid.*

46. Mr. BRIERLY said that the French text of the quotation was entirely different from the English, and asked whether there was an authentic French text.

47. The CHAIRMAN added that several modifications to the text were called for, and that actually the English and French versions did not tally. He wondered what could be the meaning of the phrase "*en rapport avec l'ordre reçu*"; he thought it should be replaced by the phrase "*l'existence d'un ordre reçu*".

48. Mr. LIANG (Secretary to the Commission) remarked that the quotations had been taken from the authentic French text of the proceedings of the Nürnberg trial. He would have them checked.

49. Mr. HUDSON said that the preface to the English text of the official proceedings of the Nürnberg Tribunal stated that they would be published in French, English, Russian and German. An official French version must therefore exist, and the wording of that text should be reproduced in the report.

50. Mr. SANDSTRÖM did not understand the meaning of the words "*le vrai criterium*", etc., which seemed to him meaningless.

51. The CHAIRMAN said that he too was not clear as to the meaning of the words.

52. Mr. KERNO (Assistant Secretary-General) said that he had often found himself puzzled by texts drafted in two or three languages, all of them authentic. In the preparation of the English text, the official documents had been available. The French translation, which in this particular case differed from the English, had been badly done, but the quotations in it had been taken from a text which could be regarded as official. Hence he stood by the present text, whether correct or not.

53. The CHAIRMAN said that if there was no objection, he would regard Principle IV and the footnotes referring to it, with the amendments, as adopted by the Commission.

It was so decided.

PRINCIPLE V

The CHAIRMAN next passed on to Principle V, which he read out.

54. Mr. HUDSON asked that the word "*quiconque*" in the French text be altered.

55. The CHAIRMAN felt that the words "*quiconque est accusé*" should be replaced by "*toute personne accusée*". He thought the English term "*fair trial*" was not the same thing as a "*procès équitable*".

56. Mr. HUDSON asked what was meant by "*fair trial*". So far as he knew, the term had no value as an international definition. He personally could not say precisely what it meant.

57. Mr. SPIROPOULOS said that the term was not his own, and was to be found in the Charter of the Nürnberg Tribunal.

58. Mr. HUDSON's opinion was that the expression "*fair trial*" did not constitute a principle recognized

in international law. Hence, he would prefer to see it replaced by another expression.

59. Mr. CORDOVA maintained that the term should be kept. It stated precisely what was required. It constituted a safeguard for the accused person against unfair practices, and the same principle had been inserted into article 10 of the Universal Declaration of Human Rights.

60. Mr. ALFARO thought that a very important principle was involved; these terms were used in the Nürnberg Charter, where article 16 defined precisely what was to be understood by "fair trial". Moreover, the same expression was to be found in the United States Constitution, and it was also used in the Universal Declaration of Human Rights adopted by the General Assembly. It meant that any person must have the right to establish proof of his innocence. In several instances, governments had been obliged to pay compensation to individuals because they had not granted them a fair trial. The expression should be retained in Principle V.

61. Mr. BRIERLY agreed with Mr. Alfaro. The various paragraphs of article 16 of the Nürnberg Charter were quite explicit. Incidentally, they were reproduced in the commentary on Principle V.

62. The CHAIRMAN also felt that the expression should be retained, in both the English and French texts, though the latter was not very precise.

63. Mr. KERNO (Assistant Secretary-General) read out article 10 of the Universal Declaration of Human Rights:

"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

64. The CHAIRMAN said that all these texts were in harmony, and the term "fair trial" in the report should therefore be maintained. He then read out paragraph (1) of the commentary.

65. Mr. HUDSON suggested that the paragraph be deleted as referring to the preparatory work which was not the Commission's concern. It was not called upon to review what had taken place in London. In any case, the paragraph added nothing to the essence of the report.

66. Mr. ALFARO thought that references to preliminary work could possibly be omitted. But understanding of the text was often simplified if the historical background was known. It was important to bring out the fact that the principle in question had been recognized ever since the London Conference.

67. The CHAIRMAN thought that Mr. Hudson's scruples went rather too far; and he suggested that the Rapporteur be left to decide whether to insert the paragraph or not. He then read out paragraph (2) not including sub-paragraphs (a), (b), (c), (d) and (e) and paragraph (3).

Principle V and the commentary on it were adopted by the Commission.

CRIMES AGAINST PEACE

68. The CHAIRMAN suggested that the Commission pass on to examine section B of part IV of the report: "The Crimes". He read out the first sentence of this section.

69. Mr. ALFARO said that this sentence seemed to him particularly important as a link with the previous sections of the report, since it referred expressly to the terms of the Charter and judgment of the Nürnberg Tribunal.

70. Mr. HUDSON agreed with Mr. Alfaro, but suggested that the sentence be worded in terms similar to those used in the first sentence of section A of Chapter IV of the report.

71. The CHAIRMAN said that the French text was perfectly satisfactory as it stood. Possibly the English text called for modification.

72. Mr. ALFARO wanted the present wording retained.

73. The CHAIRMAN next read out heading (a), "Crimes against peace", with the sub-headings (i) and (ii).

74. Mr. HUDSON remarked that the quotation was taken textually from article 6 (a) of the Nürnberg Charter. Nevertheless, he wondered whether "waging of a war" should be included among the crimes against peace. Reading the judgment of the Nürnberg Tribunal, he had noticed that it was mainly concerned with the planning, preparation and initiation of war. Indeed, the expression "waging of a war" would apply to any individual in uniform—which would certainly not be justified from the legal point of view. In a conversation with high officials of the Naval College of New Jersey, he had found them most concerned about the inclusion of the word "waging" of a war, and had wondered how far this could be applied to officers, non-commissioned officers and private soldiers fighting in a war.

75. The CHAIRMAN asked Mr. Hudson whether he did not feel that the spirit in which the judgment was pronounced left no doubt that in the eyes of the Tribunal, private soldiers, non-commissioned officers or officers fighting in a war were not committing a crime.

76. Mr. HUDSON said that if that were the case it would be better to say so. With regard to the initiation and waging of war, the Nürnberg Tribunal had granted acquittal in cases where it had found that the accused person had had nothing to do with the preparation of a war. General Keitel had been sentenced for committing crimes against peace and for planning and preparing war, but not for waging war; Streicher, who had been sentenced for crimes against peace and mankind, had been acquitted of the charge of waging war, as he had had nothing to do with the waging of war. Hence they could not talk of waging war but of planning, preparing and initiating war. A young officer or a private soldier fought in a war. Was the Commission going to maintain that such officers, non-commissioned officers and soldiers were guilty on that account?

77. Mr. BRIERLY referred to page 60 *et seq.* of *The*

Charter and Judgment of the Nürnberg Tribunal,³ where it was clearly stated what waging war was intended to mean. A private soldier had no moral choice.

78. Mr. HUDSON emphasized that the judgment of the Tribunal as a whole did not dwell on the notion of waging war.

79. Mr. SPIROPOULOS recalled that in the first part of his report he mentioned several proposals made at the London Conference, in particular a proposal by the Soviet Union delegation regarding the definition of crimes, and a proposal by the United States delegation stating that "the maintenance... of the words 'participating in the waging of the war' would make the entire soldiery, conscript and volunteer, and numerous civilians guilty by definition" (A/CN.4/22, para. 21). There was no doubt that only high-ranking military personnel were by definition guilty of waging war. On the other hand, if, for example, a general had not taken part in the preparation of a war or in the operations of a war, but had been called upon in 1943 to take part in the war against Russia, he would not be guilty of the crime of preparing war. There was no doubt, too, that a private soldier could not be prosecuted. This surely was clear from his report; and the Charter of the Nürnberg Tribunal contained nothing to contradict this.

80. Mr. CORDOVA asked whether in Mr. Spiropoulos' opinion guilt on the grounds of waging war must be confined exclusively to high-ranking soldiers and officials. What was the position of an officer or official who prepared plans for a war without knowing at all whether a war would actually take place? In his opinion the terms of article 6 of the Charter applied exclusively to high state officials.

81. Mr. SPIROPOULOS replied that the Tribunal had decided that private soldiers, non-commissioned officers and officers were excluded. Incidentally, it was not for the Commission to go into the details of this question, since its task was to formulate principles which could be regarded as principles of international law.

82. The CHAIRMAN asked whether it was not the task of a judge to decide whether or not there had been participation in the preparation and planning of war.

83. Mr. BRIERLY thought that pages 60 *et seq.* of *The Charter and Judgment of the Nürnberg Tribunal* gave most valuable data on the notion of waging wars. The Rapporteur would find material most useful for his report.

84. Mr. HUDSON said that, in the light of the discussion which had just taken place, he felt that the Commission should be logical and omit the words "waging of a war". If the term were kept in the principles and commentaries, every soldier would fear the consequences of having worn uniform and fought in a war. Mr. Spiropoulos seemed to maintain the same opinion, and his impression was confirmed by point (ii) in paragraph 21 of the report. If the expression were kept, he would find it impossible to reassure his military friends.

85. Mr. SPIROPOULOS thought the term might be kept, on the understanding that it would refer only to high military personnel and officials.

86. Mr. CORDOVA recalled that the Commission's task was to formulate principles. The formulas laid down by the London Conference had in fact exonerated subordinate military personnel. The Nürnberg Tribunal had also, in fact, never tried private soldiers. The Commission must make it clear that the act of waging war was not punishable unless committed by high military personnel and officials.

87. Mr. SPIROPOULOS thought that the Commission might be satisfied if an explicit commentary on what the London Conference had decided were inserted into the report.

88. Mr. AMADO remarked that the final paragraph on pp. 60 - 61 of *The Charter and Judgment of the Nürnberg Tribunal* indicated that the Tribunal only appeared to have considered persons occupying high positions as guilty of the crime of waging aggressive war; while mere participation in an aggressive war did not constitute participation in the waging of aggressive war, and therefore was not a crime against peace.

89. Mr. SANDSTRÖM thought that when the Commission examined the report on the draft code of offences against the peace and security of mankind, it could take up the discussion with more profit.

90. Mr. HUDSON said that the passage quoted by Mr. Amado seemed to make a distinction between "act of warfare" and "waging war". He could not follow the distinction intended. His military friends thought that a person committed an "act of warfare" the moment he "waged war". This very subtle distinction seemed to indicate that there had been an attempt to choose the wording carefully, and he would be glad to hear explanations which might clarify the matter.

91. Mr. LIANG (Secretary to the Commission) said that the distinction was from an authoritative source. In fact it was taken from the actual terms of the judgment of the Nürnberg Tribunal. The private soldier and the man in the street could not follow the distinction, and as was frequently the case, they must be helped by a jurist in order to understand them.

92. Mr. BRIERLY asked whether "waging a war" and "poursuite d'une guerre" were equivalent terms.

93. The CHAIRMAN did not see why preparation of war should be regarded as a crime if waging war was not. If it was diabolical to prepare a war, it was equally diabolical to wage it; and he saw no reason why the word "waging" should be deleted. There must of course be a commentary explaining the exact sense to be given to the various terms used in this part of the report.

94. Mr. el-KHOURY thought that the expression "waging of a war" meant "initiating and carrying on a war". Hence, it covered the two notions at once. A person who was merely engaged in war was therefore not guilty of "waging the war". He saw no objection to the term being used in the Commission's report; but at the same time it should be explained that a private

³ United Nations publication, Sales No.: 1949.V.7.

soldier was not referred to by the expression, and the explanation should make it clear to the private soldier what the term did imply.

95. Mr. KERNO (Assistant Secretary-General) said that the explanation of the terms was to be found in current language. One did not speak of a soldier "waging war"; he "was in the war". The terms "waging" and "poursuite" applied to the same idea and included the preparation and planning of a war. As long ago as the London Conference, the terms had been taken in that sense.

96. The CHAIRMAN thought it was time that this long discussion was closed; and he asked the Commission to decide whether the definition of crimes against peace should be retained, with the addition of a commentary in the general report, without explaining the sense in which the term "waging of a war" was to be interpreted.

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

97. Mr. HUDSON said he would like to raise one further point—namely, the term "assurances" in sub-paragraph (i) of section A. He did not quite see the meaning of the word. He knew, of course, what a treaty or an international agreement was; and he knew that when two States concluded a covenant of perpetual peace—a thing which frequently happened—they gave each other mutual assurances. But what was the significance of the word taken by itself? Had the Nürnberg Tribunal built up the idea of assurances in its judgment? The word might give rise to great difficulties. In a recent speech, President Truman had given his listeners the assurance that the United States would never declare war on any other country. Did such a public statement constitute an "assurance" as contemplated in sub-paragraph (i)?

98. Mr. SPIROPOULOS said that under chapter IV, "Violation of International Treaties", the Nürnberg judgment had decided what were crimes committed in violation of international treaties and agreements, and had listed them. But it did not appear to have examined cases of "assurances" referred to in sub-paragraph (i).

99. Mr. ALFARO thought the word "assurances" was used in the sense of pledge or engagement. A nation could give an assurance or a pledge to another nation—e.g., it could undertake to keep its troops at a distance of five miles from a frontier, etc. International treaties or agreements were texts solemnly concluded between two or more States. Assurances, on the other hand, were unilateral undertakings. A war waged in violation of an assurance of this kind would equally constitute a crime against peace.

100. Mr. BRIERLY recalled that Hitler had repeatedly given assurances of this kind without observing them; so that he thought the term should be kept.

101. The CHAIRMAN agreed that the term should be kept with some explanation in the report to make its meaning clear.

102. Mr. KERNO (Assistant Secretary-General) was sure there was no doubt as to the meaning of the words

"treaties" and "agreements". An "assurance" could be defined as a unilateral undertaking which in some cases might entail obligations. One Power gave an undertaking to another; that constituted an assurance. If the other nation confidently relied on this assurance, it might, for example, disarm. Hence, the violation of such an assurance was a crime in accordance with the term "assurance" quoted in the report. A typical assurance was that given by Hitler, to the effect that when the Sudeten Germans were returned to the Reich he would never again make claims on Czechoslovakia.

The meeting rose at 1 p.m.

48th MEETING

Friday, 16 June 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 CORDOVA, 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).

Formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal: Report by Mr. Spiropoulos (item 3(a) of the agenda) (A/CN.4/22) (continued)

CRIMES AGAINST PEACE (continued)

1. The CHAIRMAN read paragraph a (i) (A/CN.4/22, para. 44); he preferred the word "undertakings" or "declarations" to "assurances". One might say "treaties, agreements and undertakings", the first two being bilateral or multilateral, whereas undertakings could be unilateral. This would correspond to the order in the English text.

2. Mr. HUDSON remarked that the French word "direction" was not the equivalent of the English word "planning".

3. The CHAIRMAN also thought the word "conception" should be used, or perhaps "initiative" or "projet" which was the most appropriate word. The nouns should be replaced by verbs—"projeter, préparer, déclencher, poursuivre".

4. Mr. ALFARO observed that the word "planning" had a wider meaning than "projet". It meant the drawing up of overall plans.

5. Mr. FRANÇOIS asked why the Commission should depart from the official French text of the Charter, which had used the word "direction".

6. The CHAIRMAN replied that the word was a poor translation, and that the most suitable term was "projeter".

7. Mr. KERNO (Assistant Secretary-General) noted that the so-called official translation was in fact so bad that the Commission would have to improve on it; this would have to be mentioned in the report.

8. The CHAIRMAN agreed.

9. Mr. HUDSON asked where the French version had been issued.

10. Mr. LIANG (Secretary to the Commission) said that it was a reproduction of the official version of the Tribunal's Charter drawn up in London. The London Charter had been drafted not only in English, but in French and Russian. If the Commission wished to alter the French text, this must be indicated in a note. The version given in the report was the official French text.

It was decided to adopt the text with the alterations suggested by the Chairman.

11. The CHAIRMAN read paragraph a (ii).

12. Mr. HUDSON said that in the French version the word "participer" ought to be used instead of "participation" to make the wording of the text correspond to that of sub-paragraph (i).

13. The CHAIRMAN read the second paragraph. He felt that the wording "treaties, agreements and undertakings" should be used there also.

The text was adopted with these alterations.

The CHAIRMAN read the third paragraph.

14. Mr. HUDSON quoted the following passage from the judgment: "War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression and such a war is therefore outlawed by the Pact" (*Trial of the Major War Criminals before the International Military Tribunal, Nürnberg, 1947, p. 220*). He thought the report should include this sentence with its reference to aggression.

15. Mr. SPIROPOULOS said he would leave it to the Commission to decide.

16. Mr. ALFARO did not see how the Commission could make amendments to the special report by Mr. Spiropoulos, as it had been distributed and could not be altered. No one could do the impossible. The passage quoted could be included in the general report. He suggested that the Commission should take note of it.

17. Mr. HUDSON said that if the Commission ac-

cepted Mr. Alfaro's view, its members were wasting their time. The Commission was discussing the special report, and was at liberty to add or delete anything it thought fit for the purpose of its general report.

18. Mr. CORDOVA considered that in examining the report by Mr. Spiropoulos, the Commission was working on its report for submission to the General Assembly. When it decided to add anything, it was giving a directive to its general rapporteur. Mr. Hudson's proposal was a valuable one, and should be reproduced in the general report.

19. Mr. HUDSON said that his proposal should figure in the report as adopted by the Commission. The Commission was drafting a commentary on the principle and might add anything it thought fit. When it had examined the special report and taken a decision as to what parts of it it wished to keep, delete, or alter, the general rapporteur need not re-draft the text for the Commission to discuss afresh.

20. The CHAIRMAN said that the Commission was not called upon to re-draft Mr. Spiropoulos' report, but it must indicate to its general rapporteur what it wished to retain and what it did not wish to retain in its general report.

21. Mr. KERNO (Assistant Secretary-General) said there was a misunderstanding. All the members of the Commission were fundamentally in agreement. The report by Mr. Spiropoulos would remain as it stood until Domesday, so to speak. The Commission was at present preparing its report to the General Assembly. That would be another document. It did of course take Mr. Spiropoulos' report and the other documents submitted to it as a basis for its discussions. It first of all examined the definition of the principles and of the crimes, and after that the commentaries—which as it had found, were most important. It gave its general rapporteur instructions which in some cases were quite specific and in others allowed him a certain latitude. Of course if the Commission attached great importance to any particular point, any member was at liberty to propose the precise wording he felt to be most suitable. The Commission would decide whether its directives to the general rapporteur were definite instructions or otherwise.

22. The CHAIRMAN agreed with Mr. Kerno's view.

23. Mr. SPIROPOULOS also agreed. At the same time, Mr. Hudson was right in arguing that the Commission could not discuss the report twice over. The work of the Rapporteur consisted of drafting a text and submitting it for the Commission's approval. Of course the Commission might not agree with the Rapporteur. Only where it instructed its general rapporteur that such and such a passage should be included in his report would that passage be included.

24. Mr. SANDSTRÖM asked whether anyone would object to the insertion in the Commission's report of the sentence suggested by Mr. Hudson (para. 14 above). He personally had no objection, since the sentence lent weight to Mr. Spiropoulos' arguments.

25. Mr. SPIROPOULOS said he would merely like remark that he had inserted commentaries in his report provisionally. The choice of passages to be quoted from the judgment was a matter of personal opinion.

26. Mr. ALFARO thought the quotation suggested by Mr. Hudson an excellent one. He too agreed with Mr. Kerno, whose statement corresponded to what the Chairman had had in mind in giving his ruling. The Commission was meeting to discuss the conclusions to be inserted in its general report.

27. The CHAIRMAN suggested that the sentence quoted by Mr. Hudson be included in the final report.

It was so decided.

28. The CHAIRMAN read the fourth paragraph of the commentary on Crimes against Peace (A/CN.4/22, para. 44), and observed that the paragraph was complete in itself.

It was decided to insert the paragraph in the general report.

29. The CHAIRMAN read the fifth paragraph (*ibid.*), and footnote 61.

30. Mr. SPIROPOULOS explained that this time the footnote did not give a verbatim quotation, but was a passage which he himself had drafted. He felt that it was important for the Commission to discuss it. If the usual method was followed of not referring to preparatory studies, the footnote would be deleted.

31. Mr. KERNO (Assistant Secretary-General) suggested that as a matter of style the French word "garanties" should be replaced by the word "engagements".

32. Mr. LIANG (Secretary to the Commission) thought that quotations from one of the official texts could not be altered, since all three texts were of equal validity. It would be better to explain in a note that the various authentic texts did not tally.

33. Mr. BRIERLY thought it would be advisable to end the final sentence of the paragraph in question after the words "in further detail", and to delete footnotes 61 and 62.

34. The CHAIRMAN thought that the Commission might keep the French text and explain in a note the interpretation it gave to the text.

35. Mr. SANDSTRÖM felt that the English word "assurances" should be included in the note.

36. The CHAIRMAN suggested that it be left to the general rapporteur to draft the note. Obviously it was awkward to alter the text; on the other hand, unintelligible expressions could not be retained.

37. Mr. CORDOVA agreed that it would be better to explain in a note any alterations the Commission might decide to make in the Nürnberg texts.

38. Mr. el-KHOURY pointed out that the Commission's idea had been to change the French text; this was contrary to what Mr. Liang had stated.

39. The CHAIRMAN replied that the text altered by the Commission was not an official text.

40. Mr. KERNO (Assistant Secretary-General) thought there was an important question involved. The Com-

mission had adopted the wording "According to the charter..."—a semi-quotation—in the sentence introducing the Crimes against Peace. Yet it had decided to alter the wording of the passage. In the present instance the text was a quotation, and the Commission should proceed carefully.

41. Mr. LIANG (Secretary to the Commission) thought that the text of the passage quoted should be retained.

42. Mr. CORDOVA thought an explanation should be given as to why the Commission had altered the text.

43. Mr. BRIERLY suggested deleting the beginning of the first paragraph on page 35: "According to the Charter and the judgment, the following acts constitute crimes under international law".

44. Mr. ALFARO pointed out that these introductory words did not appear in the Appendix to Mr. Spiropoulos' report.

45. The CHAIRMAN said that if the Commission agreed, no alteration would be made to the texts quoted in French; a note would merely be given in the report indicating the meaning attached to them by the Commission. In the case in point, the report would include "According to the Charter..." followed by the text adopted by the Commission; and a note would be given explaining that the official text had been changed.

It was so decided.

The Commission decided in principle to delete footnote 61.

46. The CHAIRMAN read the sixth paragraph (*ibid.*). Here too he thought that in the French text the word "direction" should be replaced by the word "projet".

47. Mr. KERNO (Assistant Secretary-General) remarked that the Commission was again faced with the same difficulty.

47 a. The CHAIRMAN thought it would be sufficient to put the words "direction" and "preparation", in the last line of the paragraph, between inverted commas.

48. Mr. LIANG (Secretary to the Commission) said that the London Charter had been drafted in three copies—French, English and Russian—all authentic. As the Commission had altered the wording of the London Charter, it would have to give an explanation. The difficulty was aggravated when the Commission retained the word "planning" while changing the corresponding word in the French text. He was of the opinion that no change could be made in the passages quoted.

49. The CHAIRMAN considered that this did not affect the previous decision.

50. Mr. HUDSON said that Mr. Liang had suggested to him a possible method of altering the definition of Crimes against Peace. He wondered what was gained by keeping the word "direction" (planning), since the word "préparation" surely covered the idea of planning. The Commission was not bound to follow the Charter where it gave a definition of crimes. If

the French word "direction" raised any difficulty, the English word "planning" could be deleted.

51. Mr. SPIROPOULOS said that in his second report (A/CN.4/25) he used only the word "préparation" in this connexion. Like Mr. Hudson, he had felt that "planning" was covered by "préparation". There could be no preparation without planning.

52. Mr. CORDOVA thought there was a difference between the drawing up of plans and preparation. For example, the drafting of constructional plans for a building was not the same thing as the preparation for building.

53. Mr. SANDSTRÖM was of the same opinion. In the Swedish Penal Code, preparation was the beginning of execution, whereas a plan was merely the expression of intention.

54. Mr. el-KHOURY did not regard intention as constituting crime. Crime involved the commission of acts.

55. Mr. SPIROPOULOS considered that a plan was part of preparation.

56. The CHAIRMAN asked whether the Commission wished to delete the words "planning" and "direction", as Mr. Hudson had suggested.

57. Mr. HUDSON withdrew his proposal.

58. Mr. SPIROPOULOS said that for reasons of prudence he would prefer that the words should not be deleted. He agreed with Mr. Hudson, adding that in the draft Code of Offences, he had not used the word "planning".

59. The CHAIRMAN thought it would be better to keep the text as it stood.

The Commission decided to retain the words planning and direction in order to keep as close as possible to the judgment of the Tribunal.

60. The CHAIRMAN read the final paragraph of the commentary.

There were no observations.

WAR CRIMES

61. The CHAIRMAN read paragraph b relating to war crimes and the commentary on it.

62. Mr. BRIERLY pointed out a discrepancy between the English version, which read: "Such violations shall include, *but not be limited to*..." and the French text, which had no corresponding phrase.

63. The CHAIRMAN said that the phrase in the English text was translated by the word "notamment".

64. Mr. LIANG (Secretary to the Commission) said that the official text read: "... sans y être limitées".

65. The CHAIRMAN thought that this accurate translation should be restored.

It was so decided.

66. Mr. HUDSON said that Articles 46, 50, 52 and 56 did not appear in the Hague Convention, but only in the Regulations annexed to the Convention.

67. The CHAIRMAN agreed that this was the case.

68. Mr. FRANÇOIS said that here again there was a quotation from the judgment of the Tribunal.

69. Mr. HUDSON also pointed out that there had been several Geneva Conventions in 1929.

70. The CHAIRMAN thought it would be better to say which was meant.

71. Mr. LIANG (Secretary to the Commission) thought the best plan would be to insert a note drawing attention to the points lacking precision in the text of the judgment.

The Commission so decided.

72. Mr. el-KHOURY recalled that the Secretary-General of the United Nations had received a note from the Government of Pakistan on the use of the expression "killing of hostages" (A/CN.4/19/Add.2). If only the killing of hostages were regarded as a war crime, it would be an implicit admission that the taking of hostages was legitimate. Pakistan asked the Commission to add the taking of hostages to the list of war crimes, and he supported this request.

73. The CHAIRMAN asked whether the Commission would like this crime to be inserted here or in the Code of Offences.

74. Mr. CORDOVA thought that the part of the sentence implying that the taking of hostages was allowable should be deleted. Pakistan thought that the Charter had made a mistake; and he hoped that the sentence would be amended, which would be to the advantage of international law.

75. Mr. el-KHOURY recalled that a great number of hostages had been taken during the last war, and many had been killed. It was a crime to kill hostages. Was it a crime to take them? He called for a note indicating that the taking of hostages was not allowable.

76. Mr. SANDSTRÖM wondered whether it was necessary to make this enumeration. The Commission might mention under the heading of war crimes violations of the laws and customs of war, leaving it to courts dealing with such cases to interpret the phrase.

77. Mr. SPIROPOULOS said that at the Commission's first session, the Sub-Committee consisting of Mr. Sandström, Mr. François and himself had submitted to the Commission a draft which contained no enumeration of war crimes (A/CN.4/W.6, para. 4).¹ The Commission had felt that it would be better to list the crimes as set out in the Charter of the Nürnberg Tribunal. The proposal to give some explanation in a commentary had been rejected by the Commission. In his report on the draft Code of Offences against the peace and security of mankind he was proposing not to list the crimes again. But in the report now before the Commission, he had felt it would be wise not to depart from the text of the Charter, but to reproduce the list as given there. In any case, he saw no reason why there should be any departure from the Charter in this instance.

¹ See *Yearbook of the International Law Commission, 1949. Summary record of the 25th meeting, footnote 9.*

78. Mr. CORDOVA and Mr. el-KHOURY felt that the words "killing of hostages" should be deleted from the list of war crimes, and a note added giving the reasons why the Commission felt the words should be omitted.

79. Mr. BRIERLY thought the words should not be omitted; on the contrary they were most important and should be kept in the text. The essential point was that there should be no killing of hostages. He personally would like to go further and prohibit the taking of hostages. But the Charter of the Nürnberg Tribunal made no mention of this. Moreover, he was under the impression that at present the taking of hostages was not forbidden by international law.

80. Mr. CORDOVA thought on the contrary that the Commission ought to point out that the Charter was wrong to mention the killing of hostages in its list of crimes, as that this would seem to imply that the taking of hostages was permissible. Incidentally, to prohibit the taking of hostages was one way of preventing hostages from being killed.

81. Mr. el-KHOURY recalled that the Geneva Convention of 1949 relative to the protection of civilian persons in time of war definitely prohibited the taking of hostages, and the Commission would be well advised to include this among the war crimes.

82. Mr. BRIERLY pointed out that the Convention in question had not yet come into force.

83. The CHAIRMAN supported Mr. el-Khoury's proposal. The taking of hostages must be prohibited.

84. Mr. BRIERLY dissented from this proposal, pointing out that the Commission could not make this addition, since the taking of hostages had not yet been recognized as a war crime at the time of the Nürnberg Trial. He had no objection to the Commission drafting a note stating its opinion that the taking of hostages in general should be prohibited.

85. Mr. KERNO (Assistant Secretary-General) thought there was no reason why the term "killing of hostages" should not be retained. Paragraph b as a whole, like Article 6 (b) of the Charter, was governed by the first phrase which read: "War crimes, namely violations of the laws or customs of war". Since it was stated that the list of crimes in the paragraph was not limitative, the taking of hostages would automatically be included if prevailing international law forbade it.

86. Mr. HUDSON asked that the Commission should quote in its report the Geneva Convention of 1949 relative to the protection of civilian persons in time of war, in particular Article 34 which laid down that the taking of hostages was unlawful. Articles 39 and following of the same Convention, dealing among other things with the treatment of hostages, might also be quoted. These articles established an entirely new piece of law. By inserting the text of these two articles in its report, the Commission would greatly reinforce the force of paragraph (b) "War crimes".

87. The CHAIRMAN agreed with Mr. Hudson's proposal and commended it to the Rapporteur's attention.²

CRIMES AGAINST HUMANITY

88. The CHAIRMAN read paragraph (c) "Crimes against humanity" (A/CN.4/22, para. 44).

89. Mr. SANDSTRÖM said he would like to put to the Commission a very difficult question: when did a crime against humanity become an international crime? In his report, Mr. Spiropoulos stated that the Nürnberg Tribunal had "applied Article 6 (c) in a very restrictive way"; and in footnote 65 he added that "nothing is said in the findings as to whether the above acts would be considered as international crimes under international law in the event of their not being connected with crimes against peace and war crimes". It was doubtful whether the Charter defined more clearly the relationship between crimes against humanity on the one hand and crimes against peace and war crimes on the other. Article 6 (c) of the Charter said: "... in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated". The position seemed to him quite clear: in Germany terrible atrocities had been committed before the war, and the Tribunal had not considered that such acts were connected with a crime coming within its jurisdiction; hence it had felt it was not competent to declare that such atrocities were crimes against humanity in the sense given in the Charter.

89 a. He asked for explanations for two reasons. Article 7 of the Draft Resolution on Rights and Duties of States read: "every State has the duty to ensure that conditions prevailing in its territory do not menace international peace and order".³ This text meant that it was the duty of States to treat their population in such a way as not to constitute a threat to peace. But possibly ill-treatment of a population itself constituted a threat to peace. He would like to know whether it thereby constituted a crime against humanity in the sense of paragraph (c).

89 b. The other point on which he would be glad of an explanation was the case of genocide. The 1948 Convention made all acts of genocide, even where peace was not threatened, crimes under international law. Would it not be well to define the criteria for deciding whether a crime of this kind should be regarded as genocide or as a crime against humanity.

90. The CHAIRMAN said that article 6 (c) of the Charter of the Nürnberg Tribunal included crimes committed "before or during the war". He thought that the Rapporteur had in fact interpreted this wording in a restrictive sense, and that the Commission had a right to examine this interpretation. He suggested deleting the words "when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime".

91. Mr. SPIROPOULOS opposed this suggestion. The judgment had interpreted the Charter, and the Commission must abide by the judgment.

² The debate on war crimes was resumed at the 49th meeting.

³ Yearbook of the International Law Commission, 1949. Report to the General Assembly. Part II.

92. The CHAIRMAN asked which rule took precedence, the rule laid down in the judgment, or the provisions of the Charter.

93. Mr. SPIROPOULOS replied that in his opinion the judgment took precedence since the judgment applied the law.

94. Mr. AMADO observed that if crimes of the type listed in paragraph (c) (crimes against humanity) were not connected with crimes against peace or war crimes, they were common crimes; just as the murder of a group of people not committed with the intention of suppressing that particular sector of the population on racial or religious grounds was not genocide, but a common crime. That was why the Tribunal had hesitated to regard itself as competent in the matter of atrocities committed before the war. He favoured the text as it stood in the report.

95. Mr. HUDSON was not satisfied with the commentary on paragraph (c) (crimes against humanity): for example, he was puzzled by footnote 65, which suggested that the Tribunal would have been justified in considering whether, under international law, the acts mentioned in paragraph (c) could be regarded as international crimes, even if they were not connected with crimes against peace or war crimes. With regard to Mr. Sandström's suggestion that murder not connected with crimes against peace or war crimes might still be an international crime, this was going rather far. These crimes could not all be regarded as crimes under international law. The connexion with war must be kept. A good example was slavery, which existed in a great many countries and which was never regarded as a crime under international law. The point raised by Mr. Sandström was pertinent in regard to persecution on political, racial or religious grounds because it could constitute a threat to peace.

96. The CHAIRMAN agreed with the distinction made by Mr. Amado. The difference of opinion which had just arisen among the members of the Commission was connected with the words "committed . . . before or during the war". Personally he saw no reason why the judgment should prevail if it was not in keeping with the Charter. If the judges had made a mistake, that was a miscarriage of justice. A judgment must be in conformity with the law.

97. Mr. HUDSON also felt that where a law and a judgment were in harmony, the judgment was correct; but a judgment was not correct when it modified the law which it ought to apply.

98. The CHAIRMAN said that if the Charter and the judgment were not consistent, it would be for the Commission to discuss the instances where they did not tally. In any case, he was opposed to the theory that the judgment took precedence over the Charter.

99. Mr. CORDOVA supported the Chairman's statement. A tribunal might misapply the law. But the law must be respected and, if it were not respected, the judgment should be quashed or revised. The Tribunal and the Commission had an equal right to interpret the Charter.

100. Mr. HUDSON thought the question might be cleared up by a closer examination of the second paragraph of the commentary which read: "The Court did not consider that the acts relied on before the outbreak of war had been committed in execution of, or in connection with, any crime . . . etc." Actually, the Tribunal had made a similar declaration:

"To constitute Crimes against Humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of the crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime." (*Trial of the Major War Criminals before the International Military Tribunal*, p. 254). The terms used by the Rapporteur went further than the Tribunal's declaration. It was solely for want of satisfactory evidence that the Tribunal had regarded itself as not competent to declare in general terms that acts prior to 1939 constituted crimes against humanity as defined in the Charter of the Nürnberg Tribunal.

101. Mr. AMADO pointed out that Article 6 (c) of the Charter of the Tribunal expressly stated that the acts must have been committed "in execution of or in connection with any crime within the jurisdiction of the Tribunal . . .".

102. Mr. KERN (Assistant Secretary-General) wished to make the same observation; he did not think there was any contradiction between the Charter and the judgment. Article 6 (c) of the Charter also stipulated that the acts listed there were only crimes against humanity where they were connected with "any crime within the jurisdiction of the Tribunal". There was clearly some difference between the French and the English texts of paragraph (c) in the report. It might be argued that the words "in execution of or in connection with any crime within the jurisdiction of the Tribunal" referred only to persecutions, whereas it was quite clear from the French text that the words referred to all "acts . . . or persecutions".

103. Mr. ALFARO supported Mr. Kern. If, as the Chairman had suggested, paragraph (c) were to stop after the words "on political, racial or religious grounds", it would amount to no more than a definition of common crimes. The end of the paragraph was necessary to make them crimes under international law. Cases might, however, arise in which a government before a war which it had prepared and as a part of the plans for that war, might decide to exterminate the population of a given region on political, racial or religious grounds. Unquestionably such a crime ought to be classified as a crime against humanity. He thought the Commission would agree to the incorporation of the words "before or during the war" in paragraph (c).

Mr. SCALLE handed over the chairmanship to Mr. SANDSTRÖM, the first Vice-Chairman, and left the meeting.

104. The CHAIRMAN read the first paragraph of the commentary on paragraph (c.)

105. Mr. el-KHOURY asked whether the French term "assassinat" and the English word "murder" had the same meaning.

106. Mr. BRIERLY replied that actually the terms "murder" and "assassination" did not mean the same in English, but he saw no objection to retaining the word "murder".

107. Mr. AMADO said that in French the term "assassinat" meant aggravated murder.

108. Mr. HUDSON pointed out that the commentary was not precise, since the words "before and during the war" did not appear in paragraph (c), whereas they were contained in Article 6 (c) of the Charter.

109. Mr. KERNO (Assistant Secretary-General) agreed that as the commentary began with the words "The above text", it was not correct.

110. Mr. LIANG (Secretary to the Commission) suggested replacing the first two words of the commentary by the words "Article 6 (c) of the Charter". This would bring the commentary into line with the principles laid down by the Charter of the Nürnberg Tribunal.

111. Mr. FRANÇOIS remarked that the words "committed before or during the war" as given in the Charter, had a very definite sense in their context. They referred to the last World War. But in a general statement they could be omitted. Not only was it self-evident that crimes could be committed "before or during the war"; but account should also be taken of the fact that the crimes could be committed in connexion with the preparation of war without a war actually breaking out. Hence, he suggested that the text as drafted by Mr. Spiropoulos be maintained.

112. Mr. ALFARO said he would like to know precisely what was the Commission's opinion. Did it hold that crimes against humanity could be committed before as well as during a war? His own view was that in connexion with a crime against peace they could be committed before a war, but in connexion with a war crime, they could be committed only during a war.

113. Mr. CORDOVA thought the solution would be to consider that crimes against humanity committed without any connexion with war were not crimes under international law, but crimes under domestic law. If, however, they were committed during or in connexion with a war they constituted international crimes.

114. Mr. ALFARO put to the Commission the case of a nation planning an invasion. One part of the invasion plan was that prior to the war the authorities of the country to be invaded, and its population, should be exterminated. That was a crime committed before the war; whereas other crimes, such as the killing of hostages or the massacre of prisoners etc., were committed during the war. In his opinion, it would be dangerous to omit the words "before or during the war" from paragraph (c). They should be inserted for the sake of precision and with a view to including in the definition of crimes under international law, the crimes listed in paragraph (c), even if committed before the war.

115. Mr. HUDSON thought that if the words were added they should apply only to crimes against peace, not to war crimes.

116. Mr. el-KHOURY favoured the insertion of the words "before or during the war". In the course of preparing for war, a government might exterminate groups of people opposed to war. Such cases should be covered by paragraph (c).

117. Mr. BRIERLY thought that crimes such as those contemplated in paragraphs (a) and (c) could be committed even where there was no war. A crime against humanity was a crime even in the absence of war. The Charter had rightly inserted the words in question because it was referring to a specific war, but there was no reason to keep them in a definition of general application.

118. Mr. el-KHOURY said that crimes of this kind could be committed not only by an aggressor but by the government attacked; the latter might decide, for example, that certain sectors of its population refusing to take part in defence against aggression should be liquidated.

119. Mr. KERNO replied that under the Charter, the crimes mentioned in Article 6 (a) applied only to aggressive wars, whereas the crimes listed under Article 6 (b) applied to all wars and all parties.

120. Mr. CORDOVA thought the Commission was discussing several points at once, and he would like to know what was the precise point at issue at the moment.

121. The CHAIRMAN said the Commission was discussing whether the words "before and during the war" should be inserted in paragraph (c) or not.

122. Mr. CORDOVA thought that the omission of the words would make the text of the Commission's report clearer.

123. Mr. HUDSON said that what the Commission was actually discussing was the commentary on paragraph (c). It had already been suggested that the first two words of the commentary should be replaced by the words "Article 6 (c) of the Charter". There would thus be no necessity to delete the words "before or during the war" since they appeared in the Charter.

Replying to Mr. el-Khoury, he pointed out that the final sentence of the commentary stressed the fact that crimes against humanity could be committed by an aggressor against his own populations.

124. Mr. ALFARO agreed with Mr. Hudson. If the first paragraph of the commentary began with the words "Article 6 (c) of the Charter", there would be no need to insert the words in question in the definition of the crimes. However, he felt that the Commission had strayed rather far from the terminology of the Charter, and he feared that if the words were not inserted under paragraph (c) the impression might be given that the Commission was thinking merely in terms of crimes committed during wartime. He was not opposed to the omission of the words provided it were understood that such crimes could be committed before a war and even without a war breaking out.

125. Mr. HUDSON thought that if the Commission departed from the text of the Charter, it should add a commentary in its report explaining the reason why.

126. The CHAIRMAN thought the time had come to take a decision, and he asked the Commission whether it wished to keep the text of paragraph (c) as it stood in the report.

It was decided to keep the text.

127. The CHAIRMAN consulted the Commission regarding the first paragraph of the commentary, the words "The above text" at the beginning of the paragraph being replaced by the words "Article 6 (c) of the Charter".

The Commission adopted the first paragraph of the commentary with this amendment.

128. The CHAIRMAN asked the Rapporteur, when drawing up the Commission's general report, to explain the reasons why the Commission had not thought it necessary to insert the words "before or during the war" in the definition of the crimes.

129. The CHAIRMAN read the second paragraph of the commentary, along with footnote 65.

130. Mr. HUDSON pointed out that the first sentence of the paragraph was incorrect and would be better omitted. It was not true to say that the Court applied the article in question in a very restrictive way. With regard to the second sentence, as he had already proposed,⁴ it would be advisable to alter it so as to bring it into line with the wording of the judgment of the Tribunal. He therefore proposed that the words "the Court did not consider... etc." be replaced by the words "the Court considered that it had not been satisfactorily proved that before the outbreak of war...".

131. Mr. SPIROPOULOS signified his agreement with this alteration.

132. Mr. CORDOVA and Mr. HUDSON proposed that footnote 65 be deleted.

133. The CHAIRMAN consulted the Commission on the two alterations suggested by Mr. Hudson.

Mr. Hudson's proposals were adopted.

The Commission likewise decided to omit footnote 66.

134. Mr. SPIROPOULOS remarked that he had inserted footnote 67 for the benefit of the Commission, but he was quite willing that it should be deleted.

The Commission decided to delete footnote 67.

135. Mr. CORDOVA thought that if the Commission pronounced on the possibility of crimes committed either by an aggressor State or by a non-aggressor State, it would not be keeping within the framework of the Charter and the judgment of the Nürnberg Tribunal. But he thought it would be well if at least the Commission's report referred to the fact that it had also considered the case of crimes committed by a non-

aggressor State, and that the decisions it had taken in this connexion would be found in the draft Code of offences against the peace and security of mankind.

136. Mr. HUDSON said that paragraph (b) referred to war crimes in general, and not only to crimes committed during a war of aggression. Paragraphs (a) and (c) were confined to crimes committed in connexion with an aggressive war. The point raised by Mr. Córdova was very important. If the Commission examined principles that went beyond those laid down in the Charter and judgment of the Nürnberg Tribunal, it would be advisable to follow Mr. Córdova's suggestion. Personally, he considered that the Commission was going beyond those principles in regard to paragraph (b).

137. Mr. BRIERLY thought that the point mentioned by Mr. Córdova did not arise. Some of the crimes in question could only be committed by the aggressor; other crimes could equally well be committed by the party attacked. However, he had no objection to the report giving an explanation on the subject.

138. The CHAIRMAN thought the Commission might discuss the point when the report on the draft Code of offences against the peace and security of mankind (A/CN.4/25) came up for examination.

139. Mr. CORDOVA agreed to this suggestion; but he thought it would be useful for the Commission to refer also in its present report to the statements it would be making in its second report, since it had also been asked to indicate what place the Nürnberg Principles should have in the code of international crimes.

140. Mr. el-KHOURY considered the point raised by Mr. Córdova to be one of great importance. He cited the following example: supposing that Greece attacked Bulgaria, Greece would unquestionably be the aggressor. As a result of this aggression, Bulgaria might exterminate the Greeks living on her territory. Would it be admissible for her to use aggression as a pretext for doing so?

141. The CHAIRMAN suggested closing the meeting and terminating the discussion of the first report by Mr. Spiropoulos at the beginning of Monday afternoon's meeting, and then going on to Mr. Brierly's report on Treaties.

142. Mr. AMADO was in favour of the adjournment of Item 3 (b) of the Agenda. He thought it would be useful to take up the discussion of Mr. Spiropoulos' reports again at a later date, in order that they might have a brief respite.

143. Mr. KERN (Assistant Secretary-General) supported this proposal.

144. Mr. SPIROPOULOS disagreed. He thought that his report on the draft Code of offences against the peace and security of mankind should have priority. The General Assembly had asked the Commission to examine it as quickly as possible. He was quite willing that other reports should be discussed before his own, however, on the understanding that his second report would in any case be examined during the present session.

⁴ See para. 100, above.

145. The CHAIRMAN ruled that Mr. Brierly's report (A/CN.4/23) should be examined at the next meeting, as soon as the Commission had completed its examination of Mr. Spiropoulos' report on the formulation of the Nürnberg principles.

The meeting rose at 1.10 p.m.

49th MEETING

Monday, 19 June 1950, at 3 p.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. 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).

Formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal: Report by Mr. Spiropoulos (item 3 (a) of the agenda) (A/CN.4/22) (continued)

WAR CRIMES (continued)

1. The CHAIRMAN asked the Commission to excuse Mr. Spiropoulos, who was ill. As Mr. Spiropoulos had agreed, the study of his report might be completed before the Commission took up the examination of Mr. Brierly's report on the Law of Treaties (A/CN.4/23).
2. Mr. el-KHOURY said he had already asked that part IV, section B, paragraph (b), "War Crimes"¹ should include the phrase "the taking and killing of hostages".² He proposed that the report should mention that this addition had been made at the request of several members of the Commission. He also suggested

that in addition to crimes committed by an aggressor, crimes committed by other States should constitute crimes under international law.

3. Mr. KERNO (Assistant Secretary-General) pointed out that the list in paragraph (b) was not restrictive. Hence, if the taking of hostages was in fact a crime under prevailing international law, it was unnecessary to state this specifically.

4. Mr. el-KHOURY admitted that there were war crimes other than those mentioned in the list; but he felt that if the Commission mentioned the killing of hostages, it should also mention the taking of hostages so as to make it quite clear that this was condemned also. If the Commission did not agree to the interpolation he suggested, he asked that the point should at least be mentioned in the Commission's report.

5. Mr. HUDSON thought it would not be correct to state that the Nürnberg Charter and Tribunal recognized the taking of hostages as a crime. The Commission was not attempting to recast the Charter.

6. Mr. FRANÇOIS agreed that the Nürnberg Charter and Tribunal had not recognized the taking of hostages as unlawful. On the other hand, the Diplomatic Conference of the Red Cross held in 1949 at Geneva had gone further and had admitted the principle that the taking of hostages was prohibited. The Nürnberg Tribunal had merely decided that it was unlawful to kill hostages. He would prefer the text to be kept as it stood, since the Commission's task was to formulate the principles of international law recognized at Nürnberg.

7. The CHAIRMAN recalled that the Commission seemed disposed to agree to the insertion of a note indicating that some members felt it would be desirable to lay down the principle that the taking of hostages was unlawful.

8. Mr. SANDSTRÖM asked whether the Commission would not have an opportunity of discussing the point again when the draft Code of offences referred to in item 3 (b) of the agenda came up for examination.

9. The CHAIRMAN said there would be such an opportunity; but he thought a note in the report would prevent readers from gaining the impression that the Nürnberg principles and the Code were at variance.

10. Mr. CÓRDOVA said that to include the taking of hostages among war crimes would be contrary to the Nürnberg principles; but the principles should be altered so as to enable them to be included in the Code.

11. Mr. SANDSTRÖM considered that the best plan would be to give an account of the present discussion in the general report, indicating the evolution that had taken place since Nürnberg; and to revert to the point when dealing with the Code of offences against the peace and security of mankind.

12. Mr. HUDSON thought that, on other issues also, the Commission might go further than the Nürnberg principles when drafting the Code.

13. The CHAIRMAN felt that the Commission had accepted the view that it should retain such of the Nürnberg principles as it regarded as principles of

¹ A/CN.4/22, p. 37.

² See Summary record of the 48th meeting, para. 75.

international law. It had already changed the Nürnberg wording in one or two instances. He was anxious not to re-open this discussion of pure principle; at the same time, he would like to meet Mr. el-Khoury's wishes by accepting the Nürnberg text with the proviso that an indication be given in the report that some of the members of the Commission felt that the taking and killing of hostages should be regarded as a war crime.

14. Mr. HUDSON saw no reason for inserting even a note in the report concerning the Nürnberg principles, for no one maintained that the taking of hostages was a crime under those principles.

15. Mr. el-KHOURY remarked that the Nürnberg Charter had in mind the judgment of specific questions. Moreover, hostages could not be killed unless they had been taken. If the Commission stated that the taking of hostages was unlawful, it would still be dealing with the same crime. Moreover, it was a well known principle in criminal trials for the prosecution to concentrate on the most serious crime. Where hostages had been killed, the crime of taking hostages would be disregarded. The elimination of the crime should involve the elimination of its cause.

16. Mr. HSU supported Mr. el-Khoury's proposal. Undoubtedly, it was not illegal to take hostages during the last war, and the Nürnberg Charter and Tribunal were justified in so deciding. Nevertheless, the taking of hostages was a barbaric survival, and was not in harmony with the spirit of the principles recognized in the Charter and the Tribunal. Furthermore, the taking of hostages had now been condemned by the Geneva Convention of 1949. The Commission must not, even by implication, sanction the survival of this practice.

16a. He referred to article 34 of the Geneva Convention of 12 August 1949, relative to the protection of civilian persons in time of war, where the taking of hostages was prohibited.³ He went on to quote part I, article 3, of the "General Provisions":

"In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as the minimum, the following provisions:

(1) Persons taking no active part in the hostilities . . . shall in all circumstances be treated humanely . . .

To this end the following acts shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a);
- (b) taking of hostages."

16 b. This article appeared not only in Convention IV, but also in the three others. The preliminary work on the 1949 Conventions began as early as 1945. The final stage was the discussion of draft conventions by the Diplomatic Conference which met at Geneva in 1949 and was attended by representatives of 63 govern-

ments. At the closing meeting, 58 delegations signed the final Act, and 17 of them also signed the Conventions. On 8 December 1949, 43 other States signed them at a special meeting. Since then, two States had deposited instruments of ratification, thus bringing the Conventions into force.

16 c. With the development of democratic government and the liberalization of social structure in the world, the taking of hostages has lost its value and what remained of the practice was the discredited theory of collective responsibility. It was right to prohibit the killing of hostages, but it was not sufficient. No one—even an enemy civilian—should be deprived of liberty, without just cause, and the taking of hostages was a practice which must be abandoned. Moreover, as 60 States had already proscribed it, he suggested that it should not be countenanced, even implicitly, in the formulation of the principles recognized by the Nürnberg Charter and Tribunal.

16 d. He had set out from the assumption that like the Charter and Tribunal, the Commission recognized that the principles to be formulated were principles of international law. But even if they regarded themselves as mere draftsmen, engaged in formulating the principles without necessarily passing judgment on them, they should accept the proposed changes, in order to bring harmony into the formulated principles. The survival of a barbarous practice did not look well in the company of principles which declared certain acts against peace and crimes against humanity to be in the same category as war crimes, and made individuals responsible for such crimes, irrespective of domestic law, official status or superior order.

16 e. Whether the Commission accepted the principles recognized in the Nürnberg Charter and judgment or not, it should put an end to the practice of taking hostages. If it were objected that the taking of hostages was not included among the principles which the Commission was instructed to formulate, the answer was that the Commission had already altered Principles III and IV, thereby weakening them; whereas, in the case in point, the principle would be strengthened. The outlawing of the taking of hostages was in harmony with the purpose which the General Assembly had in mind when it decided to formulate the principles recognized in the Nürnberg Charter and Tribunal, the purpose of formally registering progress in international law. If the Commission had worked in 1945, it could have properly declined to consider the proposal under discussion. But today, after 60 States had signed the Geneva Convention relative to the protection of civilian persons, it could not very well turn its attention away from the question.

17. Mr. YEPES also supported Mr. el-Khoury's proposal. There was no reason why the text of the Charter should not be altered in the present instance, as had been done twice already. If a hostage was taken, the threat to kill him was implied. Hence, to outlaw even the taking of hostages would be a decided step forward. He urged the members of the Commission not to be too conservative.

³ First Section: "Provisions Common to the Territories of the Parties to the Conflict and to Occupied Territories". Part III: "Status and Treatment of Persons".

18. Mr. BRIERLY pointed out that the Geneva Conventions of 1949 were nothing more than proposals—drafts awaiting confirmation or rejection by the States concerned. It could not be contended that the Nürnberg Charter and Tribunal prohibited the taking of hostages. So long as the Commission was merely formulating the Nürnberg principles, it could not formulate a principle which did not appear in the Charter. If the Commission's purpose was to make suitable alterations to the Nürnberg principles, there were plenty of changes to be made; but that was not the Commission's task.

19. Mr. ALFARO thought he could support Mr. el-Khoury's proposal. For logical and textual reasons, he was convinced that the judgment had assumed that the taking of hostages was prohibited by international law. Previously, the Commission had decided to leave the text as it stood, on the grounds that once the killing of hostages was prohibited, the taking of hostages was likewise prohibited. General Assembly resolution 177 (II) called on the Commission to formulate the principles recognized in the Charter and judgment of the Tribunal. In support of his thesis, he referred to the section of the Nürnberg Judgment entitled "War Crimes against Humanity", and read the following passages from the last paragraph: "The Tribunal proposes, therefore, to deal quite generally with the question of War Crimes" . . . "Hostages were taken in very large numbers from the civilian populations in all the occupied countries, and were shot as suited the Germans purposes."⁴ He also read the following passage from the section entitled "Murder and Ill-treatment of Civilian Populations": "The practice of keeping hostages to prevent and to punish any form of civil disorder was resorted to by the Germans."⁵ In the view of the Tribunal, it was forbidden and regarded as a war crime to take and kill hostages. He could not agree that the taking of hostages was permissible because the Charter had specifically forbidden only the killing of hostages.

20. Mr. el-KHOURY assumed that Mr. Brierly's opinion was that it was permissible to take hostages provided they were not killed.

21. Mr. BRIERLY and Mr. FRANÇOIS said that that was the position in international law at the time of the Nürnberg trial.

22. The CHAIRMAN shared the view of Mr. Brierly and Mr. François.

23. Mr. AMADO referred the Commission to paragraph 79 of the report of Mr. Spiropoulos: "Draft Code of offences against the peace and security of mankind" (A/CN.4/25), and quoted the final paragraph: "Article 6 (b) of the Nürnberg Charter and paragraph 1 (b) of article 2 of the Control Council Law No. 10 declare without any qualification the 'killing of hostages' as a 'war crime'. In consideration of this the tribunal of the *Hostages Trial* held that, subject to a number of

conditions, the killing of reprisal victims or hostages, in order to guarantee the peaceful conduct in the future of the population of occupied territories, was *legal*." With due respect to the views expressed by most of his colleagues, he felt obliged to abide by the text.

24. The CHAIRMAN put to the vote Mr. el-Khoury's proposal to add the taking of hostages to the list of war crimes.

Five votes were cast for Mr. el-Khoury's proposal, 5 against, and there was one abstention. The proposal accordingly was not adopted.

25. The CHAIRMAN said the reason why he had abstained was that, although he felt that the taking of hostages should be outlawed, it could not be argued that the Charter and judgment of the Nürnberg Tribunal had declared the act a war crime.

26. Mr. YEPES thought the question at issue was whether the Commission regarded the taking of hostages as a war crime or not. It was unfortunate that the majority had voted against the adoption of this new principle.

27. The CHAIRMAN asked whether the Commission would like the Rapporteur to insert in the general report a note to the effect that there had been five votes on each side, and that it would deal with the question again when it came to define war crimes in its draft Code of offences against the peace and security of mankind.

28. On a point of order, Mr. YEPES thought that in the case of an equality of votes, the Chairman had to give the casting vote.

29. The CHAIRMAN disagreed; indeed such a requirement would be unfortunate, as it would be unfair on a chairman wishing to abstain.

30. Mr. KERNO (Assistant Secretary-General) read rule 132 of the General Assembly Rules of Procedure, showing that the Chairman was not obliged to vote.

The Commission decided, by 9 votes to 0, that its general rapporteur should insert in his report the note suggested by the Chairman.

31. Mr. HSU asked whether the Commission could take up again the question of the formulation of the Nürnberg principles if, in discussing the Code, it decided that the taking of hostages was a war crime.

32. The CHAIRMAN replied that the Commission would not discuss the Principles again.

33. Mr. HUDSON said he would like to make a suggestion regarding the statement of Principles. In Principle I, the Commission had stated that "Any person who commits or is an accomplice in the commission of an act . . . etc." He asked whether the principles should take into account cases of complicity. An accomplice committed an act, and that act was a crime according to the Charter and judgment. Article IV of the Convention on genocide said: "The following acts shall be punishable: (e) complicity in any of the acts . . . etc."

33 a. He suggested that the Commission add to section B a paragraph (d), worded as follows: "Complicity in

⁴ *Trial of the Major War Criminals before the International Military Tribunal, Nürnberg, 1947, Volume 1, pp. 277-228.*

⁵ *Ibid.*, p. 234.

the commission of a crime against peace, a war crime, or a crime against humanity, as set forth in (a), (b) and (c).” It would thus be unnecessary to mention accomplices in Principle I. Mr. Spiropoulos, whom he had consulted on this point, had agreed with him and had asked him to propose the deletion of the words “or is an accomplice in the commission of”.

34. The CHAIRMAN thought that Mr. Hudson’s proposal would be useful as clarifying the Nürnberg principle. He asked the opinion of Mr. Amado as a specialist in penal law.

35. Mr. AMADO approved Mr. Hudson’s proposal.

36. Mr. SANDSTRÖM thought a perusal of Principle I made it clear that it referred to all the crimes listed in paragraphs (a), (b) and (c). He asked whether paragraph (a) (ii) of section B did not cover Mr. Hudson’s objections.

37. Mr. HUDSON said it was a question of logic. Paragraph (a) (ii) did, of course, say “participation in a common plan or conspiracy”; but complicity was another matter.

38. Mr. BRIERLY supported this new wording as being an improvement.

39. Mr. ALFARO also supported the proposal.

40. Mr. SANDSTRÖM remarked that in Sweden, complicity was not a separate crime, but was an aspect of each category of crimes. He thought the arrangement in the report was preferable.

41. Mr. CORDOVA shared this view, though for different reasons. The Charter referred to complicity only in the case of crimes against peace. Hence to apply the notion to other crimes meant extending the principle. The Commission recognized that complicity was a crime, even though the Charter was silent on the point. Hence it was extending the list of crimes. Nevertheless this was an improvement, and he would vote for the proposal.

42. Mr. HUDSON asked Mr. Córdova to refer to paragraph (2) of the commentary on Principle I,⁶ where Mr. Spiropoulos stated: “*prima facie*, this principle seems to go further than the Charter”, and maintained that the judgment had applied either the last paragraph of article 6 by analogy, or the general principles of criminal law in regard to complicity. If the change he proposed was adopted, the commentary on Principle I would also have to be changed.

The Commission decided without opposition to adopt Mr. Hudson’s proposal.

43. Mr. ALFARO said that one of the most severe criticisms of the Nürnberg trials was that they constituted a violation of the principle of penal law *nullum crimen, nulla poena, sine lege*. Article 27 of the Nürnberg Charter provided that: “The Tribunal shall have the right to impose upon a defendant, on conviction, death or such other punishment as shall be determined by it to be just.” It had been maintained that this provision established an *ex post facto* penalty, but the fact remained that the Charter imposed penalties for

the crimes it defined. While he did not advocate the imposition of the death penalty for any crime, he believed that it might be deemed necessary to incorporate in the Commission’s formulation a principle corresponding to article 27 of the Nürnberg Charter.

43 a. In general terms, the Commission might formulate the important principle that persons found guilty of the crimes therein defined would be punished by imprisonment for such terms as might be determined to be just by such international organ of criminal jurisdiction as might be created in the future. Or else the formulation might state that inasmuch as the principle *nulla poena sine lege* must be observed in any international system of crime repression, the Code of offences against the peace and security of mankind should fix the penalties to be imposed on persons found guilty of such offences. In this way, the Commission’s formulation would consist of three logical parts: the principles, the crimes, and the penalties. This course was indispensable, because otherwise the Commission could be criticized for leaving out of its formulation the basic provision of article 27 of the Charter; and it might be asked how principles of international penal law and definitions of crimes could be established permanently for the future without laying down the penalties with which the crimes defined should be punished.

43 b. The last page of Mr. Spiropoulos’ second report (A/CN.4/25) contained *Basis of Discussion No. 4*, whereby it was proposed that the parties to the Code should “undertake to enact the necessary legislation for the establishment of penal sanctions applicable to persons found guilty of any of the crimes defined in the Code.” He nevertheless wondered if the Commission should not discuss this matter in connexion with the formulation of the Nürnberg principles, in view of the fact that penalties were established by the Charter and actually imposed by the Tribunal in its judgment.

To sum up, his proposal was that the Commission should determine whether or not it ought to include in its formulation of the Nürnberg principles a clause relative to penalties.

44. The CHAIRMAN requested Mr. Alfaro to draft a specific proposal.

45. Mr. SANDSTRÖM agreed that it was clear that the Nürnberg Charter imposed penalties, but he could not agree that it was a principle of international law prior to Nürnberg. His view was that international crimes should carry penalties. The Commission should examine the question when dealing with the draft Code.

46. Mr. AMADO was of the same opinion as Mr. Sandström. In connexion with the *Basis of Discussion No. 4* on the last page of Mr. Spiropoulos’ second report, he recalled that the Nürnberg Charter had applied the system of indeterminate penalty. The judge fixed the penalty. He felt that there was a tendency to go too quickly. He would revert to the question later, and was not in favour of Mr. Alfaro’s suggestion.

47. The CHAIRMAN felt the Commission would do better to examine the question when the draft Code of offences against the peace and security of mankind came up for consideration. The General Assembly had

⁶ A/CN.4/22, para. 43.

asked the Commission to formulate the principles of international law recognized in the Charter and judgment; and in the case in point, it was difficult to decide whether a principle of international law was involved. In French constitutional law, it had been considered for a long time—if indeed it was not still considered—that the High Court of Justice was not bound by the principle *nullum crimen*. Would it be wise to bind an international criminal court to this principle? He personally was doubtful; he thought it might be premature to do so. He asked the Commission whether the proposal should be put to the vote.

48. Mr. ALFARO thought that as the Commission had hardly discussed the question, and only two of its members had expressed an opinion, it seemed preferable to postpone the discussion of his suggestion until later, when item 3 (b) of the agenda was being dealt with. The Commission's terms of reference were clear—it had to indicate what place the Nürnberg principles should be given in the Code.

49. Mr. SANDSTRÖM pointed out that it was not the Nürnberg principles which the Commission would insert in the Code, but the principles of international law recognized in the Charter and judgment.

50. Mr. el-KHOURY thought that if the Commission was to prepare a comprehensive international criminal code, the principles would appear in it as well as the penalties.

51. The CHAIRMAN said that the Commission had two tasks before it; to draft a Code of offences against the peace and security of mankind, and to indicate what place should be given in the Code to the principles of international law recognized in the Nürnberg Charter and judgment. It was not essential that the Code should be complete. It was too early to raise the question whether the Commission should insert the principle of the legality of offences and penalties. He had his doubts; and he thought he was not alone in having them. The introduction of this principle into international law might hamper its development. Neither the Charter nor the judgment had seen fit to adopt the principle. The same was true of many undeveloped legal systems. In all primitive judicial systems, offences appeared before any provision had been made for them. Indeed, before 1939, who would have imagined that the government, officials and private individuals in Germany could commit such crimes? It would have been impossible to foresee them, and they could not have been punished if the principle of the legality of offences and penalties had been strictly adhered to.

52. Mr. CORDOVA shared Mr. Alfaro's views. Article 27 of the Charter showed that the Tribunal had the right to impose such punishment as it considered just. The Commission could not ignore this principle, since it was to be found in the Charter and judgment; on the other hand, he did not think there was any principle of international law granting a tribunal full discretion to pronounce sentence. Hence he was opposed to this formula.

53. Mr. KERNO (Assistant Secretary-General) observed that Mr. el-Khoury had wondered whether the

Commission, when it reached the second part of the task entrusted to it by the General Assembly, intended to draw up a general international penal code, or merely a code of offences against the peace and security of mankind. In the course of the preliminary work, both possibilities had been considered, but resolution 177 (II) of 21 November 1947, which governed the Commission's debates, had referred only to a restricted draft code.

54. Mr. el-KHOURY thought the Commission might postpone a number of questions and take them up again when the Code came under discussion. At the previous meeting, he had asked the Commission to declare that the crimes remained crimes even when committed by the party attacked. The Charter and judgment dealt, of course, with a specific case. The Commission should adopt the equitable point of view that a crime is always a crime. The non-aggressor was not answerable to the Nürnberg Tribunal because the Tribunal was set up by the victors; but the Commission was called upon to establish a general principle. He hoped it would decide to include the following passage in its report:

“The Commission is of the opinion that these crimes are to be considered international crimes, irrespective of which side has committed them.”

55. Mr. YEPES read Principle I, concluding that the words “Any person” implied that the victor as well as the vanquished was responsible for his crimes.

56. Mr. KERNO (Assistant Secretary-General) pointed out that undoubtedly the intention of the General Assembly had been to make the principles recognized at the Nürnberg Trial general in their application. At present, the Commission was concerned merely with formulating the Nürnberg principles. These principles of international law recognized in the Charter and judgment included crimes which could only be committed by an aggressor—namely, crimes against peace; but war crimes and crimes against humanity could be committed by either side. The Commission might go into this question in the second half of its work when dealing with the draft Code. The general tendency in the future would surely be to demand punishment for certain types of crime, irrespective of which side had committed them. But certain crimes by definition could only be committed by an aggressor.

57. Mr. CORDOVA thought that a commentary at least would be called for, indicating that the Commission felt that the restriction imposed on the Nürnberg Tribunal should not be considered as a principle of international law, and adding that when it came to examine the criminal code, it would revert to crimes committed by parties other than aggressors, and would make them crimes under international law as they deserved to be. The Commission might state, either in the text or in the commentary on the text: “committed by the aggressor or the victim of aggression”; or it could leave the text as it stood, stating that in its opinion the principle was not one of international law, but a Nürnberg principle.

59. Mr. el-KHOURY explained that his proposal had

not been to alter the text, but to mention in the report that the Commission did not consider that only an aggressor was punishable.

59. Mr. SANDSTRÖM agreed with Mr. Yepes. Under the principles adopted by the Commission, any person guilty of a crime against humanity and against peace was punishable. Crimes against humanity could be committed not merely by an aggressor but by the victim of aggression, whether in connexion with a crime coming within the jurisdiction of the tribunal or not. To cite an example, it was conceivable that a country attacked might exterminate all enemy subjects within its territory. Clearly this was a crime against humanity.

60. The CHAIRMAN thought that this was self-evident, but he had no objection to the idea being expressed in the report. In reply to a question by Mr. Yepes, he explained that all the opinions expressed in the debates would be mentioned in the report.

61. Mr. CORDOVA argued that under the terms of the Charter, a crime against humanity could not be the subject of proceedings unless committed in connexion with the initiation or waging of an aggressive war. The report should state clearly that in the view of the Commission, the war crimes and crimes against humanity referred to in article 6, paragraphs (b) and (c) of the Charter could be committed even by a non-aggressor.

62. Mr. SANDSTRÖM pointed out that the term "in connexion with" in no way implied that only an aggressor could be proceeded against.

63. The CHAIRMAN felt that Mr. Córdova's scruples were hardly warranted. At the same time, he had no objection to the idea he had expressed being explained and included in the report, on the grounds that one could never be too careful. The Rapporteur could include a note in his report to the effect that on this point, the aggressor and the victim of aggression were on an equal footing.

64. Mr. YEPES said that as he had been absent at the end of the previous meeting, he did not know whether the Commission had examined footnote 67, which was of the utmost importance since it dealt with the responsibility of organizations.

65. Mr. SANDSTRÖM replied that the Commission had decided to delete the footnote.⁷

66. Mr. YEPES regretted the decision. The footnote concerned a most important legal principle. The Charter appeared to establish the new principle of "responsibility of organizations", and the comments of the Rapporteur, given in the footnote on that question, brought out the fact that the principle that "criminal guilt is personal and that mass punishment should be avoided" remained inviolate. He emphasized that point, because the principle that fraud cannot be transmitted ("l'intransmissibilité du dol") was fundamental to criminal law and was upheld by the declarations made in footnote 67.

67. The CHAIRMAN pointed out that as the Commission had taken a formal decision, this could not

be revoked. Incidentally, the author of the report, Mr. Spiropoulos, had agreed to the deletion of the note. But to meet Mr. Yepes' wishes, the summary record would mention the reservation he had just made.

67 a. He declared the discussion of Mr. Spiropoulos' report on the formulation of the Nürnberg principles closed.

Law of Treaties: Report by Mr. Brierly (item 5 of the agenda) (A/CN.4/23)

68. The CHAIRMAN said that the Commission had decided to pass on to the examination of Mr. Brierly's report before taking up the second report by Mr. Spiropoulos on the draft Code of offences against the peace and security of mankind. He asked Mr. Brierly to tell the Commission how he would like his report discussed.

69. Mr. BRIERLY said he was sure that the members of the Commission had read his report, which he explained was merely a draft. He then gave a summary of the Explanatory Note introducing the report (paras. 1 - 12). He emphasized that this preliminary report dealt only with the definition of certain terms, treaty-making capacity and the making of treaties. Other chapters would be added to it. There were certain difficulties in the way of codifying rules likely to be generally acceptable; and instead of codifying the propositions of existing law, he could have adopted another method—namely, to evolve a set of rules which States might apply or modify as they chose. He had rejected this second method. The questions raised in paragraphs 6 and 7 would afford material for future discussion, as would also the subject matter of paragraph 8. He explained why he had avoided using the terms "ratification" and "accession"—this being a new practice instituted by the United Nations and not applied consistently. As rapporteur, he had tried to define the precise scope of the term "treaty", and so had included in his draft other agreements such as Exchanges of Notes. He also mentioned various draft codes on which his report was based. He added that he had received a great deal of help from the Secretary-General and the Secretariat. Without it, his report could not have been prepared.

70. Mr. KERNO (Assistant Secretary-General) paid tribute to the high standard of the report. He felt he should draw the Commission's attention particularly to one of the sections of the report which was of great immediate importance to the United Nations—namely, the section dealing with "Reservations to Treaties" (Articles 10, paras. 84 - 102). He explained that as the depository of a great many international conventions, the Secretary-General of the United Nations had often been faced with great difficulties. This had been particularly true of the Convention on Genocide. If the Commission decided to discuss this part of the report, it would be of great value to the Secretary-General, as the question of reservations was of considerable importance to him. He intended, in fact, to place the question of reservations, including those referring to the Convention on Genocide, on the agenda of the next General Assembly. The report raised so many problems

⁷ See Summary record of the 48th meeting, para. 134.

that the Commission might not manage to reach a definite conclusion on all of them at the present session. But he hoped that on the subject of reservations, certain preliminary conclusions might arise out of the Commission's debates, and these would certainly be of great help to the Secretary-General, as well as to the General Assembly and the Sixth Committee when they discussed that particular item on the agenda.

71. Mr. FRANÇOIS commended the high quality of Mr. Brierly's report. He was not very clear, however, as to the legal scope of the provisions it contained. Nor did he see what legal obligations would be incurred by States ratifying a convention established on the basis of the report. In a number of countries, the constitution made a distinction between treaties and other conventions or agreements, such as exchanges of notes. In such countries, treaties were subject to parliamentary approval, while other conventions were not. If a country accepted the convention envisaged by the Rapporteur, would it be bound by the convention, or would it still be at liberty to make a distinction between a treaty and, for example, an exchange of notes? This distinction was made by the Netherlands Constitution. Or alternatively, would exchanges of notes and other agreements as well as treaties have to be submitted to parliament? He thought a great deal of confusion might arise as to the legal consequences to States of the acceptance of the convention.

72. Mr. BRIERLY replied that if the draft convention were ratified, countries would be at liberty to distinguish between treaties and other agreements in accordance with their constitutional law. In article 1 of his draft convention, he had tried to give a definition of the term "treaty" for the limited purposes of the convention; and as the definition stood, he did not think he had created any constitutional difficulties for the States referred to by Mr. François, even though he had been obliged to use here and there a different terminology from that used by some States.

73. Mr. AMADO was of the opinion that the draft Convention on the Law of Treaties as presented by Mr. Brierly departed greatly from tradition. While he recognized the great value of the report, he wondered whether the flexibility of the draft and of the definitions it contained were likely to remove the theoretical or practical discrepancies and controversies connected with the law of treaties.

73 a. The Commission's task was "to promote the progressive development of international law and its codification." The work of codification presupposed the existence of earlier customary material, and this could not be ignored even if it had to be adapted to modern practice, where international organizations were sometimes parties to agreements. The notion of "treaty" had always been regarded as the expression of concordance of views between the parties, and at the same time as the instrument recording this concordance. The definition of a "treaty" as expressing agreement between the parties was wider than the formal definition of a treaty as an instrument. The wording of article 1 (a) of Mr. Brierly's draft was eclectic, since

it stated that a treaty was an agreement, and at the same time recognized the formal nature of a treaty, which according to Mr. Brierly must be "recorded in writing". The origin of all conventional international norms was *consensus* between the parties. But, in paragraph 19 of his report, Mr. Brierly stated that there was no absolute rule of law requiring that a treaty should be in writing. Quoting the works of Professors Scelle, Genet and Rousseau, he argued that the *consensus* was what brought a treaty into existence, while the agreement was the concordance of views giving validity to the treaty, a formal instrument which recorded the conditions of the agreement. On this point, he thought it would be preferable to revert to the definition given in the Harvard Draft Convention, article 1 of which stated: "A treaty is a formal instrument of agreement by which two or more States establish or seek to establish a relation under international law between themselves."⁸ This point was most important with regard to the definition of agreements by exchanges of notes, referred to in article 1 (b) of Mr. Brierly's draft, under which the term "treaty" covered agreements by exchange of notes. According to the Harvard draft, the term "treaty" did not cover agreements made by exchanges of notes. He wondered which of the two definitions was the more in keeping with the evolution of the needs of international law.

73 b. The most serious problem in treaty law was to make it possible for conventions to become an integral part of international conventional law. This could be achieved by the definitive adoption of the agreements by governments, and their transformation from simple treaty drafts into valid international rules. In other words, they must be ratified; and the provisions of article 8 of Mr. Brierly's draft were not likely to induce States to renounce their right to reconsider texts which had been negotiated by their plenipotentiaries. It would indeed constitute a great step forward if States regarded themselves as bound by the decisions of their plenipotentiaries; but the constitutions of most countries gave the legislatures the power to make the final decision as to international undertakings. It was therefore doubtful whether the inclusion of agreements by exchange of notes under the definition of the term "treaty" implied progress or retrogression. Such agreements had always been regarded as a guarantee of flexibility in the relations between States—the slow, complex procedure of legislative ratification being thus avoided as it was by all agreements of a simplified kind—e.g., the well known American "executive agreements", interdepartmental agreements, etc. He referred in this connexion to paragraph VI of the report of the First Committee of the League of Nations Assembly of 2 October 1930 (document A.83.1930.V.).

73 c. The part played by the "executive agreements" in the diplomatic history of the United States was well known—e.g., the exchange of notes between the United States and England in 1817 on the limitation of naval forces on the Great Lakes; the exchange of notes with

⁸ *American Journal of International Law*, Vol. 29, No. 4 (1935), Supplement, p. 657.

England in 1850 ceding Buffalo Bay to the United States; the Protocol of 1898 on the cession to the United States of Spanish sovereign rights over Cuba and Puerto Rico, etc. If the United States were ever bound by a convention such as that contemplated under article 1 (b) of Mr. Brierly's draft, the agreements by exchange of notes would be classed as treaties, and would come up for legislative ratification under the terms of article II, section 2 of the United States Constitution. The same would apply to Brazil and many other countries. Hence, he was inclined to think that the solution proposed by Mr. Brierly, under which agreements by exchange of notes would be submitted to the formal process for the conclusion of a treaty, would not contribute to the development of international relations. The immediate consequence of the adoption of Mr. Brierly's plan would be to make the agreements on a number of subjects in which the executive authorities at present had full liberty of action dependent on the formality of ratification.

73 d. He thought that article 2 on the use of the terms "State" and "international organization" might very well be eliminated. Mr. Brierly had stated that he had not attempted a definition of the term "State" (para. 36). His intention appeared to be to avoid making the convention apply to the various entities which make up a State, such as provinces or cantons, which were not members of the community of nations. Moreover, article 2 was not strictly logical, since it might well be asked whether an international organization was not itself a member of the community of nations.

73 e. The rule laid down in article 5 (b) struck him as very wide in scope. It was true that nowadays it frequently happened that ministers of finance or transport, for example, concluded international agreements with their colleagues direct. But it would be going too far to lay down that the powers proper to the Head of a State could be presumed to be delegated to anyone assuming ministerial functions. The rule should be confined to the conclusion of agreements of secondary importance.

73 f. Article 7 laid down the principle of the autonomy of consent of all the parties. In this respect, he was in agreement with Mr. Brierly.

73 g. Under article 8, signature would be the normal procedure for acceptance, in the absence of a declaration to the contrary in the treaty. Signature would therefore be the general rule, whereas ratification would be the exception. This would mean a return to the privatist doctrine of Grotius, under which the relations between Heads of States and plenipotentiaries were similar to those between the parties with regard to powers of attorney. This doctrine was contrary to the practice of the last few centuries. The position taken by Mr. Brierly on this point represented a doctrine which during the last few years had had several protagonists in England—Sir Arnold McNair, Sir Gerald Fitzmaurice, etc. There must be no confusion between ratification, an institution of international law, and approval by legislatures, which was an institution of constitutional law; but there was a certain correlation

between the two. Where the constitution required legislative approval, the Head of the State could not sanction the instrument of ratification without consulting the representatives of the people. Thus, the principle proposed by Mr. Brierly would not avoid the obstacles to ratification, since States in which the power to conclude treaties was subject to reference to the legislature would stipulate that treaties to which they were parties must be ratified, except perhaps in the case of agreements of secondary importance. Mr. Brierly stated in paragraph 76 of his report that the tendency during the last few years had been to make treaties binding by signature alone, quoting the example of the UNRRA Agreement, etc. Nevertheless, a great many agreements—e.g., the Charter of the United Nations, etc.—still stipulated that they must be ratified. The necessity for ratification as a condition of validity for treaties had been declared time and time again by the Permanent Court of International Justice. Article 5 of the Convention on Treaties signed at Havana in 1928 consecrated the principle of compulsory ratification.

73 h. The opponents of the principle of compulsory ratification for the validity of treaties used the argument that a ratification clause was almost always expressly put in. But this clause never stated anything but the necessity for the formality; it invariably contained a stipulation as to the procedure for the exchange of instruments of ratification, the place where this should take place, and the deposit of ratifications. Incidentally, the argument could also be used against its advocates, since the clause under which a treaty was valid from the time of signature was never implicit, but always expressly stated. Article 8 provided that a representative should have authority to conclude the treaty. But States would endeavour to limit the full powers of their representatives, at least in respect of treaties of some importance. Moreover, in countries where legislative approval was required by the constitution for the conclusion of treaties, the Executive could never grant full powers authorizing a representative to conclude international treaties simply on his signature.

73 i. In short, Mr. Brierly's draft did not express the unanimous views of the various legal systems regarding the law of treaties, but was built up on the model of the British legal system. Incidentally, in his book, "The Law of Nations" (fourth edition, 1949, pp. 231 - 232),⁹ Mr. Brierly had outlined a doctrine diametrically opposed to the one on which his present draft was based.

74. The CHAIRMAN asked whether Mr. Brierly would like to reply at once to Mr. Amado's speech, which incidentally confirmed the impression he himself had had when he read the report. Every line of the report would be likely to give rise to discussions which would be of great value to the Commission. To discuss it seriously, the Commission would need, not a week or two, but possibly months, to exhaust the subject and to reach definite conclusions. That was true, of course, of all reports dealing with vast subjects which

⁹ J. L. Brierly, *The Law of Nations*, Oxford, The Clarendon Press, 1949.

could not be thoroughly discussed in a short space of time. He agreed with the Assistant Secretary-General that the Commission might give the General Assembly its opinion, not on the draft as a whole, but on certain points.

75. Mr. KERO (Assistant Secretary-General) repeated that it would be most desirable to reach definite decisions and conclusions; but he was sure that the Commission had no illusions as to the possibility of completing its agenda quickly. In regard to certain topics, it would be useful if a definite report could be submitted to the General Assembly—for example, on the Nürnberg principles, on the international criminal jurisdiction, and on the ways and means for making the evidence of customary international law more readily available. In regard to the law of treaties, the Commission might be well advised to try to agree on the basic principles and to examine certain particular points, with a view to enabling the rapporteur to submit a more concrete report and proposals at the next session. The Commission might, for example, discuss the possibility of drafting a convention on the law of treaties, or merely certain principles. It was certainly desirable that on this topic also the Commission should make progress.

76. The CHAIRMAN remarked that in conformity with the decision of the General Assembly, certain reports had priority. Mr. Brierly's report was not one of them. It might perhaps have been better to take up the study of the priority topics. He thought the Commission might have to limit the time it devoted to each report. At any rate, it hardly seemed possible for Mr. Brierly's report, which raised the most vital questions, to be examined carefully and thoroughly. Hence, it would be better to limit the discussions and to examine some of the principles laid down by Mr. Brierly. The point raised by Mr. Kero had not been examined by Mr. Brierly—namely, whether the Commission was to draft a convention or merely a set of principles. There seemed to be no doubt that the Commission's task was to draw up draft conventions, but he did think there would be time to reach agreement on all the terms of a convention. As the Commission had seen, the standpoint taken by Mr. Amado was contrary to Mr. Brierly's; and his seemed to indicate that the study of article 1 alone would keep the Commission busy for days. Hence, he suggested that the current week be devoted entirely to the study of Mr. Brierly's report, and the report by Mr. Spiropoulos on the draft Code of offences against the peace and security of mankind be taken up the following week. He also reminded the Commission that it would have to discuss the report to be submitted by its general rapporteur. When it did so, it would certainly resume the discussion of a number of points it had examined previously.

The meeting rose at 6.5 p.m.

50th MEETING

Tuesday, 20 June 1950, at 10 a.m.

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Chairman: Mr. Georges SCALLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. Roberto CORDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris el-KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Jesús María YEPES.

Secretariat: Mr. Ivan KERO (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).

Law of Treaties: Report by Mr. Brierly (item 5 of the agenda) (A/CN.4/23) (continued)

ARTICLE 1

1. The CHAIRMAN did not think it possible for the Commission to embark on a thorough discussion, though it might take up some individual points. Article 1, paragraph (b), assimilated what were previously known as treaties to the simplified agreements which were exchanges of notes.

2. Mr. HUDSON had difficulty in understanding paragraphs 3, 4 and 5 of the Explanatory Note. The last sub-paragraph on page 5 read: "these rules¹ are so broad that if they were stated in reverse they would command scarcely less agreement". He was unable to see how they could be stated in reverse. Paragraph 6, dealing with standard clauses, was important and he hoped the Commission would find it possible to revert to that matter. He was not clear as to the meaning of paragraph 7. What sort of depositories were contemplated? In paragraph 8 he had indeed been surprised to find that the terms "ratification" and "accession" were not employed at all. He could not understand why tradition had been departed from there. The Genocide Convention and the 1949 Geneva Convention employed those words. He wondered what problem connected with exchanges of notes it would be appropriate for the Commission to discuss (paragraph 9). The Commission was not considering all types of agreements, and he had been pleased to see in paragraph 10 that purely unilateral engagements did not come within the purview of the draft

2 a. The title of Section C "Source of the Draft" was misleading. Paragraph 11 gave a list of drafts; but

¹ Articles 5 (b) and 7 of the Harvard Draft Convention; see A/CN.4/23, p. 52.

drafts were not sources. The proper sources would be the practice of States and of international organizations. There also appeared to be a slight misunderstanding about the Convention on Treaties adopted by the International Conference of American States at Havana in 1928; that Convention was no longer a draft since it had been ratified by at least fifteen States. It was an instrument of some importance. He questioned the relevance of Field's and Bluntschli's drafts. The Draft of the International Commission of American Jurists was merely a preliminary document prepared for the Havana Conference of American States.

3. Mr. BRIERLY remarked that he had confined himself to mentioning the documents on which his Draft Convention was based.

4. Mr. HUDSON pointed out that Mr. Brierly had referred to them as sources. The Havana Convention was a source in the strict sense of the term, but the other texts were mere suggestions.

5. Mr. BRIERLY stated that he would have occasion to revert to the words "ratification" and "accession". In connexion with the Secretary-General's depository functions he had been obliged to rely on the documentation provided by the Secretariat. Perhaps a representative of the Secretariat would be so good as to give further information on that matter immediately or at a later date.

6. The CHAIRMAN thought that a later date, when the Commission was discussing article 9, would be preferable.

7. Mr. BRIERLY had nothing to add to his Explanatory Note for the moment. He had endeavoured to explain the nature of the draft and had not attempted to define treaties in general. His definition merely outlined the limits of the subject-matter of the Report.

8. Mr. ALFARO complimented Mr. Brierly on his work but was unable to accept some of his proposals. Article 1, which the Commission was about to discuss, constituted a departure from the principles of international law and the established practice of States. To assert that an exchange of notes amounted to a treaty might be interpreted as indicating an intention to give governments the power to conclude international agreements of all the other categories without submitting them to the legislature for ratification. For example, the Senate of the United States might believe that it was the desire of the Commission to deprive it of its power of final decision on international treaties. He mentioned the American practice of making "Executive Agreements", which did not need to be ratified by Congress. Both those agreements and exchanges of notes, however, were of a secondary character and could not be regarded as treaties within the meaning given the word by the draft under discussion. The definition of a "treaty" was based on an idea which he was unable to accept. He proposed that Mr. Brierly's text be amended. Mr. Brierly had said that it was not his intention to define the term "treaty" for all purposes, but the Convention could become law for the signatory Powers. It was essential, therefore, to know what was meant by "treaty".

8 a. Article 1 (a) stated that a treaty was an agreement recorded in writing between two or more States or international organizations. Hence an agreement between, for example, the Universal Postal Union and the International Labour Organisation would be a treaty. He did not believe that definition tallied with the meaning of treaty in international law. The Trusteeship Agreements, important as they were, had never been called "treaties". The definition went on: "which establishes a relation under international law between the parties thereto". But there could be treaties which annulled or modified a relation under international law: for instance, the Hay-Pauncefote Treaty of 18 November 1901 on the Panama Canal brought to an end the regime instituted by the Clayton-Bulwer Treaty of 19 April 1850. Many contemporary writers were considering the possibility of creating, modifying or annulling an obligation, as appeared from the definitions given by Field (A/CN.4/23, Appendix C, para. 188) and Fiore (*Ibid.*, Appendix E, para. 744).

8 b. Regarding paragraph (b) of the article, he was unable to accept the principle that the term "treaty" included an agreement effected by an exchange of notes. He proposed that paragraph (a) be altered and redrafted as follows: "A treaty is a formal instrument of agreement concluded by two or more States with a view to establishing, modifying, regulating or extinguishing a relationship of international law". That combined the Harvard and the Fiore definitions. He had left out the words "recorded in writing" because he had used the words: "formal instrument". If the Commission thought it necessary to stipulate that treaties must be drawn up in writing, it could adopt a provision of the type appearing in the Havana text. A treaty was not only drawn up in writing but negotiated with some formality.

9. The CHAIRMAN stated that it was too soon to submit amendments. What was taking place was a general discussion to enlighten the rapporteur as to the Commission's views. He would retain Mr. Alfaro's proposal as an expression of his opinion.

10. Mr. SANDSTRÖM agreed with Mr. Brierly, in connexion with paragraph (a) of article 1, that definitions given in international conventions did not affect interpretation in municipal law. But if in a convention on treaties the generally accepted definition of the term "treaty" were altered, some misunderstanding might arise, particularly in States which made a distinction between treaties and other categories of international agreements. If the proposed definition was rejected, however, the ideas underlying it need not necessarily be rejected also.

10 a. He understood that Mr. Brierly proposed to bring agreements concluded by exchanges of notes and treaties under the same rule. Supposing it were thought necessary to bring exchanges of notes and treaties under the same rule, there were other ways of doing so than by a change of definition. It might for example be laid down that an agreement concluded by exchange of notes should in whole or in part come under the same rule as a treaty. It might also be decided that what was

said of treaties should apply in part to exchanges of notes.

11. Mr. CORDOVA thought that the definition of the term "treaty" in article 1 ("a treaty is an agreement . . . which establishes a relation under international law") was incomplete. Many relations under international law, for example, relations arising out of a *modus vivendi*, did not bind States. The other drafts that had attempted to formulate the law of treaties confined themselves to agreements which created real obligations. He thought that the idea of creating a legal obligation should be included in the proposed definition.

12. Mr. FRANÇOIS was of the opinion that much misunderstanding might be avoided if it were stated at the outset that the Commission did not contemplate taking a decision that might affect the distinction made in various countries between treaties and other agreements, and that States would in no way be obliged to alter constitutional provisions in force.

12 a. In any case, he thought that the words "which establishes a relation under international law" in article 1 embraced too much. As Mr Córdova had said, there were relations under international law which were concluded in writing and yet were not treaties. If, for example, a State requested in writing the recognition of a diplomatic agent and the State to which the request was addressed also replied in writing, that would not constitute a treaty. He considered that it would be best to say "a relation under public international law . . .".

13. Mr. HSU agreed with Mr. Brierly that an exchange of notes constituted a treaty. If some exchanges of notes had results binding the parties, the Commission could not leave them out of account. The definition in question of the term "treaty" might not tally with the practice of some countries, but that was not material since the Commission was considering international, not constitutional, law. Clearly constitutional law must not be forgotten, but since there was considerable confusion about it it would be better to start on the right lines. Jurists could always find an explanation reconciling the provisions of municipal law with those of a convention.

14. Mr. HUDSON was rather doubtful about the words "recorded in writing"; they seemed to him to imply that an agreement existed apart from the instrument in which it was expressed. He wondered whether that ought to be accepted. In his opinion the written document was the expression of an agreement, not merely the record of it.

14 a. With regard to what should be registered (A/CN.4/23, para. 16) he thought that the limit set was not a satisfactory one. It was true that the word "agreement" appeared in article 102 of the Charter, but that article could hardly be said to be an improvement on Article 18 of the Covenant of the League of Nations.

14 b. He regretted that the Comment on paragraph (a) of article 1 said nothing about the terminology adopted for formal agreements. He failed to see the difference between many of the terms employed. At the previous

meeting² Mr. Brierly, in reply to Mr. François, had stated that formulation of international law did not modify distinctions which might be established by a constitution. There was no point in discussing the distinctions that might be made by certain constitutions but it would be desirable to insert the provisions of some constitutions, in the form of an annex, to show their ruling on the matter. The Constitution of the United States, for example, made a distinction between treaties and agreements concluded by the executive ("executive agreements").

14 c. He failed to follow the thread of the argument in paragraph 20. He agreed with Mr. Brierly (para. 21) about excluding oral agreements; but in his opinion it was not enough to mention the *Eastern Greenland Case* and other cases: it was necessary to state what was involved. He remarked that he had no recollection that the *Mavrommattis Case* had raised the question of the legal effects of oral agreements.

14 d. There could be an agreement between a State and an international organization; the terms used in paragraph (a) of article 1 therefore did not answer to the facts (A/CN.4/23, para. 26). To revert to the example mentioned by Mr. Alfaro, it was true that a treaty could supersede or modify another treaty, but the words "to establish relations" included superseding, modifying, etc. (*Ibid.*, para. 28). On the other hand, the example given by Mr. François did not appear to raise any difficulties.

14 e. The sentence in paragraph 30: "And it is of course the case that a draft for an agreement is frequently termed a 'treaty' . . ." involved a popular expression with which the Commission need not concern itself. The explanation given in paragraph 32 puzzled him. He was doubtful about the expression "contracts of international law". The Hague Court had pronounced that the transactions dealt with in that paragraph could not be regarded as contracts of international law. He agreed with Mr. François about the inclusion of exchanges of notes in the definition of the term "treaty" (para. 33).

14 f. His reply to Mr. Hsu was that he saw no need for the Commission to consider a matter which did not come within its terms of reference and did not raise any special problems. In connexion with paragraph 34 he felt that account should be taken of the fact that real treaties had been signed by protectorates and colonies—by the African Postal Union, among others. Such entities, though perhaps not States, nevertheless concluded agreements of international scope.

14 g. Mr. YEPES desired to associate himself with the compliments paid to Mr. Brierly on his report, which set out the principles of the English school of international law. He did not know whether the Commission ought to accept those principles; but an attempt had been made to present the facts. He would revert later to the constitutional power to conclude treaties.

14 h. For the moment he would confine himself to article 1. He regretted the extreme vagueness of the

² See Summary record of the 49th meeting, para. 72.

terms of that article; when the Commission came to put it into final form, the question would have to be gone into more thoroughly. It involved consideration of the very nature of international agreements. Since the modern form of treaty was the multilateral treaty, it was advisable to explain the difference in form between bilateral and multilateral treaties and whether or not the nature of a treaty varied with its object. The same definition could not be adopted for a law-making treaty, which laid down a new rule of law, and a treaty concluded on the *do ut des* principle ("traité contrat") by which two States undertook to respect a contractual obligation. Nor should sight be lost of the difference between a treaty adopted at an international conference and a treaty resulting from negotiations between two or more States.

15. Mr. KERNO (Assistant Secretary-General) pointed out, in connexion with the question whether international organizations could be parties to a treaty and the doubts expressed by Mr. Alfaro on the matter, which had caused him (Mr. Alfaro) to omit any mention of international organizations in the text he had proposed, that The Hague Court had observed that the Charter provided for the conclusion of agreements between the Organization and its Members (paragraph 26 of the Comment).

15 a. He drew the Commission's attention to the agreements concerning the Organization's Headquarters concluded between the United States of America and the United Nations. He had himself taken part in the negotiations leading to that agreement and could testify that it had been called an agreement and not a treaty, not because anyone had questioned the capacity of the United Nations to sign a treaty, but merely because ratification was easier if the agreement were called an agreement: in that case only a simple majority was required in Congress, whereas a two-thirds majority was required for ratification of a treaty by the Senate.

15 b. He desired in conclusion to point out that Article 43 of the Charter provided for the contingency of certain agreements being concluded which would undoubtedly be treaties. He read out to the Commission paragraph 3 of article 43. He thought it necessary therefore that the definition appearing in article I should include international organizations among the parties to treaties.

16. Mr. el-KHOURY was of the opinion that international organizations could not be parties to a treaty if what was meant by an "international organization" was a specialized agency or non-governmental organization or even the United Nations, since cases of violation would be submitted to the International Court of Justice, which was only competent to deal with disputes between States. If agreements to which an international organization was party were called "treaties" by the Commission, the Court would have to consider them should occasion arise. In his opinion an international organization could only be party to a treaty if it were one of the regional agencies contemplated by the Charter, that is to say a group of States such as the Arab League or the Organization of American States.

16 a. An exchange of notes had its value, it created an obligation; but he was not sure whether it ought to be called a "treaty", since under all constitutions treaties had to be ratified by special procedures. He did not think that exchanges of notes were subject to the same procedures; that did not mean, however, that the question of exchanges of notes should be ignored. Paragraph (c) of article 1 was acceptable, provided the words "or international organization" were deleted or those words were defined as meaning a regional agency in the sense in which that term was used in the Charter.

16 b. Regarding the general discussion on which the Commission was engaged, he thought it desirable that Mr. Brierly should be precisely informed of the Commission's views. If the Commission did not accept paragraph (a) for example, Mr. Brierly ought to know how it wished the term "treaty" to be defined. If the discussion continued as it had begun and first one member gave his views and then another contradicted them, Mr. Brierly would not be able to profit from it, and it would be of no help to him in making a fresh draft.

17. The CHAIRMAN remarked that Mr. Brierly would have the records of the proceedings at his disposal.

18. Mr. el-KHOURY was aware of that. But he proposed that Mr. Alfaro's proposal be adopted and that the words "or international organizations" be deleted. In that way Mr. Brierly would be informed of the Commission's view.

19. Mr. HSU wished to know precisely what Mr. Hudson meant by his statement that he saw no need for reference to be made in the report to exchanges of notes.

20. Mr. HUDSON stated that exchange of notes was a very general practice and he did not think it raised any legal problems germane to the subject of the discussion.

21. Mr. HSU thought it would be most desirable from a practical point of view for exchange of notes to appear in the draft, to avoid any misunderstanding. The matter might be dealt with by stating that an exchange of notes came within the same category as a treaty.

22. Mr. HUDSON asked to be given a concrete example.

23. Mr. LIANG (Secretary to the Commission) cited, as an example of the application of one of the principles of international law to an exchange of notes regarded as a treaty, what had occurred in the case of the notes exchanged between Japan and China in 1915, known as the "Twenty-one Demands". China had maintained in international conferences that since the Chinese Parliament had not approved the exchange of notes, the agreement arising out of it was not operative. Cases might arise in which it would be of importance to determine whether the principles of international law concerning treaties applied to exchanges of notes.

24. Mr. BRIERLY realized that it was not desirable to include every exchange of notes in the term "treaty" since to do so might raise constitutional difficulties

in some countries, but he thought that to fail to mention exchanges of notes in the draft would leave it incomplete. Many of the rules of treaty law also applied to exchanges of notes. The question of application of the principle *rebus sic stantibus* and the question of reservations, for example, could arise in connexion with an exchange of notes. He thought that Mr. Sandström's suggestion might provide a way out of the difficulty. It was desirable to mention exchanges of notes, but to do so without including it in the concept of treaty. It might be stated that the draft applied to an exchange of notes unless otherwise specified.

25. The CHAIRMAN said that Mr. Brierly's reply was of considerable value.

26. Mr. CORDOVA thought that the Commission was skipping from subject to subject. In his opinion it would be better to exhaust one subject before passing on to discuss the next. Mr. Alfaro had expressed himself very clearly. The Rapporteur ought to state his views on each question.

27. The CHAIRMAN felt that the discussion was proceeding in the normal manner. The view of the Commission should emerge from the whole body of views expressed. The Rapporteur would note all the comments made on article 1 and reply whenever he thought fit, and then in due course make his reply to all of the comments as a whole. Everything that might be said about article 1 had not yet been exhausted and if he himself thought there were further remarks to be made he would submit them.

28. Mr. HUDSON declared himself satisfied by the statements of the rapporteur, Mr. Brierly. He thought, however, that it was important to settle the matter under discussion by the Commission. In his opinion the views expressed by members concerning exchanges of notes might be summarized as follows; it was preferable to state in paragraph (b): "In this Convention the term 'treaty' does not include an agreement concluded by exchange of notes". He realized the great importance of the question of agreements effected by exchange of notes but would prefer it to be dealt with separately.

29. The CHAIRMAN stated that Mr. Brierly had considerably modified the view adopted by him in his report.

30. Mr. HSU held that treaties and agreements effected by exchange of notes were of equal importance and that there was occasion to examine both; the criterion the Commission ought to adopt was that of law, since it was with law that it was concerned. If a treaty or an exchange of notes established law, the matter was of consequence. If it did not, it was immaterial whether a treaty or an agreement by exchange of notes was concluded.

31. Mr. AMADO was pleased to observe that the Rapporteur had altered his attitude towards exchanges of notes. If exchanges of notes were included among treaties the Commission would have to ponder very carefully its conclusions. It must be borne in mind that if it were made obligatory for exchange of notes to be ratified, as treaties had to be under the Constitutions of various States, the Commission would hardly be in

a position to object to the inclusion of agreements in the term "treaty", as article 1 of Mr. Brierly's Draft Convention provided. That article was the most important one in the report, and he noted with satisfaction that from its very first meeting the Commission appeared to have been progressing towards formulating the common view of its members.

32. Mr. BRIERLY, replying to a question from the Chairman, stated that he preferred at present not to reply to the various views that had been expressed. They were so numerous and so varied in character that it would be difficult for him to analyse them unless he were given time to think them over. He asked the Commission to allow him time. He was sure that he would then be able to clarify and analyse the different views, and so be able to give a reply. He felt certain that the interchange of opinions would enable concrete results to be achieved. But first he would like to ask all members of the Commission to make their views known.

33. Mr. el-KHOURY believed the Commission now took the view that a difference existed between an agreement effected by exchange of notes and a treaty. It was desirable that the Commission should examine that difference and be able to define it. In his opinion the term "agreements effected by exchange of notes" should be taken to mean agreements for settling matters within the competence of the Executive, and the term "treaty" to meaning an instrument within the competence of the legislature. If the Commission thought that such was the difference between the two instruments, it would be easy for it to reach agreement. It would, however, be advisable for all opinions to be made known and he thought that discussion was therefore necessary.

34. Mr. CORDOVA concluded from the discussion that views differed as to the meaning of the terms "treaty" and "agreements effected by exchange of notes". In his opinion a treaty was a contract established in writing which contained legal provisions binding the contracting parties. An exchange of notes on the other hand merely settled certain matters of a technical character between the parties. Consequently if an agreement contained provisions binding the two parties it constituted a treaty. For example, the agreement concluded between Mexico and the United States by exchange of notes on 19 November 1941 contained provisions binding on Mexico.³ That was a treaty in the strict sense of the term, whatever name it might be given. The difference between the two types of instrument lay in the presence or absence of binding provisions. He thought the Commission should therefore decide that an instrument was a treaty if it contained legal provisions binding the two parties.

35. Mr. BRIERLY repeated that it was necessary for the Commission to choose between the two points of view. In the Draft Convention appearing in his report he had adopted the view that agreements effected by

³ *Agreement on Expropriation of Petroleum Properties*. U.S. Executive Agreement Series No. 234. Also in *American Journal of International Law*, Vol. 36 (1942) Supplement, pp. 182-184.

exchange of notes contained binding provisions. But the Commission now appeared not to be unanimous on the question. He would like therefore to be informed what its view was.

36. Mr. HSU asked the Chairman not to put the question to the vote for the moment. He would like the Commission to have time for reflection. For his own part the matter appeared clear in the sense that the Commission was debating the question of the form given to different instruments. The decision it would have to arrive at, however, was that any agreement which was binding must be regarded as a treaty. It would be necessary to find a common term applicable to both kinds of instrument; that would resolve the difficulty the Commission appeared to be in. He repeated that he saw no basic difference between the two kinds of instrument.

37. Mr. HUDSON understood that the Rapporteur desired to know the unofficial, provisional opinions of the members of the Commission. The discussion appeared to him highly desirable for that purpose, it being understood that each member might perhaps wish to modify his opinion in the light of the discussion.

38. Mr. BRIERLY expressed his agreement with that view of the matter.

39. The CHAIRMAN thought that it was indeed desirable for the Commission to be able to express its opinion, at any rate in a provisional manner. He asked the Commission to allow him to state his own opinion, not as Chairman but as a member of the Commission.

39 a. In the first place he would like to explain why he was unable to accept the wording of article 1 in its present form. In paragraph (a) the great difficulty the Commission was experiencing in defining the term "treaty" appeared to arise from its indecision concerning the criteria it wished to adopt. There were two criteria: the formal and the substantial. In other words there was the criterion "instrument" and the criterion "substance or content of the agreement". In his definition Mr. Briery had employed both. Mr. Briery stated that the essence of a treaty lay in the "agreement"; that did not mean that an agreement existed in every case, since a treaty could be concluded without the parties being free to express their disagreement on certain points. Mr. Briery also stated that a treaty must be an agreement "recorded in writing". It followed from those two criteria that a treaty was an "instrument containing an agreement".

39 b. He was glad Mr. Briery had used the two criteria, but in reading the report he observed that Mr. Briery also stated that a treaty was a contract, and there he disagreed. An agreement would be a treaty, but a contract was not. Many conventions were not contracts and many agreements were not treaties. He believed everyone was in agreement about the differences between those two kinds of instruments. The distinction was moreover a very old one and attempts had frequently been made to establish the distinction between law-making treaties—conventions—and treaties concluded on the *do ut des* principle ("traités-contrat"). The difference was as follows: a law, even

when established on the basis of mutual consent, was a lasting rule of law applicable to an infinite number of cases. There were, for instance, establishment treaties concluded between two countries, such as the convention in force between Switzerland and France. That convention enabled Swiss citizens entering France to settle there, do business, etc. So long as it lasted, the convention, which was a treaty, remained in force and constituted law for the two countries, not only for their governments or ministries but for the courts, administrative authorities and even individuals. That was a typical example of a convention, a law-making treaty.

39 b. A contract, on the other hand, disappeared immediately it had been fulfilled. In municipal law a bill of sale, for example, was a contract that was fulfilled when the goods were delivered by one of the parties and paid for by the other. From that moment the bill of sale was dead and no further obligation existed for the parties. The same applied to treaties concluded on the *do ut des* principle ("traités-contrat") in international law. Many legal instruments established by agreement had nothing in common with a contract. Collective labour conventions provided an example. They all dealt with labour questions, such as working hours, wages, holidays etc. But they never provided a rule of law stipulating that the employer must engage a worker or that the worker must become employed. (In the same way an establishment treaty did not oblige any national of one contracting party to settle in the territory of the other.) Such conventions constituted laws applicable to labour relations between employers and workers, but were not contracts. A contract settled the details of a transaction between individuals. That was the basic difference. Also called treaties were instruments into which governments introduced whatever they pleased, rules of law and laws: for example, the Covenant of the League of Nations. Those instruments sometimes contained provisions concerning judgments and even judicial procedure; for example, the Treaty of Versailles, which contained provisions concerning sanctions against Wilhelm II.

39 c. To return to the scope and content of a treaty: a treaty established a rule of law. It was concluded by a Government and was law for all who were subject to the law of the signatory States. The real criterion of a treaty was the instrument. It was a solemn transaction. And because it contained important matters it had to be embodied in a written instrument, solemnly signed. In municipal law a deed executed before a notary was, similarly, a solemn transaction containing provisions of importance for the parties. One did not have a deed executed before a notary for buying an umbrella, but one did for selling or buying real estate.

39 d. He could not agree that an exchange of notes should in all cases be assimilated to a treaty; a treaty was too important. It was necessary to consider the reasons for such an exchange of notes. It frequently occurred when the agreement concerned did not deal with matters of great consequence. For example, the ministries of public works of two countries might agree upon certain special points which came within their

particular province. In that case there would be an agreement between the two administrations on matters of secondary importance and, usually, of a technical character. That was why agreements effected by exchange of notes did not require ratification. There was no need to consult the public on such matters. At one time indeed the public had not asked to be consulted. But great progress had been achieved since then. Nowadays the public desired to know what a treaty contained. In many countries even ratification was not regarded as sufficient. Thus in the case of treaties of some importance certain peoples, such as the Swiss, had acquired the right of referendum. In the United States of America jurisprudence connected with treaties was based on the entirely correct view taken by the Senate of the importance of treaties. In short, the distinction between the different instruments lay in the importance of their content, and to some extent in their form.

39 e. For some time a lamentable deterioration had been taking place in the legal situation. To his regret Mr. Brierly's report sanctioned that deterioration. The world had fallen so low that agreements of the greatest importance were concluded without ratification and without the public being consulted. Among others there were the Munich, Yalta and Moscow agreements. If the practice continued, all progress would cease; strife, war would result. When they went to Munich, Daladier and Chamberlain did not know what they were going to do, and they finally accepted everything Hitler demanded. The scrap of paper which was finally to have decided the fate of the Sudeten Germans and the Czechs was torn up by Hitler next day. Originally agreements were instruments that dealt with questions of minor importance. He could not agree to such agreements on details now being assimilated to treaties. But agreements existed which were of wide scope, and it was those which it was the duty of the Commission to examine. They had in reality the nature of treaties. It was for the Commission to explain the difference between law-making treaties on the one hand and agreements on the other. A law was sovereign because the legislator had included vital matters in it. To assimilate treaties and agreements concluded by exchange of notes would in his opinion be contrary to established usage, the development of international law and the interest of nations.

39 f. The wording used by Mr. Brierly at the beginning of his report could be regarded merely as stating the present condition of the law. He did not agree that it was correct so to regard it. But even if it was, he thought that the Commission, faced with a deterioration, ought to consider it its duty to restore the former and better situation. The Rapporteur, Mr. Brierly, had said that he did not wish to use the terms "ratification" and "accession" because the point did not appear to him important. There he entirely disagreed with the Rapporteur, for non-ratification and non-accession were a deplorable degradation of law. On that point he (the Chairman), a revolutionary in the field of international law, was conservative.

39 g. In conclusion he asked whether the Commission

wished to accept in principle that agreements concluded by exchange of notes should be assimilated to treaties. Or did it desire definitely to rule there and then that an exchange of notes and a treaty should not be placed on the same footing?

40. Mr. HSU expressed his agreement with the statements made by the Rapporteur. It was desirable to define the meaning of the terms to be used in the draft convention, but any artificial definition not in accordance with the rules of international law must be avoided. Reverting to the Chairman's statement, he thought that statesmen had not the right to bind their countries by treaties or agreements which were not submitted to the parliamentary procedures of ratification or approval. But it was not within the power of the Commission to modify existing procedures and customs. The only way to do so would be to exert influence on parliaments and public opinion to oblige them to take action to effect such modification.

41. Mr. el-KHOURY felt that the Commission ought to express its opinion as to whether or not the term "treaty" included agreements effected by exchange of notes. In his opinion the correct view was that it did not, but exchange of notes ought not to be left out of the report which Mr. Brierly was to draw up and submit to the Commission. In Syria, conclusion of agreements by exchange of notes was always effected by the Executive. Clearly the same was not true of other countries, and agreements frequently formed an integral part of treaties and were also subject to the procedure of ratification. The Commission might perhaps decide to include agreements in the term "treaty" if those agreements fulfilled certain legal conditions.

41 a. Passing on to the question of international organizations having the capacity to be parties to a treaty, he thought that certain international organizations, such as the Arab League for example, ought to be included among organizations recognized as having that capacity. But he did not believe that all international organizations in general could be accepted as parties to treaties or as having the right to appear before the International Court of Justice. He asked for the matter to be explained.

42. The CHAIRMAN stated that in his view an exchange of notes which had the same external form as a treaty and was subject to ratification ought to be regarded as a treaty. In that case the agreement undoubtedly was a treaty. In his last statement he had allowed himself to disagree with Mr. Brierly, because Mr. Brierly had not merely failed to take his stand on present practice but in his report had gone even further. Since the end of the war the world had reverted to the view, a view corresponding with social necessity, that the rules applying to the conclusion and ratification of an agreement or treaty should be observed. In other words it was necessary for the public to be informed of treaties, should it so wish, and to approve them, whereas Mr. Brierly desired to perpetuate the Yalta procedure. The theory that only the signature of a treaty bound States appeared dangerous. Moreover, the constitution of many States made ratification obligatory

and any treaty which did not correspond with the rules provided in their constitution was null and void for those States.

43. Mr. CORDOVA thought he was right in saying that a certain amount of confusion still existed among the members of the Commission. Mr. Brierly was of the opinion that it was not the terms employed which constituted a treaty, but the substance. Mr. Kerno, on the other hand, had stated that in the case of the agreement concerning the United Nations Headquarters the word "agreement" had been employed instead of "treaty" in order to make possible a simpler procedure of ratification.

43 a. A treaty which did not provide for ratification might be in conformity with the law of a country the constitution of which did not require ratification. The views expressed by the Chairman that conclusion of a treaty was not possible without the consent of the nation did not appear to him to be applicable in all cases. Ratification could not always be a criterion. In his view, the essential characteristic of a treaty was that its provisions were binding on the State.

44. Mr. KERNO (Assistant Secretary-General) said that whatever definition the Commission might adopt, it would not be necessary to employ the term "treaty" in each case in order to make applicable the rules which the Commission was engaged in drafting. In his opinion the term "convention" was very frequently synonymous with "treaty".

44 a. As to the statement made by Mr. el-Khoury concerning international organizations and their inability to appear before the International Court of Justice, that difficulty had already been provided for and settled. He read out section 30 of the General Convention on Privileges and Immunities of the United Nations:

"All difficulties arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties."

45. Mr. BRIERLY desired to know the view of the Commission concerning international organizations. Were they or were they not to be included in paragraph (a) of article 1 of his draft? He would like the Commission to reach general agreement on the matter.

46. The CHAIRMAN summed up the discussion by saying that the Commission was faced with two questions: first, did it wish the report to deal with agreements concluded by exchange of notes or were exchange of notes or were exchanges of notes to be did it intend to regard international organizations as competent to conclude treaties within the meaning of article 1 of Mr. Brierly's draft?

47. Mr. ALFARO asked Mr. Brierly what he meant by his reference to international organizations. The Commission ought to know what was meant by the reference to them in paragraph (a) of article 1: did it mean that those organizations were competent to conclude an agreement between one another, or that it was possible for them to conclude an agreement with other States?

48. Mr. BRIERLY replied that the fundamental question was whether international organizations were regarded by the Commission as competent to conclude or to be parties to a treaty or agreement between one another, or whether it regarded them as also competent to conclude a treaty or agreement with a State.

49. The CHAIRMAN thought the latter question might be answered in the affirmative. There was the example of the treaty concluded between Greece and the Council of the League of Nations. In his opinion, if an international organization adopted a resolution or decision which was binding only on its own members, that was not a treaty, but if it concluded an agreement with a Government, the agreement had the nature of a treaty.

50. Mr. el-KHOURY asked the Commission to define which international organizations would be competent to be parties to a treaty.

51. Mr. BRIERLY stated that the definition appeared in paragraph (b) of article 2 of his draft.

52. The CHAIRMAN wished to know whether the definition Mr. Brierly had given applied to all international organizations, which were very numerous and which international organizations would be competent in character. Mr. Brierly's definition might perhaps apply to inter-governmental organizations such as the Universal Postal Union. But there was, for example, an International Organization for Bird Preservation; could such a body be regarded as an international organization within the meaning of article 2? Did Mr. Brierly think that a convention concluded between the International Organization for Bird Preservation and Liechtenstein was a treaty?

53. Mr. BRIERLY replied that it was for the Commission to pronounce on such matters. He thought that the definition given in article 2, paragraph (b) would be adequate.

54. Mr. HUDSON asked what were the "common organs" which such organizations must possess according to article 2 in order to be international organizations. Did Mr. Brierly mean that such organs must be empowered to act on behalf of the members of their organization and to bind them?

55. Mr. BRIERLY replied in the affirmative.

56. Mr. SANDSTRÖM would have preferred it to be stated that an organ within the meaning of article 2 of the draft must be empowered to represent its members.

57. Mr. ALFARO asked that the meaning of the term "common organs" should be illustrated by some concrete examples. Mr. Hudson had just proposed a criterion which might help to clear up the matter.

There was an International Office for the Publication of Customs Tariffs at Brussels. Was that organization competent to conclude treaties? There was also an International Lighthouse Association which had a permanent office and was in constant communication with governments. Could that organization be regarded as competent to conclude treaties? And could agreements concluded by such organizations be regarded as treaties? That was an important point which required explanation.

The meeting rose at 1 p.m.

51st MEETING

Wednesday, 21 June 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 CORDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris el-KHOURY, Mr. A. E. F. SANDSTRÖM, 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).

Press releases

1. The attention of the Commission had been drawn to press release No. C.6 on the discussions at the previous meeting; and members had considered it unsatisfactory as lacking in precision and not giving an impartial account of the discussions. Mr. KERNO, Assistant Secretary-General, explained the system by which press releases were issued by the Information Centre.

It was decided that before being issued, the texts of press releases should be approved by the Secretary of the Commission.

Law of treaties: Report by Mr. Brierly (item 5 of the agenda) (A/CN.4/23) (continued)

ARTICLE 1 (continued)

2. The CHAIRMAN said that Mr. Brierly had furnished him with the text of two points on which he would like the Commission's opinion—namely:

- “ 1. Without pre-judging the extent to which exchanges of notes can be assimilated to formal treaties, is it the sense of the Commission that this draft should deal with the law relating to exchanges of notes ?
- “ 2. Is it the sense of the Commission that agreements between an international organization and a State or between two international organizations should be treated in this draft ? ”
3. Mr. HUDSON was opposed to exchanges of notes being dealt with in the draft.
4. Mr. AMADO thought the Commission should follow the Harvard Draft, or should make no mention of exchanges of notes.
5. Mr. HUDSON preferred Mr. Amado's earlier proposal.
6. The CHAIRMAN thought it was conceivable for the draft to deal with exchanges of notes, without stating that such exchanges constituted treaties.
7. Mr. HUDSON preferred the way in which the Chairman had put the question at the previous meeting—namely, “ Did the term ‘ treaty ’ include exchanges of notes ? If not, should that question be considered separately in the draft ? ”
8. Mr. BRIERLY thought the Commission was agreed that the term “ treaty ” did not include exchanges of notes.
9. The CHAIRMAN said it was a very awkward question. Although the Commission had not voted, he had the impression that it was of the opinion that exchanges of notes should not be assimilated to treaties, which did not mean that Mr. Brierly should not deal with exchanges of notes.
10. Mr. AMADO pointed out that the problem to be dealt with by Mr. Brierly was that of treaties. If he discussed exchanges of notes as well, there might be some confusion.
11. Mr. SANDSTRÖM thought that if the draft dealt also with exchanges of notes, its present title would have to be changed and another title decided on.
12. Mr. AMADO said that exchanges of notes would continue to be used as a procedure for inter-governmental agreements. The Commission must not prevent the development of international law. One day, possibly, exchanges of notes would become treaties, but that was not the case at present.
13. Mr. ALFARO considered that exchanges of notes were not covered by the term “ treaty ”, so that the draft Convention on the law of treaties should not deal with them. If the Commission mentioned exchanges of notes, it would also have to consider other types of international agreements.
14. Mr. AMADO urged the importance of keeping the expression “ formal instrument of agreement ” included in the Harvard draft. The form given to the agreement was of vital importance.
15. Mr. LIANG (Secretary to the Commission) suggested that it would be useful to find an empirical

solution in view of the diversity of scientific opinions. Some members of the Commission thought that the exchange of notes should be included in the term "treaty", others thought the opposite. The best plan might be for the Commission not to pronounce on that academic issue. The fact that certain exchanges of notes amounted to treaties might prove to be of no importance for the work in hand.

16. Mr. HUDSON said that Mr. Brierly had intimated that he had not intended to formulate scientific definitions, but had merely explained the sense in which the terms were used in the draft Convention. The Commission should not attempt to draw up abstract definitions.

16 a. The CHAIRMAN proposed that the query raised by Mr. Brierly be put to the vote. If the Commission decided that exchanges of notes should not be mentioned in the draft, the implication would be that such exchanges did not constitute treaties.

17. Mr. HUDSON thought it should be made clear that nothing more than the draft was involved. The Commission would be expressing an opinion on the draft only.

18. The CHAIRMAN replied that in the view of several members of the Commission, to ignore the question of exchanges of notes would automatically signify that exchanges of notes were not treaties.

19. Mr. YEPES pointed out that in some countries treaties were concluded by means of an exchange of notes followed by ratification. The possibility of concluding a treaty by an exchange of notes should not be ignored.

20. The CHAIRMAN maintained that if notes were exchanged and then ratified, there was a treaty.

21. Mr. CORDOVA, said he had had experience of that problem. The Agreement of 19 November 1941 for payment of compensation by Mexico to the United States of America had been concluded by an exchange of notes. The question had then arisen whether the domestic law of Mexico and the United States required ratification of the notes. The Mexican Government had submitted the notes exchanged to the Senate, but the United States Government had not followed a similar procedure. Hence ratification was clearly a matter of domestic law and could not be used as a criterion in international law. Possibly, even in the case of a formal instrument—a treaty—the domestic law of one of the contracting parties might not require the procedure of ratification. In any case, many governments tried to avoid the necessity for submitting treaties to their parliaments for approval, by concluding such treaties in the form of exchanges of notes. Hence that type of agreement must be dealt with in the draft. In Mexico, when an agreement concluded affected legal relations, it was regarded as a treaty and submitted to the Senate. What mattered was the intention in the minds of the parties and the contents of the agreement. A concrete criterion must be adopted.

22. Mr. SANDSTRÖM said that the discussion had convinced him that exchanges of notes must be included in the draft. That would throw light on a great many

problems. There was no difficulty involved; the title of the draft would of course have to be changed, but that was no drawback.

23. Mr. LIANG (Secretary to the Commission) thought that there had been a very important practical reason why the compilers of the Harvard Draft had not included the exchange of notes under the term "treaty". He read out the following passage, stressing the last two sentences:

"Unquestionably, agreements concluded in this form have the juridical force and effect of treaties as the term is usually understood; they are considered by many writers as falling within the category of treaties equally with protocols, arrangements, declarations, and other international agreements designated by other names. They are often published in official treaty collections, and they may be registered with the Secretariat of the League of Nations in conformity with the provision of Article 18 of the Covenant. But it would be difficult because of their peculiar form to formulate a body of general rules which would apply equally to them and other instruments having a different form. For that reason it has seemed desirable to exclude them from the category of instruments to which this Convention is intended to apply."¹

He thought it would be helpful if Mr. Hudson would comment on that passage.

24. Mr. AMADO argued that the question of nomenclature had nothing to do with the nature of the agreement. If notes exchanged were submitted to a parliament, that did not alter the agreement; it was a treaty, and remained a treaty. The negotiation came under international law and constitutional law. The problem under discussion had been admirably set out in the Harvard Draft.² The question was whether, in its definition of the term "treaty" as used in the Brierly draft, the Commission intended to include the exchange of notes. If it did not, that would be tantamount to stating that at present, exchanges of notes did not come within the category of treaties. The question had been very clearly stated by Mr. Brierly.

25. Mr. CORDOVA thought that if the Commission regarded a treaty as an agreement recorded in writing, an exchange of notes could be a treaty. The report was based on the premiss that it was not merely the instrument, but the agreement recorded in writing that essentially constituted a treaty. Hence, the question what was meant by an exchange of notes must be studied. Possibly, it was an agreement recorded in writing; hence, the entire article must be altered.

26. Mr. AMADO pointed out that Mr. Córdova was concerned with the material aspect of the problem, the idea of unanimity of intent; but a treaty was a scientific apparatus. It was the formal recording of unanimity of intent. To become a treaty, an agreement must conform to a mould, to use Professor Scelle's expression.

¹ *American Journal of International Law*, Vol. 29, (1935), Supplement, part III, Law of Treaties, p. 698.

² *Ibid.*

27. Mr. el-KHOURY said that international or inter-governmental agreements could take various forms—treaties, arrangements, protocols, exchanges of notes, undertakings or declarations. It would be better to call the report not “Report on Treaties”, but “Report on international agreements”, dividing it into various chapters dealing respectively with treaties, exchanges of notes, arrangements, protocols, etc., and giving definitions so that the result would be a comprehensive work. The question was whether the Commission was legislating for States, or recording the practices adopted by States. In the latter case, it was difficult to find a general formula covering all the categories used. But what was the point of recording the practices adopted by States? The Commission’s task was to draft a convention for ratification, and it must not regard itself as bound by previous practice, which was most complicated. It must draft new rules easy to apply. If the convention to be submitted to the General Assembly was approved, States would adopt it. He suggested that the part dealing with treaties be discussed, and that exchanges of notes be left over until later.

28. Mr. YEPES feared that the Commission was becoming involved in a discussion on mere terminology, and was more concerned with the form than the substance. What called for study was the substance, not the form. In the draft, the Commission was concerned mainly with the substance of the problem. If two States declared their intention to use the procedure of an exchange of notes for an important agreement, why prevent them? Such an exchange must of course be regarded as a treaty. If the Commission excluded exchanges of notes from the definition of treaties, it would run the risk of appearing to authorize States to conclude treaties in the form of exchanges of notes, and so avoid submitting such treaties to their parliaments. States would maintain that they had concluded treaties only where a certain procedure had been followed, and would conclude treaties, calling them exchanges of notes. To obviate the danger of that anti-democratic practice, it must be stipulated that a treaty could take various forms, including the exchange of notes.

29. Mr. AMADO thought the Commission should not attempt to formulate the law regarding exchanges of notes, protocols, etc. The Harvard Draft—as Mr. Liang had pointed out—stated that “unquestionably agreements concluded in this form have the juridical force and effect of treaties as the term is usually understood; they are considered by many writers as falling within the category of treaties equally with protocols, arrangements, declarations, and other international agreements designated by other names”. Professor Basdevant spoke of such an agreement as being composed of two unilateral instruments.³ The Harvard Draft went on to say that agreements concluded in that form “are often published in official treaty collections, and they may be registered with the Secretariat of the League of Nations in conformity with the provision of

Article 18 of the Covenant. But it would be difficult because of their peculiar form to formulate a body of general rules which would apply equally to them, and other instruments having a different form. For that reason, it has seemed desirable to exclude them from the category of instruments to which this Convention is intended to apply”. At present, no one could possibly formulate the rules covering exchanges of notes. That, incidentally, was the opinion expressed in the Harvard Draft.

30. Mr. el-KHOURY thought this was more or less what he himself had said. If the Commission was codifying the existing law, it would find it impossible to draft a formula covering all the various types of agreement; if, on the other hand, the Commission was legislating, it could lay down new rules which would be binding on States. During her mandate over Syria, France had concluded an arrangement with Turkey under which she ceded to the latter the Sanjak of Alexandretta. There must be room for agreements of that kind in the draft convention. They could not be ignored, since they would continue to be made unless it was suggested that they be prohibited.

31. Mr. HUDSON maintained that the arrangement in question could be termed a treaty.

32. Mr. el-KHOURY replied that it had not been ratified.

33. The CHAIRMAN said he knew the details of the incident referred to by Mr. el-KHOURY, and he could state his opinion freely, since he was not representing his government. His impression was that France had committed an illegal act, by disposing of territory in which she had not a free hand. She had effected by means of an arrangement something for which a treaty was required. The question whether an agreement was a treaty or an arrangement was not a matter of domestic law. It must be determined in international law and for all parties. Governments were not at liberty to refer to an arrangement as a treaty. In the instance mentioned by Mr. Córdova, in which Mexico considered that a particular exchange of notes amounted to a treaty, whereas the United States maintained that it was not a treaty, one of the two governments was wrong. Unquestionably, there were obligations in either case; but what was open to question was whether such obligations should be contracted with certain formalities or otherwise. If an agreement was confused with a treaty, this meant suppressing a distinction essential to the definition of two different things. The rule of international law stipulated that in the case of a matter of some importance, the people must be consulted. If an agreement was negotiated and ratified, it became a treaty; hence, he would define a treaty as an international undertaking requiring certain formalities. He agreed with Mr. Amado.

34. Mr. CORDOVA pointed out that he had said that ratification was a rule of domestic law.

35. The CHAIRMAN contended that ratification was a matter of international law. He thought it would be difficult to put the question as formulated by Mr. Brierly to the vote. It seemed impossible to vote on the

³ *Recueil des Cours*, Academy of International Law, Vol 15, 1926, V, p. 610.

first phrase "without prejudging the extent to which exchanges of notes can be assimilated to formal treaties". None of the members of the Commission could decide whether an exchange of notes could be a treaty or not.

36. Mr. BRIERLY explained that he was enquiring whether the draft should deal with exchanges of notes. In his own opinion, an exchange of notes was a treaty. Other members held different views. He was not calling for a decision on the point; he merely inquired whether the draft should deal with the law relating to exchanges of notes. The first phrase was merely explanatory.

37. Mr. HUDSON thought the Rapporteur had every right to consult the Commission on the question at issue. He himself would be inclined to ask two questions: First, should the draft deal with exchanges of notes? Secondly, if so, should the term "treaty" be used to cover exchanges of notes? Mr. Brierly wished to see the second question postponed for another year, and he saw no objection.

38. The CHAIRMAN put to the vote the question: Is it the sense of the Commission that this draft should deal with the law relating to exchanges of notes?

By 6 votes to 5, the Commission decided that the draft should deal with exchanges of notes.

39. Mr. HUDSON took it that the vote represented the unofficial view of the Commission. In fact, Mr. Brierly had not asked for a formal decision.

40. The CHAIRMAN confirmed that the decision did not prejudice the question whether exchanges of notes could be assimilated to treaties. He asked whether he might put to the Commission the question: Should the term "treaty" be used to cover exchanges of notes?

41. Mr. YEPES thought it would be better to say "can" rather than "should"; there were occasions when, because of their subject matter, exchanges of notes could be assimilated to treaties; whereas, in other instances, there was no reason for doing so.

42. The CHAIRMAN recalled that the report was entitled "Report on Treaties". If the Commission decided simply that the Convention should deal with the exchange of notes, it would imply that treaties and exchanges of notes belonged essentially to the same category. On that point, the Commission appeared to be divided. Did an exchange of notes constitute a treaty? If so, this meant that the distinction between treaties and agreements was being disregarded.

43. Mr. KERNO (Assistant Secretary-General) agreed with the Rapporteur and various members of the Commission that the question might be left over until later. The Commission must be consulted.

44. Mr. el-KHOURY felt strongly that exchanges of notes should have a place in the draft. This did not mean, however, that he was in agreement with the Chairman's second question.

45. The CHAIRMAN thought the question was sufficiently important for the Commission to take a decision on it.

46. Mr. YEPES asked whether the Rapporteur was anxious for the question to be put.

47. Mr. BRIERLY said he would prefer to leave it over for the moment.

48. Mr. YEPES thought that, as the question referred to the special report for the following year, the Commission had no reason to insist if the Rapporteur did not.

49. The CHAIRMAN thought that, in point of fact, the Commission had no right to insist. He suggested that the following sentence be added to the recent decision: "This decision does not prejudice the extent to which exchanges of notes can be assimilated to formal treaties."

50. Mr. ALFARO thought that proposals should be made in an unequivocal form. The special rapporteur was to deal with exchanges of notes in the report on treaties. His personal opinion had been that treaties did not cover exchanges of notes. Mr. Yepes had urged the Commission to declare that treaties could include exchanges of notes. Hence, there were three proposals before the Commission: (1) that the term "treaty" covered agreements concluded by exchanges of notes; (2) that the term "treaty" did not include agreements concluded by exchanges of notes; (3) that the term "treaty" could include agreements concluded by exchanges of notes. He thought the Rapporteur had a right to know what was the sense of the Commission; and he asked the Chairman to consult the Commission on the second proposal at least.

51. The CHAIRMAN said that the Rapporteur had agreed that the question should be adjourned, and that the Commission should state that it did not prejudice the extent to which exchanges of notes could be assimilated to formal treaties. He proposed to put Mr. Brierly's second point to the vote.

52. Mr. HUDSON thought Mr. Brierly would like to be allowed a certain latitude, and he suggested that the Commission comply with that wish.

53. The CHAIRMAN also felt that Mr. Brierly should be given time to consider the matter.

The Commission decided to leave the question open.

54. The CHAIRMAN invited the Commission to pass on to the second question put by the Rapporteur: "2. Is it the sense of the Commission that agreements between an international organization and a State or between two international organizations should be treated in this draft?"

55. Mr. HUDSON said that a year previously he had supported the opinion of other members of the Commission that the law of treaties should be one of the priority topics. There was some confusion in the minds of a great many people, and there were many discrepancies in the practices of the various States. He did not know how many treaties of that type were in force, but there were a great many. Twenty-five years ago, one of his American colleagues had estimated that they amounted to at least 15,000. He had no idea how many there were today, or whether there were fewer or more of them. Possibly there were 25,000 or 30,000. As the law on international instruments was the issue before the Commission, he hoped that the

draft convention to be prepared would help to get rid of the confusion, and to make the practice in the various countries more uniform.

55 a. The question of international agreements which international organizations might conclude was of great interest. He knew of only two or three such agreements, which had been concluded by the League of Nations. One was a convention concluded with Switzerland concerning the broadcasting station; another was a convention concluded with the Canton of Geneva concerning the Ariana grounds, where the new building was to be put up. The other day, the Chairman had also mentioned a treaty concluded between the League of Nations and Greece. At any rate, there were not many of them. He was glad to find a document expressly recognizing the League of Nations' capacity to make treaties. No one could deny that that capacity was shared by other international organizations—e.g., the International Labour Organisation. There was also an agreement between the United Nations and the United States of America on the United Nations Headquarters in New York. Then there was the general Convention on the Privileges and Immunities of the United Nations; there were formal agreements between the United Nations and the specialized agencies; and there were the trusteeship agreements. All those agreements together amounted to some twenty-five conventions or so, concluded between international organizations and States, or among themselves.

55 b. With regard to agreements between governments, there was a great deal of experience over many years to fall back on. But there was little experience of agreements concerning international organizations, and the Commission could not rely merely on that restricted experience for its constructive work. He wondered whether it would not be better to await future developments before laying down a set of rules. If the Commission agreed, it might decide that the draft convention should not deal with agreements to which international organizations were parties. But it could state in its report that it recognized such organizations as capable of making treaties, though it awaited more information on future developments before taking a decision on specific points.

55 c. He had no desire to minimize the capacity of the United Nations to make treaties, and he referred to the admirable account given to the International Court of Justice some time previously by Mr. Kerno, the Assistant Secretary-General. He suggested, therefore, that the draft convention be confined to the essential question of agreements between States, and that the question of international organizations be postponed until developments permitted a closer examination.

56. The CHAIRMAN said that if he had understood the position correctly, Mr. Hudson did not in any way question the capacity of international organizations to make treaties, but felt it would be wise for the draft convention not to deal with that question, and for the Commission to await future developments before committing itself.

57. Mr. YEPES said that he had not been convinced

by Mr. Hudson's argument. He saw no reason why the lack of precedent or experience should prevent the Commission from examining the question and laying down rules. On the contrary, the Commission would be all the more free to lay down such rules if it were not hampered by experience or precedent. Hence, the question of the capacity of international organizations to make treaties should be examined at once.

58. Mr. el-KHOURY said that Mr. Hudson had referred not to treaties, but to agreements, and had mentioned agreements dealing exclusively with administrative matters, not with political questions. He wondered whether treaties of a political nature had been concluded by international organizations.

59. Mr. HUDSON replied that his intention had been to use a comprehensive term, and in speaking of agreements he had, of course, had in mind not merely agreements in the strict sense, but conventions like the general Convention on Privileges and Immunities. That convention, in his opinion, was a treaty, even though it was called a convention.

60. Mr. el-KHOURY did not question that there were international organizations which had the power to make treaties. But apart from those already mentioned, he could think of only two others which also had that power—namely, the Arab League, and the Organization of American States. For the sake of precision, he asked the Commission to define the term "international organizations", Reading article 2 (b) of the draft convention, he had wondered what was the meaning of the expression "with common organs", and he would like to have a definition of that expression also.

61. Mr. HUDSON said that if the Commission followed his suggestion, it would not need to give the definitions asked for by Mr. el-Khoury. The difficulties raised by Mr. el-Khoury were precisely those which had occurred to him, and because of which he had suggested that the Commission omit all mention of international organizations.

62. Mr. SANDSTRÖM took it for granted that the United Nations had the power to make treaties, and that other international organizations could have the same capacity under their constitutions and within the limits of those constitutions. Hence, he thought it was hardly possible to ignore that point, and to make no mention of it in the report, especially as the General Assembly had asked the Commission to deal with it. The Commission must comply with that request. It was, of course, most difficult to define what was to be understood by "international organizations", and to establish the principles determining their capacity to make treaties. At the same time, the problem called for examination; and it should be borne in mind that there were other international bodies like the one which dealt with the publication of customs tariffs, and the one concerned with lighthouses referred to at the previous meeting. Those bodies were in permanent contact with governments, but in all probability they did not possess the power to make treaties. It was surely self-evident that certain other international organizations—e.g., the

International Committee for Bird Preservation—most probably would not come within the category of international organizations as defined in the draft convention.

63. Mr. ALFARO thought the Commission should decide to deal with the capacity of international organizations to make treaties. Actually, a few international organizations undoubtedly had that capacity. They were associations of States expressly authorized to conclude agreements which from every point of view constituted treaties. The difficulty arose from the fact that many other international organizations did not possess that capacity. They might conclude agreements on administrative or domestic matters, but they were not capable of concluding treaties or agreements binding on Member States. Hence, the Commission should avoid a sweeping statement applicable to all international organizations, and should explain that the provisions it intended to make would apply to international organizations as far as was feasible. With that proviso, he was in favour of including the point in question in the draft convention.

64. Mr. BRIERLY said he had been much impressed by Mr. Hudson's reasoning, and he attached great importance to the fact that the Commission recognized that international organizations such as the United Nations had the capacity to make treaties; but he agreed that it was both necessary and difficult to determine which international organizations could be regarded as having that capacity. In view of the opinions expressed, and of the fact that the Commission had not sufficient background material at present, he thought it would be wiser not to include the point at issue in the draft convention, but simply to insert in the report a commentary stating that in the Commission's opinion that capacity did exist in the case of certain international organizations, and had been confirmed by the International Court of Justice. The commentary should add that the Commission was anxious for the time being to avoid examining the possible legal consequences of the capacity granted to certain organizations to make treaties.

65. Mr. YEPES thought it was most important to specify the meaning given by the Commission to the term "international organizations" and their capacity to make treaties. He referred the Commission to article 2 (b) of the draft convention, giving a definition of the expression. As far as international organizations as defined there were concerned, he was in favour of including them in the draft convention.

66. Mr. FRANÇOIS was in favour of the proposal made by Mr. Hudson and supported by Mr. Brierly, to proceed by stages, on the basis of future experience not yet possessed by the Commission.

67. Mr. CÓRDOVA said that the debate showed clearly that there were opinions for and against the inclusion of the question. Mr. Hudson was against it, while Mr. el-Khoury had expressed doubts and called for further information. He himself supported the idea that a distinction should be made between the various international organizations with regard to their capacity

to make treaties. In the case of an association of individual members, that capacity could not possibly be admitted. In the case of an association established by a group of States, and expressly granted by those States the capacity to make treaties, there was no doubt that such an organization did possess that capacity. That applied, for example, to the United Nations. The States which set up an organization were competent to declare in its charter that it would have that capacity. The capacity depended therefore on the constitution given to the organization. Hence, the question should be dealt with by the Commission in a restricted sense—not comprehensively.

68. Mr. HUDSON agreed with the idea put forward by Mr. Córdova on the capacity of organizations to make treaties. He still thought, however, that it would be preferable to postpone study of the question.

69. Mr. LIANG (Secretary to the Commission) felt that there were two issues involved, whereas the problem as stated by Mr. Brierly contained only one. The latter question could not fail to be agreed upon by the Commission, since the rules to be drafted by the Commission must apply not only to treaties concluded among States, but to treaties concluded between States and international organizations as well. The question put by Mr. Brierly did not relate to the capacity of international organizations to make treaties. Yet that was the problem at issue, since no one in the Commission had maintained that all international organizations should be empowered to make treaties. This question of capacity involved the formulation of principles. Possibly, there were rules in the draft convention which could not apply to international organizations.

70. Mr. AMADO thought that the Commission should bear in mind the terms of article 1 of its Statute, under which it was instructed to deal with the codification of law. That procedure involved the formulation of practice. Practice developed gradually, but it was a long, slow process. There was no question but that an evolution was taking place towards a situation where international organizations could make treaties. The problem had been very well expounded by Mr. Brierly in his report, and he wondered whether it was advisable to take up that question, which was still in its infancy, of whether it would not be better to await further developments so that the decision could be based on more complete data. The task which the Commission should keep before it was the formulation of an opinion as to which international organizations already possessed the capacity to make treaties. In view of the lack of experience, he would vote for postponement of the question to a later stage, with the proviso that mention be made in the report of the reasons why the Commission had not wished to take a decision immediately.

71. Mr. KERN (Assistant Secretary-General) thought the Commission might adopt Mr. Liang's suggestion that an affirmative reply be given to the question put by Mr. Brierly—namely, that agreements between an international organization and a State or between two international organizations should be dealt with in the

present draft. There was still, of course, the difficulty of determining which those international organizations were; but the decision on that point could come later. As Mr. Hudson had pointed out, there was no doubt that certain international organizations did possess the capacity to make treaties—e.g., the United Nations. The Harvard Draft had considered that agreements between international organizations were an anomaly.⁴ In his opinion, the Commission could not accept that view. Nowadays, it could no longer be argued that agreements as important as those concluded by the United Nations could be regarded as anomalies.

72. The CHAIRMAN said he would like to give his opinion. Before doing so, he had given much thought to the problem and had reached the conclusion that international organizations should be included in the draft convention for the simple reason that such organizations actually were confederations, and in some cases possessed common organs with the capacity and authority to take decisions binding upon their members. There were organizations whose capacity to make treaties was unquestioned, since their constitutions expressly gave them that capacity. In doubtful cases, the International Court of Justice could decide. Since the days of the Harvard Draft, an evolution had taken place. It was true that the treaties concluded by international organizations were still few in number, but they could and would increase. The Charter of the United Nations itself contained provisions specifying the treaties to be concluded by international organizations. The International Labour Organisation and the International Civil Aviation Organization had concluded treaties involving real obligations with respect to the United Nations. The Commission must therefore deal with the question. But it could not declare that all the provisions of the draft convention would automatically apply to international organizations, for the simple reason that the draft was concerned first and foremost with States. The Commission must specify the particular cases. Hence, he was in favour of Mr. Brierly's proposal.

73. Mr. HSU was in favour of the majority view. The only valid argument advanced against the inclusion of international organizations was that of novelty, and such an argument could not be taken seriously.

74. Mr. BRIERLY said he would like to give his personal view, and to explain that he would vote in favour of the inclusion of international organizations on the assumption that the decision was a provisional one. Indeed, at the present time, it would be unwise to exclude international organizations, though he reserved the right to vote against their inclusion at a later stage.

75. The CHAIRMAN thought there was no necessity for a vote, since the majority of the Commission were in favour of including international organizations in the draft convention and continuing the study of the question. It was nevertheless a provisional conclusion, like all directives given to the Rapporteur.

76. Mr. el-KHOURY hoped that in the course of its

discussions the Commission would also find a definition for the term "international organization".

77. Mr. KERNO (Assistant Secretary-General) explained that it was understood that the report would make mention of the conclusions just reached by the Commission.

78. Mr. BRIERLY, answering the remarks made by Mr. Alfaro at the previous meeting⁵ to the effect that a treaty not merely "established" a relation under international law, but could also modify or annul such a relation, agreed that the term "established" as found in article 1 (a) of his draft might be supplemented by the words "or modified". Mr. Córdova had maintained that relationships of international law established by a treaty were binding, and that the terms of article 1 (a) should be clarified by the introduction of the concept of obligation. He was agreeable to that question also being discussed by the Commission.

79. Mr. CÓRDOVA said that the point he had raised could be settled by merely adding the word "obligatory" to the word "relationship".

80. Mr. HUDSON and Mr. SANDSTRÖM thought that idea was already expressed in the draft as it stood. In fact, a relationship of international law was always binding.

81. The CHAIRMAN agreed. Perhaps Mr. Córdova was thinking of agreements in which there was no express stipulation. Nevertheless, the conclusion of a treaty always involved an obligation. To meet the suggestion made by Mr. Córdova, he suggested that the word "established" be replaced by the word "regulated".

82. Mr. SANDSTRÖM wondered whether that word reflected the true position. It presupposed the existence of an international agreement, which was not always the case.

83. The CHAIRMAN emphasized that the text of the draft convention spoke of "relation under international law". There were, however, relationships of an international character which were not relations under international law. But the moment relation in law was spoken of, as in the draft, there was no doubt possible on the point, since a law was always binding.

84. Mr. HUDSON remarked that the Commission was not drafting a text, but merely expressing opinions for the benefit of the Rapporteur.

85. The CHAIRMAN agreed with Mr. Hudson. The Commission was merely examining Mr. Brierly's report. For the moment, it was not called upon to draft texts.

86. Mr. ALFARO had no objection to the words "relation under international law". In his view, a relation under international law invariably constituted an obligation. He merely wished to amplify the term "established" to include the modification or abrogation of a relation under international law.

87. The CHAIRMAN thought the word "regulated" might equally reassure Mr. Alfaro.

⁴ *American Journal of International Law*, Vol. 29 (1935), Supplement, part III, p. 692.

⁵ See Summary record of the 50th meeting, para. 8a.

88. Mr. BRIERLY stressed the fact that he had stated that a treaty was an "agreement recorded in writing". He asked the Commission whether it considered that a treaty was constituted by the instrument, or rather that the substance constituted the essence of the treaty. In paragraph 19 of his report, he had stated that the essence of a treaty "lies in the agreement or *consensus* brought into existence by the act of its formal conclusion." In his view, the instrument was no more than the evidence that the treaty existed. It was true that the Chairman did not share this opinion, and that the current view was that a treaty was formally constituted by the written instrument, but that the essence of the matter was *consensus*.

89. Mr. FRANÇOIS asked what, for practical purposes, was the difference between those two concepts.

90. The CHAIRMAN thought there was no treaty where there was nothing in writing. He also thought that a written agreement which did not stipulate obligations was not a treaty; moreover, a treaty must be formally concluded. The formality was an essential. Here, there was an analogy between a contract and a deed executed before a notary—by no means one and the same thing. A marriage contract without the notarial instrument was null and void. A marriage contract was only created by the fact of its having been formally concluded before a notary. There was no treaty where there was no formality; on the other hand, there was no treaty where there was no *consensus*.

91. Mr. HUDSON thought the first and second sentences of paragraph 19 of Mr. Brierly's report were perhaps not very well drafted. They stated that the term "treaty" was used in the sense of an instrument or document recording an agreement which already existed before the act formally recording it. The Harvard Draft stated that a treaty was a formal instrument. He personally thought that there must be *consensus* before the conclusion of the formal act; and he had always regarded a treaty as the instrument. Hence, he suggested altering the second sentence of paragraph 19 of the report, the word "by" being replaced by "before" in the phrase "brought into existence by the act of its formal conclusion" (in the French text he suggested that the words "accord ou consensus auquel donne naissance l'acte..." should read "accord ou consensus aui a pris naissance avant l'acte par lequel il est formellement réalisé").

92. Mr. BRIERLY agreed to that alteration, since a treaty was an agreement existing prior to the act of its conclusion.

93. Mr. HUDSON said he would prefer to speak merely of a "formal instrument".

94. Mr. ALFARO did not see how the concept of *consensus* could be separated from the concept of *instrument*. Both were essential before a treaty could exist. If the concept of *consensus* or that of *instrument* were eliminated, there would be no treaty. He thought that whether the terms of the Harvard Draft or the terms of Mr. Brierly's draft were used, the result was the same. The term "treaty" meant an agreement by

consensus and recorded in writing. It was impossible for the Commission to separate the two concepts.

The meeting rose at 1 p.m.

52nd MEETING

Thursday, 22 June 1950, at 10 a.m.

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Chairman: Mr. Georges SCHELLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. Roberto CORDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris el-KHOURY, Mr. A. E. F. SANDSTRÖM, 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).

Law of treaties: Report by Mr. Brierly (item 5 of the agenda) (A/CN.4/23) (*continued*)

ARTICLE 1 (*continued*)

1. Mr. HUDSON observed that Mr. Brierly had asked a question which the Commission had not answered.
2. Mr. BRIERLY was not asking the Commission to vote on the question he had put, but he did think that discussion might be useful.
3. Mr. HUDSON said he had pointed out that the words "a treaty is an agreement recorded in writing" meant that unanimity of intent was independent of the instrument. At the previous meeting, he had given his opinion that that notion was too subtle. He would now like to go further and to contend that it was incorrect. To take an example from private law, could a deed transferring lands be regarded as mere evidence of the transfer? He doubted it. In some countries, agreements of that kind must be drawn up in writing before the transfer became effective. Paragraph 19 of the report showed that international agreements could exist which were not recorded in writing, and that would apply to treaties if they were merely defined as agreements. It was more correct to say, in accordance with the Harvard Draft: "A treaty is a formal instrument of agreement."

3 a. The use of the expression "agreement recorded in writing" could only be explained by the possibility of international agreements being made verbally; but the Rapporteur had explained to him why verbal agreements should be excluded. He hoped Mr. Brierly would take up that question again. He would like to see the word "instrument" used, and the word "recorded" deleted. If that were done, the text would be less open to criticism.

4. Mr. HSU supported Mr. Hudson's suggestion that the word "recorded" be deleted, although it was a minor point. He was sorry to see that there was some fundamental disagreement between Mr. Hudson and Mr. Brierly, since the Commission was called upon to take a decision, and he personally was not altogether happy at having to choose between the opinions of two such eminent authorities.

4 a. He was opting for the solution proposed by Mr. Brierly for a fundamental reason. Mr. Alfaro had urged that the form should be borne in mind when the substance was discussed, since the two could not be separated; but he would surely admit that it was possible to go further and to discuss both. Nevertheless, for the sake of clarity the Commission should concentrate either on the substance or on the form, and the substance must prevail rather than the form. But where was the substance in the case in point? The form was the written instrument. At present, all agreed that treaties must be written down; but for a long time it had not been considered that agreements of that kind must necessarily be written down. For 4,000 years in China, contracts had not necessarily had to be in writing. The definition should revolve round the substance; hence he was in favour of Mr. Brierly's suggestion.

5. Mr. SANDSTRÖM said that he too had pondered whether the question of form in relation to treaties was parallel to that in certain types of private law contracts which required a specific form; and he had reached a conclusion contrary to Mr. Hudson's. Where a particular form was required under contract law, it could be maintained that it was an integral part of the contract. That was not true of treaties. No doubt the form of a treaty dictated certain consequences of some importance for the domestic law of particular countries, and those consequences might have repercussions in international law; but it could not be argued that the form was an integral part of the treaty.

5 a. The question whether the text should refer to an instrument or to an agreement was a matter of terminology. He was inclined to Mr. Alfaro's opinion, that either of the two courses could be followed. He personally preferred to stress the aspect of *consensus*, while not disregarding the formal aspect, and to use the formula "a treaty is an agreement recorded by means of a formal instrument".

6. Mr. ALFARO considered that the result would be the same either way. The agreement could no more be separated from the instrument than the body from the soul. The soul of a treaty was the unanimity of intent.

The body was the formal written instrument. The agreement without the instrument was nothing, and vice versa. The Harvard Draft stated that a treaty was "a formal instrument of agreement". Mr. Brierly's draft called a treaty "an agreement recorded in writing". What constituted a treaty was an agreement converted into an instrument. It was better to refer to the written instrument, but whatever term was used, the result was the same. He nevertheless preferred the Harvard text.

7. The CHAIRMAN supported the view expressed by Mr. Hudson and the general rapporteur. But the question was more important than Mr. Alfaro thought. There were many ways of drawing up a convention, i.e., of adopting a rule binding on two or more States. The question might arise as to whether a convention was involved. The binding rule existed where there was no treaty, but if an instrument which was not a formal instrument was drawn up in circumstances where international law required a formal instrument, the treaty was null and void. The question of nullity of treaties was common knowledge. How could such a question exist if the form was of no importance? In some countries marriage did not require any formality; but where the law did require certain formalities, there would be no marriage where they were not complied with. If the formalities required for a treaty had not been fulfilled in a case where a treaty was called for, the treaty would not exist, and in many cases there would not even be a convention.

7 a. It was very difficult to find out when international law called for a treaty and when it did not; but it was not impossible. International law had made tremendous progress in the matter of customary law. Until the recent troubled times, international law required a treaty whenever an important convention was made. Whenever a government wished to bind its people by an undertaking on an important subject, it had to conclude a formal treaty. That was a general norm, as Kelsen would put it; and the authorities to which all constitutions gave the power to make treaties were the organs competent to conclude them under international law. The definition of a treaty must be a formal definition. Where the Commission was wrong was in assuming that every convention was a treaty.

7 b. The established rules for the conclusion of a treaty were negotiation by duly accredited plenipotentiaries, and signature—which under international law was not binding upon States. What was binding was the ratification. Wherever those formalities required in a formal—as opposed to a consensual—instrument, had not been complied with, the result was an agreement by *consensus* and not a treaty. He thought therefore that the expression used in the Harvard draft convention was more correct than the expression "agreement recorded in writing".

8. Mr. HSU asked whether there was any difference between a formal instrument of agreement and a formal agreement. He thought every one could accept the principle of a record in writing; that was not the point of disagreement. A treaty must be a formal instrument. If a treaty was a formal instrument of agreement, it

included exchanges of notes, and the problem was back again.

9. The CHAIRMAN pointed out that there were many written conventions which were not treaties; hence the fact that an agreement was recorded in writing was not what made it a treaty. "An agreement recorded in writing" was not the same thing as "a formal instrument of agreement". The latter expression signified that a number of conditions must be fulfilled apart from the record in writing.

10. Mr. HSU asked what was meant by "formal instrument". Did it mean ratification by parliament; or was the recording in writing and the mutual exchange by the two ministries sufficient?

11. The CHAIRMAN observed that, as he had already stated, the fulfilment of that latter condition was not sufficient; other principles laid down in the various constitutions must also be observed.

12. Mr. el-KHOURY thought that the point on which a treaty differed from any other agreement was that it could only be international, whereas other agreements could be either national or international. With regard to the term "formal", he did not know of any definition. Could it be said to mean "official"?

13. The CHAIRMAN recalled that even in Roman law there was a distinction between consensual contracts and formal contracts.

14. Mr. el-KHOURY asked why the expression "recorded in writing" should not be used. The word "instrument" meant document. Hence it could be maintained that a treaty was a formal document which recorded in writing an international agreement. The sense of the expression was similar in all the other drafts in which the terms "formal", "in writing", "international", were to be found.

15. Mr. BRIERLY did not think that any vote was necessary. So far his opinion remained unshaken, though when he prepared his report for the next session he would bear in mind all the opinions expressed.

16. There was an exchange of views between the CHAIRMAN, Mr. CORDOVA, Mr. HUDSON, Mr. el-KHOURY, Mr. BRIERLY, Mr. AMADO and Mr. HSU, as to whether it was desirable for the Commission to indicate by vote its preference for Mr. Brierly's text or the Harvard Draft, with a view to giving the special rapporteur a more precise clarification than the summary records of the meetings would provide.

17. At the end of the discussion, the CHAIRMAN said he would put the question to the vote, though Mr. Brierly would be allowed full latitude. The opinion of the Commission should be crystallized, since Mr. Brierly would have to take it into account. He asked whether the Commission had decided to accept the idea as formulated in Mr. Brierly's report or whether it preferred the wording of the Harvard Draft; in other words, whether it favoured the expression "agreement recorded in writing" or the expression "formal instrument".

By 6 votes to 4, with one abstention, the Commission decided in favour of the Harvard text.

18. Mr. SANDSTRÖM said he had abstained because, although he would like to see the words "formal instruments" in the text, he preferred the formula "an agreement concluded by means of a formal instrument".

19. The CHAIRMAN was of the opinion that the vote need not have been taken, since without it the result had been much the same; nevertheless he was anxious to meet the wishes of members of the Commission.

20. Mr. HUDSON and Mr. BRIERLY felt that as the Commission's time was limited, it should go straight on to a discussion of the main problems, e.g., capacity to make treaties (articles 3 and 4 of the draft, and in particular A/CN.4/23, para. 43).

Following a discussion in which Mr. el-KHOURY, Mr. CORDOVA and Mr. YEPES took part, *the Commission, by 5 votes in favour and 5 against, upheld its previous decision to discuss the draft article by article.*

ARTICLE 2

21. Mr. el-KHOURY pointed out that the Commission had not defined the term "State". Article 2 (a) stated that "A State is a member of the community of nations". A year previously, when discussing the Draft Declaration on Rights and Duties of States, the Commission had not defined the term "State". He would like to know when it intended to do so.

22. The CHAIRMAN said it was not the function of the Commission to define the word "State". He himself had been active in international law for more than fifty years, and still did not know what a State was; and he felt sure that he would not find out before he died. He was convinced that the Commission could not tell him.

23. Mr. HUDSON observed that the Rapporteur had said he thought some of the members of the Commission were not satisfied with paragraph (b) of article 2, and had proposed re-casting it. Mr. Hudson thought that the Commission would complicate the problem of the wording of the draft by raising the question of agreements signed by an international organization. The Rapporteur would have difficulty in explaining the words "international organizations". With some reservations, he suggested the following definition:

"An international organization is a body established by a number of States, having permanent organs with capacity to act within the field of its competence on behalf of those States".

24. Mr. BRIERLY said the proposed text included some useful ideas which might very well be adopted. For the moment, that was all he wished to say.

25. Mr. KERNO (Assistant Secretary-General) admitted that the precise definition of an "international organization" possibly raised certain difficulties; but there was no necessity to conclude that because of those difficulties the Commission should do nothing. Since the object of the discussion was to help the Rapporteur, the latter would be assisted by the expression of a general feeling that the definition called for

recasting. The suggestions put forward by Mr. Alfaro, Mr. el-Khoury and Mr. Hudson would be most helpful.

26. Mr. ALFARO did not feel that the Commission should embark on a discussion aiming at a comprehensive definition of the expression "international organization"; at the same time, without losing sight of the fact that the Commission wished to avoid giving the impression that international organizations like the International Organization for Bird Preservation, already mentioned, were to be considered competent to make treaties, he would like to offer a definition for what it was worth. His definition laid special stress on the purpose for which an international organization had been set up, and on its status:

"An international organization is an association of States which exercises political or administrative functions concerning vital common interests of the associated States and which is constituted and recognized as an international person."

27. Mr. CORDOVA thought the Commission would have the same difficulty in defining an international organization as in defining a State. An attempt should, however, be made to clarify the capacity of such organizations. It might be stated, for example, that the capacity of an international organization to make treaties must be defined in its constitution. It was hardly appropriate for the Commission to specify what an international organization could or could not do. If the contracting States had given it in its charter the power to make treaties, it possessed that power.

28. The CHAIRMAN pointed out that Mr. Córdova had said was in keeping with the provisions of article 3, which he read out.

29. Mr. el-KHOURY thought Mr. Córdova's statement was at variance with paragraph (3) of article 4, which stated: "In the absence of provision in its constitution to the contrary, the capacity of an international organization to make treaties is deemed to reside in its plenary organ."

30. Mr. CORDOVA did not see any contradiction. If under its constitution an international organization had the power to make treaties, and the constitution did not specify what organ would be competent to exercise that power, article 4, paragraph (3) indicated that the organ empowered to make treaties would be its General Assembly. Article 4, paragraph (1) stated that the capacity of an international organization to make treaties might be exercised by whatever organ its constitution might provide. The question was what happened when the constitution did not specify any organ. That question was answered in article 4, paragraph (3).

31. Mr. el-KHOURY thought there could be no question but that the organs of an organization could make treaties if its statutes made no stipulation to the contrary.

32. Mr. BRIERLY thought the organs must be specifically invested with that capacity. Once that question was settled, the next thing was how was it to exercise that capacity?

33. Mr. HUDSON thought the draft called for a definition of the meaning of the expression "international organization"; but it would be sufficient to indicate the sense in which the expression was being used in the draft.

34. Mr. CORDOVA thought it would be better merely to define capacity, and to describe the situation of the organization with regard to that capacity, which would be defined by its constitution.

35. The CHAIRMAN said that was what he had understood. There was no question of defining a State or an international organization.

36. Mr. BRIERLY suggested that the Commission pass on to article 3, as it had gone as far as was possible in regard to article 2 (b).

ARTICLE 3

37. Mr. HUDSON remarked that the scope of the text was explained in paragraph 41 of the Comment, which began: "This article deals exclusively with the rules of international law respecting capacity to make treaties". The Rapporteur might find it useful to divide the text of article 3 into two paragraphs: (1) "All States have capacity to make treaties, but the capacity of a State to enter into certain treaties may be limited." That text was similar to article 3 of the Harvard Draft, which he personally did not much care for. The Rapporteur might add the three words "by international regulation". Paragraph 2 would read: "An international organization (it must be understood that that would not apply to all international organizations) may be endowed with the capacity to make treaties." He put that suggestion to the Rapporteur as one which was based on recent developments.

38. Mr. CORDOVA supported Mr. Hudson's text.

39. Mr. BRIERLY explained that in article 2 (b) he had tried to single out international organizations having the capacity to make treaties; but he had not succeeded.

40. Mr. HUDSON thought the question should be left to article 3, article 2 indicating the type of organization referred to. It would be a good thing to add to the second paragraph he had proposed, following the word "endowed", the words "by the States creating it".

41. The CHAIRMAN said that in the case in point the State was the legislator.

42. Mr. CORDOVA said he would like to have the views of the members of the Commission on the necessity for a definition of the expression "international organization". He felt the definition would be difficult.

43. Mr. HUDSON asked whether it would be in accordance with Mr. Brierly's intention to say that he had not wished to give any definition but merely to explain the sense in which the expression was used in the draft convention.

44. Mr. BRIERLY said that was what he had meant by "Use of certain other terms".

45. Mr. ALFARO said he had had in mind the words introducing article 2, and because of them he was not so much attempting to define international organizations, as to indicate what organizations had the capacity to make treaties.

46. The CHAIRMAN thought the Commission had been wise in not attempting to define the terms "state" and "international organizations". As to the question of capacity to make treaties, that belonged to all States, except where the capacity was limited, as stated in article 3. With regard to protectorates, they were authorized to make treaties. If, for example, a question affecting Tunisia called for a treaty, the treaty would be made by Tunisia and not by France. Any State could make a treaty, including the Swiss Cantons. But their capacity to make treaties might be limited by their constitutions, or by international law. The individual States of the United States of America made treaties daily—e.g., for the settlement of questions relating to the utilization of rivers forming the boundaries between them. He thought it could be concluded from this that such States had the capacity to make treaties. Incidentally the Harvard Draft gave a long list of treaties made by the various States of the United States of America.

47. Mr. HUDSON pointed out that those States could not make treaties without the consent of the Federal Government. But they could make "Interstate Contacts", though they had not the right to make treaties. Thus the State of New York could not make a treaty with Canada for the settlement of questions of waterways and their utilization. Such questions came within the competence of the Federal Government of the United States and Canada. But it was feasible for the State of New York to establish an Interstate Contact with the State of Massachusetts for agreement on technical matters.

47 a. Replying to a question put by the Chairman, he said that arbitration between two States of the United States of America could never be regarded as international arbitration.

48. The CHAIRMAN thought that in Switzerland the Cantons had the capacity to make treaties. For instance, the Canton of Geneva and the Département of Haute Savoie could conclude a treaty on matters of common interest. He was sorry though that he had raised that issue, which was outside the Commission's orbit.

49. Mr. HUDSON and Mr. AMADO thought the draft convention prepared by Mr. Brierly did not cover treaties or agreements of that kind.

50. The CHAIRMAN invited the Commission to proceed with the examination of article 3 of the draft convention, and suggested that it be examined in two parts as Mr. Hudson had proposed.

50 a. The first part of Mr. Hudson's proposal read: "All States have the capacity to make treaties, but the capacity of a State to enter into certain treaties may be limited (by international regulation)." He invited Mr. Hudson to give a few examples in illustration of what he had in mind.

51. Mr. HUDSON said that unfortunately he could not call to mind a series of concrete examples to illustrate the point made in his text. The question implied in the text was important and called for reflection on the part of the Commission. But to cite a single example, he had had in mind the Free City of Danzig which was probably not authorized to make certain types of treaties. He did not know whether that limitation was laid down in the constitution given to the town or by other agreements. He had been thinking also of Switzerland whose neutrality had been proclaimed in 1815 by the Pact of Vienna; and he could not say whether by that Pact Switzerland was free to make treaties contrary to the neutrality guaranteed therein. He would like to be better documented than he was at the moment to give more precise information. Possibly, too, the General Assembly of the United Nations might one day decide to set up a new State, stipulating that it should never have the capacity to conclude a treaty under which it was obliged to go to war.

52. Mr. FRANÇOIS had understood Mr. Hudson to say that the Free City of Danzig had not had the capacity to conclude certain treaties. He himself was under the impression that Danzig had not had the power to make treaties of any description. That capacity had been delegated to Poland, which concluded treaties for and on behalf of Danzig. The case of Tunisia was different. Tunisia could conclude treaties. There the limitation of the capacity to conclude certain types of treaties did not apply, though he understood that the exercise of that capacity was to some extent limited.

53. The CHAIRMAN said it was true that there were certain restrictions with regard to Tunisia. In virtue of treaties concluded with France, Tunisia could only exercise its capacity with the authorization of the Resident-General; and there were other treaties that it could not conclude at all. There were of course States not authorized to conclude treaties of any kind.

54. Mr. HUDSON thought the Commission was discussing both the question of capacity and the question of exercise of capacity. Those were two quite different questions, and must be examined separately. In the case of Danzig and Tunisia, he was not quite sure whether it was the capacity or the exercise of the capacity that was involved. He was inclined to think that Poland exercised the capacity on behalf of Danzig. Without a more thorough study he could not take a definite stand. He had inserted the last three words "by international regulation" solely for the convenience of the Rapporteur. Hence he had not intended that the Commission should take a decision on the point. He wanted to leave the Rapporteur free to delete or keep the expression, to give his comments on it.

55. Mr. el-KHOURY remarked that the capacity of States might be limited not only by international regulation but by the existence of undertakings previously concluded by the State and constituting by their very existence a limitation of that capacity. In the case of

Tunisia, he thought that limitation existed under the treaties and agreements binding Tunisia and France.

56. The CHAIRMAN pointed out that the treaty between France and Tunisia crystallized the application to Tunisia of the status of Protectorate. That treaty had been recognized by all States and therefore constituted international law.

57. Mr. el-KHOURY observed that England would like to make a treaty with Egypt limiting Egypt's capacity to conclude treaties where such treaties were at variance with the contractual obligations binding Egypt and Great Britain.

58. Mr. HSU asked for the deletion of the words "by international regulation". If the Commission kept them, the draft convention would be less wide and less general in scope. He would like to put the case of a non-self-governing State on the way to acquiring its independence. Had such a State the capacity to make a treaty during that transition period, and could such a treaty be regarded as valid? He would be glad to hear opinions on that point.

59. Mr. HUDSON referred back to Mr. el-Khoury's statement on the validity or non-validity of a treaty concluded by a State and including provisions at variance with previous undertakings by which the State was bound. He would give an example: State A concluded an agreement or a treaty with State B, under which State A undertook never to transfer any portion of its territory to other States. Later on, State A concluded a treaty with State C, under which it ceded to the latter a portion of its territory. There was thus an obvious violation of the treaty concluded between States A and B. Was the new treaty valid or not? A case of that kind had arisen between the United States and Cuba. He found it difficult to answer the question, since he was not sure whether in the example he had mentioned, the treaty concluded between A and C was valid or not under international law.

60. The CHAIRMAN said that the problem of repugnant norms which might be found in treaties was most complicated. Fuller documentation would be needed in order to study the case and to reach any conclusions. In any case, the Commission was not called upon to take any stand on that point. The words "by international regulation" placed in parentheses in Mr. Hudson's text were optional and could be deleted.

61. Mr. el-KHOURY's opinion was that the treaty concluded between States A and C was invalid.

62. The CHAIRMAN shared that view, though for different reasons. By entering into a treaty with State B, State A had renounced its right to cede territories, and had thus voluntarily restricted its own capacity. If Mr. Hudson interpreted the term "treaty" as being a contract, he was right, but if a treaty was regarded as a law, he was wrong.

63. Mr. YEPES said that the question of inconsistent norms contained in agreements and the consequences thereof for the validity of treaties, was not mentioned in the draft convention. They were getting close to the problem of the illicit motive. As the problem was important, he proposed to raise it again at a later stage.

64. Mr. KERNO (Assistant Secretary-General) thought that certain objections to Mr. Hudson's text could be eliminated by a slight amendment. All that was necessary was to delete the word "certain" from the expression "enter into certain treaties".

65. Mr. AMADO also suggested the deletion of that word; indeed he would like to see the entire article omitted. It was better not to make a distinction between treaties which States could or could not conclude. Moreover, the examples cited so far were very restricted. Hence, failing fuller information it would be better to omit any reference to the limitation of the capacity to make treaties.

66. Mr. LIANG (Secretary to the Commission) emphasized that the first two examples mentioned by Mr. Hudson concerning the capacity of the Free City of Danzig and of Switzerland were pertinent to the question under discussion. The Harvard Draft on that aspect of capacity gave other examples which were not closely connected with the question of capacity to conclude treaties. They were concerned rather with the question whether a treaty concluded at a later date than, but incompatible with, the earlier treaty, could be considered as valid. The Harvard draft mentioned Article 20 of the Covenant of the League of Nations, which under the interpretation which the draft appeared to favour, limited the capacity of States Members of the League of Nations by forbidding them to contract agreements incompatible with the terms of the Covenant. A provision similar to that of Article 20 of the Covenant could be found in Article 103 of the Charter of the United Nations. From one point of view, it could be argued that those two instruments were of a constitutional nature, and hence were endeavouring to limit the capacity of Member States. In that connexion, he mentioned two articles by Professor Lauterpacht; "The Covenant as the Higher Law"¹ and "A Contract to Break a Contract"² (*Law Quarterly Review*). It would be preferable nevertheless to deal separately with the question of validity of a treaty incompatible with a previous treaty concluded by the same State on the same subject. The Commission was now discussing not the question of validity of treaties but the capacity to make treaties.

67. Mr. BRIERLY supported Mr. Liang's statement. The problem of the validity of treaties would have to be studied at a later stage. But the examples of Danzig and Switzerland certainly referred to the limitation of capacity. It was tenable theory—though he had his doubts about it—that under Article 20 of the Covenant the States Members of the League of Nations had limited their capacity to make treaties. There seemed to be an impression that he proposed to omit article 3 entirely. That was not so; he felt that the article was essential and must be kept. What he felt somewhat doubtful about were the words "by international regulation".

68. Mr. HUDSON said that the Rapporteur was at liberty to treat his proposal as he thought fit; but the

¹ *British Yearbook of International Law*, Vol. XVII (1936), pp. 54-65.

² *Law Quarterly Review*, Vol. 52 (1936), pp. 494-529.

question of limitation by international regulation did seem to him sufficiently important to warrant discussion.

69. Mr. CORDOVA said that a State had always the capacity to conclude a treaty; but it had also the power to limit that capacity by a voluntary act. It was therefore a matter for the State concerned, involving individual obligations on its part. But its capacity to make treaties was not affected. With regard to the effect of previous commitments, he agreed with Mr. Liang that it was a question of validity of treaties, not of capacity to make treaties.

70. The CHAIRMAN asked the Commission if it agreed to adopt the following text, from which the words "by international regulation" had been deleted:

"All States have the capacity to make treaties, but the capacity of certain States to enter into treaties may be limited."

71. Mr. HUDSON asked the Commission not to take a formal decision, so as not to prejudge the issue.

72. The CHAIRMAN said that in that case he would suggest that the Commission pass on to paragraph 2 of Mr. Hudson's proposal:

"An international organization may be endowed with the capacity to make treaties."

72 a. In the absence of any objection, he said that the sense of the Commission was that article 3 as proposed by Mr. Hudson and amended by the Commission could be inserted in the draft convention.

ARTICLE 4

73. The CHAIRMAN asked the Commission to pass on to the examination of article 4, paragraph (1).

74. Mr. BRIERLY explained that in paragraphs 47 and 48 of his report (A/CN.4/23) he had outlined various theories regarding the exercise of the capacity to make treaties. Having studied them closely, he had decided to settle on the formula he had used in his own article 4, paragraph (1)—namely, that the capacity to make treaties could be exercised by whatever organ or organs of a State or organization its constitution might provide.

75. Mr. HUDSON admitted that the exercise of the capacity to make treaties was a knotty problem. To illustrate the difficulty he cited a hypothetical case of the Chairman going to the United States to negotiate a treaty with the United States on behalf of France. One fine day he might wonder what person or what organ in the United States had the power to negotiate and conclude such a treaty. If the Chairman asked him personally who or what was that person or organ, he would hand him the American Constitution of 1787, asking him to read it, as it determined what persons or organs were invested with the power to negotiate or conclude treaties. But he must not merely read the Constitution; he must read it in the light of the 340 volumes containing the judgments of the Supreme Court, and in the light of agreements concluded over a period of nearly 170 years. The Chairman would go back home and study all that documentation. He would be obliged

to do so, since he would be unable to form a clear opinion on the point in question until he had digested the documents. It was a question which Mr. Hudson had been engaged in studying for a long time; and he had often been asked his opinion on the subject. He had also found that the question was settled quite differently in the various countries. According to one interpretation the constitutional provisions relating to treaty-making capacity were of concern to the State in question alone, and not to other States with which it negotiated treaties. At the moment he thought it would be impossible for the Commission to give an accurate and unanimous opinion on that point.

76. Mr. BRIERLY confessed that he too had frequently been puzzled by that problem. In view of its extremely complex nature, he had taken the view in his report and in the draft convention, that the capacity to make treaties could be exercised by whatever organ or organs of the State or organization its constitution might provide. He did not think that States would accept the theory that treaties concluded by them in violation of their constitutional capacity were nevertheless valid.

77. Mr. FRANÇOIS said he had always been in favour of the theory of Judge Anzilotti, who held that a treaty concluded by the Head of a State or a Foreign Minister was valid even if they had acted in violation of the constitution; and that the State was bound by the treaty. Anzilotti's view was that it was more just for the State to be the victim of the violation of the constitution by its own organ than that the other contracting State should suffer, since the second State could not be conversant with the law of the first, or aware that its constitution had been violated. There were two types of limitation found in national constitutions. The first was a limitation of the internal capacity of the authority empowered to make treaties; the second had to do with the constitutional provisions affecting the validity of treaties, and those could hardly be known to other States. He favoured Anzilotti's theory as giving a more effective guarantee and greater security from the point of view of international law.

78. The CHAIRMAN thought the question was almost insoluble. It was difficult to hold that a government could decide of its own accord whether a treaty was valid or not.

79. Mr. CORDOVA thought the question was bound up with relations between States, a question as difficult as that of relations between individuals. The acts performed by a State were and must be based on its constitution. If the Head of a State did not possess the capacity to make certain treaties, other States should be aware of the fact; and if he made a treaty in spite of not having that capacity, the treaty was null and void. The Commission should abide by the text of article 4 as drafted by the Rapporteur and should act similarly in regard to the treaty-making capacity of international organizations. In both instances, the exercise of capacity was determined and limited by the constitution.

80. Mr. BRIERLY agreed.

81. Mr. HUDSON recalled that in the Eastern Greenland case, the Permanent Court of International Justice, without studying the terms of the Norwegian Constitution, had taken it as a rule of international law that the words of the Norwegian Foreign Minister constituted an undertaking binding on Norway. He referred again also to the example of the Executive Agreement which the United States of America had concluded with Mexico on 19 November 1941.³ The Mexican plenipotentiaries had been uncertain during the negotiations what organ of the United States had the capacity to negotiate and treat with them. The problem of which organs were competent to exercise the capacity to make treaties was certainly most complicated. That was why he had been rather surprised when Mr. Brierly had asked the Commission to take a decision on the point. He himself had felt on the contrary that the question should not be discussed at all; and the present debate must be regarded as no more than a preliminary survey.

82. Mr. BRIERLY said he would certainly like to have the Commission's opinion, since he himself hesitated to commit himself to one theory rather than another. At any rate, the text he had drafted struck him as the most acceptable from a legal standpoint. Mr. Francois' point of view might be more logical, but it was not practical, because States would not be prepared to admit that treaties concluded by them which violated constitutional provisions were valid.

83. Mr. CORDOVA thought the Commission should try to solve the problem. If it bypassed all the obstacles one after another it was not fulfilling any useful purpose.

84. Mr. AMADO said he would like to read to the Commission a passage from the book *The Ratification of International Treaties* by a young Brazilian lawyer, José Sette Camara, which stated: "A purely theoretical solution to this problem cannot be satisfactory. As Basdevant says, each particular case must be examined on its merits. In fact, international *bona fides* establishes a presumption that the Head of State is the regularly authorized agent to express the will of the State in the conclusion of a treaty. A State cannot scrutinize the constitutional provisions of every other one with whom it negotiates, to verify that ratification by the latter is good and valid. It would involve an interference in the domestic affairs of the other contracting party, which could be repelled as unwelcome. On the other hand, where it is clear and evident that the other party is acting *ultra vires*, it would not be fair to hold the pact to be valid and binding, to the detriment of the other State. Such is the case when the Constitution of a State, as, for example, the Charters of El Salvador and Guatemala, forbids the approval and ratification of certain kinds of treaties. A Head of State, in ratifying such treaties, is obviously acting *ultra vires*, and, therefore, the agreements should not have binding force."

84 a. It was undoubtedly a most difficult question, but the Commission should nevertheless examine it closely. It presented no difficulty of course for the

Chairman, since Article 26 of the French Constitution of 1946 expressed itself quite clearly on the matter. The arguments put forward on both sides were justified, and showed how difficult it was to solve the problem. The Commission must therefore discuss it more thoroughly before reaching a conclusion.

85. Mr. ALFARO agreed that the rule as drafted by the Rapporteur was a simplification for practical purposes. States invariably asked for information as to the capacity of the other party to make the treaty under negotiation. Suppose a given country wished to make a treaty with Mongolia, but, like everyone else, knew nothing about the Mongolian constitution. Nevertheless it might be assumed that there must be some provision in its constitution or in some text stipulating what organ was competent to make treaties, and research would have to be made.

86. Replying to a question by Mr. Amado as to what should be done at present in the case of China, Mr. Alfaro replied that in such cases it would be advisable to abstain from negotiating.

87. Mr. HUDSON pointed out that there were States which had no constitution. In such instances, paragraph (2) of article 4 would apply.

He thought Mr. Amado's suggestion should be studied carefully, precisely because of the contrary opinions revealed within the Commission.

88. The CHAIRMAN thought that the text as drafted by Mr. Brierly had the great virtue of being based on the legal principle that any act performed by a person who was not competent to perform it was null and void. At the present time the International Court of Justice was the proper body to decide in case of doubt. Certainly it would frequently be faced with a very difficult task; at other times the difficulty would not be so great. In practice, the question of the exercise of the capacity to make treaties would arise in the case of conflicts. Conflicts could be submitted to a tribunal or to arbitration; incidentally cases where was no constitution were extremely rare. If Mr. Brierly maintained that in the absence of provision in its constitution to the contrary, the competent entity was the Head of the State (article 4 (2)), he could not agree. The position was the same in the case of a State or of an international organization; in both instances, competence belonged to the organ which actually wielded sovereignty. In certain cases, it might be the Head of the State; in others the parliament.

89. Mr. BRIERLY, replying to a remark made by the Chairman, said that in the United Kingdom there was no formal constitutional provision conferring on the Crown competence to exercise the capacity to make treaties; but the King was invested with the treaty-making capacity, even though for political reasons he frequently did not ratify treaties until Parliament had given its approval. He mentioned a historic instance—at the end of the last century, when the island of Heligoland was ceded by Great Britain to Germany, that had been done after consultation with Parliament. Gladstone, the head of the Opposition at the time, had

³ U.S. Executive Agreement Series, No. 234.

raised objections against that consultation, declaring that the session should have been made by the Crown without reference to Parliament.

The meeting rose at 1 p.m.

53rd MEETING

Friday, 23 June 1950, at 10 a.m.

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Chairman: Mr. Georges SCALLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. Roberto CORDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris el-KHOURY, Mr. A. E. F. SANDSTRÖM, 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).

Law of treaties: Report by Mr. Brierly (item 5 of the agenda) (A/CN.4/3) (*continued*)

1. The CHAIRMAN said he was sure the Commission would not be able to complete its discussion of the draft convention during the present meeting. At the same time, Mr. Keruo, the Assistant Secretary-General, had to be away the following week, and he would like to have Mr. Keruo's opinion on the question of reservations. Mr. Brierly being agreeable, he therefore proposed to take up that technical matter, which might be completed by the end of the meeting.

2. Mr. YEPES said he had made a suggestion on those lines the previous day. He hoped the Commission would resume the discussion of Mr. Brierly's report. On that understanding he supported the Chairman's proposal.

The Commission decided to examine the question of reservations.

ARTICLE 10

3. Mr. BRIERLY said he had nothing to add to the full commentary he had given. He emphasized the importance of the statement that a reservation was "part of the bargain between the parties and therefore required their mutual consent to its effectiveness" (A/CN.4/23, para. 87).

4. Mr. KERNO (Assistant Secretary-General) read

out a series of passages from Mr. Brierly's report which he thought contained the salient points, and on which the Commission might be consulted:

(a) Point I. "A reservation is part of the bargain between the parties and therefore requires their mutual consent to its effectiveness." (*Ibid.*, para. 88)

He felt that in the English text the word "bargain" might be replaced by some other word. It was desirable to know whether the Commission approved the fundamental principle concerned—namely, that a reservation was an integral part of a treaty, and must be accepted before the treaty could be valid.

(b) Point II. "The text of a proposed reservation must be authenticated in formal fashion." (*Ibid.*, para. 92)

The reservation must be presented in a particular form, especially in the negotiation of multilateral treaties.

(c) Point III. "The acceptance of a treaty with a reservation is of no effect unless or until the necessary consents are forthcoming." (*Ibid.*, para. 93)

(d) Point IV. "The necessary consents may be implied as well as express." (*Ibid.*)

(e) Point V. "If a proposed reservation relates to a projected treaty not yet in force" it is effective only if "consented to by all States and international organizations which have taken part in the negotiation of the projected treaty." (*Ibid.*, para. 96)

(f) Point VI. A reservation presented after the entry into force of a treaty must be consented to "by everyone of the then parties to that treaty." (*Ibid.*, article 10 (4), para. 95)

(g) Point VII. "A State or international organization accepting a treaty impliedly consents to every reservation thereto of which that State or organization then has notice." (*Ibid.*, article 10 (5), para. 100)

Those were the points on which he thought the sense of the Commission might be taken.

Point I

5. Mr. HUDSON referred to article 13 of the Harvard Draft (*Ibid.*, Appendix A), showing that a reservation consisted in making willingness to treat subject to a condition. He did not know what was to be understood by "parties" in point I. If it meant that a reservation must be accepted by certain States, he agreed. There was no point in saying that "the text of a proposed reservation must be authenticated in formal fashion". What did the word "authenticated" mean? It would be better to say "stated in a formal manner"; but he was not sure how far formality should be taken. A text formulated in writing was sufficient.

6. Mr. BRIERLY thought it was difficult to conceive of any other method.

7. Mr. KERNO (Assistant Secretary-General) said that on the subject of South-West Africa, the delegation of the Union of South Africa had given the San Francisco Conference its views in a document which was sometimes referred to as a "reservation". Yet when

that case ¹ had come up recently before the International Court of Justice, no one—not even the South African delegation—had regarded the document as a reservation proper. Actually, a reservation had not been presented either when the United Nations Charter was signed or when it was ratified. The fact that a reservation must be made in a certain form was therefore important.

8. Mr. HUDSON considered that if the Union of South Africa had signed the Charter without reservation, the reservation made during the preparatory negotiations had become null and void. It was not the form of the reservation that was at issue, but the fact that it had not been presented at the proper time. A reservation must be presented at a definite time—namely, the time of signature or ratification. If it had been made at the time of signature, mention of it could be omitted on ratification. The depository of the treaty should not accept a ratification with a reservation unless the States concerned had accepted the reservation.

9. Mr. BRIERLY thought Mr. Hudson and he were agreed on the principle, and differed only as to the way of drafting it.

10. The CHAIRMAN said that the word “bargain” mentioned in the English version was of no importance. It was not a part of a projected text, and it could be replaced by the word “agreement”. The Rapporteur had no objection. Mr. Hudson, he continued, had made a remark concerning the sense of the word “parties”.

11. Mr. KERNO (Assistant Secretary-General) thought the Commission was discussing general concepts. It was difficult to reach agreement on the sense of the word “parties”. The problem was like that of the chicken and the egg. Which came first, the treaty or the parties? The word “parties” was not used in that context in a technical sense. There were no contracting parties until a treaty was in force. Everyone seemed agreed that general consent was necessary.

12. The CHAIRMAN said that the parties were the States which were or would be bound by the treaty. The idea formulated in point I left no room for doubt, and all were agreed on it. The precise wording might be left to the Rapporteur-General.

13. Mr. FRANÇOIS thought it advisable to bring out expressly the fact that a reservation was always reciprocal, in that a State which had not made the reservation could invoke it against the State which had made it.

14. The CHAIRMAN found Mr. François’ remark very much to the point. A State which had made a reservation might be confronted with the reservation by any other party.

15. Mr. KERNO (Assistant Secretary-General) mentioned the reservation made by the Soviet Union in connexion with article IX of the Convention on Genocide, giving the International Court of Justice competence to settle disputes between the contracting parties. In the event of that reservation being accepted, it was essential to know whether another State could invoke

the same reservation for its own ends against the Soviet Union. The idea of reciprocity was not included among the points he had listed; obviously, it was an omission.

16. Mr. HUDSON gave another example, the reservation made by the United States of America when signing the Statute of the International Court of Justice. That reservation barred disputes with regard to matters essentially within the domestic jurisdiction of the United States of America, as determined by the United States. A State which had not made a declaration of that kind might take advantage of it to thwart the United States.

17. The CHAIRMAN thought that, as Mr. Briery was agreeable, that second point might be introduced following point I. He asked the Rapporteur-General to mention in his report that “any State party to a treaty may invoke against another State a reservation made by the latter.”

Point II

18. The CHAIRMAN explained that if the text of a treaty was authentic, the text of the reservation must also be authentic.

19. Mr. BRIERLY agreed that a reservation must be presented formally, but it might be announced informally during negotiations; though that would not suffice to make it a formal reservation.

20. Mr. HUDSON suggested stating that a reservation could be made either at the time of signature or on ratification. Its substance must be known.

21. Mr. BRIERLY concurred.

22. Mr. KERNO (Assistant Secretary-General) thought that statements made during negotiations must be ruled out. Where it was possible to sign in the presence of the depository of the text within a period of, say, one year, it might seem desirable to ask States to make any reservations in a given form. Generally speaking, a reservation was recorded alongside the signature, or was inserted in the instrument of ratification, or in a separate protocol. The essential point was to stress the necessity of a specific form.

23. The CHAIRMAN saw no contradiction between what Mr. Hudson had said and point II. It might perhaps be added to point II that a reservation could be made at the time of signature, ratification or accession. It was pointless to speak of reservations made during negotiations, since there was no reservation until it was accepted. He suggested the addition of a further point to read: “The text of a reservation must be presented formally. The reservation may be made at the time of signature, ratification, or accession.”

24. Mr. CORDOVA questioned whether it was really necessary to add that point.

25. The CHAIRMAN thought it would be useful, since the same procedure would not necessarily be followed on each of those occasions. At the time of signature, most negotiators were present, and it was easy to find out whether they accepted the reservation. But it was more difficult at the time of ratification. It was unsatisfactory that reservations should be made at the time of accession. Such action might lead to the emer-

¹ Advisory Opinion on the International Status of South West Africa.

gence of twenty treaties instead of one. Pillet described treaties with reservations as imperfect treaties. That was an exaggeration, since reservations were inevitable; but it must be admitted that very often reservations were the ruination of treaties. The important point was to find out whether the other States would accept such a procedure.

26. Mr. ALFARO thought a general principle was involved, and that it would be enough to state that reservations must be made by means of a communication formally presented.

27. Mr. LIANG (Secretary to the Commission) observed that the question under discussion had been raised in 1948 in the Sixth Committee, when the Convention on Genocide² was being discussed. Some delegations had wished to make reservations, and the Rapporteur, Mr. Spiropoulos, had said that reservations made at the time of voting would be inserted in the records of the discussions of the Committee, but would have no legal force, and that reservations could be made when the Convention was signed. The Chairman of the Committee, Mr. Alfaro, had maintained that the fact that representatives had made reservations merely indicated their anxiety to leave their governments free to make reservations at the time of signature or ratification.

27a. He wondered whether the case just quoted—the reservation made by the Union of South Africa—came under point II. That reservation was not receivable because the Charter made no provision for reservations; it had therefore not been rejected because it had not been presented formally.

28. Mr. HUDSON pointed out that it frequently happened that representatives of States made reservations during negotiations, and at the time of signature declared that they confirmed the reservation made on such and such a date. If such reservations were not confirmed, it was an admission that declarations made during negotiations did not rank as reservations. The fact that they were confirmed at the time of signature made them formal reservations. The Charter made no mention of reservations; hence, it was possible to become a Member of the United Nations and yet make reservations regarding certain provisions of the Charter, provided those reservations were accepted by other Members.

29. Mr. LIANG (Secretary to the Commission) thought a State which made a reservation at San Francisco would not have been able to sign the Charter. He quoted the precedent of China at the Versailles Conference in 1919. China had wished to make a reservation which was not accepted, and had had the choice of signing without reservation or not signing at all. China had therefore not signed the Peace Treaty with Germany.

30. The CHAIRMAN said that in the case of a treaty of a constitutional nature, the question was a special one. A State could not become a Member of the United

Nations with reservations. He mentioned the case of Switzerland and the League of Nations. A special decision of the League of Nations Council had been necessary to admit Switzerland while allowing her to keep her neutrality. Articles 24 and 25 of the United Nations Charter were incompatible with a signature involving a reservation as to the neutrality of the signatory State. But that was not the type of case under consideration by the Commission, which was concerned at the moment with ordinary treaties. Mr. Hudson held that a reservation not accepted by the other signatories of a treaty was not valid if invoked against them.

31. Mr. KERNO (Assistant Secretary-General) felt there was no difference of opinion on point II. The word “authenticated” was not absolutely essential. Mr. Alfaro had suggested “presented in a formal manner”. It might also be added that a reservation could only be presented at the time of signature, ratification, or accession.

32. Mr. el-KHOURY had no objection regarding the principle under discussion. It was the principle that was at issue, not the drafting. “Authenticated” was out of place.

33. Mr. ALFARO presumed that the Commission had decided to adopt Mr. Hudson’s proposal to add the words “a reservation may be made at the time of signature, ratification, or accession”.

34. The CHAIRMAN confirmed that that was the position. Point II was therefore adopted with the addition suggested by Mr. Hudson.

Point III

35. The CHAIRMAN read out point III.

36. Mr. BRIERLY thought that point merely repeated the principle enunciated in point I, but from the standpoint of a State wishing to make a reservation. If the reservation was not accepted, its ratification too was invalid.

37. Mr. YEPES did not think the word “acceptance” was admissible; he would prefer to say “ratification”.

38. Mr. BRIERLY argued that a general term was called for. He had not used the word “acceptance” in its technical sense, but had merely intended to use a general word applicable to all contingencies.

39. Mr. YEPES withdrew his objection to the word “acceptance” in view of Mr. Brierly’s explanation.

40. The CHAIRMAN observed that the general sense of point III was acceptable to the Commission.

Point IV

41. Mr. HUDSON said he had some misgivings. Suppose there were twenty States concerned in a convention, and the Secretary-General, as the depositary, received a ratification with a reservation on which he consulted the other States, which might raise objections. If they did not raise any objection, he wondered how far it could be said that their consent was implied.

42. Mr. BRIERLY pointed out that he had not quoted any particular case, but had merely stated that there

² See Yuen-li Liang, “Notes on Legal Questions concerning the United Nations”, *American Journal of International Law*, Vol. 44 (1950), pp. 100-101; p. 120.

might be instances of implied consent. He had quoted a case under point VII.

43. Mr. HUDSON said he had made a marginal note against that text to the effect that it implied the duty to take cognizance of reservations and to discover their existence. The implication was rather alarming.

44. Mr. BRIERLY asked Mr. Hudson whether he agreed that in certain cases consent could be implied.

45. Mr. HUDSON said he did not know what was the practice in that matter. Cases must crop up frequently. He wondered whether it could be said that a State had given consent where it had been notified of a reservation made by another and had not replied to the notification. He thought it was doubtful too where such a State ratified a treaty after notification of reservation.

46. Mr. KERNO (Assistant Secretary-General) recalled that the Soviet Union and Czechoslovakia had signed the Convention on Genocide with reservations. The Secretary-General, who was the depository of the Convention, had communicated the reservations concerned to the Members of the United Nations and to non-member States, which could become parties under a General Assembly resolution. The communication had been made in a circular letter. But he had sent a separate letter to the four or five States which had already ratified the Convention, informing them that, in his capacity as depository of the Convention, he would like to be informed as to their attitude to those reservations, and stating that failing any indication to the contrary he would assume they accepted them.

47. The CHAIRMAN thought that was a very wise course.

48. Mr. BRIERLY regarded the case as one of implied consent.

49. Mr. FRANÇOIS recalled that in the days of the League of Nations it was the practice to fix a time-limit for a reply, and to consider that the absence of a reply implied consent.

50. The CHAIRMAN thought the Commission might suggest that procedure, not only to the United Nations, but to States which were depositories of treaties.

51. Mr. BRIERLY felt that otherwise the Commission would reach an impasse.

52. Mr. FRANÇOIS added that in practice it was out of the question to hope for a reply from all States.

53. The CHAIRMAN thought that at any rate if States were warned that their silence would be regarded as acceptance, silence would amount to acceptance.

54. Mr. CORDOVA thought the Chairman's suggestion most helpful; but it must be remembered that the draft convention did not concern the powers of the depository. What the Commission was called on to formulate were his obligations. If a State invoked the principle of reciprocity, that very fact might be interpreted as acceptance of a reservation.

55. Mr. KERNO (Assistant Secretary-General) pointed out that it frequently happened that signatures were not all given at the same time. The Convention on Genocide had been open for signature until 31 December 1949. At the time when the Soviet Union made

its reservation, five of the parties to the Convention had finally committed themselves, and they would therefore necessarily be among the first twenty ratifying or acceding States required before the Convention could come into force.

56. Mr. HUDSON took the instance of a text signed without reservation and later ratified with a reservation. Would that ratification count among the first twenty ratifications or not? Under the terms of point III, that ratification could still be nullified.

57. Mr. KERNO (Assistant Secretary-General) suggested that complicated problem be left aside, and only the question of implied consent discussed.

58. Mr. HUDSON pointed out that the question he had raised was evidence of the vital importance of the particular time when reservations were made. In the Harvard Draft, three occasions were referred to (A/CN.4/23, Appendix A)—reservations at time of signature (article 14); reservations at time of ratification (article 15); and reservations at time of accession (article 16). He was of the opinion that if implied consent were admitted, the cases must at any rate be specified. If a long period, say several years, had gone by without any objections being raised, it could be argued that there was implied consent.

59. Mr. CORDOVA pointed out a contradiction between point III and point IV. Under point III, if a State made a reservation, it meant waiting until the other States had given their consent. He asked when it could be said that there was implied consent. Point III must be followed; there could be no implied consent to a reservation.

60. Mr. BRIERLY said he had merely stated that there were cases in which consent was implied.

61. Mr. HUDSON said the important point was that all the interested States must have full opportunity of making their objections to the reservation. If they had made no objections, it could be taken that they had given their consent. He would be happy if he could state that consent must be express, but he knew that was impossible. From the administrative standpoint, it was impossible to go as far as that. Not all governments answered communications sent to them. Where all the interested States had had ample opportunity of making their objections and had not done so, it could be maintained that there was tacit consent. He hoped the text would express that idea.

62. Mr. CORDOVA thought it was impossible to state precisely at what point full opportunity had been given.

63. Mr. AMADO said it must not be forgotten that reservations were a kind of fresh negotiation. They were an invitation to other States to accept them, and they were without effect if the other States did not do so. There were four possible hypotheses: a treaty was signed by all parties on the same date; it was open for signature until a given date; it was open for signature indefinitely; or certain States had made reservations at the time of signature and had then ratified the treaty. Any reservation implied a reopening of negotiations. Hence the other States must give their consent.

64. The CHAIRMAN also felt that such consent was necessary in every case, though it could be implied.

65. Mr. AMADO could not conceive how it was possible to conclude that a reservation had been accepted by the other States. That was the problem.

66. The CHAIRMAN thought it was possible to tell, if the depository of the text put the question to each State. He could do so by intimating that if the States did not reply, their silence would be regarded as giving consent.

67. Mr. el-KHOURY did not agree that silence could be regarded as giving consent. When a depository forwarded a reservation to the Foreign Minister of a contracting State, the latter might not always be in a position to reply immediately; a year might pass. Thus silence could not be regarded as constituting tacit acceptance. The reservation was part of the treaty, and must be accepted like the treaty. Silence must be regarded as a refusal to accept the reservation.

68. Mr. HUDSON observed that the Commission had in mind a multilateral instrument. The problem did not arise where a treaty was bilateral. In the latter case, there must be an exchange of ratifications, and that would not occur if one of the parties did not accept the reservation made by the other. In regard to multilateral conventions, the position was that the absence of objection after reservations had been communicated would be regarded as implying consent.

69. Mr. CORDOVA took the instance of his government receiving a notification from the Secretary-General that some State had made a reservation to a particular convention. The Secretary-General might intimate that in the absence of a reply within six months he would assume that the reservation was accepted. The government would acknowledge receipt of the communication, stating that it must submit the reservation to the senate, which would not be meeting before such and such a date. It was thus impossible to fix a time limit after which absence of objection could be considered as acceptance.

70. Mr. AMADO referred to article 6 of the Havana Convention (A/CN.4/23, Appendix B). He thought that "action implying... acceptance" constituted a semi-explicit acceptance.

71. The CHAIRMAN said that acceptance could be explicit, tacit or semi-explicit.

72. Mr. ALFARO thought the Commission was considering a problem distinct from the general principle that acceptance of reservations could be implied. The hypothesis in question often arose in the case of bilateral treaties—e.g., in treaties fixing frontiers. At the time of ratification, one of the States might declare that it assumed that the line would be drawn in such and such a fashion; the other State would receive that reservation without objection; and the frontier line would be fixed on the ground. If, therefore, the frontier line was fixed as indicated by the first State, that would constitute implicit acceptance.

72 a. To cite another example, suppose State B had undertaken to pay compensation to State A in the currency of the latter, then later declared that it would pay

in some other currency, and State A accepted the payment. There were many instances in which a reservation was accepted implicitly. With regard to multilateral treaties, the rules governing such implicit acceptance must be drafted most carefully. He was prepared to admit that the acceptance of reservations could be either explicit or implicit.

73. Mr. CORDOVA did not think that mere silence could be interpreted as acceptance, though he was quite prepared to admit that acceptance could be assumed from certain actions.

74. Mr. el-KHOURY pointed out that oral acceptance arising out of actions were both known to common law; and both were regarded as express acceptance.

75. Mr. KERNO (Assistant Secretary-General) said that great caution must be exercised before a text concerning acceptance with reservation was formulated. In practice it would be impossible to avoid certain difficulties. He gave some details of the case of the Convention on Genocide which he had quoted previously. When the Soviet Union Foreign Minister had signed that Convention on behalf of his Government on 16 December 1949, he had made a reservation in respect of articles IX and XII. The Secretary-General had notified the governments which had ratified the Convention, adding that he would assume that the governments in question accepted those reservations unless they communicated their objections before the date on which the first twenty instruments of ratification or accession required for the entry into force of the Convention had been deposited.

75 a. The States thus had an opportunity to express their views. The Secretary-General had not fixed any time-limit within which those views must be expressed, apart from the date laid down by the Convention itself for its entry into force. Silence on the part of the governments could therefore not be regarded *ipso facto* as implying acceptance or otherwise of the reservation made by the Soviet Union until such time as the Convention came into force. The case showed that the general principle which the Commission was called on to formulate could in the last resort be drafted as it was now drafted under point IV.

76. Mr. el-KHOURY thought the text as at present worded might give rise to great difficulties. He gave the analogy of an invitation sent to a number of people, and marked R.S.V.P. If the guests did not reply, it might be assumed that they would come, though it was quite possible that they would not. The case of tacit acceptance of a reservation to a treaty was decidedly of greater import than the example cited, and might have very grave legal consequences. Hence, he would prefer to see point IV drafted more precisely.

77. Mr. BRIERLY thought that if it were declared that the acceptance of a reservation must invariably be express, other difficulties might arise—e.g., it would scarcely ever be possible to verify the exact position in regard to a treaty.

78. The CHAIRMAN suggested that it might be possible to agree that the fact of not replying to a

notification or reservation could be regarded as non-acceptance.

79. Mr. CORDOVA supported that suggestion. Acceptance should be specified quite clearly by means of an explicit reply or action proving that the reservation was accepted.

80. Mr. FRANÇOIS thought that rule could not apply, for example, to an international organization with some sixty members.

81. Mr. KERNO (Assistant Secretary-General) suggested that an explanation be added to the commentary on point IV, drafted on the lines of point VII.

82. Mr. el-KHOURY pointed out to Mr. Kerno that under the law in his country, tacit acceptance had no value unless accompanied by an action of acquiescence in the action of a third party. If someone sold an article belonging to another person who was unaware of the sale, silence on the part of the owner did not imply agreement to the sale. But if the owner knew that the article was being sold by another person and made no demur, the sale was regarded as valid and did not constitute a violation of the right of ownership.

83. Mr. BRIERLY said that the discussion on point IV had produced a most valuable exchange of views. But he thought it preferable to bring it to a close and to examine points V, VI and VII. The Commission could then return to point IV and examine it in the light of the opinions on the other points.

It was so decided.

84. The CHAIRMAN thought that, although the discussion had not produced any conclusions or a definite rule, it had nevertheless been most useful and important.

85. The CHAIRMAN asked the Commission to pass on to points VI and VII, and requested the Rapporteur, Mr. Briery, to give some explanation on point VI.

Point VI³

86. Mr. BRIERLY thought there was nothing he could add.

87. Mr. HUDSON wondered what was the position of "potential" parties to a treaty. Should such potential parties be at liberty to make objections as to reservations made by other States? It might be argued that they were not free to raise objections against reservations until such time as they ratified the treaty. But there were States which might prefer to wait until a treaty had come into force before ratifying it themselves. Could they, when ratifying after the treaty's entry into force, still raise an objection against reservations, and could they themselves still make reservations?

88. Mr. FRANÇOIS supported Mr. Hudson. He took the example of a treaty which had been signed by thirty States and had come into force after ratification by five States, while some of the other signatory States were preparing to ratify it. The sixth State might make a reservation at the time of depositing its instrument of

ratification. Need only the five States which had previously ratified be consulted in connexion with that reservation? That would hardly be fair. The 1937 Convention for The Prevention and Punishment of Terrorism laid down a waiting period of three years after signature, during which time all signatory States should be consulted as to reservations made by other States. Possibly that period was too long, but the idea underlying it was a sound one and might be embodied in point VI.

89. Mr. BRIERLY admitted the pertinence of Mr. François' proposal.

90. Mr. KERNO (Assistant Secretary-General) agreed that point VI as at present drafted did, of course, involve certain penalties for laggards. But any other procedure ran the risk of being extremely long and complicated.

91. The CHAIRMAN said that if it was laid down in a treaty that it would come into force once a certain number of ratifications were forthcoming, its entry into force was automatic the moment the number was reached. From that time on, it might be argued that the other signatory States did not count, even though they might still ratify subsequently. One thing was certain—that there was no treaty so long as the treaty had not come into force. Another thing was certain to his mind—namely, that the negotiations for a treaty did not end at the time of signature, but at the time of its entry into force. Entry into force turned a draft treaty into a treaty proper. Hence, reservations were admissible up to the time of entry into force of the treaty. It would be a good thing for the Commission to adopt the wording of point VI as it stood.

92. Mr. AMADO pointed out that signatories of a treaty who had not ratified it were not parties to the treaty. They became parties only if they ratified. He too thought the Commission could approve point VI.

93. Mr. BRIERLY thought that opinions differed on that point. However it was worded, there would always be drawbacks; but he still thought the present wording the most acceptable.

94. Mr. el-KHOURY thought that certain difficulties could be eliminated where it was laid down that a treaty came into force only within a certain period after the necessary number of ratifications had been forthcoming.

95. Mr. KERNO (Assistant Secretary-General) felt that in such cases other precautions would be called for. He reiterated the point raised by Mr. Amado, that States which had ratified a treaty were parties to it the moment it came into force, whereas the signatories were not.

96. Mr. FRANÇOIS thought that if a State made a reservation which had not yet been accepted by the other States, it must consult all the other States parties to the treaty to find out whether they accepted or rejected the reservation. It would be unfair not to consult the States which had signed the treaty in all sincerity, but had not yet completed the procedure for ratification.

³ For the discussion on point V, see below, paras. 138 and ff.

97. Mr. HUDSON pointed out that article 15 (c) of the Harvard Draft (A/CN.4/23, Appendix A) covered the case of a treaty open for signature without a time limit. He could not see how point VI as at present worded could be applied in such cases.

98. Mr. AMADO regarded article 15 (c) of the Harvard Draft as unduly narrow in stating that a State could make a reservation when ratifying, only with the consent of all the other signatories, or of the States acceding to the treaty after it had been brought into force. It would thus mean waiting for the consent of all the States before the reservation became operative as between the State which made the reservation and the other States which had become or might become parties to the treaty. That seemed to him to be going too far.

99. The CHAIRMAN did not agree with the terms of that article of the Harvard Draft.

100. Mr. HUDSON said he could not accept the thesis that the signatories of a treaty should be debarred from consultation on reservations. Such a bar could only apply where they declared expressly that they did not intend to ratify. If the Commission accepted tacit consent with certain precautions laid down, there would be nothing against consultation of all the States concerned.

101. The CHAIRMAN noted that Mr. Hudson recognized that signature gave the signatories certain rights. He too agreed that such was the case, since the negotiation of a treaty was not concluded by the fact of signature.

102. Mr. KERNO (Assistant Secretary-General) said that a multilateral treaty could come into force before all the signatories had ratified. He could quite see that the rule laid down in point VI was not ideal, but any other formula would probably be still less so.

103. Mr. HUDSON and Mr. CORDOVA were afraid that if the Commission tried to formulate too strict a rule, the result would be that certain States would decline to ratify or accede. The secretariat of the League of Nations had studied ways and means of mustering a large number of accessions to treaties. The formula adopted by the Commission should be based on that same consideration, and should be calculated to bring in the largest possible number of accessions to treaties. Hence, all the States which were potential parties to the treaty should be consulted as to the admissibility of any reservations made.

104. Mr. AMADO thought there were two hypotheses: There were the treaties signed simultaneously by all the States responsible for the treaty; in such cases, a reservation could be made only at the time of signature. But if a treaty was open for signature for a certain period, or even without any fixed time-limit, a State wishing to accede to the treaty could make a reservation only with the consent of all the States parties to the treaty. The main point was whether a State which was a signatory but had not ratified was a party to the treaty.

105. The CHAIRMAN thought that a signatory State which did not ratify was not a party to the treaty, even though the objections on that score raised by Mr. Fran-

çois and Mr. Hudson were entirely pertinent. The Commission had to choose between a practical and a theoretical course. The reference to the risk of losing accessions was very serious. He personally was somewhat shocked—from the legal standpoint—at the idea of allowing States to challenge a reservation, even where they had no intention of ratifying a treaty themselves.

106. Mr. HUDSON thought the following might be added to point VI:

“and by the signatory States, subject to any signatory State objecting to the reservation being bound to notify at the same time its willingness to ratify the treaty”.

107. Mr. FRANÇOIS thought that legally that was an excellent formula, though in practice it was not feasible. The Convention on Terrorism had provided a more practical method by fixing a time limit for consultation of signatory States on the subject of reservations. After the expiry of the period, only States which had ratified the treaty or acceded to it would be consulted.

108. Mr. LIANG (Secretary to the Commission) regarded Mr. Hudson's proposal as worded in too peremptory a fashion. It could be argued that the objection made by a signatory State to a reservation would have no legal effect until such time as the State ratified the treaty.

109. Mr. HUDSON felt that under his formula the question whether the reservation was accepted or not would be kept in abeyance for a time.

110. Mr. YEPES found Mr. Hudson's suggestion quite logical. A State objecting to a reservation automatically indicated that it accepted the treaty, and thus would have no reason to give an assurance that it would ratify it.

111. Mr. CORDOVA said he had changed his mind. The fact that a signatory State had not been consulted regarding reservations made after the treaty came into force should not prevent the State from ratifying it, since it could itself make reservations at the time of ratification.

112. The CHAIRMAN thought the question was identical with that arising in the case of accession to a treaty.

113. Mr. AMADO thought that if a State made a reservation after the treaty had come into force, the States which had already ratified the treaty and were parties to it could decline to accept the reservation on the grounds that a reservation derogated from certain stipulations in the treaty. That would mean fresh negotiations. Although he appreciated the force of the objection raised by Mr. François, he upheld point VI.

114. Mr. KERNO (Assistant Secretary-General) wondered whether after the current lengthy discussion the Commission might declare itself in principle agreeable to point VI, with the proviso that a commentary should be added to the effect that the formula as drafted did not cover all the problems which might arise on the subject, and therefore represented only a partial solution.

115. Mr. HUDSON pointed out that the Geneva Conventions of 12 August 1949, which had been signed by more than sixty States, laid down that they would come into force six months after at least two instruments of ratification had been deposited. What would be the position if, after ratification by two States, a third submitted its ratification with a reservation, declaring that its reservation was accepted by the two States which had already ratified? Would all the other signatory States have no say in such a case?

116. The CHAIRMAN thought Mr. Hudson's point was quite convincing, and asked whether the conventions in question admitted of reservations.

117. Mr. FRANÇOIS remarked that, among others, the Soviet Union had made a reservation at the time of signature of one of the Conventions. Mr. HUDSON said that, in such circumstances, the existence of the convention might be endangered by the caprice of a mere three countries. He recalled that certain conventions concluded by the Organization of American States came into force the moment two instruments of ratification had been deposited.

118. The CHAIRMAN said that many conventions adopted by the International Labour Conference came into force as soon as two States had ratified them. Mr. Hudson's remark was most pertinent. It could not be admitted that reservations came into force simply by the wishes of two or three States.

119. Mr. AMADO thought reservations should be made at the time of signature. The example quoted by Mr. Hudson illustrated the danger of allowing States to make them subsequently. That was also the view of Anzilotti, who went so far as to argue that reservations should be made prior to signature. Personally, however, he did not wish to turn down the idea that reservations could be made at the time of ratification.

120. The CHAIRMAN thought the Commission should make up its mind that reservations could not be admitted at the time of ratification.

121. Mr. CORDOVA said that when a treaty specified that it must be ratified before it could come into force, ratification was part of the negotiations. Hence, reservations could be made on ratification.

122. The CHAIRMAN did not agree. States could be expected at the time of drawing up a treaty to reflect on what they were doing, and not to destroy what their negotiators had built up.

123. Mr. HSU was opposed to the practice of reservations, which he thought was pernicious. It was true, however, that if States were allowed some latitude, they would be more inclined to ratify.

124. Mr. HUDSON suggested that it be left to the Rapporteur to note the opinions expressed by the Commission. The discussion on that ticklish subject had been a long one, and he thought it would be well to pass on.

125. Mr. el-KHOURY said that at the time when he was President of the Syrian Parliament, there had been a long discussion about the ratification of a treaty. As

parliament could not reach a decision, he had announced the following ruling:

"Parliament must accept or reject the treaty in its entirety. But if it wishes to make a reservation, the treaty will be referred back to the Executive, which will be called upon to open new negotiations at which a decision will have to be taken by the negotiators on the points which gave rise to difficulties. Only when an understanding has been reached in the negotiations may the treaty be brought again before Parliament for its decision."

That proposal was accepted by the Syrian Parliament. Such a procedure was possible in the case of bilateral treaties, but could not, he thought, be applied in the case of multilateral treaties, since it was not feasible to reopen negotiations in such cases.

126. Mr. LIANG (Secretary to the Commission) said that reading the section of the report concerned, he had been struck by the words "to propose a reservation". He thought that such a reservation should be made, and in fact accepted, before it could be regarded as valid.

127. Mr. BRIERLY agreed that he should have said "make a reservation", and he would alter the passages in the report accordingly.

Point VII

128. The CHAIRMAN asked the Commission to pass on to the examination of Point VII.

129. Mr. HUDSON observed that Czechoslovakia and the Soviet Union had made reservations at the time of signing the convention on genocide. He thought that any signatory State could still raise objections to those reservations, since the convention had not yet come into force. Suppose the United States ratified the convention while those reservations were still pending. He did not think that by ratifying, the United States expressed consent to the reservations. Another example: suppose a non-signatory State acceded to the Convention on Genocide. The State would not figure in the list of States invited to accede to it; but its application for accession might be accepted. In such circumstances, was it not the duty of the State in question to verify whether reservations had been made previously, and what such reservations were? In view of all such cases that might arise, the formula "of which that State... then has notice" in Point VII was too laconic, and some more explicit phraseology should be sought.

130. Mr. KERNO (Assistant Secretary-General) suggested that the Commission re-read paragraph 101 of Mr. Brierly's report (A/CN.4/23).

131. Mr. BRIERLY thought that the difficulty which might arise in the cases mentioned by Mr. Hudson could not be solved without sober reflection.

132. Mr. HUDSON considered that it would be sufficient to draw the Rapporteur's attention to those various points and to ask him to give an account of the opinions of the various members of the Commission, drawing whatever conclusions appeared to him to be

deducible from the exchange of views that had taken place.

133. The CHAIRMAN agreed that the problems in hand were most formidable.

134. Mr. BRIERLY said it would be extremely difficult to reply at a moment's notice to the questions just put. He would like time for reflection before he replied.

135. Mr. CORDOVA suggested that Mr. Hudson set out very clearly the conclusions he thought could be reached on the points he had raised.

136. Mr. KERNO (Assistant Secretary-General) thought the words "reservations... already... in operation" in paragraph 101 of Mr. Brierly's report were worth emphasizing. Such reservations already in force were the ones referred to in point VII, and it would be helpful to have that idea lucidly expressed in the drafting of point VII.

137. Mr. HUDSON concluded that the terms meant that the reservations in question were already accepted. A State acceding to a treaty when a reservation was already in operation ought not to be at liberty to object to such a reservation; but it could always make a fresh reservation. The wording of point VII struck him as too succinct.

Point V

138. The CHAIRMAN suggested that the Commission go back to consider point V.

139. Mr. el-KHOURY remarked that, as bilateral treaties made up the great majority of treaties between States, the Commission might simplify its task by adopting under point V the rule that reservations were not admissible in the case of bilateral treaties, and were only permissible in multilateral treaties.

140. Mr. BRIERLY pointed out that point V referred only to multilateral treaties.

141. Mr. HUDSON hoped the Rapporteur would make the point in his report that States participating in negotiations for a treaty and deciding not to sign it had no right to make reservations. He mentioned the instance where the United States of America had been present during the negotiations resulting in the 1930 Hague Convention on certain questions relating to the conflict of nationality laws. The United States had declared its dissatisfaction with that convention and had declined to sign it. It had felt that it should be consulted where any State proposed to make a reservation.

141 a. Replying to a question put by Mr. Brierly, he said that in his opinion all signatory States should be consulted when a State wished to make a reservation; and he suggested that the words "all States and international organizations which have taken part in the negotiation of the projected treaty" be replaced by the words "all the signatories".

142. Mr. BRIERLY supported that proposal. It was his opinion that a State which had not signed had no right to be consulted, and could be ignored. But signatory States, which by the fact of being signatories

were the originators of a convention or a treaty, should be consulted, and point V applied to such States.

143. Mr. KERNO (Assistant Secretary-General) thought that if the term "signatories" had to be defined, it should mean those signing on the occasion of the signing ceremony, as well as those signing within the period during which the treaty or convention was open for signature.

144. Mr. HUDSON pointed out that the Harvard Draft had attempted to formulate rules for cases where a treaty was open for signature at any time in the future.⁴ In such cases, one might wait until Doomsday before all possible reservations were made. There were three distinct situations: reservations could be made first of all at the time of the simultaneous signature of the treaty by the negotiators; secondly, prior to a given date; and thirdly, at any time in the future. Could point V really apply to those three distinct cases?

145. The CHAIRMAN thought the explanations given during the discussion, and the various opinions put forward, had contributed to the clarification of the problem. He thought it was true to say that there was a large measure of agreement on points I to VII, which might perhaps be expanded, in many instances on the basis of the articles of the Harvard Draft. He would like to add that the exchange of views which had just taken place had provided the Rapporteur with valuable data for his task. The Commission had admittedly not been able to deal with all the issues, nor to express an opinion on every point; but what it had done was undoubtedly of great value.

The meeting rose at 1 p.m.

54th MEETING

Monday, 26 June 1950, at 3 p.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 CORDOVA, 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.

⁴ See A/CN.4/23, Appendix A.

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(II) (item 3(b) of the agenda) (A/CN.4/25)

1-12. The CHAIRMAN stated that the Commission had a certain number of points of a general nature to discuss. He suggested that they should be discussed in the order followed by the Rapporteur.

The first concerned the nature of the criminal code to be prepared by the Commission: should it be a general international criminal code or a special code dealing with offences against the peace and security of mankind?

A. NATURE OF THE CODE AND MEANING OF THE TERMS "OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND" (A/CN.4/25, para. 11 and ff.)

13. Mr. SPIROPOULOS thought that the first question to be examined by the Commission was the kind of code it should draw up.

14. Mr. HUDSON considered that the reply to that question was to be found in a phrase of General Assembly resolution 177(II): "(b) prepare a draft code of offences against the peace and security of mankind..."

15. The CHAIRMAN pointed out to Mr. Hudson that the view he had expressed was a personal one and that others might hold different opinions.

16. Mr. SANDSTRÖM agreed with the conclusions drawn by Mr. Spiropoulos from a study of the genesis of resolution 177(II).

17. Mr. ALFARO expressed his admiration for the work of Mr. Spiropoulos, which was a fresh proof of his scientific abilities. He was happy to share his view on the substance of the proposal concerning the definition of the code. He had, however, several comments to make concerning points closely related to the question of the establishment of an international criminal jurisdiction and the formulation of the Nürnberg Principles. He considered that those questions and the question of the preparation of a criminal code were inseparable. The code was indispensable in an international system for the suppression of crime, and the Nürnberg Principles ought to have their place in the code. But there was no point in possessing a criminal code if persons guilty of the crimes defined therein were not tried by an international court.

17a. As Mr. SPIROPOULOS had said, there was a choice of two methods (para. 1): the first consisting of preparing an "ideal" international penal code, the second of elaborating a text based on a realistic approach and able to serve as a basis of discussion at an international conference. Mr. Spiropoulos had declared in favour of the second method, and had sug-

gested that that was the method contemplated by the General Assembly in resolution 177(II). He (the speaker) shared that opinion.

17 b. He considered that, apart from the question of whether the code should be adopted by means of a convention concluded only among Members of the United Nations or could be laid open to the accession of non-member states, the code should play in the community of nations the part played by a criminal code in a national community. Giving reality to that concept should not be difficult, for the Commission had already formulated the Nürnberg Principles, which should be considered as constituting the law applicable to the fifty-nine States which at present formed the United Nations. He would return to that point when the Commission discussed the first outline of the draft code.

18. The CHAIRMAN said that the Commission had another question to decide. Did the term "offence against the peace and security of mankind" refer to two types of crime or to only one? Mr. Spiropoulos had come to the conclusion that only one type of offence was concerned, and that the General Assembly had had in mind offences endangering peace and security. Another opinion was possible. Some serious offences could jeopardize the peace, others endanger only security. Under Chapter VI of the Charter, the Security Council was called upon to deal with situations which might possibly endanger the peace, whereas Chapter VII laid down that it should deal with offences which already endangered the peace. The distinction made was not a purely academic one, for the list of offences depended upon it. If only major offences which might endanger the peace were to be considered, the list would be a short one; if, on the other hand, actions which might possibly endanger security were to be considered, the list would be a longer one. Counterfeiting money might endanger security, if a State encouraged or did not prosecute the counterfeiters. False reports might disturb the general peace; such reports did not constitute an immediate danger but they caused uneasiness in the public mind. All had read that morning in the newspapers that war had broken out between Northern and Southern Korea. That was a matter calculated to disturb the peace. If it were a question of a false report, the person disseminating it should be punished. In the case of the Balkans, it was stated every morning that mobilization had begun: that also was a report calculated to disturb the peace. It consequently came within the provisions of Chapter VI and ought therefore to be punishable. He considered himself that peace and security were one and the same thing.

19. Mr. SANDSTRÖM thought it desirable to make another distinction, which, in his opinion, was the most important of all. Mr. Spiropoulos in his report had correctly noted the political nature of offences against peace and security. In several of the examples quoted by the Chairman there had been no political element. He thought that such offences, for that reason, should not appear in the code. He nevertheless admitted that in some cases such offences might have a political character, as for example if a State instigated the counterfeiting of money in order to cause economic uneasiness

in another State. If, however, the act of a private person were concerned, the Commission had no need to concern itself with it.

20. The CHAIRMAN pointed out that agencies like Reuter and Havas were not unrelated to their respective governments.

21. Mr. SANDSTRÖM still did not see in the spreading of a false report an offence against peace and security.

22. The CHAIRMAN pointed out that there was also such a thing as mental security.

23. Mr. SANDSTRÖM held to his opinion that if the political element he had referred to was lacking, the Commission would be going beyond the limits bounding its work.

24. Mr. HUDSON was inclined to give a rather wide meaning to the expression "peace and security". A people might feel endangered by actions affecting its economic situation. To take a further example, the production and sale of dangerous pharmaceutical products could cause a feeling of insecurity. He admitted the difficulty of fixing limits. He could not see why the Commission should give a restricted meaning to the expression "the peace and security of mankind"; a definition of the offences going beyond the scope of the code would in any case be as difficult as a definition of the offences within its scope. He approved of the distinction made by the Chairman between physical and mental security.

25. Mr. BRIERLY held the opposite opinion, agreeing with the view of the Rapporteur for the practical reason that if, as the Chairman and Mr. Hudson had suggested, the meaning of the term "peace and security" was extended, it was difficult to see where an end might be made. He also thought that the General Assembly had undoubtedly not had in mind two different things when it spoke of "the peace and security of mankind", for that was an expression so much in common use that it meant the one thing only.

26. Mr. HUDSON admitted the soundness of Mr. Brierly's remarks. The solution he had advocated would be impractical, and the Commission should keep within the limits indicated. He considered that the phrase appearing in Article 33 of the Charter had not had the effect of limiting the intervention of the Security Council. As far as he knew, the Security Council had never said that a dispute was such as to "endanger the maintenance of international peace and security". Consequently, it was entitled to intervene under Article 33. The Council had not considered its action limited by that provision of Article 33.

27. The CHAIRMAN agreed. He was himself inclined to widen the scope of the concept, but he desired particularly to refer the question to the Commission, for it would find that difficulty cropping up at the definition of each and every offence. Suppose, for the sake of argument, that a certain press launched a series of insults against another State, saying that that country was a warmonger, etc., those acts were such as to endanger public order, an expression which, in French, bore a

very wide meaning. Such daily accusations against the government of another country fitted well within the definition of offences against international peace and security. That question had already been examined in relation to material and moral genocide.

28. Mr. YEPES considered the concepts of international peace and security so closely linked as to be inseparable; if a state encouraged counterfeiting, it endangered public security, and for that very reason it also endangered the peace. Innumerable examples of a similar nature could be produced.

29. Mr. AMADO said that Mr. Spiropoulos had formulated the question admirably in paras. 27-32 of his report. He himself believed that the Commission should not seek to extend an already considerable task: an attempt should be made to do what could be done. He recalled that Mr. Donnedieu de Vabres had pointed out that there were two possibilities, one the drawing up of a code of offences against peace and security, the other the drawing up of an international criminal code which would comprise all the categories of offences not related to peace and security.

29 a. He read out two passages from Mr. Spiropoulos' report which stated that the proposal submitted by the United States delegation in 1946 had contemplated the appearance of the Nürnberg principles "in the context of a general codification of offences against the peace and security of mankind or in an international criminal code" (para. 27), and that, after the report by the Committee on the Progressive Development of International Law and its Codification which met in spring 1947, there had been no further mention of the code of international criminal law (para. 32). The mandate given had been lost sight of, and had, as it were, faded away in the innumerable commissions which had dealt with the question. Something practical and acceptable should be done quickly, and he accepted the limited interpretation of the Commission's task.

29 b. He understood the Chairman's view, but he would like the Commission to enquire into whether it was possible to reach an agreement on crimes against peace and security.

30. Mr. FRANÇOIS supported, like Mr. Amado, the narrowing down of the concept, but felt that it was impossible to draw a very clear dividing line. Counterfeiting, for example, might possibly be retained, but the question of harmful drugs left out. The Commission would have to examine that question when it came to decide upon the specific offences to be considered as affecting peace and security.

31. Mr. HSU considered that the Commission should certainly limit itself to offences against peace and security within the meaning given to those terms in Mr. Spiropoulos' report. He wondered, however, if Definitions I, II, III, IV, etc., provided for all the offences it was desirable to place in the code. He noted that war propaganda and the supply of arms were not mentioned among them. Some of the examples quoted by the Chairman could, in his opinion, be considered as coming within the ambit of the draft code if they formed part of a plan against peace and security.

31 a. Mr. Sandström had spoken of a political element; it would then be a question of whether an act committed had been committed with the intention of endangering peace and security.

32. Mr. el-KHOURY considered that offences against the peace and offences against security were one and the same, and that only one subject was concerned, not two. In the United Nations Charter peace and security had always been mentioned without any attempt made to distinguish between them. A threat to peace led to insecurity; if peace was disturbed, the security of mankind disappeared. It was clear that civil war could destroy the peace, but the Commission had not met to discuss the question of internal security. He admitted that such internal disturbances could be as dangerous as war, but it was not for the United Nations and the Security Council to intervene in that field. International peace and security were what was to be studied, and it was desirable to continue to consider them as one and the same thing.

33. Mr. AMADO asked the Commission not to forget that it was at the beginning of an immense task. In a single country, the drawing up of a criminal code took years. The Commission had a long way to travel, and all that was involved at present was the taking of the preliminary step; for that reason it was necessary to limit its task.

34. Mr. CORDOVA also thought it desirable to limit the work to be done by the Commission. An act by a State endangering the peace and security of other States was one of the offences the Commission ought to deal with. The political element in such an offence was what the General Assembly resolution had had in mind when it spoke of "offences against the peace and security of mankind".

35. The CHAIRMAN thought that the great majority of the members of the Commission were in favour of the narrowest interpretation, that is, of the interpretation advocated by Mr. Spiropoulos. When each offence came up for discussion, the Commission would decide where the border-line lay between acts to be made punishable under the code and acts not coming within its purview.

36. Mr. HUDSON wished to ask another question concerning the nature of the offences contemplated. He read two passages from Mr. Spiropoulos' report (paras. 37 and 56). The latter concluded with the words "following international practice up to this time, and particularly in view of the pronouncements of the Nürnberg Tribunal, the establishment of the criminal responsibility of States—at least for the time being—does not seem advisable".

36 a. He had listened carefully to the discussion, and thought that the Commission should state whether it was attempting to envisage the criminal responsibility of States or the criminal responsibility of individuals, or both. If Crime No. I were considered, it was a State which would use armed force. If Crime No. VI were considered, it was still a State, and not an individual, which would violate the military clauses of international treaties. As for Crime No. VII, he could not see how

an individual could be guilty of an annexation of territories in violation of international law. He thought that the report failed to clarify the point.

37. Mr. SPIROPOULOS feared that there was some confusion in the discussion. The Commission was examining the question of what kind of code should be drawn up and what the meaning of the words "peace and security" was. The majority of the Commission had thought that there was only one offence involved, for the Charter used the term "international peace and security". He recalled in that connexion the document prepared by Mr. V. Pella; the International Association of Penal Law had asked its members if one concept was involved, or two. The replies sent were divided in their opinions, but the majority had considered that only one concept was involved. Such was also the opinion of Mr. Pella and of Mr. Biddle.

37 a. He recalled that in the previous year, when the Commission had asked him to draw up its second report, there had been no very clear knowledge of which code was being referred to. To gain an idea of his task, he had consulted the correspondence between President Truman and Mr. Biddle, the records of the discussions of the competent United Nations bodies and also the views of Mr. Donnedieu de Vabres. He had thereby reached the conclusion that the code should bring together crimes having a political impact, crimes which *prima facie* were committed by States but which involved the responsibility of individuals. The draft code, in fact, endeavoured to fix the criminal responsibility of individuals only.

37 b. Offences such as the use of armed force, etc., could be committed either by an individual or by a State. In fact, they were committed by individuals. When he had spoken of "armed force", he had meant the armed forces of the State. If a State made use of its armed forces it was responsible according to the traditional view. According to the draft code, the responsibility of the State was the individual responsibility of the members of the government. If the Commission desired the State also to be held criminally responsible, the code could include a provision to that effect. So far the code did not contain such a provision.

37 c. Other offences could be committed by individuals, such as the violation of the military clauses of an international treaty. After the first world war Germany had set up an army when it had no right to do so. Such action constituted a violation of a clause of a treaty. That violation had been carried out on the orders of the government, but individuals might form a party and violations might be committed by individuals, by civil servants or by the State.

37 d. In his opinion the first thing to be studied was the meaning of the terms "peace" and "security", then the question of the place to be accorded to the Nürnberg Principles; only afterwards could the Commission tackle the question raised by Mr. Hudson.

38. The CHAIRMAN said that that was a matter for the Commission to decide on. Mr. Hudson's suggestion changed the plan laid down, which had been to follow the order adopted by Mr. Spiropoulos in his report.

The Commission, however, was at liberty to decide if the question should be settled at once. According to Mr. Hudson, it was desirable to come to a decision without delay and to decide with whom criminal responsibility would lie. Mr. Spiropoulos had sought to clarify the subject. The Commission had decided, first, that the code would deal only with offences against peace and security, and second, that peace and security constituted a single entity. There was then the third point regarding the place to be accorded to the Nürnberg Principles. That point should be cleared out of the way first of all.

38 a. He agreed with Mr. Hudson that the problem the latter had raised was of capital importance. He did not personally believe in the criminal guilt of a State, but the question might be discussed. It could be discussed at an appropriate time, unless Mr. Hudson insisted and carried the Commission with him. He believed that the Commission might wait before discussing that supremely important point.

39. Mr. HUDSON added that it was also a preliminary point.

40. The CHAIRMAN did not agree. There might be discussion, he claimed, on a crime before it was known who was the guilty party. The fact of several parties bearing responsibility might be admitted, but it could also be claimed that war was a crime, whoever might be held to be guilty of it, either body corporate or individual. The crime might thus be defined before deciding who should be held guilty of it.

41. Mr. el-KHOURY considered that crime could not be ascribed to a body corporate, but might well be ascribed to individuals representing their country.

42. The CHAIRMAN pointed out that the matter before the Commission was which question it would deal with first.

43. Mr. el-KHOURY considered it desirable to begin with the question of the place to be accorded in the code to the Nürnberg Principles.

B. PLACE TO BE ACCORDED IN THE CODE TO THE NÜRNBERG PRINCIPLES

44. Mr. SPIROPOULOS considered that the General Assembly resolution clearly indicated the place to be accorded. He read sub-paragraph (b). The Commission had reached a decision on the first part of that sub-paragraph relating to the preparation of a draft code of offences against the peace and security of mankind. It would now define the meaning of the words "indicating clearly the place to be accorded to the principles mentioned in sub-paragraph (a) above". It was logical to proceed in that way.

45. Mr. BRIERLY referred to the conclusion appearing on page 18. In his opinion it could not have been desired that the Commission reproduce the principles word for word. It ought to reserve the right to weigh up those principles and modify or develop one or another. The last paragraph on page 18 expressed his opinion exactly.

46. Mr. el-KHOURY believed that the Nürnberg Principles should not be taken and inserted as such.

They should be embodied in the code without any distinct place being given to them and without any mention of them as the Nürnberg Principles. The chapter in the general report dealing with the formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal would be the place where those principles would appear for the last time as a separate text.

47. Mr. SANDSTRÖM agreed with Mr. Briery's opinion. He would add that the Commission should perhaps indicate in its report the place it had accorded to the Nürnberg Principles.

48. Mr. ALFARO agreed with the conclusion expressed by the Rapporteur in paragraph 45 of his report. An automatic incorporation of the principles should not be contemplated. He had concluded, perhaps wrongly, from paragraph 39 of Mr. Spiropoulos' report, that in the latter's opinion those principles had already been embodied in the list of crimes and that it was therefore pointless to reproduce them in the code. If such were the case, two documents, the Nürnberg Principles and the code, would confront readers, and the principles would appear in two different texts. Some people would say that there was risk of ambiguity and confusion and that there would be no means of settling any difficulties that might arise. He proposed that the report should indicate the part of the code where the principles had been embodied and the manner in which they had been embodied. He thought that the code should contain some kind of a provision stating which of the two texts should take precedence for purposes of interpretation. In that matter, it was desirable to be extremely precise, otherwise the international criminal court, when confronted with two texts where the crimes were defined in different terms, would not know which to apply.

49. Mr. AMADO considered it a matter of indifference whether the list of the Nürnberg Principles was inserted at the beginning, in the middle or at the end of the report. In any case, the code could not be framed without incorporating the principles in it. He thought, however, that the Commission had not yet reached a stage permitting it to fix the place to be accorded to each of the principles within the framework of the Code.

50. Mr. CÓRDOVA agreed with the opinion expressed by Mr. Alfaro. It seemed very difficult to him to formulate the principles to be inserted in the code in the same terms as had been used in the Charter and judgment of the Nürnberg Tribunal. The code the Commission was to draw up should be in conformity with international law. The Nürnberg Principles should therefore be adapted to that law. He thought it essential, however, that the Commission should give the reasons why it formulated those principles differently from the Charter of the Tribunal and the judgment. Moreover, some of those principles had already been formulated by the Commission with minor modifications as compared with the Charter of the Tribunal. He had often wondered what exactly the General Assembly had meant in asking the Commission to formulate the Nürnberg Principles. He thought that the Commission was

free to formulate them as it thought best, while leaving the General Assembly with the final decision as to what it would do with those principles. However that might be, they must be embodied in the code.

51. Mr. SANDSTRÖM considered that if that were done the formulation by the Commission of the principles recognized in the Charter and judgment of the Nürnberg Tribunal would merely be of historical interest and would form a subsidiary document. In any case it would be essential to explain in the report the reasons for the differences between the formulation of those principles under the formulation of the Nürnberg Principles and the formulation in the code.

52. Mr. BRIERLY stressed an important point in Mr. Córdova's statement. The latter seemed to start from the hypothesis that the code should be drawn up in conformity with existing international law. His own view was that in carrying out that part of its work the Commission should think of international law as in the process of evolution and should therefore make suggestions with a view to improving it. Thus it might insist that the taking of hostages be included in the list of offences against peace and security, irrespective of whether that act was already forbidden under existing international law. He thought he could state that the Commission should reserve the right to develop international law and should not content itself with codifying it as it existed at present.

53. The CHAIRMAN strongly supported Mr. Brierly.

54. Mr. el-KHOURY agreed with the views of Mr. Alfaro. He nevertheless did not agree with him when he claimed that there would be two distinct documents, one the Nürnberg Principles, the other the code, both having equal validity in international law. The Commission had been entrusted with the preparation of a draft code which would perhaps form part of a future convention and which in any event would be submitted to the General Assembly as a basis of discussion. The General Assembly could do with it what it liked, but he did not think it possible for it to be confronted with two separate documents. The formulation of the Nürnberg Principles was a preliminary task. The principles as formulated could be modified by the Commission for insertion in the code; they would nevertheless remain the same. He did not see why so much importance should be attached to the Nürnberg Principles, as the Commission was preparing a draft code. In the future the Nürnberg Principles would have a certain historical interest. Those who had prepared the Charter of the Nürnberg Tribunal had sought to establish a foundation for legal action which they proposed to undertake, and the principles they had adopted for that purpose should be accepted as setting up an international judicial organization with a fixed but limited purpose. In preparing its draft code, the Commission would be assisting the General Assembly to contribute towards the progressive development and the codification of international law.

55. Mr. FRANÇOIS pointed out that the affirmation of the Nürnberg Principles by the General Assembly had no legal force. The Assembly had no right to legislate by a majority of votes and to bind its members.

Accordingly, it had not desired to do so. If it had, there would have been no point in entrusting the Commission with the formulation of the principles of international law recognized at Nürnberg. Consequently, he thought that the Commission, in drawing up the code, was entirely free to criticize those principles and to formulate them as it thought best in its capacity as an independent group of international jurists. Even when it was said that the General Assembly had affirmed those principles, that did not mean that the principles were unchangeable; the affirmation was merely of secondary and passing importance.

56. Mr. ALFARO wished to explain his point of view. He did not ask that the Nürnberg Principles be formulated in absolutely identical fashion in the two reports that the Commission was to place before the General Assembly. He was thinking rather of the fact that difference of terminology in the two texts might cause confusion, not only in the public mind generally, but also among jurists. He asked that the Commission decide clearly what the position would be, after the adoption of the code it was preparing, with regard to the Nürnberg Principles as they had been formulated by the Commission. Would they be regarded as an integral part of the code or as a separate text being merely of historical interest? He pointed out that Nürnberg Principle I, as adopted by the Commission, and basis of discussion No. 2 in the report by Mr. Spiropoulos on the draft code said substantially the same thing; nevertheless, the terminology was not uniform. The same was also true of other Nürnberg Principles and of the bases of discussion dealing with the same subjects. To avoid all confusion of mind, he thought it essential that it should be clearly stated in a provision of the code why the Commission had not used the same terminology in the two cases it had to deal with. If the Commission did not wish to insert such an explanation, it should make the two texts uniform. He asked the Commission to take a decision on that point.

57. Mr. HUDSON pointed out that the Commission was not as yet confronted with two different texts. It had so far adopted no text in the draft code of offences against the peace and security of mankind. Not until it came to discuss the texts to be included in the code would it have to decide on the terminology to be used for their drafting.

58. Mr. ALFARO repeated that he wished to know whether the explanations on the differences between the terminology used, on the one hand, in the formulation of the Nürnberg Principles, and, on the other hand, in the texts to be embodied in the code, would be contained in the report or in the code itself.

59. Mr. CORDOVA thought that there would be general mention of the matter in the report, which should state how the Commission had carried out the task entrusted to it under the terms of the last clause of resolution 177(II).

60. Mr. SANDSTRÖM pointed out that the Commission had been entrusted with the task of preparing a code which might perhaps be the basis of a convention, and of including the Nürnberg Principles in

that code; but the formulation of the Nürnberg Principles, such as had now been decided upon would merely be the expression of the views of a group of independent international jurists and would have no legal validity.

61. The CHAIRMAN agreed with the opinion of Mr. el-Khoury. He, too, thought that there could only be one legally valid document. The formulation of the Nürnberg Principles had no legal validity and was neither binding nor unchangeable. Nevertheless, as the principles had to be incorporated in the code, it was necessary for the report to state the reason why they had been formulated in the code in terminology differing from that found in the Commission's report on their formulation.

62. Mr. LIANG (Secretary to the Commission) considered that resolution 177(II), adopted by the United Nations General Assembly in 1947, requested the Commission to carry out one composite task rather than two separate tasks. He pointed out that General Assembly resolution 95(I), of 11 December 1946, after confirming the principles of international law recognized in the Charter and the judgment of the Nürnberg Tribunal, contemplated only one task, that of the formulation of those principles "in the context of a general codification of peace and security of mankind, or of an international criminal code".

62 a. The Committee on the Progressive Development of International Law and its Codification, which had met in May and June 1947, in its attempt to meet the objections of the Soviet Union representative to the idea of a codification of international criminal law, had recommended in its report on the subject (A/AC.10/52) the preparation of (a) a draft convention containing the Nürnberg Principles, and (b) a "detailed draft plan of general codification of offences against the peace and security of mankind in such a manner that the plan should clearly indicate the place to be accorded to the principles mentioned in (a)".

62 b. Sub-Committee 2 of the Sixth Committee, at the second session of the General Assembly had replaced the words "detailed draft plan of general codification" by the words "draft code" found in the text of resolution 177(II). By mistake, however, the clause "in such a manner that the plan should clearly indicate...", which was to have been deleted, was allowed to stand. Too much importance should not therefore be attached to that clause. Moreover, once the code was drawn up it would be clear where the Nürnberg Principles were to be found in it.

63. The CHAIRMAN believed that the Commission already agreed on the first point raised by Mr. Liang. As for the second point, he thought that the report should clearly indicate that the sole text that could be regarded as official and binding would be the code.

64. Mr. ALFARO requested the Commission for a decision that the explanation to be inserted in the report should give the reasons why the provisions of the code were drafted differently from the Nürnberg Principles as formulated by the Commission, and that the code only should be binding.

65. The CHAIRMAN considered that the Commission should first decide whether that explanation should be given in the draft code or in the report on the formulation of the Nürnberg Principles. In both cases the Commission should, in his opinion, state that the Nürnberg Principles were not binding, and that only the text of the code or of a convention would have legal validity.

66. Mr. AMADO stated that no judge would explain what was not the law, and that there was no doubt that only the code would constitute the law. He therefore considered it unnecessary to vote on the points put forward by the Chairman.

67. Mr. YEPES thought that the Nürnberg Principles were only of historical interest and that in the drafting of the code the Commission was at liberty to revise them, modify them or leave them as they were at present. Being a Commission of independent jurists, it could adopt the Nürnberg Principles only inasmuch as they tallied with the standards of international law.

68. Mr. CORDOVA considered that Mr. Amado was right in stating that the judges should apply nothing but the law; it was necessary, however, to say in the text of the report on the formulation of the Nürnberg Principles or in the code what the Commission had done with those principles and what reasons it had had for considering it had to modify them for incorporation in the code. If that explanation were not found, there would inevitably be confusion in the public mind and even in the minds of jurists.

69. The CHAIRMAN was of the personal opinion that the explanation should not appear in the code but in the report on the formulation of the Nürnberg Principles. He would even like a commentary added to the preamble to the Nürnberg Principles to fix the value attributed by the Commission to those principles.

70. Mr. SPIROPOULOS thought that the Commission should clearly distinguish what it had been instructed to do. Two tasks had been entrusted to it: the one, that of formulating the Nürnberg Principles, the other, that of preparing a draft code of offences against the peace and security of mankind, at the same time indicating the place that the Nürnberg Principles would be accorded in that code. The Commission should therefore draw up two documents to put before the General Assembly. It was not for the Commission to alter the tasks as they had been entrusted to it.

70a. He recalled that he had given all the necessary explanations in his report by insisting upon the necessity of the Commission's stating how and where it proposed to incorporate in its draft code the Nürnberg Principles it had formulated. The first thing left for it to do was to examine the code and draw up its details; only when that had been done could it consider what it should say concerning the work it had done and give the necessary explanations required. In his opinion the explanations should not appear in the code.

71. Mr. ALFARO thought that Mr. Spiropoulos' proposal should be accepted. He thought that the Commission should at once begin an examination of the code, and when it had finished it could consider how it

proposed to carry out the task entrusted to it under the General Assembly Resolution regarding the place to be accorded to the Nürnberg Principles. All he wanted was to prevent confusion arising in the mind of people in general concerning the work carried out by the Commission in execution of the General Assembly resolution. A great majority of those reading that resolution would conclude that the words "indicating clearly the place to be accorded to the principles" of Nürnberg implied the necessity for the Commission to state in what place in the code those principles had been embodied. He had raised the question in order to avoid such confusion. He was, he repeated, in agreement with Mr. Spiropoulos' proposal that that precise point should be examined after consideration of the provisions of the code.

72. Mr. AMADO felt he should stress the fact that, as he had said to the Sub-Committee of the Sixth Committee of the General Assembly at its second session, the clause "indicating clearly the place to be accorded to the Nürnberg Principles" was justified just as long as mention was made of a "plan of codification", but was no longer justified (see A/CN.4/25, para. 40) when it had been decided to draw up a code. In drawing up the code, the Commission should, therefore, embody in it the Nürnberg Principles, but he believed that it was impossible to examine at once the question of where they should be embodied in the code. They should certainly not be inserted in a separate chapter.

73. The CHAIRMAN believed that the Commission was in agreement in postponing its decision regarding the incorporation of an explanation either in the code or in its report on the formulation of the Nürnberg Principles until such time as it had examined the various items in the code. He invited the Commission to proceed to examine the rules relating to criminal responsibility in the draft code.

C. DETERMINATION OF CRIMINAL RESPONSIBILITY (Part III of the Report)

74. Mr. SPIROPOULOS stated that he had expressed his views clearly on that matter in his report. So far there existed no precedents for the recognition of the criminal responsibility of States or organizations; the Nürnberg Tribunal had also restricted itself exclusively to the criminal responsibility of individuals. For that reason the draft code he had prepared envisaged the criminal responsibility of individuals only.

75. The CHAIRMAN pointed out that Mr. Spiropoulos' suggestion was that the Commission should examine only the criminal responsibility of individuals, leaving aside the responsibility of corporate bodies such as the State, or organizations whose criminal responsibility had not so far been recognized although their civil responsibility could legally be entailed.

76. Mr. SPIROPOULOS proposed that to shorten the discussion only those members of the Commission who opposed the exclusion of the question of the criminal responsibility of States and organizations should speak.

77. Mr. FRANÇOIS said that theoretically the question of the criminal responsibility of States could arise in certain countries; the criminal responsibility of corporate bodies was recognized by law. Such was the case in the Netherlands, where the responsibility of corporate bodies in taxation matters had been established. He agreed, however, that discussion of the draft code should be limited to settling the responsibility of individuals.

78. The CHAIRMAN pointed out to Mr. François that in speaking of compensation of victims by the State he had referred to a matter which was within the province, not of criminal law, but of civil law. He believed, however, that if the Commission wished to introduce the culpability of corporate bodies into the code it would deal with the principle of responsibility on a broader basis than it should.

79. Mr. SPIROPOULOS said that he had been guided by the principles embodied in the Nürnberg Charter and judgment, which stated that only individuals could be held responsible.

80. Mr. HUDSON pointed out that the Commission was not bound by the Nürnberg Principles.

81. The CHAIRMAN said that in his opinion it was extremely difficult to determine group responsibility.

82. Mr. CÓRDOVA asked the Commission to confine itself to an examination of the question of the criminal responsibility of individuals, so as to avoid lengthy discussion. The Commission would in due course be free to examine the responsibility of States.

83. Mr. SPIROPOULOS read the following conclusion from the chapter in his report on responsibility: "following international practice up till this time, and particularly in view of the pronouncements of the Nürnberg Tribunal, the establishment of the criminal responsibility of States—at least for the time being—does not seem advisable" (A/CN.4/25, para. 56). He added that that did not rule out the possibility of the Commission's examining the question of the responsibility of States at a later stage.

84. The CHAIRMAN thought that the Commission agreed to leave aside for the time being the question of the responsibility of States and groups.

85. Mr. HUDSON considered it impossible to examine the formulation of offences in international law without knowing where criminal responsibility lay. That would only be possible if the Commission agreed to consider also the responsibility of the State. In the case of the State, however, he could not see who could be made criminally responsible for a crime committed by it.

86. Mr. SPIROPOULOS said that Mr. Hudson was right, but he would repeat that he had desired in his report to confine himself to individuals only, for they, according to the Nürnberg Charter and judgment, could alone be held criminally responsible.

87. Mr. el-KHOURY observed that in general law there existed civil responsibility and criminal responsibility; between those two concepts there was a very close link. The government, he thought, was responsible for crimes committed by its officials, but it could be held that the State was responsible civilly for those

crimes, not criminally. If the Commission were considering the guilt of highly placed persons who had committed crimes, it was, in his opinion, still a matter of the criminal responsibility of individuals.

88. The CHAIRMAN noted that in French law a distinction was made between a delict committed in the course of duty and a personal delict committed by an official. If it were a case of a delict committed on duty, the State was responsible. On the other hand, if it were a personal delict the State could not be held responsible. French law did not recognize, for example, offences committed by communes, but the representative of a commune could commit an offence such as a breach of trust. In such a case the commune would be financially liable for the offence committed in its name by its official, while the offender could also be prosecuted criminally for the breach of trust. Corporate bodies, however, such as the communes, were never criminally responsible for a crime committed by their officials or representatives.

89. Mr. BRIERLY thought he must emphasize that it had never been stated that the Commission should examine the criminal responsibility of States. The Commission was in the process of examining a code, which was concerned only with individuals rendering themselves guilty of a crime and becoming criminally responsible. It could be decided to deal with individual responsibility only in the code. Clearly that influenced the definition of the crimes it might be desired to include in the code. The question would require examination in respect of each and every act. How, for example, could it be said that an individual could annex a territory and be held responsible for that action? He suggested therefore that the Commission should confine itself provisionally to the examination of the criminal responsibility of individuals.

90. Mr. ALFARO accepted the view expressed by Mr. Spiropoulos. He would add that it seemed clear to him that crimes could be committed by States and that they could be held responsible.

91. Mr. SPIROPOULOS thanked Mr. Brierly for his contribution to the debate. By confining itself to the examination of the criminal responsibility of individuals, the Commission was embarking upon the only path which could ensure reasonably brief discussion. The point raised by Mr. Hudson was an important one, there was no doubt of that. In drawing up his report, however, he had not been able to examine the responsibility of States or of groups. He asked the Commission to restrict itself for the time being to the question of the responsibility of individuals, which alone had been provided for in his report. He asked the Commission that the passage "General Rules of Responsibility" of his report (para. 86) should be read: It dealt with the responsibility of the State and formed an essential part of his report, setting out the reasons why he had confined himself exclusively to the examination of the responsibility of individuals.

92. Mr. ALFARO read out that passage of the report.

93. Mr. SPIROPOULOS considered that the Commission could, by studying that passage, ascertain the

kind of responsibility he had wished to examine: Responsibility, for example, for the conduct of war, in other words, the responsibility devolving upon those in whose hands lay the conduct of war—i.e., the governments, the foreign ministers and so on. As for the fomenting of civil strife, he recalled the example of the assistance given by Albania to the Greek guerrillas. In that case the responsibility of the Albanian Government and even the responsibility of private persons was involved: the responsibility of Albania for the commission of an international crime, and also the responsibility of the individuals who had been accessories to that crime. To take another example, in the case of an annexation it was not the State as a whole that could be held responsible, but rather those who had taken part in the annexation, the government, the ministers and also those who had assisted the government to make preparations for the annexation (as for example Schacht in Germany). In that case the situation was the same as that contemplated by the Nürnberg Tribunal.

94. Mr. CORDOVA asked that a vote be taken on the proposal of the Rapporteur that the draft code deal only with the criminal responsibility of individuals.

The CHAIRMAN thought it possible to vote without prejudicing in any way any possible opinion that the Commission might come to later on the responsibility of States. He did not think, however, that it was necessary to vote, as the Commission seemed to be in agreement for the time being not to consider more than the criminal responsibility of individuals in the draft code.

95. Mr. SANDSTRÖM believed it necessary also to take into account the responsibility of groups. He agreed, however, with the view of Mr. Spiropoulos that such responsibility might conceivably be equated with complicity. He did not wish therefore to press the point.

96. The CHAIRMAN made it clear that the Commission's decision to begin by examining the responsibility of individuals was only a provisional one.

The meeting rose at 6 p.m.

55th MEETING

Tuesday, 27 June 1950, at 10 a.m.

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Chairman: Mr. Georges SCALLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L.

BRIERLY, Mr. Roberto CORDOVA, 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. 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 (II) (Item 3 (b) of the agenda) (A/CN.4/25) (continued)

NATURE OF THE TEXT SUGGESTED AS A WORKING PAPER FOR THE INTERNATIONAL LAW COMMISSION (APPENDIX TO THE REPORT)

1. The CHAIRMAN stated that the draft code constituted the most important part of the Commission's work on the present item. The Commission had to decide what was the nature of that text. It was the text of a draft code, but the opening words in the French were "Les parties au code". He did not know if the English version, "The parties to the code", meant anything, but in French the expression was absurd. If it was a code it was not a convention. A code applied to all; it was not a text in which one could speak of parties.

2. Mr. HUDSON agreed with the Chairman. If the Commission was trying to draw up a draft code, it need not concern itself with the way in which the code would be implemented. He noted in the bases of discussion a number of questions which would have to be examined if the Commission drew up the convention for enforcing the code. He suggested that the Commission should not concern itself with the instrument for enforcing the code, but confine itself to carrying out the task assigned to it by the General Assembly, which was to draw up a draft code of offences against the peace and security of mankind.

2 a. He suggested the deletion of the first two lines of basis of discussion No. 1:

"The parties to the code declare that the acts mentioned below are crimes under international law which they undertake to prevent and punish."

3. Mr. ALFARO reminded the Commission that on the previous day he had expressed the opinion that the Commission was drafting an international code of offences for use in international criminal law. He therefore entirely agreed with Mr. Scelle and Mr. Hudson that it was not desirable for the Commission to draft the code in the form of a convention. It ought to draft the code, and the code ought to be universally applicable.

3 a. He did not think it was necessary to delete altogether the words serving as introduction to basis of discussion No. 1. He proposed that the words, "the acts mentioned below are crimes under international law", be retained. The words, "which they undertake to prevent and punish", were only in place in a convention; they came, moreover, from the Genocide Convention. His proposal was compatible with the drafting

of an international criminal code if that code were put into force by an international convention. The code could be incorporated in a convention as a separate instrument.

4. Mr. SPIROPOULOS declared that when he was given the task of drafting the code he had not known what he ought to do. On reflection, he had decided that he ought to submit an instrument which could be enforced. The only means which suggested itself had been to give it the form of a convention. If for some reason that he failed to understand, the Commission wished to delete the words showing that his draft was drawn up in the form of a convention, and to confine itself to enumerating a certain number of acts, the General Assembly would be obliged to put back into the draft what the Commission had taken out. It was in reality a convention, although it had been called a code. A General Assembly resolution would not be sufficient to put the text into force.

4 a. In basis of discussion No. 7 the words, "The parties to the convention", could be substituted for the words, "The parties to the code". But they would still refer to the parties accepting the code. Mention had been made of the Genocide Convention. That was the first international criminal code, a code limited to a single offence. In drawing up the draft code now being examined by the Commission, he had extended the principles of that convention and set them out in greater detail, but he had followed the most recent practice of the United Nations.

5. Mr. CORDOVA was also of the opinion that there were no parties to a code; in the present case, however, the parties would be required by a convention to observe the code; that was what the Rapporteur had meant. Resolution 177 (II) had not instructed the Commission to consider the manner in which the Assembly might see fit to enforce the code; but article 23 of the Commission's Statute allowed it to recommend to the General Assembly what it considered to be the best method of enforcing it. Resolution 177 (II) implied that the code would be made binding on all States when it had been given an acceptable form. If there were a super-State able to enforce the code, there would be no need to consider a convention, but the General Assembly did not possess legislative powers. It was only through a convention signed by the States that the code could be made binding.

6. Mr. YEPES thought it was merely a question of wording. Whether it were called a code or a convention, the text that had been prepared would still constitute, at any rate, the first step towards an international criminal code. The sixth Conference of American States had encountered the same difficulty over the adoption of a code of private international law. It had had recourse to a convention declaring that effect should be given to the code of private international law it had drafted.

7. Mr. SANDSTRÖM believed that the Commission could take either course. If the General Assembly decided to enforce the code through a convention, it would not be difficult to change the draft code into a draft

convention. The General Assembly had assigned the Commission the task of preparing a draft code. He would like the terms of the General Assembly resolution to be observed.

8. The CHAIRMAN was also in favour of keeping to the wording of the resolution. The Commission could leave on one side for the time being the question of how the code was to be implemented. He said "for the time being" because it would be necessary to revert to the point. He thought that to draw up a draft code and say that it would only be applicable to the States signing it was an odd thing to do. What would have been the value of the Nürnberg Charter if it had only been applicable to the States signing it? The legal basis of the Nürnberg Charter was not the Allies' victory.

9. Mr. SPIROPOULOS disagreed: he was certain that the Allies' victory was the basis of the Nürnberg Charter; if the Allies had been beaten they would have been tried by the Germans.

10. The CHAIRMAN thought that the legal basis of the Nürnberg Charter lay in the fact that those who had signed it were the strongest, and constituted a *de facto* government. Was it not the Commission's opinion that the Members of the United Nations constituted an international *de facto* government? He read out Article 25 of the Charter of the United Nations. It might be assumed that the Security Council would adopt the draft code and declare it in force. A code was the expression of the will of society. If the Commission merely drafted a code applicable only to those who signed it, it would not have gone any further than the Genocide Convention, which might be called a hope, but was not a reality.

10 a. He saw no objection to the Commission examining each of the crimes mentioned in the draft, but since those crimes could only be committed by governments, he wondered what government would be eager to sign its own sentence in advance.

11. Mr. SPIROPOULOS reminded the Commission that Mr. Hudson had proposed the deletion of the first two lines of basis of discussion No. 1. He would like discussion of matter to be postponed.

12. The CHAIRMAN thought that it would be best to say: "The acts mentioned below are crimes under international law."

13. Mr. HUDSON felt that the title made those words superfluous.

14. The CHAIRMAN regarded it merely as a matter of wording.

15. Mr. SPIROPOULOS proposed that consideration of the matter be deferred until some of the articles had been examined. It would be best first to see what arose from discussion of those articles. He suggested therefore that the Commission begin by examining the substance of the draft.

It was so decided.

CRIME NO. I

16. Mr. HUDSON thought that the English text should read "Offence" instead of "Crime".

17. Mr. ALFARO proposed that the expression be omitted altogether, since the introductory sentence contained the words "the acts". It would be sufficient therefore to give a list of definitions.

18. The CHAIRMAN did not see why the word "Offence" should not be used in English. But it would not be possible to use the word "Délit" in French, because a délit was a minor infraction of the law; the word had a special meaning not applicable to a crime.

19. Mr. AMADO was in favour of general ideas, with which the members of the Commission might be assumed to be familiar, being left out of the discussion. He read out the text of Crime No. 1. Precision was essential in criminal law. A criminal act must be clearly defined. It must not be left to the *ex post facto* decision of the judge. Supra-legal standards such as the ideas of Peace or Justice must not be relied on. The essential task of the Commission was to define acts punishable under international law. Evil in itself was not a conception that could be accepted in criminal law. All offences were *mala prohibita*. Exact delimitation of the act involving application of a penalty must be insisted on. He wondered whether definition No. 1 was sufficiently precise. The first part of it, "The use of armed force in violation of international law", left the tribunal free to decide whether or not an act constituted a violation of international law.

19 a. Sir David Maxwell Fyfe had spoken as follows at the London Conference:

"I want to make clear in this document what are the things for which the Tribunal can punish the defendants. I don't want it to be left to the Tribunal to interpret what are the principles of international law that it should apply. . . . Developing the same point, I am a little worried by the inclusion in (a) of 'in violation of the principles of international law and treaties', because I would be afraid that that would start a discussion before the Tribunal as to what were the principles of international law. I should prefer it to be simply 'in violation of treaties, agreements, and assurances'."¹

19 b. Sir David Maxwell Fyfe's formula seemed to him much less vague than the one used by Mr. Spiropoulos. He proposed that the first part of the text of Crime No. 1 read as follows: "The use of armed force in violation of international treaties, agreements or assurances".

19 c. The second part of Mr. Spiropoulos' text read as follows: "...and, in particular, the waging of aggressive war". In paragraph 60 of his report, Mr. Spiropoulos said: "For the reasons offered by the Russian delegate at the London Conference we suggest that the International Law Commission abstain from any attempt at defining the notion of 'aggression'. Such an attempt would prove to be a pure waste of time."

¹ Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945. Department of State Publication 3080, Washington, D.C., 1949, p. 328.

19 d. General Nititchenko had made the following statement at the same session: "Apparently this is due to the fact that aggression has become a sort of formula in itself. Apparently, when people speak about 'aggression', they know what that means, but, when they come to define it, they come up against difficulties which it has not been possible to overcome up to the present time."²

19 e. In other words, the concept of aggressive war was an incomprehensible enigma. Nevertheless, the problem which a commission like the International Law Commission composed of eminent jurists found to be insoluble, was to be settled by the tribunal that would have to try persons accused of Crime No. 1. Either an attempt must be made to define aggressive war or the expression be deleted from the code. One solution might be to say that any war not waged in exercise of the right of self-defence or in application of the provisions of Article 42 of the Charter of the United Nations was an aggressive war.

20. Mr. SANDSTRÖM wished to know whether the meaning of the words "in violation of international law" was regarded as wider than that of the words "in violation of international treaties, agreements or assurances" in the Nürnberg Charter.

21. Mr. SPIROPOULOS replied that the words quoted undoubtedly had a somewhat wider meaning; the Nürnberg Charter spoke of violation of treaties, agreements or assurances. What he had had in mind in his draft was international custom. That was why he had referred to any act contrary to international law, without making distinctions. The Nürnberg Charter only referred to a war of aggression. His draft was concerned with any act contrary to international law in general. That was why he had not made use of the expressions appearing in the Nürnberg Charter. It was not necessary to speak of an aggressive war, for the use of armed force in violation of international law included aggressive war. But he had mentioned it in order to bring that supreme crime into prominence.

22. Mr. SANDSTRÖM thought it would be preferable to retain the expression used in the Nürnberg Charter: "...in violation of international treaties" etc., and to go on to say: "and, in particular, the waging of aggressive war".

23. Mr. CORDOVA felt that the Commission ought not to concern itself with how the Nürnberg Charter had defined crimes. By virtue of that Statute, those responsible for the war had been punished under the provisions of treaties, etc., because they had in fact violated treaties. The draft code contained general provisions to be applicable to acts that might be committed in the future. For example, armed intervention was forbidden by international law. A situation might arise in which no treaty existed. In such a case, the crime would be as serious as violation of a treaty. The Rapporteur had been very wise in saying "in violation of international law". That was sufficient definition of a crime.

23 a. Stress must be laid on the "aggressive" aspect of the crime. To avoid any possible misunderstanding concerning aggressive war, it was necessary to follow the San Francisco Charter and say that the waging of any war which did not constitute exercise of the right of self-defence was the waging of aggressive war.

24. Mr. SPIROPOULOS had no objection to make.

25. Mr. HUDSON proposed that the Commission should begin by discussing the phrase: "The use of armed force in violation of international law" and afterwards consider the second phrase, "the waging of aggressive war". It would be best to discuss the first phrase thoroughly without mentioning aggressive war. He was somewhat disconcerted by the expression, "The use of armed force". Who would be responsible for its use: each individual composing the armed force, or the commander-in-chief, or the government—that is to say, the persons composing the government? The Commission might perhaps be able to find a better form of words.

25 a. If the Commission kept the words "in violation of international law", he would be asked what they meant and would have to reply that he did not know. If the Commission was to enumerate certain individual crimes, it must do so with sufficient precision for the reader to understand what it meant by them. What was involved was a crime against security, but nothing had been said to that effect. It was difficult to believe that any customary law covered the case. If such customary law did exist, however, it was necessary to mention its provisions and to indicate what use of armed force constituted a violation of it.

26. Mr. SPIROPOULOS wished to explain the history of the article. When he was considering what crimes ought to be included in the code, he had thought in the first place of the Nürnberg Charter. Clearly aggressive war was the first crime under international law. When the draft was in its initial form, he had written that aggressive war was forbidden. At first, he had thought that sufficient, then he felt it necessary to add a second definition, as follows: "any use of armed force contrary to international law, even if it does not constitute aggressive war". Finally, he had asked himself why two crimes should be distinguished. A single crime was sufficient, since aggressive war was a violation of international law; hence any use of armed force was a violation of that law.

26 a. As to Mr. Hudson's criticism, he agreed that it was necessary to follow the text; he suggested that the members of the Commission should observe the rules of procedure and propose amendments. Mr. Amado had done so; that was the correct method. If a serious criticism was put forward, it was necessary to propose an amendment and to develop it.

26 b. He had referred to any act contrary to international law. Mr. Amado had quoted a passage from a speech made in London, but had any definition of that act been given at the London Conference? All that had been done was to write "offences against the peace" and to give examples, but no definition of the offences had been provided. If they wished, the mem-

² *Ibid.*

bers of the Commission could try to produce a concrete proposal, but they would find it was impossible.

27. The CHAIRMAN remarked that the Commission had met to discuss freely and if each member had to be asked to propose an amendment in good and due form, all those who had nothing precise to propose would be prevented from speaking. Even if that was the rule, he would not apply it.

28. Mr. AMADO reminded Mr. Spiropoulos that in the report on the Nürnberg Principles, the Commission had been formulating principles—not drafting a code. Crime No. I read: “The use of armed force in violation of international law . . .” It was impossible to imagine a rule in a national criminal code which read: “in violation of national law”. Consequently, the text could not stop there and he had therefore proposed that the violation in question should be defined as follows: “in violation of international treaties, agreements or assurances”. That would make the text exact.

29. Mr. el-KHOURY reminded the Commission that when it had embarked on discussion of the Nürnberg Principles, and was considering the first of them, he had opposed the use of the words “international law”. The reply he had received was that it was a question of formulating the Nürnberg Principles and that there was no choice, but that when the code came to be discussed any provision thought suitable could be adopted.

29 a. The code was to be implemented by a criminal tribunal. It was common knowledge that when a tribunal of that sort had a case before it, it had to apply an article of law in force. The international tribunal set up in accordance with the Commission’s recommendation would have to apply the code under discussion. Supposing Mr. Spiropoulos were the judge on that tribunal, and counsel for the defence enquired what international law his client was accused of having broken and in what document or convention it appeared, it was difficult to imagine Mr. Spiropoulos’ reply. Reference might be made to the works of Professor Scelle who said that such and such an act constituted an offence, but the tribunal had to have a text to base its judgments on, or it would be unable to specify the grounds for its decision. Mr. Spiropoulos had therefore been wise in asking that amendments be proposed in good and due form. Mr. Amado had done so. Mr. Córdova had drawn attention to the fact that cases had occurred in which there was no treaty. A concrete situation of the kind might indeed arise. In the case of Korea, for example, no violation of a treaty appeared to have occurred, unless there had been a violation of the Charter of the United Nations. Mr. Amado’s amendment could, however, be accepted.

29 b. If the tribunal possessed no text laying down international law, what law would it apply? It must be provided with a text showing what international law was. That was not an easy thing to do. Neither was it easy to say what offences should be punished. Principles of international law were known to exist, but that was not sufficient. They were principles, not laws. The Court of Justice would apply laws.

30. The CHAIRMAN referred to Chapter I, Article 2, paragraph 4 of the Charter, and stated that that was international law.

31. Mr. CORDOVA quoted article 9 of the Draft Declaration on Rights and Duties of States.

32. The CHAIRMAN, speaking as a member of the Commission, remarked that the formula used by Mr. Spiropoulos included those provisions. He thought that international law was easy to define in connexion with Crime No. I. The whole of it appeared in Article 2, paragraph 4, of the Charter.

33. Mr. YEPES observed that the Commission was discussing a text which read: “The use of armed force in violation of international law”. Thus, a violation of international law occurred when force was used to coerce a State. But there were other more dangerous ways of coercing a weak State. If the Commission was to deal with the question on a juridical basis, it must condemn as an offence under international law the use of any direct or indirect means of coercing a State, including, for example, economic pressure.

33 a. The previous year, when the Commission approved the draft Declaration on Rights and Duties of States, it had forbidden intervention in the internal or external affairs of any other State (article 3) when such intervention constituted a means of coercion. Why was the Commission not sufficiently courageous to condemn such intervention, which was more dangerous than armed intervention? A State that had recourse to armed force laid itself open to intervention on the part of the United Nations; whereas, if it exerted economic pressure, it could achieve the same end without incurring the risk. He proposed that the text should read: “The use of violence in any form in violation of international law”.

34. Mr. HUDSON thought that the matter was one of the most difficult ones before the Commission. He hoped that the Commission would be able to make some contribution towards its settlement. He felt it would be hardly wise not to start with a thorough discussion. Could not the Commission adopt the same attitude as towards the law of treaties? It would not be able to finish its task at the present session and the Rapporteur would take into consideration any suggestions that were made. It was not a question of adopting provisions, but of making a general study of the code for the guidance of the Rapporteur. If the Commission were to adopt that attitude, procedural matters ought not to present any difficulty.

35. Mr. HSU pointed out that the Nürnberg Charter had been drawn up to meet special circumstances. In drafting the code, the Commission need not follow it word for word. The previous year, the question of armed forces had been studied in connexion with the Declaration on Rights and Duties of States. It should be possible to make use of the results obtained. In order to avoid all the difficulties that had been raised, it might be possible to use the following form of words: “The use of armed force, except in the case of self-defence and execution of a mandate of the United Nations”.

36. Mr. SANDSTRÖM was much impressed by the argument against any reference to international law in the description of a crime. The same principle ought to be applied as in municipal law and the text should read: "in violation of the Principles of the Charter of the United Nations".

37. Mr. SPIROPOULOS quite agreed with Mr. Hudson that the Commission would not finish dealing with the question that year, but pointed out that if it confined itself to a general discussion, and all the views expressed were different, its work would be very hard. To make it easier, an attempt should be made to find a more or less agreed definition. It was right to mention the Charter, but he had avoided doing so because the code was also to apply to non-member States. Should the Commission decide that the Charter ought to be mentioned—and it would be desirable to do so, since that would make the text more concrete—he would mention it.

38. Mr. SANDSTRÖM stated that the fact that the code was also to apply to non-member States was the reason why he had proposed the wording: "in violation of the Principles of the Charter".

39. Mr. ALFARO observed that according to Mr. Spiropoulos, the words "international law" included customary international law and conventional international law. They therefore included the Nürnberg Principles. He did not think that point was made sufficiently clear in the text. He would prefer to give a list including the crimes mentioned in section B, paragraph (a), sub-paragraph (i), of the appendix to his first report (A/CN.4/22, Appendix). Those words would be sufficiently explicit.

39 a. There was, however, another point of great importance. If the principle *expressio unius est exclusio alterius* were applied, and the Commission's formulation of the Nürnberg Principles were borne in mind, the conclusion might be drawn, for example, that to prepare to use armed force in violation of international law was not an international crime, and that the only crime was the actual use of force. The point ought to be made clear, otherwise it might be thought that Hitler and Göring had not committed the crime in question because they had not actually flown an aeroplane. That was one of the difficulties resulting from the failure to use the wording of the Nürnberg Principles.

40. Mr. SPIROPOULOS pointed out that he had not used the same wording, because Crime No. X covered conspiracies, preparatory acts, attempt, etc. The code covered even more crimes than the Nürnberg Charter.

41. Mr. HUDSON thanked Mr. Córdova for quoting article 9 of the Declaration on Rights and Duties of States. The task in hand was, however, a different one. Article 9 read:

"Every State has the duty . . . to refrain from the threat or use of force against the territorial integrity or political independence of another State, or in any other manner inconsistent with international law and order."

41 a. The declaration only dealt with the rights and duties of States, while the code dealt with individuals.

The expression "or in any other manner inconsistent with international law and order" could not be used because it would be out of place in a criminal code. The Chairman had referred to Article 2, paragraph 4, of the Charter of the United Nations, which read: "or in any other manner inconsistent with the Purposes of the United Nations". The phrase was the same and he had the same comment to make on it. He would like to know, besides, whether the Purposes mentioned were those referred to in Article 1 of the Charter. He had to admit that that was a formula he failed to understand.

41 b. Article 1 read: "The Purposes of the United Nations are: "so that it was correct to assume that those were the Purposes referred to in Article 2. Purposes Nos. 3 and 4 did not apply to Crime No. I, since armed force could not be used in a manner inconsistent with the fulfilment of those Purposes; he was less sure about Purpose No. 2, because it might perhaps be possible to use force to prevent its fulfilment, while clearly the use of force could be inconsistent with Purpose No. 1; the meaning of Article 2, however, was not very clear.

41 c. The expression was evidently a political one which would not stand strict examination. Drafting the code was a different task from drafting the Charter or the draft Declaration on Rights and Duties of States. In the present case, it might be said—though he was still not certain of it—that the use of force was a violation of international law, but in that event it was necessary to define the meaning of the term for the purposes of the code.

42. Mr. CÓRDOVA said that the Commission was engaged in examining the draft Code of Offences against the Peace and Security of Mankind with a view to deciding upon certain acts contrary to international law. To establish rules of international law, it must consider what acts were to be regarded as offences under that law. It desired application of the principle, formulated in Article 33 of the Charter of the United Nations, that States should settle their disputes by peaceful means. It wished, therefore, to ban the use of armed force in violation of international law and, in particular, the waging of aggressive war. Such at least was the very wide formula appearing in Mr. Spiropoulos' report. There were, however, in his opinion, two exceptions in which the use of armed force was justified: self-defence, and the use of armed force in execution of a mandate of the United Nations. All wars not included in those two exceptions ought to be regarded as crimes.

42 a. The Commission intended to draw up a code which would protect future generations. It was not a code applying to a specific war. It was because the Charter of the Nürnberg Tribunal applied only to a specific war that he did not consider that Charter important as establishing a rule of international law. The draft Declaration on Rights and Duties of States in two places forbade the use of armed force. No mention was made there, however, of the two exceptions he had just mentioned, which in his opinion ought to be included in the text submitted by Mr. Spiropoulos.

42 b. He therefore supported Mr. Hsu's proposal that a provision be added to the definition of Crime No. I,

stating that use of armed force in self-defence or in execution of a mandate of the United Nations did not constitute a crime.

43. Mr. HUDSON wished it to be clearly stated what was meant by self-defence. All States declared that they were waging war in self-defence. Supposing there were a threat to peace in some part of the world, and a State thought that tranquillity could be restored by the dispatch of two warships, would it in that case be acting in self-defence?

44. The CHAIRMAN asked whether the Commission would accept a general formula on the lines of that proposed by Mr. Spiropoulos in his draft of Crime No. I, or whether it wished to specify the cases in which use of armed force was to be regarded as a crime under international law. He proposed that the Commission vote on the matter not in order to produce an exact text, but so as to provide the Rapporteur with a directive for his report.

45. Mr. SPIROPOULOS observed that in asking the Commission to decide whether it would accept a general formula or wished for an exact definition of the acts constituting Crime No. I, the Chairman had not indicated the alternatives very clearly. In the first place, there had been a proposal—his own—and Mr. Hsu and Mr. Amado had asked that a provision be added to it covering the two exceptions of self-defence and execution of a mandate of the United Nations. There was also Mr. Hudson's proposal, a very pertinent one; but he thought it was practically impossible to make a satisfactory list of the acts to be regarded as crimes.

46. The CHAIRMAN asked Mr. Hsu, Mr. Córdova and Mr. Amado to agree among themselves on a formula which might serve as a directive for the Rapporteur. Mr. Hudson, it was true, had wished the Commission to go further; but he (the Chairman) agreed that it was extremely difficult to draw up a list of the kind Mr. Hudson had in mind. He remarked that not only the use of armed force, but the threat of it, constituted a crime according to the Principles of the Charter.

47. Mr. SPIROPOULOS replied that from the point of view he had adopted in his report, threat was not a crime.

48. Mr. CÓRDOVA repeated that the formula used by the Rapporteur was a very wide one. He pointed out that the Commission had three proposals before it: that of the Rapporteur; that of Mr. Hudson, which was very vague; and lastly that of Mr. Hsu, a proposal to clarify Mr. Spiropoulos' formula by negative definition—i.e., by specifying the cases in which use of armed force was not a crime. If Mr. Spiropoulos' general formula were not accepted, he wondered what formula could take its place. Mr. Spiropoulos' formula ought therefore to be accepted, with Mr. Hsu's proposed amendment.

49. The CHAIRMAN felt that Mr. Hsu's proposal was dangerous because it used the negative method of definition. In addition, he feared that a precise definition would enable many of those guilty of the acts in question to escape punishment.

50. Mr. el-KHOURY observed that the Commission

was engaged in considering something entirely new. Hitherto, the custom had been to settle disputes by conferences, arbitration or peace negotiations. The Commission was now trying to establish a law for the settlement of disputes by drawing up a code which made war a crime under international law. But before it could determine what the crime was, the Commission had to know what international law was being applied. Up to the present, international law only existed in the provisions of the Charter of the United Nations and by virtue of treaties concluded between States. Definition of the crime appeared to him impossible before the international law under which war was a punishable offence came into existence. No tribunal or court would be able to apply or impose a punishment unless it had a legal text to refer to. The Commission was employing the expression "international law"; that was a very broad expression. He did not think it admissible for so general a term to be used until the Commission had defined what the law referred to was. He suggested that the expression used should be "in violation of treaties and the Charter of the United Nations".

51. Mr. YEPES agreed that there was some truth in the statement made by Mr. el-KHOURY that no criminal international law yet existed, but thought that the value of what was known as customary law ought not to be underestimated. Moreover, articles 36 and 38 of the Statute of the International Court of Justice specified certain departments of international law which came within its jurisdiction. He thought Mr. Spiropoulos' formula a good one because it included conventional law and customary law.

52. The CHAIRMAN observed that three proposals were before the Commission: (1) Mr. Spiropoulos' formula, a very wide one which allowed all the latitude required. (2) The proposal just submitted by Mr. Hudson, which was supported by Mr. François, and read as follows:

"The use or threat of armed force by a State against the territorial integrity or political independence of another State."

That proposal was very close to the terms of Article 2, paragraph 4 of the Charter of the United Nations and Article 10 of the Covenant of the League of Nations. (3) The proposal made by Mr. Hsu and Mr. Córdova, which read as follows:

"The use of armed force for purposes other than those of self defence or execution of a mandate of the United Nations."

Such were the three proposals which the Commission had to consider.

53. Mr. YEPES repeated that he thought Mr. Spiropoulos' formula the best.

54. Mr. HUDSON observed that his own text also reproduced the terms of article 9 of the draft Declaration on Rights and Duties of States. It certainly included any aggressive war. He thought it was advisable for him at the same time to keep very closely to the wording of the provisions of the Charter, unless the Commission wished to give a list of the uses of armed force to be regarded as crimes under international law.

55. Mr. SPIROPOULOS stated that when drafting his text he had taken into account both the Charter and the draft Declaration on Rights and Duties of States. In his initial draft, he had confined himself to mentioning use of armed force against the territorial integrity of any other State, but he had rejected that text because it failed to cover use of armed force against the political independence of another State. He considered that he had gone much further in his present formula. It had been his intention also to cover cases in which no attack was made on the territorial integrity of another State in the strict sense of the term. If, for example, an aeroplane dropped a bomb on foreign territory, that did not constitute an attack on territorial integrity. It was simply the use of armed force without attack on that integrity. He feared that according to Mr. Hudson's proposal an attack on an ordinary ship might be assimilated to an attack on the territorial integrity of a State. The formula proposed by Mr. Hsu and Mr. Córdova was a good one, and undoubtedly covered the same acts and cases as his own, but he did not think its wording was strong enough.

56. Mr. CORDOVA said that the Commission was examining acts which could be regarded as crimes, and the conclusion arrived at by the Commission was that when a State made use of armed force it was guilty of a crime, whether or not it had broken a treaty: the State might not be a party to the Kellogg Pact. He thought that the provisions in article 9 of the draft Declaration on Rights and Duties of States, which were more or less the same as those occurring in Article 2, paragraph 4, of the Charter of the United Nations, were inadequate. In his opinion, any use of force that was not legal was a crime.

57. Mr. HSU, referring to Mr. Hudson's proposal, observed that the word "threat" of armed force ought not to be included in the formula adopted by the Commission for Crime No. I. Such a crime could be treated separately. He also pointed out that Mr. Hudson had omitted the second part of article 9 of the draft Declaration on Rights and Duties of States, which read: "or in any other manner inconsistent with international law and order". He wondered why that phrase had been omitted.

58. Mr. HUDSON replied that he did not know what the phrase in question meant; the idea behind it seemed to him more political than legal.

59. Mr. HSU indicated that to his mind his own proposal ought to dispose of Mr. Hudson's objections to Mr. Spiropoulos' text. Mr. Hudson desired a positive list of crimes, while he himself desired a negative one. He still thought a negative one preferable.

60. Mr. SPIROPOULOS thought that the sense of his own formula was the same as that of the formula proposed by Mr. Hsu and Mr. Córdova; he was ready to accept their formula.

61. Mr. AMADO reminded the Commission that he had proposed an amendment,³ but had not wished to press it. He asked Mr. Hudson whether he did not con-

sider that the idea of a threat of armed force was referred to and covered by articles III, IV, V and VI of the draft code. He would have preferred the Commission to vote on his own amendment. But failing that, he preferred the text proposed by Mr. Hsu and Mr. Córdova.

62. Mr. HUDSON thought that the articles mentioned by Mr. Amado did not refer to the threat of armed force at all. He objected to the use of the expression "self-defence" because it was one that had constantly been abused. Every war was proclaimed to be a war of self-defence. Moreover, where did self-defence begin? Mention had been made of the case of an aeroplane dropping a bomb on foreign territory; would such an act enable the State on whose territory the bomb had been dropped to invoke self-defence? The problem was becoming even more complicated now that advanced air bases were playing an important part. The United Kingdom Government had on one occasion declared that the Rhine was the frontier of the territory, attack upon which by another State would justify it in invoking self-defence. That raised not only the question of individual defence, but the question of collective defence, which the Commission should also consider. In any event, he thought it preferable to avoid using the term "self-defence" in the code.

63. Mr. BRIERLY remarked that a very large number of views had been expressed in the Commission, and the Rapporteur would be able to make use of them and mention them in his report. The Commission ought, however, to give further consideration to the particular point under discussion before coming to a decision. Many things could be said in favour of the three formulas before the Commission. The best thing to do would be to draw the Rapporteur's attention to them and ask him to draw whatever conclusions from them he thought fit.

64. The CHAIRMAN declared that it was necessary for the Commission to formulate directives; it must have something to bring to the next session of the General Assembly of the United Nations. It must adopt a final resolution indicating the trend it intended its work to take. The formula should, however, leave the General Assembly free to take the final decision. The question had been before the Commission for over a year, and it was inconceivable that its decisions should be deferred from session to session.

65. Mr. ALFARO thought it was best for the Commission not to attempt to reach final conclusions but to confine itself to a general decision on principle based on the views expressed. He was in favour of the formula proposed by Mr. Hsu. In his opinion, there were three things against Mr. Hudson's proposal: (1) Mr. Hudson's text was based on Article 2, paragraph 4 of the Charter of the United Nations; it was therefore very limited in scope, since it only referred to the territorial integrity and political independence of the State attacked. A large number of other cases might in fact arise which did not directly fall within those two categories. (2) Threat of armed force ought not to be regarded as an offence under international law. (3) Article

³ See para. 28 *supra*.

2, paragraph 4, of the United Nations Charter only applied to States, not to persons, whereas the draft code submitted to the Commission referred exclusively to individuals.

65 a. Mr. Hsu's formula was a very wide one. According to it, use of armed force always constituted an offence, except in the two cases it mentioned. Mr. Hsu's proposal ought therefore to be accepted, since it could also be applied to individuals.

66. Mr. HUDSON, in reply to Mr. Alfaro's objection concerning the difficulty of applying his formula to individuals, stated that the difficulty would exist whatever formula the Commission might choose. Mr. Alfaro's argument appeared to be based on a misapprehension.

67. The CHAIRMAN reminded the Commission that it had decided that individuals should mean governments—that is to say, members of a government, ministers and other responsible highly placed officials.

68. Mr. LIANG (Secretary to the Commission) remarked that the Dumbarton Oaks text, which later became Article 2, paragraph 4 of the United Nations Charter, did not contain the words "territorial integrity and political independence of any State". They had been introduced later, following the example of Article 10 of the Covenant of the League of Nations. The article in the Covenant, however, had been drafted in positive terms ("undertake to respect"), whereas Article 2, paragraph 4, of the Charter laid down negatively that "All members shall refrain . . . from the . . . use of force against . . ." etc. He doubted, for example, whether, applying case law and commentators' interpretations of Article 10 of the Covenant, the attack on Pearl Harbour could be regarded as an attack on the territorial integrity of the United States. There had, in fact, been a tendency to stress the word "integrity" at the expense of the word "territorial".

68 a. To make good that omission, the insertion in paragraph 4 not only of attacks on the territorial or political independence of a State, but of a provision covering other cases had been decided upon. The provision was worded as follows: "or in any other manner inconsistent with the Purposes of the United Nations". Those Purposes were defined in Article 1 of the Charter, paragraph 1 of which covered aggression. He thought that the formula proposed by Mr. Hudson was too narrow, and felt he ought to recommend that the Commission keep to Mr. Spiropoulos' text, supplemented, if necessary, by Mr. Hsu's proposal.

69. The CHAIRMAN desired to know which proposal the Commission meant to accept. He would begin by putting to the vote Mr. Hsu's proposal, which was wider and had Mr. Spiropoulos' support.

70. Mr. SPIROPOULOS pointed out that according to the rules of procedure of the General Assembly which the Commission applied to its own discussions, it was the Chairman's duty to put to the vote first the amendment furthest removed from the original text appearing in his report.

71. Mr. el-KHOURY suggested that the words "or threat" be deleted from Mr. Hudson's amendment.

72. Mr. HUDSON had no objection to make.

73. The CHAIRMAN took note of the fact that Mr. Hudson accepted Mr. el-Khoury's amendment, and put to the vote the amendment as amended.

The amendment was rejected, no vote being cast in its favour.

74. The CHAIRMAN put to the vote the formula proposed by Mr. Hsu, which added to Mr. Spiropoulos' formula the words "for purposes other than those of self-defence or execution of a mandate of the United Nations". He remarked that the words "self-defence" included both individual and collective defence.

75. Mr. HSU accepted the Chairman's interpretation.

Mr. Hsu's amendment was adopted by 7 votes to 2, with 3 abstentions.

76. Mr. HUDSON would like it to be understood that the decision taken was only an unofficial expression of the Commission's views to guide the Rapporteur in his report, and in no way binding.

77. The CHAIRMAN stated that the Commission agreed that the decision was only an expression of its opinion, and that it did not bind the Rapporteur. It would, however, appear as such in the general report on the Commission's work during the current session.

78. Mr. HUDSON hoped that the decision would not be made known to the General Assembly. He thought it would be enough for the General Assembly to know that the question had been dealt with at length by the Commission and that the Commission had given certain directives to the Rapporteur, but that its conclusions were in no way final.

79. The CHAIRMAN disagreed. It had been stated that the Commission's report to be submitted to the General Assembly would contain all the views expressed by the Commission. Since some members appeared to be of a different opinion, he asked the Commission to come to a decision as to what its report was to contain.

80. Mr. HUDSON thought that on some items of its agenda the Commission had only succeeded in arriving at directives for the rapporteurs; on those points, it did not appear necessary to report to the General Assembly. On other points, however, definite decisions had been taken, and those ought to be the subject of reports to the General Assembly.

81. Mr. SANDSTRÖM felt that the Commission ought to submit reports to the General Assembly on all questions which it had finished examining. But it ought not to submit detailed reports covering each stage of its work.

82. The CHAIRMAN did not agree that the General Assembly should not receive a complete report on the Commission's work, and thought that the reports ought to contain conclusions or suggestions. It was not enough to tell the Assembly that the Commission had studied certain aspects of such and such a question, and reserved the right to examine them again.

83. Mr. FRANÇOIS supported the Chairman. He felt that the Commission would produce a lamentable impression on the General Assembly if the latter was forced to conclude that it had taken the Commission

months and months merely to examine certain items without even being able to arrive at conclusions or to make suggestions.

84. The CHAIRMAN agreed with Mr. François.

85. Mr. SPIROPOULOS thought on the other hand that the Commission was not required to submit reports to the General Assembly in all cases. Up to the present it had done so, but only in order to inform the General Assembly of the progress of its work. The previous year, the Commission had taken decisions, for example, in connexion with the Nürnberg Principles; and during the current year, it had examined them afresh and arrived in some cases at different decisions from those it had made the year before. In his opinion, there was much against the practice of accepting things provisionally and bringing provisional opinions to the attention of the General Assembly, only to reverse those decisions the following year and revise conclusions arrived at on particular items. Particularly in view of the General Assembly's probable reaction, the adoption of provisional conclusions appeared to him dangerous.

85 a. A middle way had to be found between the two extreme solutions of submitting reports or not submitting them. During the current year, the Commission had already taken decisions on three questions. On those questions, reports could be submitted to the General Assembly. It seemed preferable not to submit any report on the other questions which had not been settled, and not to inform the Assembly that the Commission had taken decisions of a provisional nature. That would be dangerous, and the Commission would run the risk of losing its freedom of action.

85 b. There was obviously, in his opinion, very much to be said for being able to submit reports to the General Assembly on the whole of the Commission's work, complete or incomplete. The General Assembly would be able to examine them, and in that way the Commission would learn the opinion of the representatives to the Assembly. But in view of the dangers to which he had drawn attention, he thought it better to adopt the middle-way solution he had mentioned.

86. Mr. ALFARO agreed with Mr. François. The Commission appeared to think it would be sufficient to give the Rapporteur directives for the report he would submit to the Commission for examination the following year. He did not think that was correct. He felt that it was the Commission's duty finally to settle the question of the draft code. It should therefore cut short its discussions and reach concrete conclusions. It ought not to imagine it had the right to leave the matter in abeyance.

86 a. The Commission had only completed three tasks during the present session: its examination of the document submitted by Mr. Hudson on means of making available documentation on customary international law; its examination of Mr. Spiropoulos' report on formulation of the principles of international law recognized in the Charter and the judgment of the Nürnberg Tribunal; and its examination of the question of setting up an international legal body to try persons accused of genocide, etc. Those were very modest re-

sults, and it would be altogether contrary to custom and in particular to the Commission's terms of reference if it postponed its work on priority questions such as the one now before it, which had been entrusted to it by a resolution of 1947. It could not tell the General Assembly that it had merely discussed the question and as yet had been unable to reach final conclusions. The Commission must finish its work on the code, and not confine itself to giving directives to the Rapporteur for the report it would examine the following year. The same did not apply to the three other items which appeared on the agenda for the first time.

87. Mr. CÓRDOVA agreed with Mr. Alfaro. The Commission was under a moral obligation to give effect to the General Assembly resolution. Neither did he see that there were any difficulties in the way of the Commission completing its work on the code. If, against all expectation, it failed to do so, it would have to tell the General Assembly that it had been able to form an opinion and had drawn up directives for the rapporteurs, thus making considerable progress. That would show the Assembly that the Commission had at any rate not wasted its time.

88. Mr. LIANG (Secretary to the Commission) did not wish to give an opinion as to whether the Commission ought or ought not to complete its work. It depended on the time at the Commission's disposal. If it succeeded in completing its work on the code it must submit a final report to the General Assembly.

88 a. The view of Mr. Hudson and Mr. Spiropoulos that provisional reports on subjects not yet completed ought not to be submitted to the General Assembly was supported by the Statute of the Commission. The Assembly was entitled to receive a final report on completed work (see articles 16 and 22 of the Statute). The previous year, the Commission's report on the Nürnberg Principles had given an account of the progress of its work while mentioning that it had not yet been able to reach final conclusions, and that report had not contained provisional conclusions arrived at by the Commission. In the present year, the Commission had decided to submit a final report.

88 b. Summing up, he stated in his opinion only reports on completed work ought to be submitted to the Assembly. Interim or provisional reports containing decisions which might be altered at the next session were to be avoided. The records of the Commission's meetings would show, where necessary, the stage its discussions had reached on subjects not covered by reports. If the Commission did not finish considering the draft Code of Offences against the Peace and Security of Mankind it could submit a report on the subject similar to the one it had submitted the year before on the Nürnberg principles—i.e., one not mentioning provisional conclusions adopted.

89. Mr. SPIROPOULOS felt that all the members of the Commission were fundamentally in agreement about the presentation of the report. All that had to be done was to find a sufficiently flexible formula which would satisfy all members of the Commission, including Mr.

Hudson, and would enable the Commission to inform the Assembly that it had done effective work.

90. The CHAIRMAN said that the Commission would take a decision on the matter at the next meeting.

The meeting rose at 1.15 p.m.

56th MEETING

Wednesday, 28 June 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 CORDOVA, 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. 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(II) (Item 3(b) of the agenda) (A/CN.4/25) (continued)

CRIME NO. I¹ (continued)

1. The CHAIRMAN considered, upon reflection, that the Commission should decide what was to figure in the general report when that subject came up for discussion. He reminded the Commission that it had taken a decision on the first point, namely the use of armed force.

2. Mr. YEPES said that he had voted for the proposed wording² for lack of a better alternative. He would, however, like a vote to be taken on his proposal which ran as follows: "Crime No. I: Resort to violence in any form in violation of international law, and, in particular, the waging of aggressive war." The aim of his proposal was to make a unilateral and illegal intervention a crime in international law.

Mr. Yepes' proposal was rejected.

¹ See A/CN.4/25, Appendix.

² See Summary record of the 55th meeting, paras. 53 and 74.

3. Mr. HUDSON was under the impression that the Chairman, at the previous meeting, had stated that at that stage the Commission was not engaged in drafting a text. If, however, it was intended that the text approved by the Commission should figure in its report to the General Assembly, it would be necessary for the wording to be reconsidered.

3 a. The expression "the use of armed force" would be sufficient if it was taken to mean the use of the armed force of a State, but the Commission's theory was that the case to be envisaged was that of individuals. A private person might use armed force in several ways; for example, he might attack a bank in order to rob it. It was not enough simply to include such a phrase. It needed to be placed in a certain context. The Commission had in mind the legitimate self-defence of one State against another. In view, however, of the theory that it was the criminal responsibility of individuals which was involved, the text adopted was perhaps rather too general.

3 b. Of course, if it was only a question of giving some guidance to the Rapporteur-General, there was no need to labour the point. On the other hand, if the idea was to be submitted to the General Assembly, he himself would hesitate to assume responsibility for transmitting to the latter a text which had not been very carefully examined from the standpoint he had just referred to.

4. The CHAIRMAN declared that they were dealing only with a general form of words and that the Commission would at a later stage decide what place it should occupy in the report. It was, in fact, simply an expression of the thought of the Commission and not a text. The Commission had taken a decision on the matter by 7 votes to 2 with 3 abstentions and could not re-open the question.³ He himself, in any case, saw no point in re-opening the question.

5. Mr. SPIROPOULOS agreed with the Chairman that the question had already been settled. He thought it might be useful to give a certain amount of additional explanation but hoped that, after that, the Commission would pass on to the next point. The Commission had followed the example of the Nürnberg Charter and had adopted the principle of individual responsibility.

5 a. By "the use of armed force", he had meant the official armed forces of a State. He had at first thought of using the phrase "military forces" but he had been told by an Englishman that it was customary to use the term "armed force", meaning thereby the military forces of a State. It was for that reason that he had used the expression. The use of armed force implied that an order had been given to the latter to do something. That was what President Truman had done the day before and if his act were contrary to international law, he would be responsible for it. If the Commission considered the term incorrect, he would change it. The responsible person, in the words of the Nürnberg Tribunal, was the individual. Although the conduct of a war depended on the State, none the less only individuals had been regarded as responsible.

³ *Ibid.*, para. 75.

5 b. As he had stated in paragraph 61 of his report, Crime No. I: "The text of Crime No. I envisages the case of a *State action* and, consequently, the criminal responsibility under international law of persons acting on behalf of the State. However, nothing excludes the responsibility of private persons if such a responsibility can be construed on the basis of the punishable acts mentioned in Section V below." Action might be taken against all persons who had participated in the crime on the ground that they had assisted the government. The records of the Nürnberg Trial and of all the trials by military tribunal in the various countries showed examples of individuals condemned for having assisted the government. Even though such terms were employed, it was only the individuals who were criminally responsible.

5 c. In the case of Crime No. II: "The invasion by armed gangs of the territory of another State", the position was different. In that case, the reference was to persons acting as members of a gang. In the first crime, the armed force of a State was involved, but in the second one, only acts of individuals.

6. Mr. SANDSTRÖM considered that the question raised by Mr. Hudson was also relevant to other crimes. He accordingly thought it desirable to consider it in connexion with Crime No. I.

7. The CHAIRMAN declared that the Commission, having adopted the text the day before, could not go back on it. The Rapporteur had given a very clear explanation but he (the Chairman) thought all the members of the Commission had already had in mind the ideas he had expressed. It was possible to talk of responsibility of individuals for the reason that those individuals were part of the government. He considered the discussion on the first point to be closed.

8. Mr. HUDSON remarked that the decision taken the day before referred only to the term "in violation of international law". He accepted the Chairman's ruling but the point he had mentioned had never been considered by the Commission. He considered that the Rapporteur had not made clear what was in his mind.

9. The CHAIRMAN remarked that the Commission would come up against the question again in connexion with the crimes to follow, where it was a case of individuals not forming part of the government.

10. Mr. HUDSON asked why there should be no stipulation to that effect in the actual definition of the crime.

11. The CHAIRMAN said he could only point out that the previous day seven members of the Commission had declared themselves satisfied with the text.

12. Mr. SPIROPOULOS thought that there was no real difference of opinion and added that in his new report he would take Mr. Hudson's observations into account and clearly define the terms used.

CRIME No. II⁴

13. Mr. ALFARO thought it would be advisable to

express the opinion enunciated under that heading in clearer terms. The aim and scope of the provision should be clearly stipulated. Furthermore, reference was made to another State, without any reference having been made to a first State.

14. Mr. HUDSON shared Mr. Alfaro's view and added that he felt somewhat uncertain as to the sense to be given to the English word "gang", though he found the French term "bande" very satisfactory.

15. Mr. SANDSTRÖM returned to the question raised by Mr. Hudson in connexion with Crime No. I, since it was also relevant to Crime No. II. There was no clear indication of the conditions under which the crime must be committed in order to constitute a crime under international law. Paragraph 35 of the report stated the following: "The above-mentioned declarations, discussions, resolutions, facts and considerations lead to the *positive* conclusion that the 'code of offences against the peace and security of mankind' is intended to refer to acts which, if committed or tolerated by a State, would constitute violations of international law and involve international responsibility." That thought did not however find expression in the text of the draft Code. The boundary line separating a crime under international law from a crime under municipal law needed to be fixed.

16. Mr. SPIROPOULOS stated that it would be sufficient to add to the text the words: "committed or tolerated by a State".

17. Mr. SANDSTRÖM pointed out that the only word defining the crime was the term "invasion", which was a rather vague one. Would, for instance, an invasion by a gang of smugglers come under the provisions of the text?

18. Mr. SPIROPOULOS replied that, should the State tolerate such an invasion, it would thereby incur international responsibility.

19. The CHAIRMAN asked what was the position in cases where such acts were committed in spite of the State.

20. Mr. SPIROPOULOS considered that, in such cases, the State was only under the obligation of punishing the offenders.

21. The CHAIRMAN thought it would be advisable clearly to state whether the fact of a member of an armed gang penetrating the territory of another State was considered as a crime in international law.

22. Mr. SPIROPOULOS recalled that in paragraph 62 of his report under Crime No. II he had stated: "Whereas, under Crime No. I, a soldier, when employed in a military action, is exempted from criminal responsibility under international law (it is in this way that the various military tribunals, including the Nürnberg Tribunal, have interpreted the 'crime against peace'), according to the definition of Crime No. II, *any person*, member of an armed gang, shall be considered as criminally responsible and consequently punished."

23. Mr. SANDSTRÖM pointed out that nothing of what had just been said figured in the draft Code and

⁴ See A/CN.4/25, Appendix.

that it would be necessary to include an adequate definition of the crime in the latter.

24. Mr. SPIROPOULOS asked for a concrete proposal to be submitted.

25. The CHAIRMAN observed that, in the case of a gang of individuals committing depredations on the territory of a neighbouring State, the crime involved was one under municipal law not covered by the provisions of the definition of Crime No. II.

26. Mr. CORDOVA quoted the example of the Mexican bandit, Villa, who had attacked the village of Columbus in the United States. The Mexican Government had not tolerated that action and it had therefore been a private crime. Crime No. II, however, concerned the criminal responsibility or organs of the State. The definition should begin with the words: "The fomenting or toleration of . . ." as in that of Crime No. III.

27. Mr. YEPES thought that the doubts expressed were all due to the text's lack of clarity. He proposed the following wording: "The invasion of the territory of a State by armed gangs with a view to disturbing international peace or internal order, in cases where the State, in which the gang was organized, authorized or tolerated the invasion".

28. Mr. SPIROPOULOS accepted that proposal.

29. Mr. HUDSON expressed agreement with Mr. Yepes and Mr. Sandström. To talk of invasion of a territory was not enough. The aim of the invasion should be specified. When Villa invaded the village of Columbus it was simply in order to pillage it. The Commission had in mind a political aim.

29 a. Crime No. II must be distinguished from Crime No. I and that could be done by amending the wording of definition No. I so as to run: "The use of the armed force of a State against another State . . ." He considered the French word "emploi" more appropriate than the English word "use". The amendment clearly brought out the distinction between the two crimes.

29 b. Furthermore, it was essential to add to the definition of Crime No. II a phrase making it clear that the invasion must have a political end and he would accordingly suggest the following text: "The invasion of the territory of a State for a political end by armed gangs based on the territory of another State".

30. Mr. SPIROPOULOS found that text acceptable.

31. The CHAIRMAN said he was not quite satisfied, since the element constituting an international crime was not the end pursued but the fact that the State had tolerated the act.

32. Mr. HUDSON replied that, in that case, it would be necessary to punish the individuals forming the governments which had tolerated the act. When General Villa had invaded New Mexico, he had done so to bring back plunder and had not thereby committed an international crime against peace and security. If he had been captured in the United States he would have been tried there and the same would have been true had he been taken in Mexico. If it was considered that the crime consisted in the encouragement or toleration by a State of incursions into the territory of another State

by armed bands based on the first State, the text would need recasting.

33. Mr. YEPES reminded the Commission of the proposal he had made on those lines.

34. Mr. SPIROPOULOS explained that, in the case of the first crime, an act of the State was involved; it was the State which despatched its forces. In the second case, the responsibility of the members of the gang was involved. When there was action by a State, the ordinary soldier was not responsible, whereas in the case of Crime No. II, all the members of the gang were responsible because they had themselves banded together to form the organization. The responsibility of those forming the government could also be involved but that eventuality was provided for in Crime No. X (incitement and complicity: see paragraph 84 of the report).

34 a. It was for the Commission to judge whether it wished to attribute the responsibility for such acts to the members of the governments or to the members of the gang. He had been won over to the second view by consideration of the example of Greece. The persons who had invaded Greece had committed an international crime.

35. The CHAIRMAN considered that a band of criminals invading a State without the support of another State was committing a crime under municipal law. For a crime under international law to exist, either the complicity of the government or a political end was essential.

36. Mr. CORDOVA thought that a very clear distinction must be made between the two crimes. If a gang crossed the frontier in search of plunder, the conclusion would have to be that the crime committed was one under municipal law. There could, of course, be a question of international responsibility if the government of the country from which the gang came had neglected its duty to see that the latter did not cross the frontier. That, however, was a civil responsibility of the State. In the case he had quoted, the United States of America might have claimed compensation from Mexico for its neglect but the criminal responsibility of the members of the Mexican Government would not have been involved. The case would have been quite different if the latter had tolerated, encouraged or ordered an invasion for a political end. In that case, the criterion would be the fact that international peace and order were at stake, and the act would thereby become a crime under international law. The particular crime in question was covered by the definition of Crime No. III.

37. Mr. SPIROPOULOS said that Crime No. III was the fomenting of civil strife. If, however, the State encouraged the formation of gangs to invade a small country; if, for example, North Korea sent gangs into South Korea to overthrow the Government, it would not be a case of civil strife in Southern Korea and such an act would accordingly not come under the heading of Crime No. III. He had himself wondered whether it would be advisable to establish the responsibility of the members of a gang. If the Commission, on the other hand, preferred simply to attribute responsibility to the members of the government which had tolerated the activity of the gang, he was prepared to accept the

Commission's decision. The whole question was a matter of taste.

38. Mr. AMADO agreed in principle with the other members and particularly with Mr. Córdova. He felt that an international jurisdiction was not necessary for the repression of Crime No. II. National tribunals were quite adequate to deal with it. The invaded State could by virtue of its national legislation against illegal entry into the territory, violence etc., arrest, try and punish the authors of the invasion. It could furthermore claim compensation from the State whose nationals the invaders were on the grounds that the latter had not taken sufficient care to prevent the invasion. To call such an act an international crime would only complicate matters and result in the action of the national jurisdiction being hampered by a clash with international jurisdiction. If the crime was to be characterized as an international crime, the end pursued would have to be clearly stated.

39. Mr. el-KHOURY recalled that after the First World War d'Annunzio had occupied Fiume on his own initiative. He had been neither encouraged nor sent by the Italian Government. Although his act was an example of Crime No. II, neither he nor the Italian Government had been held responsible for a crime. On the contrary, his action had been confirmed by the Peace Conference. At the same period, the sheikh of a Syrian tribe had seized part of the Euphrates Valley belonging to Iraq and the Peace Treaty had subsequently confirmed that annexation. Both incidents came under the definition of Crime No. II and yet had not been regarded as international crimes, since it had been considered that the territories belonged by right to the State of which the invader was a national.

39 a. The question was thus a complicated one. It was not the mere fact of invasion which constituted the crime. The text was inadequate on that point and the Commission's discussions would serve as a guide to the Rapporteur for drawing up a new text. He believed he was right in saying that Mr. Spiropoulos did not regard the existing text as final and would have no objection to its being amended.

40. Mr. ALFARO thought that all the members of the Commission held the same view with regard to Crime No. II. They wished to avoid repetition of the crime committed in Colombia in 1932 (Leticia dispute), in Greece and at Fiume.

40 a. It could happen that a government tolerated the organization of an armed band so that the latter might bring about a situation desired by that government. As far as Peru was concerned, the Government of that country would never have invaded a territory recognized by treaty as Colombian, but someone no doubt thought that the creation of a *de facto* situation might enable the question to be reviewed.

40 b. The organization of gangs, the giving of encouragement to them and the toleration they enjoyed when invading the territory of another State for a political end were the things which the Commission was seeking to define. It had not in mind smugglers or

plunderers. He accordingly thought that the text might run:

"The invasion of the territory of a State by armed bands organized in another State which instigates, supports or tolerates the invasion."

One might use the word "incursion" instead of "invasion" or even both terms at once.

41. The CHAIRMAN wished to add in support of what Mr. Alfaro had said that the Disarmament Conference had envisaged that the furnishing of support by any State to armed bands organized on its territory and invading the territory of another State or the refusal in spite of the request of the invaded State to take on its territory all the measures in its power to deprive the said bands of all help, might constitute an aggression (Fifth Fact constituting Aggression).⁵ The Commission was considering whether toleration by or assistance from a government should be regarded as a crime. It might be that the band itself could also be charged with an international crime if its aim was a political one. There could therefore be two crimes and a further article would need to be added.

42. Mr. SANDSTRÖM thought that if the responsibility of the members of the government was given first place, the members of the band could be charged under the heading of complicity. It was in conformity with natural order to give first place to the activities of the government.

43. Mr. HSU had desired some time back to suggest a text to replace that proposed in the report, but since that time certain members of the Commission had expressed the idea he had had in mind. The invasion by an armed band could be considered as an international crime but there were two sorts of invasion: invasion tolerated by the government or taking place at the order, whether explicit or implicit, public or secret, of the government; and secondly, invasion by independent bands receiving no orders or assistance from the government but hoping that their action would be confirmed if successful. It was difficult to draw up a text allowing for those two situations but he suggested the following:

"The invasion by armed bands of a neighbouring State on order of a government or independent of it."

44. Mr. CORDOVA considered the distinction very important. Certain Mexican bandits who had plundered United States territory had sometimes enjoyed the toleration of Mexican frontier officials. When such was the case, and provided only plundering was involved, the State to whom the officials belonged should be liable only to pay compensation. However, in his opinion, there would be a case of crime under international law and the officials in question would be criminally responsible if the invasion had been carried out for political ends.

He proposed the following text:

"The fomenting or tolerating by officials of a

⁵ See League of Nations Document: *Conference for the Reduction and Limitation of Armaments*, Conference Documents, vol. II (1935) IX. 4. p. 681 (Conf. D/C.G. 108) (L.o.N. P. (1935) IX. 4).

State of incursions from its territory into the territory of another State of armed bands with the intention to bring disorder in the latter State.”

45. Mr. SPIROPOULOS said he had put in a considerable amount of work on the text. All the provisions he proposed were mutually interconnected. Whereas the Disarmament Conference had approached the question from the standpoint of the responsibility of the State, the current viewpoint was different. As far as he was concerned there was only one question. His mind, however, was not made up as to whether, in order to constitute an international crime, an incursion must have a political end. He had thought that if an incursion was inspired by a political motive it was without doubt an international crime. If, however, it was decided to add the stipulation “for political ends” the question would then arise as to whether the Commission wished to make provision for the responsibility of the members of a gang or not. If a political crime were involved, in his opinion, the responsibility of the members of the gang would have to be established.

45 a. Basis of discussion No. 2, appearing in the Appendix to his report, ran as follows:

“Any person, acting in an official capacity or as a private individual, who commits any of the acts mentioned in Basis of discussion No. 1 shall be responsible therefor under international law and liable to punishment.”

The second paragraph of the same ran:

“Any person in an official position, whether civil or military” (hence even members of the government) “who fails to take the appropriate measures in his power and within his jurisdiction in order to prevent or repress acts punishable under this Code shall be responsible therefore under international law and liable to punishment.”

Those two provisions constituted a general rule applicable to all the crimes.

46. Mr. CORDOVA said he was aware of the text of paragraph 2. Nevertheless, for officials to be criminally responsible, they would have to have had knowledge of the political aim of the invasion, otherwise it would only be a case of a State failing through neglect to prevent a crime.

47. Mr. SPIROPOULOS replied that in the text in question criminal responsibility was involved. Care must be taken not to draft a bad text. It was clear that the civil responsibility of the State could also be involved.

48. The CHAIRMAN pointed out that the definition of Crime No. II spoke of an invasion by an armed gang. Such an invasion might take place for a political end or for purely private ends. The question of the responsibility of officials was dealt with in Basis of discussion No. 2.

49. Mr. YEPES thought that the discussion was getting out of hand. The Commission had begun by discussing Crime No. II but had switched over to Basis of discussion No. 2. He asked for his proposal to be put to the vote first. He was not opposed to amendments being made to it but, in accordance with the

rules of procedure, he would insist on its being put to the vote.

50. The CHAIRMAN did not consider that the discussion was lacking in coherence. The Commission had just heard an explanation by the Rapporteur on the way in which the texts he had proposed were mutually interconnected.

50 a. He declared the general discussion of Crime No. II to be closed.

51. Mr. YEPES affirmed his willingness to amend his original proposal.

52. Mr. HUDSON thought that Mr. Yepes might find the following wording acceptable: “The encouragement or toleration by a State of incursions by armed bands conducted from its territory into the territory of another State for political purposes”. Mr. Spiropoulos, he continued, would like it to be stipulated that the members of the gang itself, whether encouraged by the State or not, should be regarded as the authors of an international crime. On that point there was a difference of opinion with regard to which the Commission might take a decision. The question was whether the members of gangs committed an international crime when acting on their own behalf but for a political end, or whether an international crime was involved only when the members of a government tolerated or encouraged the activities of the gang.

53. Mr. YEPES accepted the wording proposed by Mr. Hudson.

54. Mr. CORDOVA thought it would be advisable first to decide whether the Commission wished to deal with the question of the individual responsibility of the members of the gang. The Commission could then pass on to the other points.

55. Mr. ALFARO felt that the Commission should bear in mind Mr. Sandström’s remark that, if encouragement by the State was regarded as the essential element of the crime, then the members of the gang could be charged only with complicity. The fact was, however, that the invaders were the principal authors, whether encouraged or not. The question of toleration was another matter.

56. Mr. HUDSON remarked in illustration that Villa had possessed an army. Was it the view of members of the Commission that all the soldiers of that army should have been punished? They had violated United States territory in order to take what they wanted for carrying on the struggle against the Mexican Government. They had been pursuing a political end, but only vis-à-vis the Mexican Government. Did members wish to rule that all those soldiers had been guilty persons?

57. The CHAIRMAN replied that such a case was a crime under municipal law which only became an international crime when, in the first place, a political end was involved and when, secondly, the crime was committed with the complicity of the government. In such a case, one had, on the one hand, the crime of the gang and, on the other, the crime of the government.

58. Mr. HUDSON put forward the hypothesis that Villa had hoped his incursion into United States ter-

ritory would provoke war between the United States and Mexico and thereby bring about the fall of the government he was fighting. In that case, a political end would exist.

58 a. Mr. AMADO thought that great caution should be exercised on the question and that the Commission should carefully consider whether the amendment submitted by Mr. Yepes should be incorporated in the wording of the formula to be found in the report.

59. The CHAIRMAN stated that the Commission had before it two amendments: one submitted by Mr. Yepes and the other by Mr. Hudson. In his opinion, the two texts were very similar in content.

60. Mr. CORDOVA was of the opinion that the Commission could not continue the discussion unless it took a decision on the question put to it by Mr. Spiropoulos; namely whether the Commission wished to consider the problem of the criminal responsibility of the individuals forming a gang. If the Commission decided that it did not wish to do so, then and then only could it proceed to consider the various amendments submitted.

61. Mr. HUDSON thought that Mr. Yepes' amendment could, with some slight modification, prove satisfactory to Mr. Córdova.

62. The CHAIRMAN read out the amendment submitted by Mr. Yepes which was as follows: "The invasion of the territory of a State by armed gangs with a view to disturbing international peace or internal order, in cases where the State, in which the gang was organized, authorized or tolerated the invasion".

62 a. The amendment implied that the crimes would be committed by reason of the fact that the State had authorized them. In his view, that excluded the individual responsibility of the members of the gang.

63. Mr. HUDSON suggested that neither Mr. Yepes' amendment nor his own in any way ruled out the criminal responsibility of individual members of an armed gang.

64. Mr. YEPES stated that his proposal was intended to apply to crimes committed by the State itself, but he certainly did not rule out the criminal responsibility of individual members of an armed gang which involved complicity or connivance on the part of the State to which the gang belonged.

65. Mr. HSU proposed suspending the meeting to enable the various amendments submitted in the course of the meeting to be distributed. He found it impossible to continue the discussion without having before him the exact text of all the amendments.

66. The CHAIRMAN agreed. Before suspending the meeting, he would, however, read out the text of Mr. Hudson's amendment which ran as follows:

"The encouragement or toleration by a State of incursions by armed bands conducted from its territory into the territory of another State for political purposes."

and of an amendment submitted by Mr. Alfaro:

"The invasion of a territory of a State by armed bands organized in another State which instigates, supports or tolerates the invasion."

67. Mr. HUDSON asked the Chairman whether it would not be better to put to the vote first the preliminary question raised by Mr. Córdova as to whether the Commission wished to envisage in the draft code the criminal responsibility of members of armed bands.

68. The CHAIRMAN announced that the text of the preliminary question relating to Crime No. II formulated by Mr. Hudson and the text of the amendments⁶ to the wording of Crime No. II as drawn up by Mr. Spiropoulos, had just been distributed. He requested the Commission to take a decision in the first place on the preliminary question whether the Commission wished to envisage the criminal responsibility of members of armed gangs. It was essential for the Commission to come to a definite decision as to whether it wished, in the draft Code, to envisage the individual criminal responsibility of the members of a gang under international law.

The Commission decided by 8 votes to 4 to envisage the individual criminal responsibility of members of armed gangs.

69. The CHAIRMAN said that the Commission had still to determine the conditions required for a crime under international law to be considered as committed.

70. Mr. SPIROPOULOS considered that all the amendments submitted to the Commission referred to governments and not to individuals.

71. Mr. HUDSON said that after the recent vote, he saw no further point in maintaining his amendment.

72. The CHAIRMAN said that the Commission had just discussed the question of the personal responsibility of the members of an armed gang and it was on that preliminary point that the vote had been taken. The text of the amendments, on the contrary, referred exclusively to States and their responsibility for the activities of the gangs. The question of the responsibility of the armed gang as a whole remained open.

73. Mr. YEPES thought that although the Commission should consider the question of the responsibility of the gangs as a whole he would like first of all to consider the question of the responsibility of States.

74. The CHAIRMAN said that the next point on which the Commission would need to take a decision was that of whether an armed gang committed a crime under international law when invading the territory of another State for a political end or with the intention of creating disorder.

75. Mr. YEPES observed that the question was a very difficult one to decide and would require careful examination. He accordingly suggested appointing a drafting committee to study the problem and to report to the Commission at its next meeting.

76. The CHAIRMAN was not in favour of the suggestion which would, he thought, result in further loss of time. In any case, at that stage the matter before the

⁶ See paras. 42, 43, 51 and 62 *supra*.

Commission was not a question of drafting but a decision of principle.

77. Mr. SPIROPOULOS said that, since the principle had been laid down by the Commission, he would suggest that he himself should draft the text.

78. The CHAIRMAN recalled the fact that the Commission had decided that the head of an armed gang and all the members of that gang should be considered as criminally responsible in the case of an invasion of the territory of another State. The question of aim or motive remained open.

79. Mr. ALFARO thought that the Commission should take a decision on two further points. In the first place, it should decide whether the responsibility under international criminal law of the members of the armed gang was dependent or not on the fact that the invasion had been tolerated by the State from whose territory the invasion was conducted. Secondly, it should decide on the question of the responsibility of the State itself in the event of such an invasion.

80. The CHAIRMAN declared that he did not follow the first point raised by Mr. Alfaro. It seemed quite clear to him that the criminal responsibility of the members of an armed gang was in no way dependent on the question whether the State tolerated the invasion or not.

81. Mr. HUDSON remarked that there were, in fact, two distinct cases: an invasion made with the authorization of the State and that made without such authorization. In both those cases, however, the criminal responsibility of the members of the armed gang was involved.

82. The CHAIRMAN agreed with the distinction drawn by Mr. Hudson. In his opinion, the Commission had already decided in the affirmative that the international criminal responsibility of members of an armed gang was involved when the State authorized the invasion. It remained to take a vote on the question whether such responsibility was involved even when the State had not consented to the invasion.

The Commission decided by 7 votes to 4, with 1 abstention, that the criminal responsibility of members of an armed gang was involved, even when the State had not consented to the invasion.

83. The CHAIRMAN said that one last question remained to be decided in connexion with the crime, namely, the conditions to be fulfilled for the responsibility of the members of the gang to be involved. He would put to the vote the question whether such responsibility existed only when the invasion had a political end.

The Commission decided by 11 votes, with 1 abstention, that the criminal responsibility of the members of an armed gang existed only when the invasion had a political end.

84. The CHAIRMAN stated that, by its last vote, the Commission had decided that it considered that a crime under international law on the part of the members of an armed gang could be said to exist only when the invasion had a political end. He wondered whether

it would not be a good idea to add the provision that the end might be that of disturbing the peace.

85. Mr. ALFARO thought it was sufficient to say that the invasion should "have a political end".

86. The CHAIRMAN, agreeing with Mr. Alfaro, proposed that the Commission should consider the texts relating to the responsibility of the State and laying down the criminal responsibility of the government, as for example in the amendment proposed by Mr. Córdova relating to the responsibility of the officials of a State fomenting or tolerating an invasion conducted from the territory of that State against the territory of another State by an armed gang with the intention of bringing about disorder in the latter State.

87. Mr. HUDSON did not think that the Commission could consider the amendment at that stage. It covered the same facts as those dealt with in Basis of discussion No. 2, paragraph 2 (A/CN.4/25, Appendix), which was due to be studied by the Commission later.

88. Mr. YEPES did not agree with Mr. Hudson. Basis of discussion No. 2 concerned the responsibility of persons in an official position, whether civil or military, but not that of the State. It referred therefore to complicity but not to the direct and immediate responsibility of the State, which was the question that the Commission should consider.

89. Mr. SPIROPOULOS explained that the question of complicity was catered for under Crime No. X.

90. The CHAIRMAN thought the Commission was faced with a question of principle—namely, should a provision be inserted in the code "specifying that the State which authorizes or tolerates an invasion is guilty of a crime". The Commission had already decided that, for the purposes of the code, the responsibility of the State meant the responsibility of those taking part in the government.

91. Mr. AMADO thought that the question of the complicity and responsibility of persons in official positions should be discussed when the Commission came to consider Basis of discussion No. 2. He proposed that they should pass to the consideration of Crime No. III.

92. Mr. CÓRDOVA said he would like to explain why he had voted as he had. When the preliminary question had been put, he had voted against the members of an armed gang being regarded, in the draft code, as criminally responsible under international law. As the majority of the Commission had voted in favour, however, he had then voted for the limitation stipulating that in order to constitute a crime under international law the invasion must have a political end.

93. Mr. HUDSON and Mr. BRIERLY announced that they had voted in the same manner.

94. The CHAIRMAN asked the Commission whether it wished to pass forthwith to the consideration of Crime No. III or whether it wished to introduce into the draft code a new crime relating to the complicity of the State.

The Commission decided by 11 votes to proceed to consider Crime No. III.

CRIME No. III⁷

95. Mr. HUDSON thought that the formulation of the crime in the draft code was too vague. To illustrate why he thought that the text should be more clearly worded, he would give a few examples. Let it be supposed that during a period of political unrest and uncertainty in France, he made a public speech in New York in which he expressed the hope that a particular party would win the elections, adding that, if it did not, he hoped that the party would seize power by force. Let it further be supposed that he had a large number of friends in France who gave wide publicity to the speech. In such a case, he might be said to be engaged in fomenting civil strife in France. On the other hand, he would be speaking in a country which guaranteed all its citizens freedom of speech and of expression of thought, rights which he wished to exercise. Thus, in speaking in New York, he was acting perfectly in accordance with the laws of his own country. However, the draft Declaration on Rights and Duties of States stipulated in article 4 that it was the duty of every State to prevent the organization within its territory of activities calculated to foment civil strife in the territory of another State. He thought that, having spoken in a personal capacity, he could not be accused of having organized an activity of that kind.

95 a. To give a further example: let it be supposed that he wrote 100,000 letters to persons residing in France whose addresses he had been able to obtain, suggesting that they should take part in a particular seditious movement. There again he would be acting in a personal capacity and, once more, his right to freedom of expression would have to be taken into consideration. In the United States of America, there was very strong opposition to the thesis that such individual activity could be regarded as involving the personal responsibility of the author of the letter.

95 b. He thought that the Commission should decide to clarify the wording of Crime No. III in order clearly to determine the cases of responsibility under international law which could be covered by the code. Accordingly, he would like to propose the following definition for Crime No. III: "The encouragement or toleration by officials of a State of the organization within its territory of activities calculated to foment civil strife in the territory of another State."

96. Mr. SPIROPOULOS remarked that Mr. Hudson had raised a number of problems relating to the fomenting of civil strife in another State and had drawn certain conclusions from the draft Declaration on Rights and Duties of States which he had then applied to the case of an individual. The draft Declaration, however, applied only to States and had been drawn up with sole regard to States. If the Commission wished to know how he, as Rapporteur, had approached the question of the fomenting of civil strife in another State it would need to look at the code as a whole. He had based his code not only on the draft Declaration on Rights and Duties of States but also on the Convention on the Prevention

and Punishment of the Crime of Genocide and had, in fact, modelled his formulation of Crime No. VIII on the actual wording of article II of the said Convention. The case of all the crimes to be found in his code had already been discussed at length by the General Assembly during consideration of the Convention on Genocide and of the draft Declaration on Rights and Duties of States, and he had drawn upon that discussion in his draft code, which dealt with the criminal responsibility of individuals.

96 a. As for the examples quoted by Mr. Hudson, a letter written in a personal capacity to a very large number of friends should not be regarded as an incitement to an international crime. On the other hand, were Mr. Hudson to publish an article in a newspaper calling for help to be given to a particular seditious movement in another country that would, he thought, constitute an incitement to international crime. The Convention on the Prevention and Punishment of the Crime of Genocide, in article IV, paragraph (c) described direct incitement in public as a punishable act. If Mr. Hudson, therefore, published such an article he became liable to legal action. Even in countries where freedom of speech and thought existed, there was, he felt, a limit placed on the expression of thought.

96 b. With regard to persons guilty of fomenting civil strife, he would ask the Commission to refer to paragraph 1 of the commentary given in his report on the definition of Crime No. III (A/CN.4/25, para. 63) and which ran as follows: "As a rule, fomenting of civil strife in another State is carried out through State action. In that case, the State officials connected with such fomenting shall be considered responsible. If, on the other hand, the fomenting be due to private activities, the responsibility of the State officials of the State from which those private activities emanated will result from their *failure* to prevent or repress such fomenting." He accordingly considered that, according to his formulation of Crime No. III, the crime of fomenting civil strife could perfectly well be committed by a private individual.

97. Mr. AMADO regretted that Mr. Spiropoulos had not included the question of propaganda among his Bases of discussion. If it were possible to include such activity amongst those constituting a crime, the cases quoted by Mr. Hudson could be covered. The question of propaganda had been amply discussed during the drafting of the Convention on Genocide and it would, he thought, be possible to introduce that idea into the draft code, among the provisions of Crime No. X for instance. It might perhaps also be possible to formulate a clearer definition of Crime No. III. However, if the Commission did not share that view, he was prepared to accept the existing definition of Crime No. III with the addition of a specific reference to the provisions relating to Crime No. X.

98. Mr. HUDSON confessed that he had not been greatly impressed by the explanations given by Mr. Spiropoulos in connexion with the Convention on Genocide. Genocide was a crime under international law wherever it was committed. Civil strife or warfare

⁷ See A/CN.4/25, Appendix.

carried out within a State, on the other hand, was not a crime under international law and was a by no means uncommon occurrence. Paragraph 1 of the commentary to Crime No. III, which Mr. Spiropoulos had just quoted, had nothing to do with the case of private individuals acting in a personal capacity. He still could not help thinking that the definition given by Mr. Spiropoulos of Crime No. III was too general and too vague and for that reason he had submitted a more precise text.

99. Mr. ALFARO declared himself in favour of Mr. Hudson's proposal. It would be very dangerous to draw up that article of the code in such a manner that it could be interpreted as attributing individual responsibility in cases of fomenting civil strife in another State. Individual acts, such as those quoted by Mr. Hudson, could not be considered as crimes under international law. Crime No. III referred solely to the responsibility of States. Mr. Hudson's proposal accordingly seemed quite satisfactory. There remained, however, the case of fomenting civil strife through the direct action of governments, of which there were numerous examples. The Commission could express its idea quite clearly by adding to Mr. Hudson's proposal a few words bringing in the notion of direct action. He wished to emphasize again the fact that it would be dangerous to talk of the responsibility of private persons in such a case, and that only the responsibility of States was involved.

100. Mr. SPIROPOULOS was sorry to hear members of the Commission using arguments which belonged to the pre-Nürnberg period. He thought that the Commission should decide that the fomenting by an individual of civil strife in another State was a crime to be included in the code. One often heard it alleged that a banker, general or industrialist bore no responsibility in the event of a civil war, but he felt obliged to point out that, in his opinion, such a view was outdated. He had before him the collection of judgments passed by tribunals in Germany on war criminals and on those who had participated in war crimes. Those regarded as having participated in crimes included officers, officials, industrialists, judges, doctors, hospital attendants, executioners etc. Two German industrialists—i.e., civilians—had, in fact, been tried and condemned to death for having supplied poison gas for extermination camps. Although the tribunal had realized that there was no question of the direct participation of those industrialists in the crime of extermination it had nevertheless considered the indictment and condemnation to death of the industrialists justified by the sole fact that the men had been aware of the purpose for which the gas they delivered to the camps was intended.

101. Mr. HUDSON thought that the examples given bore no relation to the case before the Commission.

102. Mr. SPIROPOULOS said that, on the contrary, the two cases were closely inter-related. If the acts in question were committed by States, the government and authorities of the State concerned were criminally responsible under international law and likewise, if the acts were committed by private individuals, those persons were responsible.

103. Mr. CORDOVA said he would like to ask Mr. Spiropoulos a question. If he himself, as a Mexican citizen, went to the United States and endeavoured to organize a revolution in Mexico, he would be endeavouring to disturb the peace in Mexico. Would that activity then come under the heading of an international crime? There was a difference between the two cases under discussion.

103 a. He would also like to remind the Commission, in that connexion, that the United Nations Charter was opposed to any intervention in cases of domestic conflict within a State.

104. Mr. AMADO pointed out that civil war could be fomented in another State by other means than direct acts of war. It could be done, for instance, by supplying one of the parties with arms or by carrying out propaganda on its behalf. There was a further case in which a political party organized action in support of its adherents in another State. He would like to know what were the cases in which fomenting of civil war could be said to exist within the meaning of the code. In that respect, it was unfortunate that no definition was given in the code of the term "fomenting". It seemed to him, therefore, that it was first necessary to consider and give a definition of the term "fomenting of civil strife" before the Commission could decide on the question of the responsibility of States or of individuals. The word "strife" was of primary importance in the definition of crime.

105. The CHAIRMAN inquired whether the Commission wished again to take a decision on the preliminary question whether individuals could be held responsible for the fomenting of civil strife.

106. Mr. HUDSON agreed that the Commission should be consulted on that point. Following Mr. Amado's remarks, he had compared the English and French texts and had observed that they did not seem to be identical. The English text spoke of "civil strife" which was not the same thing as the French phrase "guerre civile". A better expression must be found.

107. Mr. SPIROPOULOS, replying to Mr. Amado, thought that, when drawing up a code, one could not envisage extreme cases but only categories of cases. Undoubtedly extreme cases differed in a number of details, but one could not include them in a code. Such a code could be based only on a legally defined category or on a limited number of categories and it was for the judges to interpret the provisions of the code and to determine how and to what extent they were applicable to extreme cases.

108. The CHAIRMAN asked the Commission whether it wished to envisage drawing up a text defining the meaning of "fomenting civil strife".

109. Mr. HUDSON noted that not many members had so far expressed any views on the question of fomenting of civil strife. Before the Commission took a decision on that matter he would like to hear the view of other members.

110. The CHAIRMAN agreed.

The meeting rose at 1 p.m.

57th MEETING

Thursday, 29 June 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 CORDOVA, 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. 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(II) (Item 3(b) of the agenda) (A/CN.24/25) (*continued*))

CRIME NO. III (*continued*)¹

1 - 5. The CHAIRMAN explained that the Commission would need to decide, as it had done in the case of Crimes Nos. I and II, whether it wished the act in question to be regarded as a crime under international law when committed by private individuals, or whether it wished to attribute criminal responsibility only to constitutionally responsible rules.

6. Mr. SPIROPOULOS said he would like to add a word of explanation. The fundamental principle behind his draft code was that of the responsibility of every individual. To examine that problem, it was necessary to forget previously acquired notions and the classical theory of the responsibility of the State. Close examination of the evolution of the problem since the war revealed that in the Charter and judgment of the Nürnberg Tribunal, in the charters of the local military tribunals and, above all, in the draft Convention on the Prevention and Punishment of the Crime of Genocide the responsibility of the individual, whether he was a public official or a private person, was the very basis of the whole system.

6 a. In none of the above texts was the word "State" to be found. The crime was defined without any indication of the author. In the Convention on Genocide, for instance, which was the first international criminal code, article I confirmed that genocide was a crime under international law, while article II defined genocide as any of the following acts: killing members of the group, etc. In no case was there any reference to the author of the crime.

¹ See A/CN.4/25, Appendix.

6 b. At the General Assembly, the French delegation had submitted a proposal stipulating that genocide could be committed only by the ruler of a State or with his consent.² In point of fact, what had occurred in Germany had only been possible because such was the will of the State. The General Assembly had refused to accept that point of view, and according to the Convention on Genocide, any person might be held criminally responsible.

6 c. The Commission would, of course, be within its rights in deciding that such a solution was not a good one, and it could even reject it; but recent developments in international law had evolved the principle that individuals, whether ordinary persons or public officials, might always be held responsible. He had had no alternative but to act in accordance with this evolution, otherwise the Commission might have reproached him with presenting the classical theory.

6 d. If each crime were examined, it would be seen that, when political crimes were involved, they were of necessity tolerated or committed by public officials. It had been maintained that civil war was not a crime, yet the latest practice of the United Nations was to regard it as such. The author of an international crime was not necessarily a ruffian, and a man responsible for fomenting a civil war in order to overthrow the government might well be a highly respectable member of society. If, for instance, it was admitted that any violation of the rules of war was a crime, then the confiscation, by a prison camp warder with a passion for stamp collecting, of letters addressed to prisoners in order to keep the stamps on those letters, was a war crime. By an international crime was meant a crime which municipal legislation did not punish, but which it was not desired to leave unpunished. National courts could not always be trusted to condemn the criminal, and accordingly the need was felt for an international tribunal and an international criminal law. The term "international crime" must be given its true significance and not another meaning. If the Commission decided to disavow the principles adopted by the United Nations, it was free to do so, just as it was free to endorse those principles.

7. The CHAIRMAN recalled that for the moment, the Commission's task was to define the crimes.

8. Mr. AMADO considered that no one could have submitted a better text than that of Mr. Spiropoulos. Although he himself was not satisfied with the definition of Crime No. III, he could not propose a better text. He would like his colleagues to submit definite proposals and, if none were forthcoming, would vote for the existing definition of the crime.

9. Mr. HSU was not sure he had understood Mr. Spiropoulos aright. If he had interpreted his meaning correctly, he saw no difference of opinion between the Rapporteur and the other members of the Commission. All of them admitted that an international crime was personal in the sense that its author should be punished, and that it could be committed independently of the government, though in the majority of cases it took

² See Official Records of the General Assembly, third session, part I, 6th Comité, Annexes, document A/C.6/211, page 14.

place at the order or with the complicity of the latter.

9 a. In the case of Crime No. II, they had reached the conclusion that the order of or toleration by the government was not necessary, the Commission thereby seeking to emphasize that the crime might be committed independently of the government. But there were other crimes which could not be committed without the consent of the government.

9 b. Crime No. III was a different case. Individuals could commit it at the order of their government or in connivance with it. Provision should accordingly be made for both cases. He felt that Crime No. III should be more strictly defined. The crimes covered by the Convention on Genocide were horrible crimes which should be punished in every case. On the other hand, it might happen that the crime defined here did not call for a punishment. They must not go too far.

9 c. The wording submitted by Mr. Hudson: "the encouragement or toleration by the officials of a State of the organization on the territory of that State of activities designed to foment civil war on the territory of another State" struck him as a good definition, and he would support it, but it did not allow for the case where the State itself directly organized the fomenting of civil war.

9 d. He accordingly proposed the following text: "The organization by a State of activities designed to provoke civil war in another State or the encouragement or toleration of such activities on its own territory."

9 e. The CHAIRMAN observed that the wording proposed by Mr. Hsu appeared to be outside the subject with which the Commission was dealing, since it referred only to a crime committed by the State.

10. Mr. HSU replied that Mr. Hudson's proposal stipulated that, in the event of fomentation of civil war in another State, the criminal responsibility of private individuals was involved only when those individuals acted in connivance with the government. There were, however, cases of individuals fomenting civil war in another State on the order of their government.

11. The CHAIRMAN pointed out that, according to Mr. Hsu's wording, an act committed by individuals acting independently of their government would not be a crime under international law.

11 a. He would like to ask the Commission whether it wished to include in the code the crime of fomenting civil war committed by private individuals, or whether it intended to limit it to crimes committed by the State. He would therefore put to the Commission the following question:

Does the Commission consider that the fomenting of civil war in another State is a crime under international law only when committed by governments? or does it consider that the crime of fomenting civil war in another State may also be committed by private individuals acting on their own account?

11 b. He would request the Commission to observe a certain discipline in its discussions, and to refrain from reverting to points which had already been settled or anticipating on discussions which would take place later

when other points came up for consideration. He saw no need for the Commission to discuss the question he had just raised, since all the members were fully aware of what was involved.

The Commission decided by 7 votes to 5 that the fomenting of civil war in another State by private individuals acting on their own account should not be considered a crime under international law under the terms of the draft code.

12. The CHAIRMAN noted that the Commission had decided that the fomenting of civil war could not be regarded as an international crime unless committed by constitutionally responsible rulers, and was not an international crime when committed by private individuals acting on their own account.

13. Mr. YEPES found the definition of Crime No. III as formulated insufficient and not clear enough, even with the changes that had been made. He therefore proposed the following wording:

"The actual fomenting of civil war in a State by the authorities of another State or by private individuals and the failure of the authorities of the latter State to repress and punish the said acts of encouraging civil war."

14. Mr. SPIROPOULOS asked if the Commission would not allow him to draft a text in the light of the opinions expressed during the discussion and of the decisions of principle taken by the Commission.

15. The CHAIRMAN thought that the Commission had sufficiently expatiated on the point, and that fresh points of view were hardly likely to emerge. The Commission should press on with its business. The least that the Commission could do was to draw up a list of crimes against the peace and security of mankind, but at the rate it was going, it would not even succeed in completing that task. He excused himself for having thus to call the Commission to order and request it to expedite its discussions.

16-19. He recalled that the Commission had just decided that it did not regard Crime No. III—i.e., the fomenting of civil war in another State—as a crime under international law when committed by a private individual. He asked the Commission to leave it to the Rapporteur to include in his report a wording which the Commission would have full opportunity of considering and discussing when that report was submitted for its approval.

CRIME NO. IV³

20. The CHAIRMAN called upon the Commission to consider Crime No. IV: "Organized terroristic activities carried out in another State".

21. Mr. SPIROPOULOS referred to the existence of a Convention for the Prevention and Punishment of Terrorism which had been drafted in 1937 but had not been ratified.⁴ There also existed a draft Statute for the

³ See A/CN.4/25, Appendix.

⁴ See *Historical Survey of the Question of International Criminal Jurisdiction*, United Nations publication, Sales No.: 1949.V.8, p. 88, footnote 2.

Creation of a Criminal Chamber of the International Court of Justice.⁵ In that draft, which had been prepared by Professor Pella, there were also provisions for the repression of terroristic activities. He had given much thought to the question whether he should base his draft on either of these texts and had finally decided to make it more general in character. His definition spoke of "organized terroristic activities", thereby implying that the terroristic activities of isolated individuals not belonging to any organization did not come under the heading of Crime No. IV. The term "organization" also covered political parties and terroristic activity could hence also be carried on by a party. He thought, however, that in order to be regarded as a crime under the terms of his draft code, such activity must be carried out by an organized group. Only under such circumstances could terroristic acts be considered as offences against the peace.

22. Mr. el-KHOURY considered Crimes Nos. III and IV very similar, and wondered whether they could not be amalgamated into a single crime—for instance, by altering very slightly the wording of Crime No. III, which could run as follows: "the fomenting of civil war in another State or organized terroristic activities carried on in another State". In both cases, the crimes could be considered as crimes under international law, provided they were international in their scope and consequences. When, however, it was merely a question of terroristic activities carried on in a single State and having only national implications, such activities would constitute a national crime and should, in his opinion, be judged by a national tribunal. It seemed to him impossible to make all organized terroristic activities international crimes to be judged by an international tribunal. The tribunal would then have to deal with thousands of cases of terroristic activities committed in a very large number of States by nationals of those States. The Commission would need to take account of that fact in any conclusions it arrived at.

23. Mr. AMADO agreed that there was a difference between national and international terroristic activities, but also thought that civil war and terroristic activities could not be covered by a single text embracing both crimes. He was accordingly in favour of keeping the two separate articles, the one relating to the fomenting of civil war and the other to terroristic activities. Did the Rapporteur consider that organized terroristic activities—i.e., terroristic activities taken in the collective sense—could be assimilated to terroristic acts properly so-called? The "act" was the technical term in criminal law, and there was a shade of meaning between "activity" and "act": activities could be preparatory measures, but acts were the accomplishment of a deed.

24. Mr. FRANÇOIS found the word "terroristic" extremely vague and could give it a precise meaning only by linking it up with the provisions of the 1937 Convention on the Prevention and Punishment of Terrorism, where a definition was given which struck him as pertinent. Unlike Mr. el-Khoury, he did not believe

that the two crimes Nos. III and IV could be amalgamated.

24 a. Quoting the second paragraph of the commentary added by Mr. Spiropoulos to the definition of Crime No. IV in his report (page 26), he said he did not understand how terroristic activities of single persons could be regarded as not affecting peace. He thought rather that even an isolated individual could constitute a threat to peace when he carried on terroristic activity. He accordingly proposed the deletion of the word "organized" from the definition of Crime No. IV.

25. Mr. HUDSON recognized that there was, in fact, a certain analogy between Crime No. III and Crime No. IV, since the question of the criminal responsibility of isolated individuals under international law arose in both cases. He thought that if the Commission wished to adopt the same point of view with regard to Crime No. IV as it had adopted with regard to Crime No. III, it would be sufficient to redraft the definition of Crime No. IV to bring them into line. He accordingly proposed the following wording:

"The encouragement or toleration by a State of the organization on its territory of activities directed against another State and calculated to create in the latter's territory a state of terror in the minds of particular persons, or a group of persons or the general public."

25 a. In drafting the text, by which he intended to exclude persons acting alone, he had reproduced the words of article 1, paragraph 2 of the Convention on Terrorism. The definitions in that convention seemed to him excellent.

26. Mr. YEPES confessed that he did not grasp the meaning of Crime No. IV as drafted by Mr. Spiropoulos. What was meant by "organized terroristic activities"? It would be necessary to give a definition of those terms and to indicate, in addition, by whom those activities were organized and where. The definition as it stood struck him as very confused.

27. Mr. CÓRDOVA enquired of Mr. Hudson whether the text he had just proposed would cover an isolated terroristic act such as the assassination of the Head of a State.

28. Mr. HUDSON replied that the text proposed was in conformity with the decision taken by the Commission with regard to Crime No. III.

29. The CHAIRMAN said that if this implied that the text excluded acts committed by individuals on the territory of a State other than their own, he would be unable to accept that limitation. The acts committed by assassins like those who had murdered the King of Yugoslavia in France should come under the code.

30. Mr. HUDSON replied that such activity was perfectly well covered by his text. The assassination of King Alexander of Yugoslavia at Marseilles was perpetrated by the Ustashi and their terroristic activity, directed against the Head of their own State and culminating in an assassination committed on the territory

⁵ *Ibid.*, p. 75.

of another State, had been tolerated by a foreign government.

31. Mr. HSU noted that Mr. Hudson's text mentioned the fact of "encouragement or toleration", and enquired whether those terms also included organization.

32. Mr. HUDSON replied that the term "encouragement" included the idea of organizing.

33. Mr. BRIERLY drew attention to the fact that Mr. Hudson's definition referred to States, and enquired whether the latter would accept the substitution of the terms "government of a State" to avoid the confusion which had arisen on a number of previous occasions.

34. Mr. HUDSON agreed to this change in his text.

35. Mr. BRIERLY said that, in that case, he would support the text submitted by Mr. Hudson.

36. Mr. SPIROPOULOS felt he should point out that the text proposed by Mr. Hudson was contrary to the general plan of his report. Under the terms of his draft code, private persons who assassinated a king would be committing an international crime.

37. Mr. HUDSON remarked that the case was similar to that on which the Commission had taken a decision when considering Crime No. III.

38. The CHAIRMAN confessed that he did not understand the analogy which Mr. Hudson had just drawn with the decision taken by the Commission on Crime No. III. While accepting the latter decision, namely, to limit Crime No. III to the acts of constitutionally responsible rulers, he could not accept such a decision with regard to Crime No. IV. The act of the assassins of Marseilles was, he thought, by virtue of its international repercussions, a crime under international law, even if the assassins had not been acting in liaison with any government.

39. Mr. AMADO thought that, according to the wording of the text submitted by Mr. Hudson, crimes committed in the form of terroristic acts were international crimes if they were committed with the intention of endangering human life. That seemed to him a limitation of the scope of terroristic acts. He enquired what was the meaning of the expression "a state of terror in the minds of . . ."

40. Mr. HUDSON explained that, in his definition, he had reproduced the actual words of the Convention on Terrorism—namely, "acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public". His text was only a suggestion for the benefit of the Rapporteur, who was free to use it or not.

41. Mr. FRANÇOIS shared the view expressed by the Chairman that the assassination of the Head of a State, even if committed by a private individual acting on his own account, was a crime under international law. The Convention on Terrorism also considered the assassination of Heads of States as a crime under international law. Mr. Hudson's text, in its existing form, accordingly represented a retrograde step.

42. Mr. HUDSON thought that Mr. François was

mistaken. He would like to remind the Commission that the Convention on Terrorism in no way stipulated that the assassination of Heads of States was an international crime. The Convention simply invited each of the High Contracting Parties to "make the following acts committed on his own territory criminal offences if they are directed against another High Contracting Party and if they constitute acts of terrorism within the meaning of article 1". In other words, the Convention on Terrorism invited the Contracting Parties to enact municipal legislation for the repression of such acts. It considered such acts therefore, from the point of view of a national crime and of municipal law, whereas the Commission was at that moment engaged in defining the crime under international law.

43. Mr. CORDOVA thought that terrorism was a crime in itself, and that certain acts of terrorism constituted crimes under international law, whereas others definitely came under the heading of crimes under municipal law. In his opinion, the assassination of King Alexander at Marseilles, which had as a matter of fact, been punished under French law, was a crime of a national character.

44. Mr. HUDSON read article 1 of the Convention on the Prevention and Punishment of Terrorism, which reaffirmed the principle of international law in virtue of which it was the duty of every State to refrain from any act designed to encourage terrorist activities directed against another State, and to prevent the acts in which such activities took shape. The other provisions of the Convention referred only to the duty of States to establish national legislation for the repression or punishment of terroristic activities. The draft code should stipulate that if the constitutionally responsible rulers of a State violated the obligation referred to in article 1 of the said Convention, they would be criminally responsible under international law.

45. The CHAIRMAN remarked that the Commission's task was to establish an international criminal code. The Convention on the Prevention and Punishment of Terrorism had not established such a code, and had confined itself to inviting States to introduce penal provisions in their national legislations. The Commission was not, however, bound by the provisions of that Convention. It was free to transpose a crime of a national character into the sphere of international law, and should indeed do so, in so far as terroristic acts disturbed international peace. He thought it would be very difficult for the Commission to deny that the terroristic activity of a band had the character of an international crime when it was liable to disturb international peace. He wondered whether the Commission was really of the opinion that a terroristic crime did not exist from the point of view of international law if such a crime were not prepared or committed in connivance with a government.

46. Mr. CORDOVA thought that an act of terrorism committed by individuals was a crime which should be prevented and punished by ordinary law. There might quite possibly be no intention whatever of disturbing international peace.

47. The CHAIRMAN thought that terrorism always constituted a threat to peace. One could take as an example the case of the head of a government who, in order to prevent war, took certain repressive measures against warmongering persons or groups and was then assassinated on the territory of his own country by terrorists of his own country against whom he had just taken repressive measures. Such an assassination might have terrible consequences and even give rise to war. An act of that nature was undoubtedly a crime coming within the sphere of international law, although committed entirely on the territory of a single State.

48. Mr. AMADO considered that, for a crime under international law to exist, an international element was essential. In the case of terroristic activity, the international element was, he thought, constituted by the fact that such activity was directed against another State. In his view, the assassination of Jaurès by a Frenchman could not possibly be classed as an international crime. The assassin had moreover been judged and condemned under French law. It was impossible to talk of an international crime if the terroristic activities were not organized in one country and directed against another.

49. The CHAIRMAN contested the need for an international element. He gathered that Mr. Amado supposed that terroristic activities came within the sphere of international law only when those activities were not carried on entirely in a single country. That was an external criterion. There was, however, also an internal criterion which was as follows: did social disturbance result from that terroristic activity? If such social disturbance was confined to a single country, clearly a domestic crime only was involved; but if the disturbance extended beyond the borders of the country in which the terroristic activity was carried out, then it was international law which applied. The problem could be summed up as follows: The criterion determining whether terroristic activity was of a national or international character was the extent of the consequences of the crime.

50. Mr. AMADO asked the Chairman whether he considered the assassination of Ghandi to be a national or an international crime. That assassination had revolted the whole of mankind, and in that sense had had international consequences. It was not certain, however, that the assassination had had the effect of creating disturbances outside India. If he judged according to his own feelings, then the assassination of Ghandi was an international crime; but if he viewed it from the point of view of the code that the Commission was at the moment considering, he could not regard that assassination as an international crime.

50 a. The situation with regard to the crime of genocide was quite different. That crime was aimed at the destruction of an entire group, and an international crime was involved even if the acts were committed on the territory of a single country.

51. The CHAIRMAN replied that there were cases in which terroristic crimes produced international disturbances and others in which they did not. Did Mr.

Amado wish to exclude all terroristic activities of an individual nature because some of those activities did not disturb international peace and order?

51 a. He felt he must again consult the Commission on the question whether it wished to exclude from the code, and consequently from the category of international crimes, terroristic acts of a purely personal nature, organized or committed without the intervention of the constitutionally responsible rulers.

The Commission decided, by 6 votes in favour, to exclude such acts.

52. The CHAIRMAN asked the Commission if it wished to include in the code acts of terrorism by individuals acting on their own account and having no connexion with the constitutionally responsible rulers.

The Commission decided, by 4 votes in favour, to include such crimes.

53. The CHAIRMAN regretted to state that, as a result of the decisions just taken, the draft code no longer corresponded to his idea of an international code.

54. Mr. el-KHOURY asked what judicial bodies would judge cases of terroristic activity.

55. The CHAIRMAN replied that the question was not under discussion by the Commission.

56. Mr. el-KHOURY added that, to his mind, an international crime should be judged by an international tribunal. He had frequently voted for the inclusion in the code of a crime which, in his opinion, was not an international one, with the idea that that crime would be punished by an international tribunal.

57. The CHAIRMAN again drew attention to the fact that the point was not at that moment under discussion. He thought that the Commission would rely on the Rapporteur to draft a text taking into account the opinions expressed and decisions taken during the discussion.

58. Mr. BRIERLY requested that the Rapporteur should take account in particular of Mr. Hudson's proposal.

59. Mr. ALFARO said he wished to explain the way in which he had voted. He had voted against the inclusion among international crimes, of individual terroristic acts organized or committed without the intervention of the constitutionally responsible rulers. Such an inclusion would have had the effect of bringing into the sphere of international law all acts committed as a result of internal conflicts in the various States. Owing to that inclusion, the assassination of the President of Bolivia, for example, would have had to be considered as an international crime.

60. Mr. HUDSON said he would like to draw the Rapporteur's attention to article 3 of the Convention on the Prevention and Punishment of Terrorism, as that article seemed to him to be a very interesting one. After reading the article in question, he added that a case might arise, for instance, in which an activity was pursued on the territory of a State A with a view to the carrying on of terroristic activity against a State B, whereas the actual terrorist act might be committed on

the territory of a State C. He hoped that the Rapporteur would take account of the example he had just quoted, together with article 3 of the Convention on Terrorism, and the problem of jurisdictions arising out of it.

61. Mr. SPIROPOULOS begged the Commission not to expect the impossible of him. He was asked not only to take account of opinions expressed in the course of discussion and of the decisions taken by the Commission, but also to take into consideration the provisions of the Convention on Terrorism. It seemed to him that that Convention laid down certain rules which went less far than the principles or the ideas formulated by the Commission. He therefore requested the Commission to leave him free to draft his report bearing in mind solely the views and opinions which had emerged during the Commission's discussions.

The meeting rose at 1 p.m.

58th MEETING

Friday, 30 June 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 J. BRIERLY, 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. 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(II) (Item 3(b) of the agenda) (A/CN.4/25) (continued)

1 - 3. Mr. SPIROPOULOS said that in his report he had confined himself to enumerating a certain number of crimes; there might, of course, be others. He had received from Mr. Pella a memorandum on the question before the Commission. In Part III of that memorandum (A/CN.4/39) was enumerated a list of crimes, which would enable them to decide whether further

crimes should be added to the list contained in the draft Code.

4. The CHAIRMAN approved of that suggestion, since it would enable the Commission to distinguish between crimes under international law and crimes under municipal law. He believed that all the members of the Commission had received a letter from the United Nations Educational, Scientific and Cultural Organization requesting that the destruction of works of art, historic monuments etc. should be included among international crimes. The Secretariat would draw up a list of all the possible crimes and the Commission would then take a decision.

5. Mr. HSU thought that subversive activities should be added to the list of crimes; they might be sub-divided into three categories:

1. The fact of a State carrying on subversive propaganda against another State or encouraging or tolerating such activities in its territory.
2. The fact of a State giving moral, political or economic support to subversive elements in another State or encouraging or tolerating such activities in its territory.
3. The fact of a State maintaining, in another State, agents instructed to overthrow the established order.

The meaning of the word "subversive" would, of course, have to be defined.

5 a. He had not accepted the proposal to add to the text submitted for Crime No. I the threat of the use of armed force; that was not because he was fundamentally opposed to the suggestion, but because of the manner in which it had been presented. He proposed the words: "The fact of a State applying measures of psychological or economic coercion in respect of another State."

5 b. The preparation of plans for a war of aggression was not mentioned in the report. Mr. Spiropoulos had told him that that was a kind of preparatory act, and that such acts came under Definition No. X. He considered that the preparation of plans was distinct from material preparation. It should therefore be given a separate place. For Crime No. V he proposed the words: "The fact of a State planning a war of aggression."

6. The CHAIRMAN observed that that proposal was in conformity with Mr. Spiropoulos' suggestion that a certain number of crimes not included in his report should be enumerated.

CRIME No. V¹

7. Mr. SPIROPOULOS pointed out that the manufacture of weapons was generally carried on by private enterprises and that the same problem again arose: should the directors of the factories concerned be held responsible, or State officials? The idea underlying the draft was that a crime was involved and that any person whatever, whether an official or not, might be responsible for it.

¹ See A/CN.4/25, Appendix.

8. Mr. BRIERLY observed that the text did not refer to the use of prohibited weapons, which was a war crime, but to their manufacture. He thought it highly dangerous to treat the manufacture, trafficking and possession of such weapons as crimes. Indeed, as long as war remained a possible danger, a State should be in a position to take counter-measures against any violations that might be committed by another State. During the last world war, the Nazis had not used war gases because they knew that the Allies had stocks which would be used if they themselves began to make use of gas. Would it be a crime to be prepared for counter-measures against a possible violation of a convention?

9. Mr. HUDSON had before him a list of international agreements prohibiting the use of certain weapons. The question of gas had been dealt with in the Geneva Protocol of 1925,² which, he observed, had been ratified by over 25 States. A further example was the St. Petersburg Declaration of 1868,³ prohibiting the use of the dum-dum bullet, which had been followed by The Hague Conventions of 29 July 1899 and 18 October 1907.

9 a. He agreed with Mr. Brierly that the definition of Crime No. V was contrary to existing practice which only prohibited the use of certain weapons. Under Crime No. V, however, the manufacture, trafficking and possession of those weapons was prohibited. But many States wished to be in a position to use those weapons if they were used by another State. Several States had made reservations to the 1925 Protocol. The French Republic, for instance, had declared that the Protocol was only binding in respect of States which had ratified it. On the basis of the international agreements at present in force it was not possible to say that the manufacture of weapons the use of which was prohibited was an international crime, even if it were encouraged by the State.

10. Mr. FRANÇOIS agreed with Mr. Brierly and Mr. Hudson. The prohibition in the draft went too far. No Government could accept it. It was the use, not the manufacture, of chemical gases which was forbidden. States wished to be able to take counter-measures against any possible violation of the agreements concluded. Besides, chemical gases could be used for lawful purposes. As for the atomic bomb, its manufacture and possession could not possibly be prohibited until full control had been established. The prohibition of its use—but only its use—would in itself be an advance.

10 a. With regard to the arms traffic, the Commission might be guided by the 1925 Convention on the international trade in arms.⁴ That was what the Netherlands Government had done in its reply to the questionnaire addressed to governments (A/CN.4/19/Add.1). He pointed out that so far the Commission had not con-

sidered the replies from governments to the questionnaire that had been sent to them.

10 b. Article 4 of the draft code appearing in the reply from the Netherlands Government defined the following crime:

(a) "The transfer, sale or distribution of arms, munitions or explosives to any person who does not hold such licence or make such declaration as may be required by domestic legislation;

(b) "Exportation of arms, munitions or explosives without such licence as may be required by domestic legislation."

That clause might be discussed when the Commission considered the list of crimes to be drawn up in accordance with Mr. Spiropoulos' proposal.

11. Mr. YEPES supported the views of Mr. Brierly, Mr. Hudson and Mr. François. That article might indeed be a hindrance to the preparation of legitimate defence measures. Moreover, he did not think that the article should be adopted until control of all armaments had been established. An article of that nature might be an encouragement to ill-intentioned States.

12. Mr. SPIROPOULOS remarked that in principle the majority of the Commission was opposed to the article. Although members of the Commission considered the article dangerous, he would like to point out that he took the opposite view; the article appeared in the Pella draft prepared for the International Association of Penal Law.

12 a. At first sight, he had taken the same view as Mr. Brierly, Mr. Hudson, Mr. François and Mr. Yepes; but he had then seen that there was a reason for the article. If the Convention were to be applied, it did not present any danger; indeed, if a Government manufactured or possessed weapons once the Convention entered into force, it would be committing a violation and other Governments would also have the right to manufacture them.

13. Mr. FRANÇOIS pointed out that it would then be too late.

14. Mr. SPIROPOULOS thought that if States were aware of a violation of the Convention at the time of signature, they would not destroy the weapons in their possession. It was nowhere stated that previous control should not be established. In theory, the crime in question should be included in a Convention postulating international control. In his opinion, the committing of one of the crimes by a signatory would release the other signatories. In the chapter devoted to reprisals it could be seen that the latter were still provided for. The Convention must be applied within the framework of all other international conventions. If the members of the Commission believed that the article was dangerous and should be deleted, he would not oppose them.

15. Mr. FRANÇOIS was not satisfied with the explanations given by the Rapporteur. It was, of course, evident that if one party did not fulfil its obligations the other party was released, but, he repeated, it would then be too late.

² Protocol of 17 June 1925 for the prohibition of the use in war of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare.

³ Declaration of 11 December 1868 prohibiting the use of explosive bullets in war.

⁴ Geneva Convention of 17 June 1925 on the control of the international trade in arms, ammunition and implements of war.

16. Mr. ALFARO believed that nearly all the members of the Commission were in favour of deleting the article. It was known that the only reason why the discussions on the atomic bomb had been unsuccessful was that the Soviet Union had refused to submit to international control. At the present stage of the atomic bomb question, the article might be considered as showing disapproval with regard to the Western States. The Commission should not attempt to adopt a text which gave the impression that it had the atomic bomb in mind.

17. Mr. SANDSTRÖM favoured the deletion of the article.

18. Mr. el-KHOURY proposed limiting the text to the words: "The use of weapons prohibited by international agreements"; the use of weapons should remain a crime, but he did not believe that manufacture, trafficking or possession should be regarded as such.

19. The CHAIRMAN explained that use of such weapons would come under war crimes.

The Commission unanimously decided to delete Crime No. V.

CRIME NO. VI⁵

20. Mr. SPIROPOULOS said that he had nowhere discovered any definition of that crime. He had based his text both on recent and on remote experience. He had had in mind the rearmament of Germany after the First World War. At that time troops had been raised and trained in a demilitarized zone. He had thought it useful to include a provision on that subject in the draft, since such measures constituted a danger to peace.

21. Mr. HUDSON wondered who would be the authors of the violations mentioned. He supposed that the intervention of a State would be necessary. If it were desired to include the persons responsible for the action of the State, that must be stipulated. The term "international treaties" was very general; if there were a treaty between two States, was its violation necessarily a crime against international peace and security? Moreover, the article appeared to refer to the provisions of various peace treaties. But such treaties were frequently imposed, and thus sometimes contained permanent provisions which it was known in advance would not be permanent. In the case of a treaty other than a peace treaty, or of a general treaty to which a large number of States had acceded, the crimes referred to must be defined. But the attempt made in 1933 had been unsuccessful and he did not see how it could be repeated in the present world situation.

22. Mr. el-KHOURY thought that Crime No. VI would arise only in the case of defeated nations on which a treaty was imposed. In those circumstances the implementation of the treaty was imposed by force. The existence of such a crime under international law would only encourage the law of force at the expense of the force of law. Where a stronger State had imposed a treaty limiting the forces authorized in the territory of

the weaker State, it was for the victor to see that the treaty remained in force, but he must not be given another weapon based on international law with which to maintain the vanquished in a state of subjection. He did not think it would be wise to retain that crime on the list of international crimes. There was no natural law obliging a weak State always to remain weak. He was opposed to the inclusion of Crime No. VI.

23. Mr. YEPES agreed with Mr. el-Khoury. But if the crime were included, it should not be limited to the cases enumerated; there might, indeed, be other cases such as the violation of clauses concerning demilitarized zones.

24. Mr. SPIROPOULOS said that he had relied on existing practice. The Treaty of Versailles contained provisions of that nature. At the present time, according to the international law deriving from the United Nations Charter, if it were desired to amend a treaty the approval of the States concerned was required. Unilateral amendment of a treaty was not admissible under international law. Bulgaria had wished to denounce the Peace Treaty, but the matter had been brought before the General Assembly and the International Court of Justice at The Hague. He did not see how it could be maintained that the rearmament of Germany, for instance, had not affected peace. The war of aggression in 1939 had resulted from that violation of the Treaty of Versailles. The definition he proposed was very broad and included neutralized territories. If the Commission thought that that crime did not affect peace or did not wish to retain it for other reasons, he would not press the point.

25. Mr. SANDSTRÖM considered that in view of the very rapid changes in the world political situation, what now appeared to be an attempt against the peace might tomorrow appear to be the contrary. It would be dangerous to make crimes of the acts enumerated in the definition of Crime No. VI.

26. Mr. HUDSON pointed out, as an example, that the United States was a party to an international agreement providing for the absence of fortifications along its frontier with Canada, which had been concluded in 1817.⁶ That agreement had always been observed by both parties and was not a peace treaty that had been imposed. If one of the States concerned thought that it should fortify its frontier, it must first obtain amendment of the 1817 Agreement. That agreement had already been amended on several occasions. If it were not possible to amend it, he did not think it could be said that the construction of fortifications would be an international crime. It might be a serious matter if there had been no previous agreement, but the violation of an international agreement was not necessarily a crime under international law.

27. Mr. SPIROPOULOS pointed out that if the works were carried out with a view to an attack, and if that attack took place, it would be preparation for a war of aggression and the provision would be useless, since

⁵ See A/CN.4/25, Appendix.

⁶ By exchange of notes at Washington on 28 and 29 April 1817.

the act committed would come under the definition of Crime No. I. But a State might rapidly increase its forces and another State might feel itself in danger. That was what the definition of Crime No. VI provided against. If the Commission believed that definition to be unnecessary he would not press the point.

28. Mr. el-KHOURY proposed that in the definition the words "international treaties defining the war potential" should be replaced by the words "conventions on disarmament which may be concluded by the United Nations to regulate armaments". The violation of such agreements might then be considered as an international crime, but there must be no general reference to treaties, because the object of some of them might be to humiliate one of the parties.

29. Mr. SPIROPOULOS thought he should recall that the rearmament of Germany had created a threat to the peace and security of mankind.

30. The CHAIRMAN thought there was no doubt that violation of a treaty was an international offence and might, if it disturbed the peace, become an international crime. It was on the basis of such charges that most of the sentences had been pronounced at Nürnberg. If the Commission did not include such acts in the list, that would not mean that it did not consider them as crimes. They must not give the impression of reverting to pre-Nürnberg doctrine. The violation of a treaty was at least an offence and in certain cases it was a crime under international law.

31. Mr. el-KHOURY thought that that problem could be considered when the Commission studied the validity of treaties, particularly treaties imposed by force. He observed that it was a matter of particularly grave violations, which were offences against the peace and security of mankind; the matter deserved some consideration.

32. Mr. AMADO was in favour of the definition of Crime No. VI, and wished to explain that if he had not been momentarily absent, he would have voted for the definition of Crime No. V, since he had not been convinced by the arguments advanced for its deletion.

32 a. As it was a matter of international agreements—i.e., of instruments establishing a rule of law on the political level—the violation of a treaty should be transferred from the political level to that of international crimes. Fortification works might be a threat to peace and security. The Commission had received its terms of reference from the General Assembly at a time when it was thought that the world was moving towards peace. There had therefore been a desire to establish rules to prevent a recurrence of war. He would vote in favour of Definition No. VI.

33. Mr. ALFARO agreed with the Chairman and Mr. Amado. The Commission had met to consider offences against peace and security, but objections might be raised against the text of the definition. It should be stated that "the violation of a treaty on the limitation of armaments or of any other treaty concluded with a view to ensuring international peace and security" was an international crime. Greater precision would entail a danger of some omission.

34. The CHAIRMAN supported Mr. Alfaro's proposal. One of the purposes of the San Francisco Charter was the limitation and regulation of armaments and he quoted article 11, paragraph 1. If a general treaty were concluded, it would be a fundamental provision of the United Nations; any act in violation thereof would be an international crime. The best formula might still remain to be found, but the principle seemed obvious. International society was like national society; a time would come when the carrying of weapons would also be prohibited in international society. He thought it would be a retrograde step to omit the definition in question.

35. Mr. SANDSTRÖM believed that if a general convention on disarmament was envisaged, the insertion of a provision against violations could be left to the signatories.

36. Mr. FRANÇOIS remarked that the words "any other treaty", proposed by Mr. ALFARO, were extremely vague.

37. The CHAIRMAN pressed the point, since the Commission had a certain responsibility before international public opinion as a whole. He considered it difficult to maintain that the violation of a treaty on disarmament was not an international crime.

38. Mr. FRANÇOIS observed that that was true of a general treaty but not of other treaties.

39. The CHAIRMAN recalled that people had been hanged for that crime at Nürnberg.

40. Mr. BRIERLY and Mr. HUDSON did not think that people had been hanged at Nürnberg for violating a disarmament treaty; they had been hanged for preparing and carrying out a war of aggression and that crime was already covered by definitions Nos. I and X.

41. Mr. SPIROPOULOS said that in his opinion Mr. el-Khoury had relied on a thesis which was incorrect in international law, namely, that a treaty imposed by force was not valid. It was the first time he had heard that view expressed. An imposed treaty was perfectly valid; the peace treaties were valid, although they were concluded under pressure. According to the principles of the United Nations Charter, a treaty could not be unilaterally amended.

41 a. They were speaking of violations which constituted a danger to peace and security. To take a concrete example, Hitler had formed an army and France had wished to intervene because that fact in itself, which was a violation of a treaty, constituted a danger for her. England had not permitted her to intervene and France had stated that she could not do so alone; the result had been the Second World War. A further example might be quoted: Bulgaria had violated the provisions and military clauses of the peace treaty. Was it believed that that was not a threat to Greece? If Bulgaria were not behind the iron curtain, there would perhaps have been intervention. It was said that that was a matter between two States, but it affected the whole world. It was sufficient for a State to feel itself threatened, since if it felt itself threatened, the result might be war. Peace between two States was inter-

national peace. It was a mistake to believe that violation of the military clauses of a treaty did not affect the peace.

41 b. The re-militarization of demilitarized territories was a threat to peace. There was a tendency to say that the death of some people in a State would be a threat to peace if it were a case of genocide, whereas the invasion of a demilitarized territory would not. In the definition in question, he had brought together everything that could be included and he pointed out that the list was not exhaustive. The wording might be "the violation of military clauses . . . including clauses concerning." If a State had no military forces it did not make war. Consequently, the constitution of such forces must be prevented.

42. Mr. YEPES said that at the start he had expressed an unfavourable opinion regarding the inclusion of Crime No. VI. But to show his goodwill he would vote for it in principle.

43 - 44. The CHAIRMAN thought it impossible to omit the principle concerned. He recognized that there might be drafting difficulties, but they did not seem to him to be insuperable. He therefore proposed that the Commission should suspend the meeting, as was usual in such cases, so as to allow time for consideration of generally acceptable means for reaching a solution of the difficulties which had arisen during the discussion.

45. Mr. SANDSTRÖM only wished to say a few words; Crime No. VI was intended to cover violations of the military clauses of international treaties, such violations being committed for the purpose of aggression and constituting an offence against the peace and security of mankind. He thought that the same result might be obtained without it being necessary to specify a particular crime under the terms of Crime No. X, which might be combined with Crime No. I. Crime No. X would thus cover the preparatory acts and Crime No. I the act itself.

46. Mr. HUDSON thought that the Rapporteur had wished to include in the Code a principle applying specially to the violation of military clauses of international treaties. He had tried to determine which treaties the Rapporteur was referring to, but had been unable to reach any conclusion. He wondered whether such a principle was appropriate in the Code, and suggested that the Commission should instruct the Rapporteur to study the matter further and perhaps clarify his idea.

47. Mr. HSU approved of Mr. Hudson's suggestion, which he considered an excellent one. He thought it difficult to take a decision on Crime No. VI as at present drafted, although he approved of the principle.

48. Mr. ALFARO proposed that the definition of Crime No. VI should be drafted as follows:

"The violation to the military clauses of any treaty or agreement designed to ensure international peace and security; such clauses including, but not being limited to, those concerning:

(a) The strength of land, sea and air forces;

(b) Armaments, munitions and war material in general;

(c) Presence of land, sea and air forces, armaments, munitions and war material;

(d) Recruiting and military training;

(e) Fortifications."

He thought that the text he had suggested might serve as a basis for discussion.

49. Mr. BRIERLY observed that Mr. Alfaro's text provided no criterion for defining or determining the treaties or agreements in question. In those circumstances how could a distinction be made between the treaties and agreements referred to, and any other treaties and agreements? And in that case how could it be determined that an offence had been committed against the peace and security of mankind?

50. The CHAIRMAN replied that it would be for the courts responsible for judging cases to decide whether a crime had been committed under the terms of the code.

51. Mr. BRIERLY considered that that was a most dangerous view. The judge could not be left to determine whether a particular treaty or agreement had been violated under the terms of Crime No. VI.

52. Mr. HUDSON agreed that Mr. Alfaro's text was not sufficiently precise.

53. Mr. ALFARO replied that in his opinion the military clauses contained in treaties and agreements were sufficiently clear in themselves. For example, if a treaty provided that a certain State was forbidden to build fortifications, with a view to preventing any danger of aggression by that State, and if it nevertheless built fortifications, then there was clearly a violation. In his view the criterion was merely as follows: If a treaty contained clauses prohibiting a particular class of weapon or limiting the military forces of a State, that State violated the provisions as soon as it failed to respect them. From that moment, there was a violation under the terms of Crime No. VI.

54. The CHAIRMAN recalled that a court had always to decide the purpose and the result of an act. If the purpose of the act could not be clearly determined and the judge remained in doubt, he must pronounce an acquittal. He thought it difficult always to determine the purpose of an act. From that point of view Mr. Alfaro's proposal seemed to him to lack precision. The court's task would be difficult, but it would be carried out.

55. Mr. HSU asked Mr. Alfaro if his proposal also referred to disarmament treaties.

56. Mr. ALFARO replied in the affirmative.

57. Mr. HSU asked why Mr. Alfaro had not made that clear.

58. Mr. ALFARO thought it evident that disarmament treaties also came within the scope of his proposal. Moreover, he thought that the code should include a provision to the effect that violation of any prohibitions or limitations of armaments included in treaties constituted an offence against the peace and

security of mankind. In reply to a further question by Mr. HSU he said that his text referred not only to multilateral, but also to bilateral treaties.

59. Mr. HSU replied that the principle of Crime No. VI was a sound one but he feared that there would be very serious difficulties when it came to practical application. In the case of a bilateral treaty, for instance, could the code be applied and would Crime No. VI be committed if a violation of the treaty by one or other of the contracting parties did not constitute a threat to the peace and security of mankind? He considered that the definition of Crime No. VI should be rather more accurately drafted in that respect.

60. Mr. BRIERLY asked the Commission to imagine that the Treaty of Brest-Litovsk was still in force. If a violation of the terms of that Treaty were now committed, could it be considered as a violation under the text of Mr. Alfaro's proposal?

61. The CHAIRMAN doubted whether the Treaty of Brest-Litovsk had been valid. He did not think that the distinction made by Mr. HSU between bilateral and multilateral treaties, with regard to the application of Crime No. VI, was relevant. Moreover, he reminded Mr. Hsu that the United Nations Charter made no distinction between multilateral and bilateral treaties and that in the case being considered by the Commission no such distinction could be made either. In the matter of violation of military clauses, as in all other matters, peace was indivisible.

62. Mr. SPIROPOULOS said that if members began to quote examples, as certain statements seemed to suggest, there would be no end to it, since an infinite number of examples might be given. He wished to quote one: The Convention on Genocide referred among other things to the killings of members of a national, ethnical, racial or religious group. Suppose that 3 German-Swiss were killed by French-Swiss. If the 3 German-Swiss were not killed because they belonged to a group, it was murder under ordinary law; but if they were killed as members of a group it was a case of genocide. How was it possible to determine whether it was a common crime or a crime under the terms of the Convention on Genocide?

63. The CHAIRMAN said that it was undoubtedly genocide if the 3 German-Swiss were killed because they belonged to a group. The question whether it was murder in the form of genocide or murder under ordinary law was for the judge to decide. All crimes raised the same problem for judges, even on the national level.

64. Mr. HUDSON said that reference had just been made to the United Nations Charter. Chapter VII of the Charter contained no provision relating to the violation of treaties. That Chapter dealt with action with respect to threats to the peace, breaches of the peace and acts of aggression. He added that there were very many other treaties which contained no provisions regarding violation.

65. The CHAIRMAN observed that every violation of a treaty was not a threat to the peace and security of mankind. But a violation such as that of the Treaty of Versailles committed by Hitler in occupying the left

bank of the Rhine would, in his opinion, come under the provisions of Chapter VII of the United Nations Charter. If the Charter had then been in existence, the Security Council would have been able to intervene. Another example was the recent one of the invasion of Southern Korea. In that case there was violation of the undertaking establishing the line of demarcation along the 38th parallel. That violation was an offence against the peace and security of mankind. The United Nations had recognized it as such, and the United States of America had intervened in pursuance of a resolution adopted by the Security Council.

It seemed to him essential that some provision such as Crime No. VI should be incorporated in the draft Code before the Commission.

66. Mr. HSU remarked that all violations of multilateral treaties which endangered the peace and security of mankind were crimes. But he insisted that the matter took on quite a different aspect in the case of bilateral treaties, and in spite of all the explanations given he still wondered whether the principles of Crime No. VI could be applied to bilateral treaties. He therefore asked that the definition of that crime should be amended.

67. The CHAIRMAN pointed out to Mr. Hsu that for the time being the Commission was not concerned with the drafting of texts, but with principles to be inserted in the Code. He thought it necessary to say if the Commission did not retain Crime No. VI in its Code, it would surprise the world, which would not understand the reasons for that omission. Violations of treaties were extremely numerous. He recognized that there were limits which might be set with regard to violations of the military clauses of a treaty. It was true that it would be difficult to define them with all the requisite precision; but there would always be difficulties of that nature and if the Commission were going to reject article after article merely because of drafting difficulties, it would do better not to consider the preparation of a code. He asked the Commission to have confidence in the Rapporteur, who would certainly find a formula that took account of the views expressed during the discussion.

68. Mr. HSU supported the proposal to instruct the Rapporteur to re-examine his text.

69. The CHAIRMAN asked the Commission to decide whether it intended to retain Crime No. VI in the Code or not.

70. Mr. HUDSON thought that the discussion had not been sufficiently clear for directives to be given to the Rapporteur, who had heard extremely divergent opinions. He did not, however, think it necessary to take a vote. A vote always meant isolation and he, for instance, did not wish to be isolated from the other members of the Commission by a vote. He hoped that the Rapporteur would succeed in finding a formula that was satisfactory to all members.

71. The CHAIRMAN said that in asking the Commission to take a decision he had not intended to isolate Mr. Hudson. He might equally well say that if a vote were taken he himself would be in danger of being in the minority and consequently isolated. Therefore he

did not insist on a vote and he asked the Rapporteur whether the discussion had been sufficiently clear for him to reconsider the draft and reach conclusions taking account of the views expressed.

72. Mr. SPIROPOULOS replied that the discussion, though somewhat confused, would enable him to draft his report.

CRIME NO. VII⁷

73. The CHAIRMAN thought that after that exchange of views the Commission could pass on to the examination of Crime No. VII: "The annexation of territories in violation of international law".

74. Mr. HUDSON said that on reading the definition of Crime No. VII he had thought that it would give rise to great difficulties. First of all, he thought he must state that in his opinion the annexation of territories in violation of international law constituted a crime which could only be committed by a Government; but in addition, he wondered whether there were clear and easily applicable principles regarding the annexation of territories. Annexations varied very greatly between one case and another. Did the definition of Crime No. VII as at present drafted apply, for instance, to the case of a group of citizens of country B preparing, in country A, the annexation of that country to their own? Were there any precise rules which could be applied to the case referred to under Crime No. VII?

75. Mr. FRANÇOIS said that he felt the same doubts as Mr. Hudson. Up to the present there was no international rule excepting that which prohibited any premature annexation, i.e., any annexation made before the conclusion of a peace treaty as, for example, the annexation of the Transvaal. That rule was not sufficiently clear and precise for incorporation in the Code. There were no rules of international law prohibiting any annexation without the consent of the population. In his opinion it would be dangerous to include Crime No. VII in the Code.

76. Mr. BRIERLY thought that the wording of the text was too general and too vague. Would it apply, for instance, to the annexation of a part of Greenland to Norway? At the time it had arisen, that case had been brought before the Permanent Court of International Justice, which had carefully examined it and declared that the annexation was contrary to the laws and agreements in force.⁸

No one, however, could say that the Norwegian authorities had committed a crime under international law.

77. Mr. YEPES said that he wished to make a general statement on the subject. First of all, he wished to recall that the United Nations Charter provided in Article 2, paragraph 4, that Members of the United Nations should refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other

manner inconsistent with the Purposes of the United Nations. That was a rule which invalidated the argument advanced by certain members of the Commission that no international rules existed.

77 a. But there were other rules. The principle of prohibiting any annexation of territories in violation of international law was a principle of inter-American law which had always been affirmed by the Pan-American Conferences since 1889 and which the American States adhered to in their mutual relations. That principle was one of the main pillars of Pan-Americanism. If the American States had succeeded in making America the continent of peace, that was largely due to the express condemnation of conquest of territories and to the non-recognition of territorial advantages acquired by force. The American States had always hoped to see that inter-American principle universally applied. He had therefore been pleased to see the principle included in the draft Code. But in its present form the text was inadequate. It did not cover annexations such as those made by certain modern States by means more subtle than force. He recalled the *Anschluss* of Austria to Germany, which had been formally condemned by the Permanent Court of International Justice (Advisory opinion on the Austro-German Customs Regime established by the Protocol of 19 March 1931).⁹ Real annexations were continually taking place under cover of so-called customs unions or the establishment of puppet governments, whose mission was to obey the orders of a foreign Power. The technique of modern imperialist States had made great progress in devising methods of camouflaged annexation, which left a semblance of national sovereignty and territorial integrity to a small State, though constituting mere annexation in the full sense of that term.

77 b. To cover such cases he proposed the insertion of the words "direct or indirect" in the definition of Crime No. VII, which would then read as follows:

"The direct or indirect annexation of territories in violation of international law".

78. Mr. ALFARO said that he doubted the accuracy of the recent statement to the effect that there was no rule prohibiting annexation. There were two kinds of territories: those which governed themselves and those which did not; for some of the latter the trusteeship system had been established under the United Nations Charter, it being understood that such territories would one day obtain their independence.

78 a. A very clear example of the view held in certain quarters with regard to non-self-governing territories was the attitude of the Union of South Africa towards South-West Africa. That was a case of disguised annexation. The General Assembly of the United Nations had affirmed that the era of annexations was past and that no annexation should be permitted in future except with the consent of the population. As early as 1889, the American Republics had adopted a resolution condemning all annexation and declaring null and void

⁷ See A/CN.4/25, Appendix.

⁸ *Legal Status of Eastern Greenland*, 5 April 1933, Permanent Court of International Justice, Series A/B, Fascicle No. 53.

⁹ *Customs Régime between Germany and Austria*, Advisory Opinion, Permanent Court of International Justice, Series A/B, Fascicle No. 41.

any cession of territory effected under the threat of war or the pressure of armed force. He thought that in view of the existing texts, the Commission should take the position that no annexation was permissible even if there was no direct use of force, and that any such annexation constituted a crime under international law, even if the definition of Crime No. VII had to be amended.

79. Mr. HSU was in favour of the principle of Crime No. VII and hoped that the Rapporteur would be able to clarify its terms.

80. Mr. SANDSTRÖM considered the formula used by the Rapporteur too vague, but he thought it difficult to find a more precise one. Such a formula might perhaps be found on the basis of the terms of articles 9 and 11 of the draft Declaration on Rights and Duties of States. It might be difficult to find an entirely satisfactory formula, but it was desirable that such a clause should be included in the Code to cover all cases of annexation of countries or territories, even without the use of force.

81. Mr. FRANÇOIS recalled that after the last war France, Belgium and the Netherlands had carried out frontier adjustments without consulting the populations. He wondered whether such adjustments would come under the term "annexation".

82. Mr. YEPES did not think that the case mentioned by Mr. François constituted a violation of international law.

83. Mr. LIANG (Secretary to the Commission) thought that the definition itself might give rise to misunderstandings with regard to annexations that took place in time of peace. He thought it would be possible to remove that difficulty by establishing a close connexion between Crime No. VII and Crime No. I. If that connexion were established, the objections to the definition of Crime No. VII would be removed.

83 a. It might be suggested that in order to constitute a crime under international law an annexation must be carried out through the use of armed force, with a view to destroying the territorial integrity of another State. As he had pointed out at the 55th meeting (para. 68), Article 10 of the League of Nations Covenant had referred to such an attack against a State with a view to annexation of its territory. Annexations carried out in pursuance of the clauses of a peace treaty or frontier adjustments, would not in themselves constitute violations of the rules of international law. He therefore proposed that Crime No. VII should be so defined as clearly to show its connexion with Crime No. I.

84. Mr. HSU considered Mr. LIANG's proposal an excellent one; he suggested going even further and considering whether a connexion of that kind might not be established between Crime No. VII and Crimes Nos. II, III, IV and V. A territory could, indeed, be annexed without the use of force. Consequently it was not only a connexion with Crime No. I, which covered the use of armed force, that must be established.

85. Mr. AMADO thought that if a connexion was established between Crime No. VII and Crime No. I and if the use of force was the characteristic feature of

Crime No. VII, then annexation by peaceful means would not be an offence against the peace and security of mankind. The question should be very carefully considered and the characteristics of annexation ascertained. They were not only the use of armed force, but also the use of other means. An annexation without the use of force was, in his opinion, as much an offence against the peace and security of mankind as an annexation undertaken by the use of force. Finally, he recalled that the possibilities of annexation without the use of force were extremely great, as examples in recent years had shown only too well.

86. Mr. el-KHOURY thought that annexations without the use of force were also violations of international law. As an example he recalled the events which had recently taken place in Azerbaijan, which was an integral part of Iran. In that province a movement had sprung up for annexation to the Soviet Union. The movement had been suppressed; but if Iran had not suppressed it, if Azerbaijan had been united with the Soviet Union, and if the latter had agreed to that union, would that disguised annexation, which had taken place without the use of force, have been considered as a crime under the terms of the Code? Moreover, the Commission must consider whether to exclude cases of annexation without the use of force in which the populations were not consulted, and also cases in which the populations wished to be annexed to another territory. He recalled that in Macedonia the population was divided, one part desiring union with Yugoslavia and the other union with Bulgaria. Finally, in India, it could be seen that the governments of India and Pakistan had carried out annexations by government declaration and without consulting the populations. He wished the Commission to state clearly what it considered to be the essential elements of the crime, so that directives could be given to the Rapporteur.

87. Mr. LIANG (Secretary to the Commission) wished to supplement his previous remarks. When he had first spoken he had not wished to suggest that Crime No. I should be brought into line with Crime No. VII. He had merely wished to suggest that Crime No. VII should be maintained in its present form and a connexion established with Crime No. I. He seriously doubted whether an annexation without the use of force or without the threat of such use could be considered as a crime under international law. It was very difficult to stipulate the cases in which annexation constituted a threat to peace and security of mankind. It was true that in certain cases it might constitute a violation of the right of self-determination of peoples. He thought that Mr. Hsu's proposal also to establish a connexion between Crime No. VII and Crimes Nos. II to V went rather too far.

88. Mr. HSU thought that there was no essential difference between Mr. Liang's views and his own. He was convinced that the use of force and threats must be covered by the Code, but if the other means of annexation were also to be included, he did not believe it would be sufficient to establish a connexion only between Crime No. VII and Crime No. I. The instances mentioned by Mr. el-Khoury strengthened his con-

viction that even cases in which there was no use of force should be condemned.

89. Mr. SANDSTRÖM proposed the following text: "The annexation of territories by the threat or use of force for an aggressive purpose, or otherwise, in a manner incompatible with the right of a State to independence".

90. Mr. YEPES recalled that he had also proposed an amendment (para 77 b, *supra*).

91. The CHAIRMAN thought that the situation was similar to that which the Commission had discussed in connexion with Crime No. VI. There was no doubt that certain annexations, with or without the use of force, were contrary to international law. He recalled the doctrine enunciated in 1932 by Mr. Stimson, the American Secretary of State, according to which any annexation by force was a violation of international law and such annexations should not be recognized. The difficulty was to determine whether or not there was an offence against the peace and security of mankind. He reminded the Commission that the principle of the right of self-determination of peoples was finding increasing acceptance in international law and was invoked by certain governments when they were about to violate it. That had been the case when Sudetenland had been annexed by Hitler. He thought it would be useful to insert the words "direct or indirect" in the definition of Crime No. VII, as proposed by Mr. Yepes. It was the duty of the Commission to state that there were cases in which annexation was a crime, whether it was carried out directly or indirectly or even in a disguised form. A decision must be taken; but in any case he thought it inadmissible for the Commission not to state that annexation was a crime. The Stimson doctrine did not make annexation a crime. The Commission should state that any annexation which was a threat to the peace and security of mankind was a crime under international law.

92. Mr. BRIERLY thought that the Commission was in general agreement on that point and that it was now only a question of drafting. Mr. Sandström's proposal should be taken into consideration by the Commission, which should ask the Rapporteur to take account of it and to prepare a new draft. The Rapporteur should also take account of Mr. Liang's proposal to establish a connexion between Crime No. VII and Crime No. I.

93. Mr. ALFARO approved of Mr. Brierly's proposal and the text submitted by Mr. Sandström. He merely wished to add the following words: "or against the will of the inhabitants of the territory".

94. The CHAIRMAN did not think it necessary to take a vote. The Commission had accepted the principle formulated in Mr. Sandström's text, as amended by Mr. Alfaro. It had also heard the proposal of Mr. Yepes. The Commission could rely on its Rapporteur to prepare a new draft.

95. Mr. SPIROPOULOS thought that the discussion had again been rather confused for the preparation of a new draft. He requested the appointment of a small sub-committee consisting of Mr. Hudson, Mr. Alfaro and himself. That would facilitate the preparation of a

text reflecting all the views expressed, and which would be more easily acceptable by the Commission.

96. There being no objection, the CHAIRMAN declared the proposal adopted.

CRIME No. VIII ¹⁰

97. The CHAIRMAN asked the Commission to turn to the consideration of Crime No. VIII. He thought that crime should also be examined in connexion with cultural genocide.

98. Mr. ALFARO said that the question of cultural genocide had been discussed at length by the Sixth Committee of the General Assembly and by the General Assembly itself. It had been decided that it was a very dangerous problem and that it was almost impossible to determine the conditions in which cultural genocide took place. Consequently, the two bodies had decided not to include cultural genocide in the text of the Convention.

99. The CHAIRMAN announced that the Commission would begin to consider that question at its next meeting.

The meeting rose at 12.55 p.m.

¹⁰ See A/CN.4/25, Appendix.

59th MEETING

Monday, 3 July 1950, at 3 p.m.

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Chairman: Mr. Georges SCILLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James J. BRIERLY, 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. 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(II) (Item 3(b) of the agenda) (A/CN.4/25) (*continued*)

CRIME No. VIII ¹ (*continued*)

1. Mr. SPIROPOULOS had considered that genocide,

¹ See A/CN.4/25, Appendix.

which had been accepted as a crime under international law in the Convention on Genocide, should appear in the draft code. He had also thought that the latter should contain Crime No. IX. The two crimes to some extent interconnected, since genocide included crimes against mankind. He had tried to separate them provisionally.

2. Mr. ALFARO held that there should be no confusion between Crime No. VIII and the definition of genocide contained in the Special Convention. He wondered whether the second sub-paragraph of paragraph 2 of definition No. VIII should not state that all those crimes against mankind were crimes for the purposes of the draft code only if they were committed as the result of one of the crimes covered by definitions Nos. I - VII—that is to say, if they were committed in connexion with crimes against peace or war crimes. It should be made clear that the Commission considered the acts referred to in paragraph 2 to be those not covered by the Convention on Genocide.

3. Mr. SANDSTRÖM considered that, nevertheless, genocide was a crime characterized by its extreme gravity and that for that very reason it constituted a crime against peace and security.

4. Mr. el-KHOURY read at the end of paragraph 2 the words “carried on in execution of or in connexion with any crime against peace or war crimes as defined by the Charter of the International Military Tribunal”. He thought that these words should be deleted since the Charter would, as the Commission had already stated, soon be no more than an historical document. It should therefore not form part of the code even by reference.

5. Mr. SPIROPOULOS pointed out that the Commission had been given a two-fold task: firstly, to indicate the crimes endangering peace and security; and secondly, to incorporate in the code all the crimes provided for by the Nürnberg Charter. In order to include the latter crimes, he had thought it necessary to refer to the Charter, as it was not possible to define them otherwise. He was prepared to accept any other definition.

6. Mr. BRIERLY thought that the Rapporteur was interpreting the General Assembly's instructions too rigidly, since the Commission had not been directed to insert the whole of the Charter in its draft code. He entirely agreed with what Mr. Liang had said at the 54th meeting (para. 62(b)) about the historical background of the phrase: “indicating clearly the place to be accorded to the principles . . .” in General Assembly resolution 177 (II). The definitions contained in paragraphs 1 and 2 of Crime No. VIII overlapped. The Commission should not consider itself bound by the Nürnberg Charter, and should endeavour to find the best possible definitions for the crimes in question.

7. Mr. HUDSON agreed with Mr. Brierly. He proposed that paragraph 2 should end with the words “carried on in execution of or in connexion with Crime No. I or Crime No. IX”. It would be undesirable to refer in the code to another document.

8. Mr. SPIROPOULOS agreed that it was not a very good idea to mention the Charter, but he had wished to provide as clear a definition as possible. If Mr. Hudson's proposal were accepted, the definition would not apply to the same crime. Crime No. I consisted in the use of armed force, whereas the Charter spoke of “planning, preparation,” etc. This showed the difficulty of providing a definition.

9. Mr. HUDSON then proposed the wording “in execution of or in connexion with crimes Nos. I, IX or X”, which would incorporate all the elements of the Nürnberg Charter.

10. Mr. SPIROPOULOS pointed out that Mr. Hudson's definition covered more crimes than the Charter.

11. Mr. HUDSON replied that the Commission was not obliged to conform rigidly to the Charter.

12. Mr. SPIROPOULOS had another idea. He thought that the Commission would endeavour to adopt general terms and mention first genocide and then murder, etc. “in so far as they are not covered by the foregoing paragraph”. He hoped that the Commission would find a more satisfactory text.

13. Mr. ALFARO noted that in its sub-paragraphs (a), (b), (c), (d) and (e), paragraph 1 reproduced the terms of the Convention on Genocide, while paragraph 2 repeated those of the Nürnberg Charter. He agreed with Mr. Hudson that the code should not make reference to any other document.

13 a. He proposed to phrase the opening words of Crime No. VIII to read: “The commission of any of the following acts committed in execution of or in connexion with any crime against peace or war crime”, and then to enumerate the acts set forth in sub-paragraph (a), (b), (c), (d) and (e). Those crimes would thus be distinguished from the crime of genocide, since the latter could be committed in time of peace. If it was committed in time of war it came within the scope of the paragraph.

14. Mr. LIANG (Secretary to the Commission) wished to draw the attention of Mr. Spiropoulos and the Commission to two points. Firstly, definitions No. I and No. VIII were closely connected, and he thought it might be possible to make the wording of the two definitions more uniform. There would otherwise be the danger of defining crimes against peace in two different ways.

14 a. Secondly, there was the question of inserting an article of the Convention on Genocide in the definition of Crime No. VIII. The application of that Convention gave rise to a large number of problems. All its articles could, of course, be reproduced in the code, but he thought this undesirable. If the articles were not reproduced, it would be better to avoid using the terms of the Convention in the definition of Crime No. VIII, and to preserve the special structure of the draft code.

15. Mr. SPIROPOULOS stated that that had always been his opinion. The wording presented great difficulty unless part of the crime were sacrificed—which it might perhaps be desirable to do.

16. Mr. BRIERLY asked what was the exact wording of Mr. Alfaro's proposal. He thought that the latter had

suggested that genocide committed in time of peace should be excluded from the definition of Crime No. VIII. His own view was that genocide was at all times a crime against peace and security.

17. Mr. ALFARO thought so too, but the crime was dealt with in a special Convention and any repetition was to be avoided. In this instance they were dealing with a code of crimes against peace and security, while the Convention on Genocide dealt with crimes committed in time of peace or in time of war.

18. Mr. SANDSTRÖM approved the idea of excluding genocide from the draft code on the ground that it was the subject of a special convention. If it was desired to mention genocide, reference could be made to the Convention.

19. Mr. HUDSON thought that it would be undesirable to confuse the two ideas. Genocide was a crime designed to exterminate a group as such. Paragraph 2 did not refer to that act, but dealt merely with extermination carried on in time of war, and not with groups "as such". It did not apply to acts committed in time of peace—such as preparation, for example. A better course would be to amend the phrase "as defined by the Charter of the International Military Tribunal" if a better wording could be found.

19 a. He found it difficult to interpret paragraph 1, sub-paragraph (a), "killing members of the group". He asked how many members of the group had to be killed before the act constituted genocide. He preferred to delete paragraph 1, but if the Commission decided to retain it, it should read "mass murder". If that crime were provided for in time of war, the act of killing a portion of the enemy army of a "national group" might be called genocide. The term used in the Convention on Genocide was acceptable in a broad sense. In time of war, however, a national group was killed as such; if one fought against the army of a given state, one destroyed that army. It should be made clear that those acts did not constitute the crime of genocide.

19 b. With regard to paragraph 2, if no limitation were inserted, any killing might be regarded as a crime against international law, and that would clearly be inadmissible.

19 c. He proposed that the Commission combine the two paragraphs and restate part of the Convention on Genocide and part of the Charter, without keeping rigidly to their text.

20. Mr. YEPES proposed that paragraph 1 be replaced by the word "genocide" so as to avoid repeating the terms of the Convention.

21. Mr. HUDSON thought that, in that case they should be more precise and say "genocide as defined in the International Convention on Genocide", but he doubted whether they could incorporate in the draft code a portion of a Convention which was open for signature and was not yet in force. He would prefer to delete paragraph 1.

22. Mr. SPIROPOULOS thought that this could be done if necessary, but it would be strange not to include in the code genocide, which had already been recog-

nized as a crime under international law. It would amount to a retrograde step. He wondered how all those crimes could be brought under a single definition. In paragraph 66 of his report, it was stated that "any attempt to include these two crimes into the draft code under any other form than the one suggested here will create considerable difficulties. That genocide cannot be omitted from the draft code should not be questioned. On the other hand, paragraph 2 of Crime No. VIII which constitutes the crime against humanity of the Nürnberg Charter should, in view of General Assembly resolution 117 (II), as far as possible also be included in the draft code".

23. Mr. SANDSTRÖM approved the idea of deleting paragraph 1 and substituting for it the words "the crime of genocide as defined in the Convention".

24. The CHAIRMAN noted that the proposals submitted overlapped one another. He thought it was difficult to suppress all reference to genocide, and it would be strange if the code contained no mention of it.

25. Mr. el-KHOURY also thought it impossible to omit genocide from the code, but in his view the definitions contained in sub-paragraphs (a), (b), (c), (d) and (e) were not sufficiently precise. Accordingly, he proposed that they retain merely the opening words of the paragraph—namely, "The commission of any of the following acts, committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such", and that they leave the task of interpreting the text to the International Criminal Court. He thought that the words "political party" should be added to the list.

26. Mr. SPIROPOULOS recalled that the definition of genocide and the question whether to include in that definition the destruction of political groups had been discussed at length at the third session of the General Assembly. The addition proposed by Mr. el-Khoury had already been rejected at the time, and they could not bring up the same point after two years. He did not see how the text could be changed. Mr. Yepes' proposal to mention merely the word "genocide" did not alter the situation. It simplified the text but the problem remained unchanged. Such great efforts had been made to punish genocide that it would be going too far to omit it now.

27. The CHAIRMAN asked the Rapporteur whether he thought that the Commission was bound to accept the text of the Convention.

28. Mr. SPIROPOULOS held that if the Commission modified the concept of genocide, it ran the risk of creating difficulties in regard to the ratification of the Convention. It would be better to leave it alone.

29. Mr. BRIERLY agreed that the Commission had not met merely to correct a mistake of the General Assembly's. It would be enough to refer to the principle of genocide without even mentioning the Convention. The judge would decide the exact meaning of the term.

30. Mr. SPIROPOULOS accepted this proposal.

31. The CHAIRMAN also thought that the judge should be left to interpret genocide for himself.

32. Mr. LIANG (Secretary to the Commission) stated that that would perhaps be better than no solution at all, but that it did not obviate the difficulty to which he had already referred. If, when the Convention containing the code came into force, the Convention on Genocide was already in force, the application of that article would raise a problem. It would be necessary to determine whether the code rescinded the earlier convention.

32 a. It would also be possible not to allude to genocide in the substantive portion of the code and to mention it in the preamble, since the act condemned under the name of genocide had been defined and declared punishable in another convention. In this way the application of the Convention on Genocide would be left outside the provisions of the code. He wished to stress the difficulty that would be raised by the application of the articles of the code relating to genocide if they were worded differently from those of the Convention on Genocide.

33. Mr. FRANÇOIS asked which were the states which had ratified the Convention on Genocide. He thought it peculiar to insert a reference to that Convention in the code if the majority of States did not wish to accept it.

34. Mr. LIANG (Secretary to the Commission) replied that twenty ratifications were required for the Convention to come into force. He did not think that any of the Great Powers had yet ratified the Convention but ratification by any twenty States would put it into force.

35. Mr. SPIROPOULOS thought Mr. Liang's proposal acceptable. It would be possible to refer to the Convention on Genocide in the preamble to the code without mentioning its contents, thus avoiding any possible contradictions between the two texts. It might indeed be difficult to secure ratification of the Convention, as to a certain extent it constituted interference in the internal affairs of States.

36. Mr. YEPES deemed it essential to mention genocide, since there had been such publicity about it that the public would not forgive the Commission if there were no reference to genocide in the body of the Code. He was opposed to Mr. Liang's proposal.

37. Mr. BRIERLY would prefer to avoid referring to genocide, but he did not think it was possible.

38. Mr. SANDSTRÖM thought that if genocide were mentioned in the preamble together with an explanation of why this was done, there could be no objection to its omission from the Code.

39. Mr. el-KHOURY agreed that genocide could not be omitted. He repeated his proposal to retain paragraph 1 without sub-paragraphs (a) to (e) and to leave it to the International Court to determine what constituted the crime of genocide.

40. Mr. ALFARO asked Mr. Yepes to clarify his proposal. When he suggested that paragraph 1 should simply speak of "genocide", was he thinking of geno-

cide in general or merely genocide committed in execution of or in connexion with any crime against peace or war crime? He had in mind the task assigned to the Commission, which was to draw up a code of crimes against the peace and security of mankind. Genocide committed in time of peace was independent of peace and security. Hence, when the Commission referred to genocide, it should indicate whether it meant the crime in general or the crime when committed in execution of or in connexion with any crime against peace and security.

41. Mr. YEPES said that in submitting his proposal he had wanted the Commission to conform to the terminology used by the General Assembly in 1948. Article 1 of the Convention on Genocide stated: "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 to punish." If they merely spoke of "genocide", the judge responsible for applying the code would try to find out what the International Law Commission meant, and would naturally turn to the Convention on Genocide. That Convention undoubtedly had its faults, but if the Commission revised the work of the Assembly it would seem to be setting itself up against that body. They had either to accept the Convention or to say that it was bad.

42. The CHAIRMAN asked the Commission to make it clear what it wished to do.

43. Mr. SPIROPOULOS said that he supported Mr. Liang's proposal because he thought that it was in the interests of the Convention on Genocide not to link its fate with that of the code. It was possible that the Convention would be adopted. If the code were adopted also, it would be adopted without the crime of genocide.

44. The CHAIRMAN asked Mr. Spiropoulos whether he did not think that in that case the Code would appear to constitute a retrograde step.

45. Mr. SPIROPOULOS said that he did not think so. It depended upon the formula adopted and it was possible to find one which would save the situation.

46. Mr. ALFARO repeated that genocide had a general aspect and a particular aspect—that is to say, as a crime committed in execution of or in connexion with a crime against peace and security. He would accept Mr. Yepes' formula if it were made to read "Genocide committed in execution of or in connexion with any one of the crimes defined under Nos. I, II, III, IV and IX".

47. Mr. SPIROPOULOS wished to ask Mr. Alfaro whether he thought that genocide committed in time of peace did not affect peace. He himself had always thought that genocide was regarded as a crime affecting peace.

48. Mr. HUDSON quoted from the preamble to the Convention the words: "The Contracting Parties... being convinced that in order to liberate mankind from such an odious scourge..."

49. Mr. ALFARO thought that in certain cases genocide could be committed in such a way as not to

endanger the peace and security of mankind, because it was confined to a particular region. He quoted as an example what had happened in Pakistan and India as the result of an outburst of hatred. In his view, the word "mankind" in the language of the code meant "all mankind".

50. Mr. SPIROPOULOS said that he did not share this impression, but that possibly he was wrong. He would be prepared to accept Mr. Alfaro's proposal if that of Mr. Liang were not adopted.

51. The CHAIRMAN asked the Commission to take a decision of principle.

52. Mr. YEPES supported Mr. Alfaro's proposal.

53. Mr. LIANG (Secretary to the Commission) stated that his intention was not to decry the Convention on Genocide, but to preserve its dignity and to avoid contradiction between its provisions and those of the code. He proposed the following wording:

"Considering that the acts constituting genocide have already been defined and rendered punishable by the Convention on Genocide adopted by the General Assembly in 1948 and that it is therefore unnecessary to insert them in the present Code."

54. Mr. AMADO pointed out that the question became clearer if considered from the point of view of what was protected. The Convention on Genocide protected the human group as such. Mr. Hudson had said that to kill an army would be to kill a national group as such, but clearly it was not his intention to regard that act as constituting genocide, since it concerned the destruction of the enemy and not of the group as such. The General Assembly's view had been that what was protected by the Convention on Genocide was something other than peace and security. The Commission's aim was to protect the peace and security of mankind and that aim should not be lost sight of.

54 a. He was prepared to accept the text of the report. The Commission's aim in drawing up the code was to protect peace and security and the reason it was inserting genocide in the code was that it was a crime against peace and security. Mr. Alfaro's proposal brought this out by showing the relationship that existed between all acts committed with the object of destroying a group and acts which endangered peace and security. That proposal appeared more acceptable than the mere mention in the preamble which Mr. Liang had suggested. By inserting the crime of genocide in the code, the Commission was not linking the fate of the latter with that of the Convention on Genocide. It was establishing an independent crime, and public opinion would be satisfied. He said that he could agree to Mr. Spiropoulos' text, or to the proposal submitted by Mr. Alfaro.

55. Mr. SPIROPOULOS said that Mr. Amado's excellent arguments had convinced him, and he renounced Mr. Liang's proposal for that of Mr. Alfaro. He realized his mistake: genocide existed as a crime against peace and security. He agreed to the wording: "Genocide committed in execution of or in connexion with any

one of the crimes defined under Nos. I, II, III, IV and IX".

56. Mr. HSU asked whether genocide should be linked to some of the articles in the draft code. It was agreed that genocide was a crime against peace and security. Was it necessary to link it to one of the articles? A crime similar to genocide had been committed in Turkey in the past, and the Turkish Government had had no intention of attacking another State or of endangering international peace. He thought that the text could be adopted without any reference to the Convention.

57. Mr. ALFARO considered that where genocide did not constitute a crime against peace and security it was the ordinary crime of genocide, and the Convention would apply.

58. Mr. AMADO pointed out that genocide could be one of the crimes committed with intent to disturb peace and security.

59. Mr. BRIERLY did not think it desirable to distinguish between two types of genocide. Genocide was at all times and by its very nature a crime against peace and security. In India genocide had constituted a serious threat to peace, and the same applied to the atrocities perpetrated in Armenia. Irrespective of what the State intended, those acts could cause international tension leading to a breach of the peace. Genocide was a crime against peace.

60. Mr. HUDSON thought that the Commission had gone as far as possible and had given its Rapporteur all the guidance in its power. He wondered into what category genocide committed against a group inside a country would fall if Mr. Alfaro's wording were adopted. Supposing that the ethnic group constituted by the Red Indians were destroyed in the United States, into what category would that act fall if Mr. Alfaro's proposal were adopted?

60 a. When discussing Crimes Nos. I, II, III and IV, the Commission had given its Rapporteur a certain amount of latitude. He could not say whether he wanted a reference to Crimes Nos. I, II, III and IV to be inserted at that point. With regard to Crime No. III, the Commission had said that it concerned solely a crime committed by constitutionally responsible rulers and not by individuals. The Convention on Genocide, however, was directed against constitutionally responsible rulers, public officials, and private individuals (article IV).

60 b. He repeated that he thought it better not to give the Rapporteur too explicit instructions, since the latter had to take into account the various factors contained in definitions Nos. I, II, III and IV. As things were, he wanted the Rapporteur to be left to settle the very difficult problem of deciding whom to make responsible for the crime in certain cases.

61. Mr. SANDSTRÖM agreed with Mr. Brierly that acts of genocide were characterized by the fact that they were crimes against peace and security. The Rapporteur could be given latitude to insert the Commission's views in his report and to express the text more

clearly. If, however, the Commission intended to take a vote, he preferred Mr. Liang's proposal.

62. Mr. el-KHOURY observed that genocide was synonymous with the massacre of a minority. Did the Commission intend to protect such minorities, whether political, ethnical or religious? He recalled that after the First World War the League of Nations had attached very great importance to the protection of minorities, and had in many cases provided protective measures for the benefit of minority groups. Were the Commission now to exclude the crime of genocide, it would be abandoning to their fate large sections of the population in a large number of countries, and would even appear to wish to encourage the majorities to threaten and persecute their minorities. He therefore thought that genocide should be regarded as an international crime for the purposes of the draft code. Minorities always existed, and governments always found pretexts for persecuting and maltreating them both in time of peace and in time of war. In time of peace, such crimes were even more reprehensible than in time of war, as there was no excuse. In time of war it was possible that governments might fear that the minorities would support the enemy and organize espionage in his favour.

63. Mr. YEPES thought that the majority of the Commission was in favour of including genocide in the draft code. He therefore asked that a vote be taken.

64. The CHAIRMAN said that he would prefer not to do so. Certain members of the Commission considered that the effect of a vote was always to isolate some of the members, and he did not want this impression to arise. Nevertheless, he admitted that the discussion had been very confused and that the Commission was still befogged. If he were the Rapporteur, he would not know what conclusion to draw from the discussion.

64 a. In reply to Mr. Amado's statement that the Commission appeared to agree that genocide should be included in the code, he said that for his part he did not think that the Commission should concern itself with the Convention on Genocide when drawing up its code. That did not mean that the crime of genocide should not be included in the code. In his view, however, the code should be drawn up quite independently of the Convention on Genocide.

64 b. He asked Mr. Spiropoulos whether he wanted a vote taken on the question of including genocide, or whether he thought that the discussion had been sufficiently enlightening for him to draw conclusions.

65. Mr. SPIROPOULOS replied that the discussion seemed to be becoming more and more complicated. He had accepted Mr. Alfaro's proposal that genocide committed in execution of or in connexion with any one of the crimes defined under Nos. I, II, III, IV and IX, should be regarded as constituting a crime against the peace and security of mankind. As Mr. Hudson had pointed out, however, most of the crimes which the Commission had already decided to include in the code applied to constitutionally responsible rulers, while the Convention on Genocide also applied to individuals.

He now thought that he had been too hasty in agreeing to Mr. Alfaro's proposal, and therefore wished to revert to his original position.

65 a. The Commission had to find a way out of its difficulty. The Convention on Genocide was the result of much hard work by the General Assembly, and it would be very satisfactory if it were ratified by a large number of countries. He thought it dangerous, however, to link that Convention with the code, if only for the reason that if the Convention were not ratified, the code would not be ratified either.

65 b. Moreover, Mr. Yepes' proposal appeared to be too restrictive. For all those reasons he reverted to Mr. Liang's proposal that they should merely refer to the Convention on Genocide in the preamble to the code without thereby establishing any formal connexion between the two texts.

66. Mr. ALFARO wished to clarify the situation reached at that stage in the discussion. Six different proposals were before the Commission: (1) to make no mention of the crime of genocide in the code; (2) merely to refer to genocide without adding any qualification; (3) to refer to the Convention on Genocide with a mention of article II thereof, as Mr. Spiropoulos had done in his report; (4) to refer to genocide and say that genocide constituted a crime under the code when it threatened the peace and security of mankind; (5) to link up the crime of genocide, for the purposes of the code, with the acts committed under Crimes Nos. I, II, III, IV and IX; and (6) to mention the Convention on Genocide in the preamble to the code.

67. The CHAIRMAN said that he thought that Mr. Liang's proposal to refer to the Convention in the preamble to the code was a curious method. It might be necessary to refer to other Conventions.

67 a. Mr. YEPES pointed out that codes did not have preambles.

68. Mr. LIANG (Secretary to the Commission) said that the sole purpose of his proposal was to recall in the code the existence of the Convention on Genocide. In that way the two texts—namely, the code and the Convention on Genocide—would continue to be completely independent of each other. It would be awkward to have two different texts dealing with the same subject. He pointed out that if the code were not incorporated in a draft Convention, it could have no more authority than, for example, a "restatement", or legal recapitulation. The General Assembly could not impose the code upon States.

68 a. He agreed with Mr. Spiropoulos that the only way to ensure the implementation of a code was to give it the form of a convention which would later be ratified by States. He considered that this was a question of the progressive development of international law—that is to say, the establishment of a new law.

69. The CHAIRMAN recalled that the Commission had not been directed to draw up a convention but to prepare a draft code for submission to the General Assembly. The latter would do what it liked with it. The Commission's task was a much more modest one

than that of drawing up a convention. The Commission had to prepare a draft code, and he thought that the crime of genocide should be included in that code. It would be for the General Assembly to decide whether it wished to retain the crime in the code or to omit it.

70. Mr. HUDSON considered it extremely important to remember which persons could be guilty of genocide. The Commission's view had been that Crime I did not apply to private soldiers or to separate individuals, while the Convention on Genocide provided that persons guilty of genocide could be constitutionally responsible rulers, public officials or private individuals. Hence, in regard to genocide, there was a discrepancy between the attitude taken up by the Commission and the decisions adopted by the General Assembly. The Convention was very comprehensive as it did not confine itself to constitutionally responsible rulers but included all private individuals. The difference was fundamental. If the Commission wished to go as far as the Convention, there were no great objections as regards paragraph 1 of Crime No. VIII, but could it go as far as that in regard to paragraph 2? Did the Commission really wish to state that genocide committed by an individual was a crime against the peace and security of mankind?

71. Mr. BRIERLY replied that it was impossible in practice for a single private individual to commit an act of genocide. Moreover, genocide should not be restricted to acts committed by constitutionally responsible rulers. There had to be two groups, one of which wished to murder or exterminate the other. That had happened in India as well as in Pakistan. Both sides had been guilty of genocide and mass murder, but the governments were not involved. Mass murder of that kind, however, carried out by groups acting without the connivance of governments, always constituted a threat to the peace and security of mankind.

72. Mr. HUDSON proposed that they should not mention the Convention on Genocide and should merely state in the code that the murder, extermination, enslavement and so forth of one group by another should be punished as constituting a crime against the peace and security of mankind.

73. Mr. BRIERLY thought it unnecessary to state that explicitly, since the code would have to be applied by judges who would consider disputes rationally and in a spirit of justice.

74. The CHAIRMAN agreed that the Commission should not forget that it would be for the judges to apply the provisions of the code and that the judges were at all times required to act in accordance with equity and justice. He therefore proposed that the Commission should decide whether it intended to include genocide in the code whenever that crime endangered the peace and security of mankind.

75. Mr. BRIERLY observed that that formula was tantamount to restricting the crime to specific cases.

76. The CHAIRMAN replied that it was possible simply to speak of genocide on the basis that any act

of genocide was an international crime endangering the peace and security of mankind.

77. Mr. YEPES approved the Chairman's formula.

78. Mr. ALFARO asked the Commission whether, in its view, a group of fanatics, such as the members of the Ku Klux Klan, for example, who sought to exterminate certain groups of the population in their own country, were committing a crime constituting a threat to the peace or security of mankind. He considered that their acts constituted genocide but not the crime provided for in the code.

79. The CHAIRMAN said that he thought that the activity of such groups was undoubtedly a threat to the peace and security of mankind, since the word "mankind" also included the inhabitants or citizens of a country in which their life was threatened by fellow citizens.

79 a. He put to the vote the question whether the Commission wished to retain the crime of genocide in the code.

7 votes were cast in favour of retention.

80. The CHAIRMAN then put to the vote the question whether the Commission wished to insert the crime of genocide in the code without any additional qualification.

4 votes were cast in favour of retaining the crime of genocide without any qualification.

81. The CHAIRMAN then put to the vote the question whether the Commission wished to retain the crime of genocide in the code with an additional qualification.

One vote was cast in favour of retaining genocide with a qualification.

Paragraph 2

82 - 83. The CHAIRMAN called upon the Commission to proceed to consideration of paragraph 2 of Crime No. VIII. He asked the Rapporteur to make an explanatory statement on this item in his report.

84. Mr. SPIROPOULOS stated that in formulating Crime No. VIII he had adopted the definition contained in article 6, paragraph (c), of the Charter of the Nürnberg Tribunal. He had thought it his duty to confine himself exactly to those terms, since the Commission had been instructed to incorporate in the draft code the crimes as formulated in the Charter and judgment of the Nürnberg Tribunal. It would be for the Commission to say whether it wanted any amendments to be made.

85. Mr. HUDSON held that the acts under discussion were not crimes against the peace and security of mankind if they were committed in time of war or in connexion with a war crime. His opinion had to a certain extent been confirmed by the observations made on Crime No. IX by the Rapporteur in paragraph 67 of his report, where it was stated that the crime of violating the laws or customs of war "does not affect the peace and security of mankind and, consequently, from a purely theoretical point of view, it should have

no place in the draft code. Nevertheless... it figures among the crimes enumerated in the Nürnberg Charter. It is only on account of this connexion that we suggest its conclusion in the draft code". He considered that the crimes listed in paragraph 2 of Crime No. VIII were such as to lead to war or to increase insecurity in time of peace. How far did the Commission wish to go, however? Did it want to include those crimes in the code? Was it bound to incorporate all the Nürnberg Principles in the code? He was by no means sure that paragraph 2 of Crime No. VIII should really form part of the code.

86. Mr. BRIERLY said that he shared Mr. Hudson's doubts.

87. Mr. SANDSTRÖM suggested that those crimes, being connected with war, could be regarded as being to a certain degree accessory to war and as therefore having a place in the list of crimes which the code was to contain.

88. Mr. ALFARO said that the Commission was dealing with a list of crimes of a particularly odious character which both before and during the recent war had aroused unanimous condemnation. The terms of reference of the Nürnberg Tribunal had been restricted to the judgment of crimes which had been committed in connexion with the war, and the Tribunal had therefore been right not to consider crimes of that category committed before the outbreak of the war. However, he did not see how the Commission could omit them from its code. They represented such appalling crimes that they had to be punished, whether committed during or before a war, with a view to preparation for war, or even irrespective of it. In his view, the entire list as it appeared in Mr. Spiropoulos' text should be retained in full in the code which the Commission was preparing on the basis of the Charter and judgment of the Nürnberg Tribunal.

89. Mr. el-KHOURY recalled that he had already proposed the deletion from Crime No. VIII, paragraph 2, of the final words "as defined by the Charter of the International Military Tribunal".² If the final words were deleted as he proposed, the paragraph would establish a rule of international law under which crimes committed by constitutionally responsible rulers against the populations of their own countries could be punished.

90. The CHAIRMAN asked whether the Commission agreed that those crimes should at all times be regarded as crimes against the peace and security of mankind. The question was one affecting the protection of human rights as defined in the Universal Declaration of Human Rights and in the draft Declaration on the Rights and Duties of States.

91. Mr. HUDSON and Mr. BRIERLY observed that there appeared to be a discrepancy between the French and English texts of that paragraph.

92. Mr. HUDSON wondered whether the phrase "when such acts are done or such persecutions are

carried on in execution of or in connexion with any crime against peace or war crimes" applied solely to "persecutions on political, racial or religious grounds", or also to "murder, extermination, enslavement, deportation and other inhuman acts done against a civilian population". In the French text, there was a comma before the words "lorsque ces actes..." while in the English text there was no comma before the words "when such acts..."³

93. The CHAIRMAN said he noted a much more substantial discrepancy between the two texts. The English text said "...in execution of or in connexion with..." whereas the French text said "...à la suite de..."

94. Mr. HUDSON considered that the Commission should study the question as a whole in order to determine whether the acts referred to in paragraph 2 of Crime No. VIII were crimes against peace and security if committed in connexion with war or war crimes.

94 a. He recalled that he had suggested amending the text of Crimes Nos. VIII and IX given by the Rapporteur. However, in order to do so effectively, he proposed that the Commission should not begin consideration of Crime No. VIII at that point, but should study Crime No. IX before doing so.

95. Mr. SPIROPOULOS thought that Mr. Hudson had raised a fundamental point when he said that he did not think that paragraph 2 of Crime No. VIII should figure in the draft code. He had carefully studied the question of which crimes should be included in the code. He had been particularly struck by paragraph (b) of resolution 177 adopted by the United Nations General Assembly on 21 November 1947, which directed the Commission to prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal. He had interpreted that text to mean that the Commission was required to include those principles in its code, and for that reason the draft code which he had submitted to the Commission contained that paragraph 2 of Crime No. VIII.

95 a. There was, however, another question which the Commission had to appreciate—namely, whether it was entitled to amend the texts of the principles which it had formulated. He thought that the Commission had that right. There was still another problem: if the Commission eliminated from the code all the crimes referred to in paragraph 2 of Crime No. VIII, as well as war crimes, as not being connected with crimes against the

³ The French text read as follows:

"2. L'un quelconque des actes suivants, dans la mesure où ils ne sont pas visés les dispositions du paragraphe précédent : L'assassinat, l'extermination, la réduction en esclavage, la déportation et tout autre acte inhumain contre toutes populations civiles, ou bien les persécutions pour des motifs politiques, raciaux ou religieux, lorsque ces actes ou persécutions ont été commis à la suite de tout crime contre la paix ou crime de guerre défini par le Statut du tribunal militaire international."

² See para. 5, *supra*.

peace or security of mankind, and if, accordingly, it wished to include in the code only crimes committed in connexion with a war of aggression, it would be performing a fragmentary task which would not be well received by public opinion. Little of the Nürnberg Principles would remain. He thought that the Commission should study all those questions once again so as to decide which rule it wished to follow.

96. Mr. HUDSON believed that something else of Nürnberg would still be left in the code—namely, the crimes referred to under Crime No. I and basis of discussion No. 2.

97. Mr. BRIERLY did not want to omit all crimes against mankind. The problem, in his view, was to find a formula which would distinguish between crimes against mankind properly so-called, and crimes against peace and mankind. The latter category should be retained in the draft code. He was inclined to thank that Mr. Sandström's proposal might provide the solution.

97 a. Mr. HUDSON said that Mr. Sandström had considered that cases of crimes committed in connexion with a war of aggression were covered by the provisions of Crime No. X, which also established complicity in crimes of that type.

98. Mr. SANDSTRÖM stated that that was not what he had meant. He had meant that there was not only war to be considered, but also the effects produced by war. If war and war crimes alone were punished, the effects of war and crimes resulting from the effects of war would not be punished at the same time. In his view, the code of crimes against the peace and security of mankind should include the crimes referred to in paragraph 2 of Crime No. VIII as accessories of war.

99. Mr. ALFARO thought that some members of the Commission doubted whether the code should include all the categories of crimes referred to in article 6 (i) of the Charter of the Nürnberg Tribunal. All the crimes should be mentioned. A distinction should be made between "peace" and "security of mankind". Even if peace had already been violated and no longer existed, it was still possible to commit crimes against the security of mankind as, for example, if persons invading the territory of another State committed crimes against the civil population. The phrase "peace and security of mankind" should not be regarded as constituting a single concept the various elements of which could have no independent meaning. The crimes covered by paragraph 2 of Crime No. VIII were crimes against the security of mankind.

100. Mr. AMADO quoted the example of a Chief of State who declared war on another country. A section of the population of the country declaring war was opposed to the war and attempted to revolt against those who had started it. The Chief of State who had declared war then sought to exterminate the section of the population which had revolted against him. That constituted a crime against the peace and security of mankind *par excellence*. All crimes committed against the population of a country, even if that population

were made up of various races, were crimes against the peace and security of mankind. A government which suppressed or exterminated those opposed to its policy of war committed a typical crime against the peace and security of mankind. He thought that at this point the Commission was discussing what was quite evident.

101. Mr. SPIROPOULOS thought the problem was clear if considered calmly. In the absence of war, such acts constituted a threat to the peace and security of mankind. They also did so if they were committed with a view to preparation for war. As soon as there was a war, those crimes could constitute war crimes, but if they were committed against the population they could not be so described. In his opinion, the whole question was whether or not war crimes should be included in the code. He proposed that to clarify the discussion, the Commission should first consider Crime No. IX and then return to the crimes referred to in paragraph 2 of Crime No. VIII.

102. The CHAIRMAN said that there was no doubt that those crimes should be included in the code and that the Commission had been directed to give them a place therein.

103. Mr. HUDSON and Mr. BRIERLY did not consider that the Commission's task should be interpreted in that way.

104. Mr. FRANÇOIS agreed in principle. The Commission could decide that a particular principle should not be embodied in the code. He would, however, be sorry if those crimes were omitted.

105. The CHAIRMAN reminded the Commission that it had been directed under resolution 177 (II) to formulate the Nürnberg Principles and to prepare a code of crimes against the peace and security of mankind, indicating clearly the place accorded to those principles. Since the Commission had formulated those principles, it should embody them in the code.

106. Mr. FRANÇOIS recalled that the Commission had first of all formulated the principles recognized in the Nürnberg Charter and in the judgment of the Tribunal as principles of international law. The Commission had now to determine what it regarded as principles of international law.

107. The CHAIRMAN saw no reason why the Commission, having formulated the principles, should not include them in its code.

108. Mr. BRIERLY said that Mr. Liang had given the Commission the historical background to the question. The Commission was not bound to include all the Nürnberg Principles in its code but was authorized to omit or modify them. He accepted Mr. Spiropoulos' proposal to take up Crime No. IX before continuing the discussion on paragraph 2 of Crime No. VIII.

109. The CHAIRMAN had no objections to this procedure.

The meeting rose at 6 p.m.

60th MEETING

Tuesday, 4 July 1950, at 3 p.m.

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Chairman: Mr. Georges SCELLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L. BRIERLY, 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 for Legal Affairs); Mr. Yuan-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 (II) (item 3 (b) of the agenda) (A/CN.4/25) (continued)

CRIME NO. IX

1. Mr. HUDSON considered that there was a logical case for the deletion of that definition. The observance of the laws or customs of war was important after war had broken out but it made no contribution to the maintenance of peace and security.

2. Mr. BRIERLY, agreeing with that view, said that when the question had been discussed on the previous day he had understood Mr. Alfaro to suggest that to omit that definition would be to slur over the frightful character of the crimes in question. But the reason the Commission had not mentioned them was because it felt doubtful whether they should be included in the Code. If the Commission were drafting a general code, it would include such crimes, but he considered it inadvisable to include war crimes in a draft code of offences against the peace and security of mankind. Nevertheless, the Commission as a whole thought otherwise and he himself did not feel very strongly on the point, as it was chiefly a question of form.

2 a. When the draft was submitted to the General Assembly it would no doubt be accompanied by observations. If it were mentioned that certain members of the Commission had had misgivings because they considered it questionable whether, from a logical stand-

point, such crimes should be placed among offences against peace, he would be satisfied.

3. Mr. HSU thought the reference to those crimes should be retained. Violations of the laws of war might ensue from a war of aggression or independently. In the former case they affected peace and security. If the North Korean forces violated the laws of war they should be punished for an offence against peace because such violation ensued from a war of aggression. A violation of the laws of war by the United Nations forces engaged in the Korean war would be a war crime, but not an offence against peace.

3 a. In his view, if genocide could at all times be regarded as an offence against peace and security, violations of the laws or customs of war were also offences against peace and security.

4. Mr. ALFARO thought that in defining crime No. IX Mr. Spiropoulos had had in mind the list of war crimes contained in the formulation of the Nürnberg Principles: "War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity."¹

4 a. He thought the world and many jurists would be astonished not to find that list in the Commission's draft code. The effect produced would be disastrous. The Commission should concern itself not only with the peace, but also with the security of mankind—a problem which still existed when the peace had been broken. Assuming that an international armed force were used in execution of a mandate of the United Nations, such a force, intervening on legitimate grounds, had to observe the laws of war; otherwise it would be guilty of an offence against the security of mankind. The deletion of that list would be a grave mistake.

5. Mr. SPIROPOULOS drew the Commission's attention to the second sentence of paragraph 1 of the commentary on Crime No. IX (A/CN.4/25, para. 67). "In reality it does not affect the peace and security of mankind and, consequently, from a purely theoretical point of view, it should have no place in the draft code." In his report to President Truman, Judge Biddle had stated that he "felt that the time seemed opportune for advancing 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." The proposal submitted by the United States delegation had recommended that the General Assembly should direct "the Assembly Committee on the Codification of International Law . . . to treat as a matter of primary importance the formulation of the principles of the Charter of the Nürnberg Tribunal and of the Tribunal's judg-

¹ A/CN.4/22, Appendix.

ment in the context of a general codification of offences against the peace and security of mankind...".²

5 a. It was quite clear from the discussions on that proposal that the Nürnberg Principles should be inserted in the draft code, quite apart from whether they were related to offences against the peace and security of mankind or not. That was also the tenor of the last decision adopted by the General Assembly on the matter (resolution 177 (II)).

6. Mr. AMADO said that, whereas statesmen usually referred in broad general terms to the aspirations of their countries—a habit explained by their everyday activities—jurists concerned with the formulation of fixed principles had to work within narrower limits. So far as the crimes in question were concerned, the Commission had before it the arguments presented by the Rapporteur, who was a meticulous man and who stated that, from the theoretical point of view, Crime No. IX should have no place in the draft code. An examination of the question from a practical standpoint showed that further precision was impossible. When the Nürnberg Tribunal was trying to solve that problem, reference had been made to the dynamic and unstable nature of custom and of international law: "This law is not static, but by continual adaption follows the needs of a changing world."³

6 a. The problem was how to fix custom. The principle involved was not that of *nullem crimen*, which was not a principle of Roman Law, despite its Latin name. He wondered what place could be found for such a definition in a code designed to safeguard peace and security. He could see no reason for running counter to all theory and practice by inserting those crimes in the code, and would therefore oppose their inclusion.

7. Mr. FRANÇOIS, supporting Mr. Alfaro's view, favoured a broad interpretation of the Commission's task in that respect. The Commission was in no way obliged to exclude war crimes. Item 21 of the list compiled by the "Commission on the Responsibility of the Authors of the War and the Enforcement of Penalties", created in 1919, showed that it was often a case of the security of mankind: that item was "Destruction of merchant ships and passenger vessels without warning and without provision for the safety of passengers and crew".⁴ Whether all war crimes should be specified was another question. He himself thought that was inadvisable, but he favoured the insertion of definition No. IX in the draft code.

8. Mr. SANDSTRÖM also supported the retention of war crimes in the list given, since they were so closely linked with offences against peace that they should, on logical and practical grounds, be punished concurrently with them.

9. Mr. YEPES also supported the retention of the violation of the laws or customs of war in the list of crimes set forth in the draft code. Apart from the ques-

tion of the mandate given by the General Assembly, it would be scandalous for the code not to mention those violations.

10. Mr. el-KHOURY pointed out that the laws of war bulked large in international law. A perusal of the list quoted in paragraph 69 of the report, of crimes committed in violation of the laws or customs of war showed them to be crimes which were very dangerous to the security of mankind. Hence the Commission could not omit them from the code which it was drafting.

11. The CHAIRMAN noted that most of the members of the Commission considered that crime No. IX should be retained in draft code, and he himself shared that view. To his surprise Mr. Brierly had for once given the Commission a lesson in logic. But logic was not everything in international affairs. An attempt had been made before the Peace Conference of 1907 to define the laws of war in order to prevent new wars. But much ground had been covered since then and the expression "laws of war" was out of date, because war itself had become a crime. The term should be the "laws governing the use of force", and those were also applicable to an international police force. In the case of self-defence, the war in question being a defensive war, which was not a crime, the authority waging the war was not entitled to act as it chose. An international police force did not stand above all law. Otherwise the signing of the Geneva Conventions of 1949 would have been pointless.

11 a. Regulations applicable to an international police force were a guarantee of peace and security. The Commission, which had to discuss rules for safeguarding peace and security, must establish rules for the use of such a force. The crimes in question, which might be called violations of the laws or customs governing the normal and legitimate use of force, must be incorporated in the draft code, since they were committed by individuals representative of the United Nations as a whole. Having in mind legitimate warfare, which should be governed by certain rules a breach of which was a crime, he favoured the retention of definition No. IX.

12. Mr. HUDSON thought the discussion as to whether the Commission should retain that definition was concluded and suggested, so far as the actual text was concerned, that all violations of the laws of war need not be included in the draft code. Some violations were of minor importance and were left by the armed forces to the Courts Martial. The Geneva Conventions of 12 August 1949 corroborated the rapporteur's statement in paragraph 68 of the report that "serious difficulties arise with regard to the definition of this crime. (a) The first problem which has to be solved in this connexion is whether every violation of the laws or customs of war is to be considered as a crime under the code or whether only acts of a certain gravity should be classified as such". The Commission might consider including in the definition only acts of a certain gravity, which was the procedure adopted in drafting the 1949 Conventions.

12 a. Furthermore, the formulation of the Nürnberg Principles referred only to the "killing of hostages",

² *Ibid.*, para. 11.

³ *Trial of the Major War Criminals, Nürnberg, 1947, vol. I, p. 221.*

⁴ See A/CN.4/25, para. 69.

whereas he believed the Commission agreed that the expression used should be the "taking of hostages".⁵ He also proposed that the last part of the list contained in paragraph b of section B of the text of the Nürnberg Principles⁶ be amended to include the destruction of historic monuments, by substituting for the words "or devastation" the phrase "or historic monuments or other acts of devastation (not justified by military necessity)".

13. Mr. SPIROPOULOS explained that it was a question of method. There were two separate problems: (1) whether all violations of the laws of war or only violations of a certain gravity were international crimes, and (2) whether all violations of the laws of war which were crimes in international law should be enumerated, or only a general definition given together with a list of certain crimes. In his view every violation of the laws of war should be regarded as a crime in international law irrespective of the gravity of the infringement. The Nürnberg Tribunal's reference to violations of the laws or customs of war appeared to cover any law or custom of war. Of course the Commission might confine itself to specifying certain acts of particular gravity. As to who would assess the gravity, that would doubtless be a matter for the competent tribunal.

14. The CHAIRMAN observed that some violations of the laws of war were offences while others were crimes. It was not necessary for the code to lay down a scale of penalties.

15. Mr. SPIROPOULOS regarded every violation of the laws of war as a crime, though others might of course take a different view. The Commission, if it so desired, might refer to acts of a certain gravity; but in that case either such acts must be enumerated or it must be left to the judges to decide.

16. Mr. HUDSON pointed out that the text of the Nürnberg Principles contained many terms which called for an appraisal of the facts by the judges, for example the term "ill-treatment". He referred the Commission to article 130 of the 1949 Convention concerning the treatment of prisoners of war and to article 147 of the Convention concerning the protection of civilians in time of war, which mentioned serious violations.

17. Mr. SANDSTRÖM agreed with Mr. Spiropoulos that all war crimes were crimes in international law. Mr. Hudson's suggestion could be taken up when the Commission came to examine the question of the competence of the courts. The International Court would deal only with serious crimes. He thought that all crimes should be included in the code but that no attempt should be made to define every violation. The best procedure was the one proposed by the French Government in paragraph (3) of its reply (A/CN.4/R.2): "With regard to war crimes, to attach penal sanctions to the provisions of international agreements regulating land, sea and air warfare and to undertake the unification of the various codes of military law".

⁵ See summary records of the 49th meeting, paras. 2 and 8 *et seq.*

⁶ See in vol. 2, Report of the Commission, para. 118 (b) *War Crimes*.

18. Supporting that view, Mr. FRANÇOIS said that the code must not be confined to serious violations since such a distinction would be impossible in practice. It should be realized that the Commission could not prepare a code of the laws of war without exceeding its competence. In the previous year it had examined the question and several objections had been tabled to a proposal that the Commission should examine the laws of war. Apart from the objections or principle raised, Mr. Brierly had then stated that the Commission was not competent to do so. In point of fact, consultations between experts would not suffice. In his view the question of war crimes should be dealt with at an *ad hoc* diplomatic conference. It was outside the province of the Red Cross and within the purview of The Hague Conferences.

18 a. Before the Red Cross examined the questions taken up in 1949, there had been consultations between the Governments of the Swiss Confederation and the Netherlands, which had agreed to define the tasks of the 1949 Conference and had shared the view that the laws of war, which were the subject of The Hague Convention of 1907, were outside the competence of the Red Cross and that the initiative in that particular field lay with the Netherlands Government.

18 b. He had received no instruction from his Government in that connexion; but if, after including those crimes in the draft code, the Commission drew attention to the advisability of convening a diplomatic conference, the Netherlands Government would doubtless consult with other governments on the matter. War crimes should, he considered, be mentioned in the code in order to meet certain objections.

19. Mr. HUDSON asked whether it was proposed that the text of definition No. IX should be retained.

20. Mr. FRANÇOIS replied that that definition might be retained or the Nürnberg text adopted. On the other hand, any modification of the Nürnberg text would involve many difficulties.

21. Mr. HUDSON understood that certain members of the Commission wished to incorporate the text of the Nürnberg Charter in the draft code; but he, for his part, thought that definition No. IX was sufficient. Nevertheless, he maintained his proposal that the word "serious" should be inserted before the word "violations" if the Commission decided to keep to the text of the report.

22. Mr. SPIROPOULOS observed that the problem had been described in paragraph 82 of his report, which contained the following passage:

"In our opinion the codification of the rules of war constitutes an *undertaking per se* which cannot be entered upon *within the framework* of the code of offences against the peace and security of mankind. To embark on such a venture now will render the attainment of our present goal, namely, the drafting and adoption by the governments of such a code in the near future, illusory. What the Commission can do, in our opinion, is to adopt a general definition of the above crimes, leaving to the judge the task of

investigating whether, in the light of the recent development of the laws of war, he is in the presence of 'war crimes'. However, we do not object to adding a list of violations of the rules of war to the general definition, provided, however, that this list does not exhaust the acts to be considered as 'war crimes'."

22 a. He was opposed to the inclusion of a list on the ground that the position with regard to certain crimes had evolved since the Nürnberg Charter was drawn up. While, for example, the Charter had referred only to the killing of hostages, the mere taking of hostages was prohibited under the latest Geneva Conventions. He therefore thought there should be no mention of any specific crime.

23. Mr. AMADO would have preferred to see no mention of war crimes in the draft code. If, however, Crime No. IX was approved by the Commission it must be included without a list, since certain crimes might be omitted from any list and such omissions would create an unfortunate impression. With regard to the addition of the adjective "serious", it was a principle in penal law that the assessment of degree in crime was a matter for the courts.

24. Mr. ALFARO said he realized that the main weakness of a list lay in the impossibility of enumerating all violations of the laws of war. But he thought it was bad technique to refer to a type of crime without trying to define it. Furthermore, the General Assembly had requested the Commission to indicate clearly the place to be accorded to the Nürnberg Principles in the draft code. If the Commission included the Nürnberg Principle concerning war crimes in the code, specific crimes could be mentioned. The danger entailed in a list was carefully avoided in the Charter by the use of the phrase: "Such violations shall include, but not be limited to...". The draft code should contain the general principle of Crime No. IX and the gist of the Nürnberg Principles as drafted by the Commission together with a statement that the list was not exhaustive. That would be an indication of the place accorded to the Nürnberg Principles in the code.

25. The CHAIRMAN thought the various views had been very clearly put. The Commission had to decide, first, whether Crime No. IX should be retained and, secondly, whether the formulation of the Nürnberg Principles should be adopted or whether the crime should merely be defined without the addition of a list. He himself thought that the method of including a list with a statement to the effect that it was not exhaustive should give complete satisfaction. The destruction of historic monuments appeared to be covered by the Nürnberg Principles, which would meet the wishes expressed by UNESCO.

26. Mr. SPIROPOULOS said that the Nürnberg Principles contained no reference to such destruction.

27. Mr. SANDSTRÖM thought it was covered by the words "plunder of public or private property".

28. The CHAIRMAN thought that was a minor question which could be examined later by the Commission.

The Commission decided by 7 votes to 4 not to add a list to the definition of Crime No. IX.

29. Mr. el-KHOURY said that his vote was intended to convey that the task of deciding which violations of the laws of war would be considered as crimes in international law should be left to the judge, but that the latter should be given a basis on which to come to a decision. He would like to ask those of his colleagues who had opposed the inclusion of a list in the definition of Crime No. IX what they understood by the laws of war.

29 a. The Nürnberg Tribunal had had as a guide the indications contained in the Charter. If those indications were excluded from the code, how was the judge to ascertain the laws of war? Would he be obliged to refer to the innumerable works on the subject? Paragraph 69 of the report contained a list of crimes. The Commission might discuss each of them in turn and decide whether it was a war crime, while regarding the list as enunciatory and not exhaustive. He would repeat that the judge should be given some guidance.

30. The CHAIRMAN, while deeply regretting with Mr. el-Khoury the deletion of the list, said that the Commission had made up its mind. The code adopted would be a mere skeleton code.

31. Mr. HUDSON requested a vote by the Commission on his proposal to insert the word "serious" before the word "violations" and observed that the 1949 Conventions all used the expression "serious infringements".

32. Mr. SANDSTRÖM, referring to Mr. Hudson's amendment, pointed out that the Geneva Conventions contained many provisions concerning the treatment of prisoners of war, etc., and, therefore, naturally distinguished between serious and less serious infringements. The distinction was not so important in the case of the draft code.

Mr. Hudson's proposal was rejected.

The Commission adopted the text of definition No. IX.

33. Mr. KERNO (Assistant Secretary-General for Legal Affairs), referring to the Commission's decision not to add a list to definition No. IX, said that the Commission had been requested under General Assembly resolution 177(II) to formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and to indicate the place to be accorded to the latter in the draft code. He did not think the Commission's decision conflicted with that of the General Assembly. The Nürnberg Principles represented the minimum, but not necessarily the maximum, to be contained in the code. By deciding to include violations of the laws of war in the code, the Commission had accorded a place to the crimes mentioned in article 6 (b) of the Nürnberg Charter. The Commission had deleted the list because it regarded it as imperfect and incomplete. The place accorded to Crime 6 (b) of the Charter in the code was under Crime No. IX.

34. The CHAIRMAN agreed with the Assistant Secretary-General's able interpretation, but he was

doubtful whether it expressed the sense of the Commission's decision.

35. Mr. ALFARO said he intended, when referring in his report to the place accorded in the code to the war crimes listed in the Nürnberg Principles, to state that they came under Crime No. IX. If the Commission disagreed he would like to be so informed.

35 a. Several members expressed their approval of the interpretation supplied by Mr. Kerno and supported by Mr. Alfaro.

36. The CHAIRMAN said the Commission would have to take a decision on the matter at the conclusion of its session when the general rapporteur submitted his report.

CRIME NO. VIII (resumed from the 59th meeting)

Paragraph 2

37. Mr. HUDSON recalled that the Commission had implicitly decided on the previous day that paragraph 2 should be retained in the draft code if Crime No. IX was retained. He suggested, in view of the very thorough discussion of that text at the previous day's meeting, that the analysis of the arguments submitted should be left to the rapporteur and that the Commission, if it shared his opinion, should proceed to consider Crime No. X.

38. The CHAIRMAN asked whether the crime of genocide committed in time of peace should not be regarded as an offence against the peace and security of mankind.

39. Mr. SPIROPOULOS replied that all the other members of the Commission thought that it should not be so regarded.

40. The CHAIRMAN said that, if that were so, such a horrible violation of human and civic rights would not be regarded as jeopardizing peace.

41. Mr. SPIROPOULOS requested the Chairman to bear in mind that, so far as the punishment of offences against humanity was concerned, the provisions of the Convention on Genocide represented the maximum that could be expected at that stage. With regard to the other crimes the text of the Nürnberg Charter must be retained; otherwise the Commission's proposal would not be adopted.

42. The CHAIRMAN considered that the Commission was not concerned only with what the Sixth Committee and the General Assembly would accept. The Commission had to draft a code. Could it really produce a text to the effect that no matter how serious the violation of human rights, it could not endanger security and constitute an offence against the peace and security of mankind in the sense of the draft code? If a rational view were taken of the Commission's work that was a serious matter. He was aware of the viewpoint the Commission tended to favour but considered it regrettable.

43. Mr. SPIROPOULOS said that the General Assembly was not the only United Nations organ dealing with such questions as the protection of minorities, etc.

44. The CHAIRMAN agreed, but thought that the Commission's task was to enumerate all offences against the peace and security of mankind and not only those to be found in the draft code prepared by Mr. Spiropoulos. The Commission would have to consider the other crimes specified in the list prepared by Mr. Pella and in the proposals of Mr. Hsu, Mr. Sandström and Mr. Yepes. He saw no reason for restricting the list of offences, as proposed.

45. Mr. SPIROPOULOS pointed out that on the previous day the Commission had discussed the question whether the code should mention the destruction of political groups. Concepts of international law naturally evolved. If a commission had been instructed twenty years earlier to prepare a draft code of offences against the peace and security of mankind, it would never have thought of including a reference to political groups. Had it done so, it would have considered itself guilty of interference in the internal affairs of States. But the primary consideration to be borne in mind by the Commission was the likelihood or otherwise of its draft code being adopted by the General Assembly. It should, therefore, include in the draft code such provisions as the General Assembly would be prepared to accept and as States would be willing to accept later in the event of a convention being subsequently drawn up based on the draft code.

46. The CHAIRMAN pointed out that Mr. Kerno who had recently returned from The Hague could certainly confirm the desire in circles close to the International Court of Justice for progress in the matter of international law. The Commission had been asked to prepare a draft code of offences against the peace and security of mankind. In his view the draft should include all conceivable offences, even it that entailed innovations in international law. That was his position, although, of course, it might not be that of the Commission.

47. Mr. AMADO pointed out that that question was not under discussion and that it was the Chairman who had raised it again. He thought it would be very difficult to reach a solution satisfactory to all the members of the Commission, including the Chairman. Even among jurists there were wide divergencies of view with regard to the definition of offences against the peace and security of mankind. As was well known, the Nürnberg Tribunal had declared that acts coming under the definition of offences against humanity always affected the rights of other States. It was stated on page 72 of "The Charter and Judgment of the Nürnberg Tribunal",⁷ that "These acts may then be said to be of international concern and a justification is given for taking them out of the exclusive jurisdiction of the State without abandoning the principle that treatment of nationals is normally a matter of domestic jurisdiction." On the other hand, Mr. Kelsen had stated in a study on the Draft Declaration on Rights and Duties of States, published in the April 1950 issue of *The American Journal of International Law* that article 6 of the Draft Declaration had no foundation in general international law which, at all events left the treatment of the citizens of

⁷ United Nations publication, Sales No.: 1949.V.7.

a State to the discretion of that State. Nor had article 6 any foundation in the Charter of the United Nations which did not impose on Member States the duty to treat all persons under their jurisdiction with respect for human rights and fundamental freedoms, without distinction as to race, sex, language or religion.

47 a. The CHAIRMAN took a diametrically opposite view to Mr. Kelsen. But, although the jurists disagreed, the Commission itself must agree on the acts it intended to include among offences against the peace and security of mankind. It must decide which acts were to come under that heading. He himself did not think that the assassination of Gandhi, for example, was an offence against the peace and security of mankind.

48. The CHAIRMAN said that the Commission seemed on the point of asserting that acts which were crimes in international law if committed in time of war were no longer crimes in international law if committed in time of peace. That struck him as completely irrational from the juridical standpoint and he requested the Commission to give some thought to the matter in order to reach a conclusion when the meeting was resumed.

49. Mr. BRIERLY said that the extent of the divergencies of opinion within the Commission should not be exaggerated. He thought it was essential to distinguish two categories of offences against mankind since some were a threat to the peace and security while others were not. Unless the Commission inserted some qualification the conclusion might be drawn that it considered all murders at all times as offences against peace and security. He thought the Chairman was inclined to go too far, but it should be possible to find a middle way. He proposed that a small drafting committee be set up to establish the distinction between crimes which were offences against the peace and security of mankind and those that were not. The drafting committee would assuredly be able to find a formula satisfactory to the Commission as a whole.

50. The CHAIRMAN asked Mr. Spiropoulos whether he thought he could prepare such a formula with the help of a small drafting committee.

51. Mr. SPIROPOULOS replied in the affirmative, provided the committee did not consist of more than three persons; for if there were more there would again be too many divergencies of view among the members.

52. The CHAIRMAN then requested the small drafting committee to meet and prepare a text to be examined by the Commission during the discussion of its report.

53. Mr. ALFARO drew the Commission's attention to the decision adopted at its previous meeting to replace paragraph 1 of Crime No. VIII by the single word "Genocide". Crime No. VIII contained a paragraph 2 dealing with crimes not mentioned in the Genocide Convention, which meant that the same article referred to two types of crime: (1) "genocide", in the sense in which the term was used in the Genocide Convention and (2) the crimes listed in article 6, paragraph (c) of the Nürnberg Charter. He thought it was

inadvisable for two different types of crime to be covered by the same text.

54. The CHAIRMAN agreed that paragraph 1 of Crime No. VIII concerned genocide while paragraph 2 referred to other crimes.

55. Mr. ALFARO proposed that the two paragraphs should be separated and that Crime No. VIII should consist merely of the original paragraph 1, while paragraph 2 would become Crime No. IX. The original Crime No. IX would then become Crime No. X, and so on.

56. The CHAIRMAN pointed out that the characteristic feature of genocide was its aim, namely the destruction of a national, ethnic, racial or religious group. The provisions of paragraph 2 were of a much wider and more general character. For example, the Genocide Convention did not include crimes against political parties; but paragraph 2 mentioned persecutions on political grounds. If, for instance, the French Government were to intern all Communists in concentration camps, that would not represent a case of genocide under the Genocide Convention. It had struck him that paragraph 2 represented an extension of the conception of genocide. On three occasions the Security Council had decided that the persecution of its own nationals by a State was a crime because it was a threat to peace. The Spanish Civil War might be mentioned as an example, since in several ways it had represented a serious threat to international peace.

57. Mr. ALFARO urged that the two paragraphs under Crime No. VIII should be separated and set down as two different crimes.

58. Mr. BRIERLY and Mr. HUDSON supported that proposal.

59. Mr. HUDSON requested the deletion of the words "on political, racial or religious grounds" from the definition of the new Crime No. IX (formerly paragraph 2 of Crime No. VIII). He thought that while the use of those words in the Genocide Convention was justified there was no need to repeat them in the code.

60. Mr. YEPES pointed out that the Genocide Convention made no mention of political groups, but only of national, ethnic, racial or religious groups.

61. Mr. HUDSON withdrew his proposal.

61 a. Mr. KERNO (Assistant Secretary-General for Legal Affairs) said that the two paragraphs of Crime No. VIII nevertheless contained certain common features and to divide them into two separate crimes would weaken that connexion. He disagreed with the Chairman's view that paragraph 2 referred to the rights of the individual. The rights referred to were those of the civil population.

62. Mr. HUDSON agreed with Mr. Kernö and said that the first sentence of paragraph 2 of Crime No. VIII contained the very important words "insofar as they are not covered by the foregoing paragraph". If paragraph 2 were to form the subject of a new crime that phrase should be retained with the necessary formal changes.

63. Mr. AMADO said there was a difference of sub-

stance between the two paragraphs. "Genocide", which was the subject of paragraph 1, might equally well be committed in time of peace as in time of war, whereas paragraph 2 covered acts or persecutions committed in execution of or in connexion with any offence against peace or any war crime. Persecution on political grounds, in particular, normally arose in connexion with a war.

64. Mr. SANDSTRÖM thought that persecutions of a political, racial or religious character were often committed without the intention of destroying national, ethnic, racial or religious groups.

65. Mr. SPIROPOULOS recalled his statement at the previous meeting that paragraph 2 under Crime No. VIII would doubtless give rise to a very involved discussion. He had placed paragraphs 1 and 2 under the same Crime No. VIII because there was a connexion between the crimes mentioned in each of those paragraphs. The Commission would note, from paragraphs 65-66 of his report, that he himself had been aware that the two paragraphs overlapped so far as certain acts were concerned. His purpose in including in the first sentence of paragraph 2 the words: "insofar as they are not covered by the foregoing paragraph" had been to obviate misunderstandings due to overlapping. Nevertheless there were crimes mentioned in paragraph 2 which were not covered by paragraph 1. He would repeat that he had drafted the text of Crime No. VIII in the form in which he had submitted it to the Commission for the sake of completeness. But he had no objection to the subdivision of Crime No. VIII into two crimes.

65 a. He was of opinion that if the Commission continued to discuss that point it would never complete its work and he therefore requested the Commission to leave it to the small drafting committee to prepare a text with due regard to the views expressed by the majority during the discussion namely—that the two paragraphs of Crime No. VIII should be divided into two separate crimes.

66. The CHAIRMAN thought the Commission could safely leave the matter to the small committee, but pointed out that the text submitted to the Commission in the report would not be final, so that the Commission would have a further opportunity of discussing it when the report came before it and of amending it, if it so desired.

It was so agreed.

CRIME No. X⁸

67. The CHAIRMAN then invited observations on Crime No. X, which need not, he thought, give rise to lengthy discussion, since all that it contained was a list of concepts in penal law.

68. Mr. AMADO said he had no particular objection to the list under Crime No. X, but asked the rapporteur whether he thought the right place had been found for it. In domestic penal codes the acts covered by Crime No. X were enumerated in a general section preceding

the other provisions of the code. In the draft code before the Commission Crimes I-IX referred to the acts themselves and were then followed by the list of preparatory acts etc. under Crime No. X. Perhaps Mr. Spiropoulos had regarded the acts mentioned under Crime No. X as specific crimes, although he (Mr. Amado) could not believe that. He therefore suggested that Crime No. X be placed in the general section at the beginning of the draft code, which would be in accordance with the almost universal practice.

69. Mr. HUDSON seconded that proposal.

70. Mr. SPIROPOULOS said he had no objection to that proposal. His intention had been merely to follow the practice adopted in the Genocide Convention, in which conspiracy, incitement, attempt and complicity were placed after the list of acts of genocide proper. The Genocide Convention was the first penal code in international law and the draft code now before the Commission would be the second. He had adopted the order of the Genocide Convention for the sake of maintaining technical uniformity between the two texts. He wondered what was meant by the "general section" of the code, to which Mr. Amado had referred, and what provisions the Commission intended to include in it. In his view the only provisions it could contain were those under Crime No. X.

71. Mr. KERNO (Assistant Secretary-General for Legal Affairs) agreed with that view and said that after lengthy discussion in the Sixth Committee and by the General Assembly at its third session (1948) during the preparation of the Genocide Convention it had been decided to adopt the technique employed in the present case by the Rapporteur. The provisions of article III of the Genocide Convention, which the Rapporteur had introduced under Crime No. X, had also been discussed at great length.

72. Mr. SANDSTRÖM thought that the example of the Genocide Convention was somewhat inconclusive, since the Convention referred to a single crime, whereas the code covered a whole series of crimes. He would also point out that when formulating the Nürnberg Principles the Commission had changed their order, particularly with regard to the special provisions on complicity.

73. The CHAIRMAN observed that the question of technique was of minor importance.

74. Mr. HUDSON thought that, from the point of view of substance, the preparatory acts mentioned in paragraph (c) of Crime No. X should not apply to all the provisions of the code. While it was true that the paragraph had a direct bearing on Crime No. I, so far as genocide was concerned, the Convention had not a word to say on the subject of preparatory acts. In his view, the provisions of paragraphs (a), (b), (c), (d) and (e) of Crime No. X were not applicable to all of the crimes, I-IX, in the code.

75. Mr. SPIROPOULOS, supporting that view, had thought at first that it might be better to mention the acts listed in Crime No. X under each of the crimes in the code to which such acts might apply. But he had

⁸ See A/CN.4/25, Appendix.

abandoned the idea for the sake of the practical presentation of the code.

76. Mr. BRIERLY thought that paragraph (c) of Crime No. X went too far. If he himself, for example, wished to commit a crime at Lausanne, he would have to carry out certain preparatory acts, such as purchasing a railway ticket etc. No such act could be criminal so long as he had not committed the crime, that was to say, performed the punishable act.

77. The CHAIRMAN observed that a preparatory act could not be a crime unless followed by the act.

78. Mr. SPIROPOULOS recalled that during consideration of the Genocide Convention the Czechoslovak Government had urged that preparatory acts should be punished even where the act was not performed. Perhaps he had had that request in mind in including paragraph (c.) At any rate he was ready to accept its deletion.

79. Mr. KERNO (Assistant Secretary-General for Legal Affairs) pointed out that the reference to preparatory acts had been deleted when the Genocide Convention was being drafted. It was true that one delegation had requested the insertion of a provision on preparatory acts; but the proposal had not been accepted. If the Commission decided to insert such a provision in the code, it would thereby extend the scope of the crimes as defined in the Genocide Convention.

80. Mr. ALFARO recalled that when the Commission had discussed Crime No. I, he had raised the question of preparatory acts and said that the code should contain such a provision applicable to Crime No. I and also to all other crimes the preparation of which might presumably be regarded as an offence against international peace and security. It had been said that Article X concerned preparatory acts. In his view a specific provision on preparatory acts should be retained in the code, but with an indication of the crimes to which it would apply, including Crime No. I.

81. The CHAIRMAN thought that all members of the Commission agreed with Mr. Alfaro on that point.

81 a. Mr. HSU observed that the question of preparatory acts as a proof of aggression might be discussed under paragraph 5 of his proposal (see below, para. 107).

82. Mr. HUDSON moved that the Rapporteur should delete the words "and public" from paragraph (b) of Crime No. X, since incitement to commit a crime might be private as well as public.

83. Mr. KERNO (Assistant Secretary-General for Legal Affairs) said that the phrase "direct and public incitement" had also been discussed during the drafting of the Genocide Convention. A request had then been made for the deletion of the term "public"; but the General Assembly had decided to retain both terms, "direct" and "public".

84. Mr. HUDSON did not regard the Commission as bound by decisions adopted previously by other organs.

85. Mr. BRIERLY, supporting that view, thought the term "direct" was quite sufficient.

86. Mr. SPIROPOULOS, disagreeing with the view

expressed by Mr. Hudson and Mr. Brierly, said that in retaining the terms used in the Genocide Convention his aim had been to facilitate the adoption of the draft code by the General Assembly. To that end he had tried to respect the opinion of the majority, which had decided to include both terms in the Genocide Convention. Some governments had adopted a very definite attitude on the question and he thought that if the Commission wished to ensure the adoption of the draft code by the General Assembly it would be well advised to retain both terms.

87. Mr. BRIERLY thought the Commission was free to submit a text in whatever terms it thought fit to the General Assembly, which could always amend the text as it deemed necessary.

88. Mr. AMADO thought the term "public incitement" had its proper place in the Genocide Convention since, before an act of genocide was committed an atmosphere had to be created, for example through the medium of the press, in order to obtain the approval of public opinion. But he did not think the term need be retained in the draft code, the phrase "direct incitement" being adequate to cover the crimes listed in the code.

The Commission decided to delete the words "and public" from paragraph (b) of Crime No. X.

89. The CHAIRMAN then invited the Commission's observations on Basis of Discussion No. 2.

BASIS OF DISCUSSION No. 2⁹

90. Mr. HUDSON pointed out that paragraph 2 of Basis of Discussion No. 2 represented a departure from the Nürnberg Principles, while paragraph 1 and Basis of Discussion No. 3 fell within the framework of the Nürnberg Principles as recently formulated by the Commission. He also suggested that the Rapporteur should re-draft paragraph 1 of Basis of Discussion No. 2 and Basis of Discussion No. 3 to bring them into line with the terms used by the Commission in the formulation of the Nürnberg Principles.

90 a. So far as paragraph 2 of Basis of Discussion No. 2 was concerned, it was expedient to include such provisions in the draft code and to link them with the provisions of paragraphs (a), (b), (d) and (e) of Crime No. X. He thought that should any of the persons referred to in paragraph 2 fail to take appropriate measures they would, in fact, be accomplices who should be punishable under international law.

91. Mr. YEPES thought it preferable not to consider Basis of Discussion No. 2 until the Commission had examined the list prepared by Mr. Pella¹⁰ and the proposals submitted by Mr. Hsu,¹¹ Mr. Sandström¹² and himself¹³ concerning the insertion of new crimes in the draft code.

⁹ See A/CN.4/25, Appendix.

¹⁰ See A/CN.4/39, Part III.

¹¹ See para. 107, *infra*.

¹² See summary record of the 61st meeting, para. 21.

¹³ *Ibid.*, para. 50.

92. The CHAIRMAN thought that the Commission might continue the examination of Basis of Discussion No. 2 and thereafter deal with the other proposals mentioned by Mr. Yepes.

93. Mr. SPIROPOULOS accepted Mr. Hudson's suggestion that Basis of Discussion No. 3 should be worded in accordance with the exact terms of the Nürnberg Principles as formulated by the Commission, although he considered the two texts substantially the same.

93 a. As regards paragraphs 2 of Basis of Discussion No. 2, his position was rather difficult. He had given much thought to the wording of that paragraph. The Commission had found that certain crimes might be committed solely by persons in an official position whereas others might also be committed by private individuals. The effect of that decision had been to modify the principle he had had in mind when drafting his text. Moreover, Mr. Hudson wished paragraph 2 of that Basis of Discussion to be linked with Crime No. X, so far as complicity was concerned, all of which made his position more and more difficult. With a view to finding a solution he requested the Commission to supply him with a text.

94. Mr. SANDSTRÖM failed to see how the omissions and negligence mentioned in paragraph 2 of Basis of Discussion No. 2 could be regarded as complicity. In his view, the failure of persons in an official position, whether civil or military, to take appropriate measures to prevent or repress punishable acts actually represented special ways of committing a criminal act, and that was not a mere act of complicity. He did not agree therefore that the Commission should link paragraph 2 of Basis of Discussion No. 2 with Crime No. X, which concerned complicity.

94 a. With regard to paragraph 1 of Basis of Discussion No. 2, he moved that it be more carefully worded to take account of the Commission's decision that certain acts would only be crimes in international law if committed by persons in an official position, while other acts would be crimes if committed by private individuals.

95. Mr. HUDSON seconded that proposal.

96. Mr. SPIROPOULOS also accepted Mr. Sandström's suggestions, agreeing that paragraph 1 should be reworded in the light of the Commission's decision limiting some of the crimes mentioned in the draft code to acts by persons in an official position.

97. Mr. HUDSON thought it should be made clear that the Commission did not have in mind the penal liability of the State, for example, by using, in paragraph 1, the expression "Any head of a State or Government".

98. Mr. SPIROPOULOS agreed that that could be done, but said that all the elements of paragraph 1 must be preserved in order, in particular, to cover any cases arising in connexion with the crime of genocide and other crimes which might be committed by private individuals.

99. Mr. HUDSON felt confident that Mr. Spiropoulos would be able to find a formula which would take account of all the views expressed.

100. Mr. SANDSTRÖM thought that other questions remained to be settled by the Commission. Foremost among them was the need for a provision concerning persons who were not public officials but who acted as agents of a government. There were, for example, agents whose task it was to foment civil strife or create disturbances in a neighbouring State. Such agents should be mentioned in the code. They should also settle the question of the complicity of private individuals in crimes committed by rulers of States.

101. Mr. SPIROPOULOS thought that the code could hardly go into full details concerning agents. Complicity was an entirely different matter. It was an extremely serious problem and one which, he thought, should be left alone.

102. Mr. BRIERLY said that heads of States must be specifically mentioned, because it was the Commission's intention not to recognize their traditional immunity in the code. The immunity of heads of States had been a long established principle but it should no longer remain inviolate. In his view the code should contain a provision corresponding to Nürnberg Principle III. The code must give guidance in that matter.

103. Mr. SPIROPOULOS said that he had intentionally refrained from mentioning the subject in view of the discussions which had taken place in the Sixth Committee during consideration of the Genocide Convention. As a result of those very lively discussions the Sixth Committee had decided to omit all reference to the complicity of heads of States. The Swedish representative, among others, had stated that the immunity of the king's person was guaranteed by the Constitution. That objection had been met by using the expression "constitutionally responsible rulers" in article IV of the Convention.¹⁴ In his view the decision in such a case must be left to the judges, although he agreed that it was a highly important problem.

104. Mr. BRIERLY thought that if the decision was left to the judges they would follow established custom and would not dare to run counter to tradition.

105. Mr. SANDSTRÖM, speaking in his private capacity as an expert in international law, considered that the draft code must contain a provision abolishing the immunity of heads of States in relation to crimes in international law. It was absolutely essential that that question should be settled.

106. Mr. HUDSON suggested that the task of re-drafting Basis of Discussion Nos. 2 and 3 in the light of the various views expressed during the discussion should be left to the Rapporteur, and moved that the Commission proceed to examine Mr. Pella's list and the proposals submitted by Mr. Hsu, Mr. Sandström and Mr. Yepes.

¹⁴ See *Official Records of the General Assembly, Third Session, Sixth Committee, 95th meeting, p. 343.*

ADDITIONAL CRIMES PROPOSED BY MEMBERS OF THE
COMMISSION FOR INCLUSION IN THE DRAFT CODE

Proposals submitted by Mr. Hsu.¹⁵

107. The CHAIRMAN, accepting that motion, invited observations on the proposals submitted by Mr. Hsu.

108. Mr. HSU suggested that the Commission should first examine proposals Nos. 1, 2 and 3 which referred to subversive activities. He had no objection to their incorporation in a single text, if that was the Commission's desire. At the same time he hoped that the draft code would take account of subversive activities as construed in his proposals.

109. Mr. HUDSON said he did not understand the meaning of the term "subversive". If Mr. Hsu meant activities designed to overthrow a government, he thought they were already covered by the various crimes which had just been adopted by the Commission.

110. Mr. BRIERLY thought that those activities were identical with activities designed to provoke civil strife.

111. Mr. HSU disagreed, citing the example of the organization of fifth columns and their activities. None of the provisions so far adopted by the Commission covered those subversive activities and such provisions as might apply to them were not strict enough. The traditional terminology was inadequate to cover new acts.

112. Mr. YEPES, while agreeing with the principles stated in Mr. Hsu's proposals 1, 2 and 3, thought that the acts mentioned were already included under Crime No. III which concerned the fomenting of civil strife in another State. He was prepared to accept Mr. Hsu's proposals if Mr. Hsu could convince the Commission that they related to something new.

113. Mr. HSU replied that the Commission was continually using outmoded formulas, which should be modified and adapted to the new circumstances and new facts that had arisen. The draft code as it stood would be inadequate to punish the activities with which his proposals dealt.

114. The CHAIRMAN was convinced that there were new elements in Mr. Hsu's proposals. He agreed that fifth column activities were a new departure and might lead to civil strife, or even to war. For example, a military arsenal in France had had an overseer of German nationality, naturalized French. On the declaration of war that overseer had donned a German captain's uni-

form, stating that he was a German after all and it was his duty to behave as such. Such special cases, which Mr. Hsu seemed to have in mind, were frequent and might be connected with war preparations or subversive movements. Mr. François could undoubtedly supply many similar examples.

115. Mr. FRANÇOIS, confirming the Chairman's observation, agreed that reference should be made to such cases. But he pointed to the danger inherent in a principle which was not clearly expressed. For instance, what would be the position with regard to anti-Communist propaganda carried out by agents in Communist countries? Would such propaganda be subversive or not?

116. The CHAIRMAN moved the adjournment and proposed that the next meeting of the Commission should be devoted to the deletion from the draft code of all provisions which might be submitted in the form of a draft convention. He added that it was outside the Commission's competence to suggest the procedure to be adopted for putting the code into effect.

117. Mr. SPIROPOULOS thought that it lay with the Commission to define the tasks it had to perform. He himself had merely drawn up a list of crimes and bases of discussion. If the Commission's present intention was to prepare, not a draft convention, but only a list of crimes, he was inclined to believe that the General Assembly would be surprised to receive a text which it had itself to complete. A draft convention would be of value as the only practical means of applying the provisions contained in the draft code. At the same time the Commission, if it intended to prepare a draft convention, should confine itself to decisions of principle and not go into further details.

118. Mr. HUDSON thought it was no part of the Commission's functions to prepare a draft convention.

The meeting rose at 6.10 p.m.

61st MEETING

Wednesday, 5 July 1950, at 10 a.m.

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¹⁵ Additional crimes proposed by Mr. Hsu (A/CN.4/R.1):

- "1. The waging by a State of subversive propaganda against another State or the encouragement or toleration of such an activity within its territory.
2. The giving by a State of aid, moral, political and economic, to subversive elements in another State or the encouragement or toleration of such an activity within its territory.
3. The maintenance of subversive agents by a State in another State.
4. The application of coercion, psychological or economic, by a State against another State.
5. The planning by a State of an aggressive war against another State."

Chairman: Mr. Georges SCELLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

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

Letter from the Vice-President of the International Red Cross Committee

1. The CHAIRMAN stated that he had received a letter from Mr. Léopold Boissier, Vice-President of the International Red Cross Committee, to the effect that the members of the Commission would receive individual invitations for a reception to be held on Thursday, 13 July. Mr. Boissier hoped that this meeting would provide an opportunity for an entirely unofficial exchange of views on subjects of common interest to the Commission and the International Red Cross Committee and, in particular, for a fruitful discussion of ways and means of bringing the proposals studied by the Commission and the Geneva Conventions of 1949 into harmony. He would be glad to know in advance what subjects the Commission would like to discuss.

1 a. He proposed that to initiate this brief discussion, which should not take more than an hour, Mr. Spiropoulos should make a short statement on the Commission's method of work, after which the members of the International Red Cross Committee could ask questions.

2. Mr. HUDSON considered that the discussion should be kept on an unofficial basis. Mr. Huber wished to know what the members of the Commission thought. He might be told that the draft code of offences against the peace and security of mankind would not be finished until next year and that, for the final draft, the Commission would take into consideration the four Geneva Conventions and, in particular, the penalties provided for therein.¹

3. The CHAIRMAN agreed with this standpoint, and thought it probable that the members of the International Red Cross Committee would adopt the method of asking questions. In his opinion, it would not be possible to introduce the four Conventions into the draft code. The conversations would be of an unofficial and informal nature. Mr. Huber would probably preside over the discussion.

¹ See International Committee of the Red Cross, *The Geneva Conventions of August 12, 1949*, second revised edition, Geneva, 1950.

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

ADDITIONAL CRIMES PROPOSED BY MEMBERS OF THE COMMISSION FOR INCLUSION IN THE DRAFT CODE

(a) *Proposals by Mr. HSU (continued)*²

4. Mr. HSU remarked that, in his statement on aggression against Southern Korea, President Truman had used the word "subversion". "The attack on Korea," he said "makes it plain beyond all doubt that the Communists have passed beyond the use of subversion to conquer independent nations and will now use armed invasion and war." These words showed that subversion was a crime that could be committed independently of the use of armed forces or of war. The objection had been raised that it was redundant to include this new crime, as it had already been provided for by other definitions. He had, however, studied the list of crimes so far agreed upon, and had found that the addition of this crime was really necessary. What had been provided for so far in this connexion was inadequate, as it did not answer to the existing situation. It was true that the fomenting of civil strife and of terrorist activities was covered by the text he proposed, but this text had a far wider application than definitions Nos. III and IV. Conquest was not the direct object of civil war or of terrorist activities, but it was the object of subversive activities.

4 a. He was prepared to submit his proposal in the form of a single item to be worded as follows: "The use of subversion, including subversive propaganda, aid given to subversive elements, and maintenance of subversive agents in another State".

5. Mr. el-KHOURY suggested that as Mr. Hsu was pressing for the inclusion of subversive activities in the draft code, it should be left to the Drafting Committee to decide on the place in the code where these activities should appear.

6. Mr. HSU considered that this suggestion did not meet the case. Subversive activities were too important to be included amongst minor provisions. They should be dealt with in a principal clause to which other questions should be related.

7. Mr. el-KHOURY thought that subversive activities could be related to the fomenting of civil strife.

8. The CHAIRMAN asked whether the Commission wished to list these activities as a separate crime.

9. Mr. HUDSON wished to know whether Mr. Hsu could reply to the very pertinent question put to him by Mr. François on the preceding day.

10. Mr. FRANÇOIS repeated his question. He asked whether this item could not equally be applied to anti-Communist propaganda. If so, the Pope had rendered himself guilty of this crime, as he indulged in anti-Communist propaganda. His aim was the abolition of the Communist regime. That was subversive activity di-

² See summary record of the 60th meeting, footnote 15.

rected against the regime existing in some countries. He considered that the proposed text went too far.

11. Mr. HSU replied that that was a very important question. Obviously, propaganda did not in itself constitute the whole of the problem. But it might be said that in the same way as there was at times legitimate occasion for the use of force, there could be good propaganda. Therefore, if the Pope indulged in propaganda, it might be considered that it was good. A distinction must be made between good and subversive propaganda, and he did not see why the Holy See's propaganda should be regarded as subversive.

12. Mr. FRANÇOIS felt that the Pope's words might also be considered as offending against item 2, which spoke of "moral aid".

13. Mr. HSU did not attach particular importance to the word "moral". If the Pope's propaganda was good, it was not subversive.

14. The CHAIRMAN said that, if Mr. Hsu was agreeable, the Commission might adopt Mr. el-Khoury's suggestion and leave it to the Drafting Committee to decide what part of Mr. Hsu's proposal was of special importance and should therefore be included. In his opinion, it applied in particular to the practice of maintaining a fifth column.

15. Mr. HSU agreed to this suggestion on condition that the Drafting Committee gave careful consideration to this question which, in his opinion, was of the very greatest importance.

16. The CHAIRMAN thought that the acts to which the above items referred had already been dealt with in the draft Code. Item 4 also fell within the sphere of the use of force in the form of a blockade, which the Commission had decided not to include as a separate crime. Item 5 was covered by the terms of Crime No. I.

17. Mr. el-KHOURY considered that the proposals went too far. According to item 4, a blockade and the breaking off of economic relations constituted international crimes. He was unable to share this view.

18. Mr. HSU did not feel so strongly about this crime as about the others, but he pointed out that they did not involve the use of force. A country could be brought to heel solely by an interruption of economic relations. Small countries were always vulnerable to measures of coercion. Nevertheless, he would not press for the adoption of item 4.

19. Mr. SPIROPOULOS pointed out that as far as item 5 was concerned, the Commission had already decided to deal separately with the act of preparing for an aggressive war in the definition of Crime No. I.³

20. Mr. HSU agreed to the elimination of item 5.

(b) *Proposal by Mr. Sandström*⁴

21. Mr. SANDSTRÖM pointed out that a State might indulge in the destruction of property in the territory of another State for a political purpose. Obviously, the

value of the Code did not depend on the number of crimes listed therein. Did any of his colleagues think there were good reasons for inserting this provision in the draft?

22. The CHAIRMAN remarked that there was a connexion between Mr. Sandström's and Mr. Hsu's proposals.

23. Mr. SANDSTRÖM pointed out that Mr. Hsu's proposal was mainly concerned with propaganda. The acts to which his own proposal referred were perhaps related to those which Mr. Hsu had in mind, but they would have a physical effect.

24. The CHAIRMAN asked Mr. Sandström whether he desired the inclusion in the Code of a special article defining the crime which he had in mind.

25. Mr. SPIROPOULOS considered that, generally speaking, the crimes listed in the draft Code consisted of concrete acts as, for instance, invasion. Other actions, such as those to which Mr. Hsu's and Mr. Sandström's proposals referred, were less serious. It was a very delicate matter to decide whether they constituted crimes under international law. The question of propaganda had been discussed when the Convention on Genocide was being drawn up. At that time it was considered that the term was too vague. Sabotage or propaganda were not sufficiently concrete acts to be considered as constituting international crimes. Nevertheless, he would not oppose the proposal.

26. Mr. SANDSTRÖM felt that acts of sabotage were quite sufficiently concrete. However, the point at issue was whether they were sufficiently important to constitute international crimes. It was on this point that he wished to have his colleagues' opinions.

27. Mr. ALFARO considered that the Commission should approve Mr. Sandström's proposal. There could be no doubt that the citizens of certain countries were at the present time fanatically attached to an ideology, and were prepared to use all weapons against countries which did not adhere to it. He recalled the acts of sabotage committed by the Germans in the United States during the First World War. Sabotage and the activities of a fifth column were crimes of which the Commission should take account, even though the agents employed therein were natives. Sabotage differed from the crimes which had been dealt with so far, and should be included in the Code.

28. Mr. KERNO (Assistant Secretary-General) was doubtful whether it were possible to define sabotage. In all penal codes, crimes were precisely defined. He was aware that it was not possible to achieve the same degree of precision in international law. But where should the line be drawn as regards sabotage? Must it be committed with a certain intention? Must it be bound up with preparations for war? If sabotage could be defined with a certain amount of precision, which he doubted, he thought that it could be brought into the Code.

29. Mr. el-KHOURY proposed to speak about sabotage in time of peace, as it was permissible for belligerents to practise it in time of war. He could not see any difference between sabotage in time of peace and

³ See *ibid.*, paras. 80 and 81.

⁴ Additional crime proposed by Mr. A. E. F. Sandström (A/CN.4/R.1): "Acts of sabotage carried out by one State in the territory of another State."

subversive activities. The agents could be nationals of the State in which they operated or of the country which sent them. Subversive activities could take many different forms and sabotage was one of them. It might be carried out for a number of reasons, and it was not perhaps necessary to list it as a separate crime.

30. Mr. SPIROPOULOS was glad to see that Mr. Kerno shared his apprehensions and doubts. The primary consideration was that the act visualized should constitute a violation of international law. He was doubtful whether a fifth column really constituted such a violation. What the Germans had done was, he thought, legitimate. If there were traitors in a country, it was for that country to punish them. For an act to constitute an international crime it had to be contrary to international law.

31. Mr. SANDSTRÖM had not been thinking of fifth column activities. On this point, he was in agreement with Mr. Spiropoulos. What he had been thinking about was foreign agents sent in by a foreign government.

32. The CHAIRMAN remarked that a fifth column was very often composed of agents sent by a foreign government.

33. Mr. SANDSTRÖM thought that they sometimes consisted of citizens of the country in which they were operating. The agents of foreign governments who committed acts of sabotage were engaged in concrete acts of property destruction with a political object. However, he would not press his proposal if it were not generally supported by the members of the Commission.

34. Mr. CORDOVA considered that there was a difference between sabotage and propaganda. In democratic countries, propaganda was free by virtue of the principle of freedom of thought and speech. Such countries should defend themselves by democratic means and not by repressing ideas. If a foreign government sent agents into a country to destroy property, with a view to hampering that country's defence, such acts did not come within the definition of fomenting civil strife. He thought they should be provided for in another definition.

35. Mr. BRIERLY was more or less of the same opinion. The word "sabotage" had a sufficiently precise meaning. If the government of a State sent agents in time of peace to carry out sabotage in another State, that was an international crime.

36. Mr. ALFARO suggested that belligerents might commit sabotage in a neutral country.

37. Mr. BRIERLY replied that as far as the neutral country was concerned, it was peacetime.

38. The CHAIRMAN said that in saying that such action might be regarded as in conformity with international law, Mr. Spiropoulos had removed any doubt that he might have had. The Commission would no doubt remember the accidents to two French aeroplanes near Bahrein Island. If there was sabotage, due to the fact that the aircraft were carrying plenipotentiaries of the Indo-Chinese Union, would this not be a typical international crime committed in time of peace?

39. Mr. SPIROPOULOS was still hesitant. Conflicts

between States would always continue in one shape or another. However, he was not opposed to the proposal in principle. If the Commission approved Mr. Sandström's proposal, it might be referred to the Drafting Committee.

40. The CHAIRMAN also felt that it was not impossible to define sabotage.

41. Mr. SPIROPOULOS was of the same opinion, but considered that Mr. Sandström's proposal went rather far. It would be difficult to discover who was responsible.

42. Mr. BRIERLY remarked that that was true in regard to all the crimes which they had listed.

43. The CHAIRMAN asked the Commission whether it wished to consider such action as constituting a separate crime. They could decide next year on the final wording. In his opinion, they were dealing with a separate crime to which the ideas put forward by Mr. Hsu could be related.

44. Mr. HUDSON considered that in this connexion the responsibility of the governments of the States carrying out sabotage should be made clear.

45. The CHAIRMAN did not think that was necessary. For instance the destruction of the "Maine", which had started the Spanish-American war in 1898, might have been the work of a group of private individuals.

46. Mr. HUDSON and Mr. BRIERLY were of the opinion that in that case, it would be a case of an ordinary crime, and Mr. SANDSTRÖM added that, in his definition, he had only visualized acts of sabotage directed by one State against another.

47. Mr. SPIROPOULOS, on the other hand, considered that the application of the Code to private individuals in this connexion would be in conformity with the rule that had been adopted.

48. Mr. BRIERLY quoted as an example the efforts of Communists in France to prevent the arrival of arms sent under the Marshall Plan. Such actions were the concern of French municipal law and did not constitute an international crime.

49. The CHAIRMAN said that such activities certainly did not constitute an international crime, but in certain circumstances they might develop into one. It might be that Viet Minh had sabotaged the French aircraft which had been lost a little time ago near Bahrein, and Viet Minh was to some extent a *de facto* government. Obviously, it was difficult to define such acts, but they were certainly not covered by the definitions of crimes hitherto accepted.

The Commission decided by 7 votes to nil, with 4 abstentions, to study the possibility of defining the crime of sabotage.

(c) Proposal by Mr. Yepes⁵

50. Mr. YEPES said that the definition he proposed should be read in conjunction with article 3 of the draft

⁵ Additional crime proposed by Mr. Yepes: "The unilateral and illegal intervention of a State or group of States in the internal or external affairs of another State or group of States."

Declaration on Rights and Duties of States drawn up by the Commission at its first session: "Every State has the duty to refrain from intervention in the internal or external affairs of any other State."

50 a. He had submitted his proposal because he considered that the problem of non-intervention was one of the most serious existing at the present time. If intervention by a State in the internal or external affairs of another State were outlawed, the international horizon would clear, and the state of apprehension in which the world was living would pass away. If article 3 were anything more than a purely theoretical statement, the logical conclusions should be drawn from it, and this great principle should be made one of the pillars of peace.

50 b. Article 9 of the Declaration read: "Every State has the duty to refrain from resorting to war as an instrument of international policy . . ." and the Commission had decided that any violation of that article should constitute an international crime subject to penalties. In the same way, it should rule that any violation of the principle of non-intervention was also an international crime susceptible to penalties. Legally speaking, unilateral intervention in the affairs of a State was no less a violation of international law than aggressive war itself. Very often, such intervention was one of the preliminaries of aggressive war, and in any case it sought to obtain, without a declaration of war, the results accruing from victory in the field.

50 c. As long as intervention was not outlawed in America, there was no peace in the New World, but when President Franklin Roosevelt's good-neighbour policy made it possible to proclaim the principle of non-intervention at the Seventh Conference of American States held at Montevideo in 1933, continental solidarity, good-neighbourly relations and reciprocal respect became the guiding principles of Pan-American policy. Peace had been solidly established in the Western Hemisphere because it rested on the principle of non-intervention. Could not what had been done in America on the continental scale be repeated on a world scale?

50 d. In his proposal, he had spoken of unilateral intervention to show that it was inspired by the self-interest of the intervening State. The word "illegal" showed that such action as that undertaken by the United States in Korea for the maintenance of international order did not come within the purview of the definition. In the preceding year, the Commission had adopted the draft Declaration on Rights and Duties of States, and had condemned intervention in the wider sense usually applied to the term. Unilateral and illegal intervention undoubtedly constituted a danger to peace and security. If there was anything—apart from aggressive war itself—which should be included amongst international crimes, it was certainly intervention in the sense which he had given it above.

50 e. The definition he had proposed was subject to modification, and he was prepared to accept such modification provided that it did not affect the basic principles of his proposal. Should the Commission not be prepared to accept his proposal immediately, it might

reserve it for further consideration between the two sessions and advise the General Assembly that it had the problem under consideration. The Assembly might be able to give the Commission valuable directives in the matter. He was convinced that at all events all the American countries, including the United States, would support his action, which conformed to one of their most cherished ideals. In order to dispel the existing anxiety, the level of international morality must be raised. The present time was similar to that between 1930 and 1939, when the peoples went in constant fear of awaking under bombardment. Care should be taken that history did not repeat itself.

51. Mr. FRANÇOIS had a great deal of sympathy with Mr. Yepes' idea, but was not sure whether it could be inserted in the Code as at present conceived. The fact that unilateral and illegal intervention could constitute a crime implied that legal intervention was permissible, but there was no definition as to when intervention was legal. It might be said that this was a matter for a judge's decision, but he could not accept that type of legislation. It represented a departure from the principle of *nullum crimen sine lege*; in other words, it would only be necessary to adopt a text to the effect that illegal acts were prohibited, and say that there was a law and that it was for the judge to interpret it. But the individual was entitled to know in advance what was prohibited. Mr. Yepes' definition was silent on that point, and he could not see his way to accept it in the absence of clarification on this matter.

52. Mr. YEPES replied that by the word "illegal" he had intended to convey that the definition in question was not applicable to action undertaken by a State on behalf of the international community. Collective or individual action on behalf of the community as a whole was legal. Intervention by a State on its own account was contrary to the principles of the Charter, and was therefore illegal.

53. Mr. BRIERLY shared Mr. François' doubts, and furthermore, he foresaw some difficulties as regards the word "intervention". The political meaning of the word was easily understandable, but it would be difficult to define it sufficiently precisely in a penal code. If intervention did not take one of the extreme forms specified in the definitions already adopted, he was not clear as to what other Mr. Yepes had in mind.

54. Mr. CÓRDOVA said that during the discussion on Crime No. I, he had pressed for the retention of the words "use of armed force" in violation of international law, as this expression included armed intervention.⁶ If this wording were retained, armed intervention would be included under Crime No. I. There would then only remain economic and political, that is to say unarmed, intervention. Any attempt to define such intervention would be faced with such a host of state activities that the whole of international relations would be involved. In America, political intervention had been defined very precisely in signed treaties, but it would be very difficult to introduce such a definition into a penal code. He felt that so far as intervention

⁶ See summary record of the 55th meeting, para. 42 b.

constituted a crime against international law, it was already included under Crime No. I.

55. Mr. YEPES admitted that the Commission had already defined its attitude as regards the invasion of the territory of a State by armed bands in Crime No. II, and as regards fomenting civil strife in another State in Crime No. III. His proposal related to another idea. Its purpose was that all intervention in the affairs of another State should be considered as an international crime under the draft Code under consideration. That idea was based on article 3 of the draft Declaration on Rights and Duties of States.

56. Mr. HUDSON remarked that Mr. Córdova's arguments had reminded him that the words "in violation of international law" had not been retained in the definition of Crime No. I.

57. Mr. CORDOVA considered that the new definition given by the Commission to Crime No. I contained the same elements as the original version.

58. The CHAIRMAN also considered that the original concept had been maintained and that all that had been done was to modify the wording, without in any way altering the scope of Crime No. I.

59. Mr. LIANG (Secretary to the Commission) read the definition given by the Commission to Crime No. I, which was as follows: "The use of armed force for purposes other than individual or collective self-defence or the carrying out of a mandate of the United Nations".

60. Mr. SANDSTRÖM was of the opinion that the modification made in the definition of the crime strengthened Mr. Córdova's argument.

61. The CHAIRMAN was of the same opinion.

62. Mr. ALFARO was under the impression that the Commission had decided to insert the words "by one State against another State" in the text of Crime No. I. These words had not been included in the text read out by Mr. Liang.

63. The CHAIRMAN and Mr. LIANG also thought that these words had been included in the text.

64. The CHAIRMAN thought that Mr. Yepes' idea was to include in the text a provision against any spontaneous intervention, carried out without having been approved or ordered by the Security Council, for instance. There had been many instances of such intervention during the last few years.

65. Mr. HUDSON referred to article 3 of the draft Declaration on Rights and Duties of States, according to which "every State has the duty to refrain from intervention in the internal or external affairs of any other State". Mr. Yepes' text was almost identical with that of article 3, and he felt he should mention the opinion expressed by Mr. Hans Kelsen on that article.

"Intervention in the internal or external affairs of another State constitutes a violation of the independence of that State. If article 3 is to be interpreted in conformity with existing general international law, 'intervention' means dictatorial intervention, that is, intervention by the threat or use of force. Hence, the

duty formulated in article 3 is covered by the duty laid down in article 9 to refrain from the threat or use of force against the political independence of another State, and article 3 is redundant."⁷

66. Mr. SPIROPOULOS drew attention to the fact that the problem of intervention had been discussed at length by the General Assembly in the preceding year, in connexion with a statement by the Yugoslav representative.⁸ As a result of that discussion, he had considered that it would not be wise to lay stress on acts of intervention in his report, particularly as "intervention" as a rule of conduct did not seem to have any meaning from the point of view of international law. It was true that the word was to be found in a very large number of international treaties, but he had considered it desirable to refrain from mentioning intervention also because the definition of the word was extremely difficult. There were cases where intervention was prohibited. Such cases were already covered by the draft Code which the Commission was examining. Other cases were not prohibited. Moreover, how was it possible to qualify or define the term "intervention"? Was it to include cases of economic or psychological pressure? According to Mr. Yepes, such interventions were crimes. In his opinion, they were not. It appeared to him to be extremely difficult to include such forms of intervention in a draft Code which was concerned with definite acts.

67. Mr. CORDOVA proposed that the Rapporteur should give due consideration to the discussions which had just taken place as well as to the fact that certain types of intervention were already covered in the crimes adopted by the Commission.

68. The CHAIRMAN felt that it was extremely difficult to define cases where intervention was permissible and those where it was not. If an intervention constituted a threat, it was prohibited by the United Nations Charter, but if it did not, it was very difficult to say if and in what circumstances it was a crime under international law.

68 a. He suggested that the substance of Mr. Yepes' proposal be inserted in the report, and that the close connexion between this proposal and article 3 of the draft Declaration on Rights and Duties of States be emphasized.

69. Mr. YEPES pointed out that in the preceding year the Commission had decided that the question of intervention should be included in the draft Code. The Commission now seemed to have changed its mind. Its attitude was also in contradiction with the decision taken in the preceding year condemning all intervention without any qualification whatsoever.⁹

70. The CHAIRMAN asked the Commission whether it wished special mention to be made of non-military intervention in the draft Code.

⁷ In the *American Journal of International Law*, vol. 44 (1950) p. 268.

⁸ See *Official Records of the General Assembly, Fourth Session, Sixth Committee*, 171st meeting, para. 44, etc.

⁹ See *Yearbook of the International Law Commission*, 1949, Part I, 19th meeting.

On being put to the vote, the proposal was rejected by 4 votes to 1, with 6 abstentions.

71. Mr. YEPES insisted that his statement on the change in the Commission's attitude be mentioned in the summary records.

72. The CHAIRMAN ruled that this should be done. The Commission was certainly agreed that any intervention in violation of the Charter was illegal, but such violation did not always constitute a crime against international law.

73. Mr. el-KHOURY explained that he had abstained from voting because he did not understand what sort of intervention was visualized in Mr. Yepes' proposal. The Charter forbade any intervention in matters which fell essentially within the national competence of a State, but the interventions apparently contemplated by Mr. Yepes had not been defined, and it was therefore impossible to say to what extent they might constitute a crime under international law. It was for that reason that he had abstained from voting.

74. The CHAIRMAN was also of the opinion that it was very difficult to stigmatize all types of intervention as crimes, although they were always regrettable. Mr. Yepes' proposal had been drawn up in very general terms, and he also considered it necessary to abstain.

75. Mr. BRIERLY said he had voted against Mr. Yepes' proposal because of the difficulty of arriving at a precise definition.

76. Mr. SANDSTRÖM gave the same explanation of his vote.

77. Mr. ALFARO also wished to explain his vote. He too had abstained because of the vague terms in which the proposal had been drawn up. He had recognized that it would be extremely difficult to draw the line between interventions which constituted crimes and those which did not. Should the use or absence of armed forces or threats for the dividing line, interventions constituting a crime were already covered by Crime No. I, but in the absence of any indication as to where the line was to be drawn, he had abstained from voting.

78. Mr. CÓRDOVA said that his abstention was based on the arguments which he had advanced when speaking of Mr. Yepes' proposal (para. 54 above).

79. Mr. YEPES said that, when submitting his proposal, he had been quite aware of all the difficulties which it would entail, in particular as regards a definition of the word "intervention". He had not expected the Commission to take a definite decision but had simply asked it to consider his proposal, if not that year, at least at the next session. He regretted that the Commission had not thought fit to accede to that request.

80. According to the Chairman that was not so. The Commission had refused to insert the concept of intervention in its draft code, but it had not refused to examine Mr. Yepes' proposal at a later stage of its deliberations. The abstentions did not by any means represent an adverse view; they simply denoted hesitation on the part of some members of the Commission as to

the inclusion of the proposal in the draft code of offences against the peace and security of mankind.

LIST OF CRIMES PROPOSED IN THE REPLIES FROM GOVERNMENTS FOR INCLUSION IN THE DRAFT CODE

81. The CHAIRMAN proposed that the Commission examine the replies from governments in respect to the crimes they suggested for inclusion in the draft code. He believed that Mr. Hudson had studied this document, and asked him to express his views on the subject.

*France*¹⁰

82. Mr. HUDSON said that the proposal made in item 2 was already covered by the draft code under Crime No. I. Item 3 was covered by Crime IX, "Violations of the laws or customs of war". Item 4 contained a very far-reaching proposal—namely, to punish as a crime against humanity any extermination of human groups or individuals for reasons of nationality, race, religion, membership of a political or social category, etc. Such protection for civilians was provided for by the Red Cross Conventions adopted in 1949 and the draft code also covered the actions mentioned in item 4.

*Poland*¹¹

82 a. Mr. HUDSON said that the Polish Government was of the opinion that one of the essential aims of the future code should be the prevention and suppression not only of incitement to war, or the perpetration of other offences against the peace and security of mankind contained in the future code, but also of the spreading of nationalistic, racial or religious hatred. He did not know whether the Commission would examine this point with a view to defining crimes for insertion in its draft code. The Polish Government also asked that the future code should prohibit the use of weapons of mass destruction and the fomenting of chauvinistic tendencies. The first part of this proposal was obviously directed against the use of the atomic weapon. The second part was in line with Mr. Hsu's proposal.

*United States of America*¹²

82 b. Mr. HUDSON said that the Government of the United States of America asked for the inclusion of the crimes of genocide and piracy in the draft code. The crime of genocide was already included in the draft code, but that of piracy was not. According to modern legal conceptions, piracy was no longer considered as an international crime, but as one coming within the purview of ordinary law. The Commission would have to decide whether it intended to look on piracy as a crime against peace and security.

83. The CHAIRMAN asked the Commission whether it wished to consider piracy as an international crime and insert it in the draft code. There had been a time when piracy was a crime against the State and an international menace, but it was certainly so no longer.

¹⁰ See A/CN.4/19, Part II.

¹¹ *Ibid.*

¹² *Ibid.*

84. Mr. HUDSON suggested that the Commission should not concern itself with the question of piracy. In his opinion, no useful purpose would be served by discussing it.

85. Mr. ALFARO considered that piracy was a crime against the security of mankind even if it were not a crime against peace. The pirate was an enemy of mankind.

86. Mr. HUDSON replied that cases of piracy were now very rare, and that he saw no reason for listing it as a separate crime within the framework of the draft code. The Commission might consider it when taking up the study of a general international penal code.

87. Mr. CORDOVA considered that there was no reason to go into the question. The Commission's task was to consider crimes of an international character, but not those committed by individuals.

88. The CHAIRMAN said that as a matter of fact the draft code would include a few crimes which could be committed by individuals. He was, however, of the opinion that piracy was a crime against ordinary law and not against international law.

89. Mr. KERN (Assistant Secretary-General) agreed that the question should not be taken up at that stage, as the Commission was now dealing with a code covering crimes against peace and the security of mankind. Later, however, when discussing a general code of international crime, it might consider whether piracy should be included therein.

90. Mr. HSU pointed out that the Polish Government's reply raised the question of the use of weapons of mass destruction. It was not his intention to support the Polish Government's proposal as formulated in its reply, but he felt that a distinction should be made between weapons of mass destruction and mass destruction itself. Such destruction should be banned, but not the arms by means of which it could be brought about, as arms could also be used for permissible ends. All depended on the purpose of those employing such weapons.

91. Mr. BRIERLY said that the use of such weapons had not hitherto been prohibited by international law. This question had for years been the object of study and very delicate discussions in the United Nations. He felt that the Commission should not take up this question at a time when the United Nations had temporarily suspended its further discussion.

92. Mr. HSU was aware that the use of such weapons properly so called was under discussion at the present time, but the Polish Government had spoken of a method of mass destruction, which was another matter. He saw no reason why mass destruction should not be prohibited by international law. He felt that whilst the launching of bombs for mass destruction on warships and purely military objectives was admissible, it was not so as regards the launching of such bombs on large centres of population or on civil buildings which would result in the mass destruction of a large part of the population. The Commission could not simply by-pass this question and ignore these factors. Its duty was to

lay down principles, and amongst such principles, it should provide for the prohibition of all mass destruction in so far as such destruction was not already covered by the crimes it had included in its draft code. Why should not the International Law Commission make known its standpoint on this question? The General Assembly might not agree with it, but the matter would at all events have been put before it.

93. Mr. SPIROPOULOS was afraid that the Commission might be going too far. In following Mr. Hsu's suggestion, it would in any case be encroaching on the sphere of the Red Cross Conventions concerning the protection of the civilian population. He feared that all those discussions might be a waste of time.

94. Mr. CORDOVA expressed the opinion that the question was not yet ripe for discussion. The Commission itself was not yet in a position to have a clear idea of what was involved in the use of weapons of mass destruction. Furthermore, the problem seemed to him to be rather of a political nature, and it was not for the Commission to say that the use of such and such a weapon was a crime. It would be overstepping the bounds set for its work if, in trying to codify crimes, it impinged on questions which were at present the subject of difficult and delicate political discussions. He proposed that study of the question be deferred until the following year.

95. Mr. SANDSTRÖM drew attention to the fact that the Commission had decided not to enter into any examination of the question of the laws of war, but the use of weapons for mass destruction came within this field. He suggested that the discussion on this question should be closed.

96. The CHAIRMAN asked the Commission to continue the study of the replies by governments in regard to further crimes for inclusion in the draft code.

*Netherlands*¹³

97. Mr. HUDSON said that the proposal contained in item (1) was already covered by the draft code. The same applied to the proposal under item (2). In regard to item (3), he had to draw attention to the first sentence reading: "The following acts committed on the territory of a State and directed against the interests of another State". He wondered whether the acts referred to in sub-sections (a), (b) and (c) were not already covered by the code. He thought that he might say that this was so and that there was therefore no need for further examination of the proposals under (a), (b) and (c). The acts referred to in item (4) had already been examined. The acts referred to in item (5) broke fresh ground so far as the draft code was concerned. They were, however, partly covered by the 1937 Convention on Terrorism. It would be well for the Commission to defer consideration of this item until a later stage of its deliberations.

98. Mr. BRIERLY agreed. He thought that the Commission should discuss those matters when considering the drawing up of a general international code.

¹³ See A/CN.4/19/Add.1.

99. Mr. HUDSON said that item (6) dealt with the manufacture and circulation of counterfeit currency.

100. The CHAIRMAN did not consider that the Commission should deal with that matter. It was true that the issue of counterfeit money might lead to trouble and a sense of insecurity, which might constitute a threat to peace, but the time was not opportune to consider the question.

101. Mr. HUDSON and Mr. SPIROPOULOS expressed agreement with the Chairman's statement.

102. Mr. HUDSON said that the acts described under item (7) were covered. The acts referred to in item (8)—namely, "the diffusion in bad faith of evidently false publications likely to endanger relations with another State", had not been considered by the Commission.

103. Mr. FRANÇOIS pointed out that this referred to a special type of subversive activities. They were in part covered by the International Convention concerning the use of Broadcasting in the cause of Peace signed at Geneva on 23 September 1936.

104. Mr. HUDSON was of the opinion that item (9) on insults to another State constituted a new subject, but he was not sure what sort of insults the Netherlands Government had in mind. The acts referred to in item (10) were covered by the draft code. The acts referred to in item (11) were covered by the draft code and by the Convention on Genocide. In regard to item (12), the terminology employed by the Netherlands Government was rather more general than the Commission had adopted in its draft code (Crime No. VIII, paragraph 2), in respect of the same sort of action. The same was true as regards item (13). Item (14), on the diffusion in bad faith of evidently false publications about a national, ethnical, racial, political or religious group as such, was something new, but it was related to the crime of genocide.

105. The CHAIRMAN said that the case referred to in item (14) was not a matter for international regulations and there was therefore no need to consider it.

106. Mr. HUDSON said that the same applied to the acts referred to in item (15). Item (16) was covered by Crime No. X. The cases referred to in item (17) were related to Mr. Hsu's proposal. The cases mentioned in sub-sections (a) and (b) were covered by Crime No. X, paragraph (b) (incitement).

107. The CHAIRMAN asked Mr. François whether he wished to provide any supplementary information concerning the list drawn up by his government.

108. Mr. FRANÇOIS only wished to say that his government had drawn up its list on the assumption that the code would be more comprehensive than the Commission had now decided should be the case. He added that some of the crimes contained in the list were already covered by the draft code and that others would be included in the general draft code which the Commission would be called upon to consider. He simply wished to draw the Commission's attention to item (4), which read as follows:

4. The following acts if they should endanger the interests of another State:

- (a) The transfer, sale or distribution of arms, munitions or explosives to any person who does not hold such licence or make such declaration as may be required by domestic legislation;
- (b) Exportation of arms, munitions or explosives without such licence as may be required by domestic legislation.

108 a. He wondered whether these acts did not constitute a crime which should be included in the category of crimes against the peace and security of mankind.

109. The CHAIRMAN asked the Commission whether it wished to consider the actions referred to in item (4), sub-sections (a) and (b) as constituting international crimes for inclusion in the draft code, or whether it was satisfied with the protection already provided by the Special Convention of 1925.¹⁴

110. Mr. ALFARO considered that if the acts referred to in item (4) were not covered by other provisions of the draft code they should be considered now.

111. Mr. HUDSON noted that the Netherlands proposal left the national legislation free to deal with the question. He considered that the Commission should also take the view that such matters fell within the competence of States. He recalled that he had formerly examined this question at some length with the Secretary-General of the League of Nations, and that some provisions in this regard had been included in the Convention of 1925, but that convention had not had much success.

112. Mr. AMADO thought that the members of the Commission would not wish to embark on an examination of this question. Furthermore, he was of the opinion that the Commission had reached the limit of the provisions which could be included in its draft code, and it seemed to him a waste of time to indulge in the involved discussions which would be inevitable if the Commission were to consider the acts described in item (4) of the Netherlands proposal. Item (4) spoke of "the interests of another State", but the Commission was not called upon to concern itself with the interests of States. There again discussion was liable to lead to serious confusion in the minds of the members of the Commission. He agreed that they should try to solve problems which might endanger the security of mankind, but it did not seem to him possible to go into all the details, nor, in particular, to determine whether such and such a problem was likely to prejudice the interests of a State. They should close the discussion and proceed with the examination of Mr. Spiropoulos' report.

113. Mr. SPIROPOULOS had nothing to add to Mr. Amado's remarks. He merely wished to emphasize that the text of item (4) had nothing whatever to do with the draft code. The Commission had not met to define the

¹⁴ Geneva Convention of 17 June 1952 for the control of the international trade in arms, ammunition and implements of war.

interests of States, but to draw up a code of crimes against the peace and security of mankind. For purposes of the draft code the Commission had hitherto always considered facts even where genocide was concerned, and it was now suddenly proposed to introduce a subjective element, that of the interests of a State. If the Commission accepted such a suggestion, it would be straying from its real work. Consequently he seconded Mr. Amado's proposal that the discussion on this point should be closed.

114. The CHAIRMAN maintained that it was the Commission's duty to examine the replies sent in by governments at its express request. Item (4) was not only concerned with the interests of such and such a State, but was of great importance from the point of view of peace. The manufacture of and trade in arms was an industry particularly harmful to peace. The transfer, sale or distribution of weapons, etc. and their export might in certain circumstances constitute the crime of fomenting war. However, he was of the opinion that consideration of the acts visualised in item (4) should be postponed and taken up later with a view to their insertion in the general code which the Commission would be called upon to draw up.

115. Mr. FRANÇOIS was in agreement with the Chairman's suggestion, but he pointed out that the Commission had requested governments to submit their views and suggestions and that there had been very little response. The replies which had been sent in might therefore be given somewhat greater consideration. From the point of view of future replies, it would not be encouraging if they did not take the trouble to give due consideration to those they had received.

116. Mr. AMADO said that he had had no intention of minimizing the importance of the Netherlands Government's reply. He merely wished to avoid an indefinite prolongation of the discussion, and specifically a discussion of the obvious. The members of the Commission all knew what was meant by the manufacture of counterfeit currency, the assassination of the Head of a State, or of his wife, etc. That was what he called the obvious. He trusted that the Commission would not misunderstand his intentions.

117. Mr. SPIROPOULOS was sorry that the replies of governments had not reached him in time to enable him to take them into account in drawing up his report.

118. The CHAIRMAN called upon the Commission to continue the examination of the replies of governments.

*Pakistan*¹⁵

119. Mr. HUDSON said that the reply of the Government of Pakistan suggesting that the taking of hostages should be included amongst the crimes listed in the draft code was something new. However, the Commission had already discussed that question. Another new idea suggested by the Government of Pakistan concerned the overthrow of a foreign government by internal upheaval. There again, there was a certain similarity

with one of Mr. Hsu's proposals which had already been discussed by the Commission. In regard to the definition of the word "war" proposed by the Government of Pakistan, he considered that the Commission had already settled this question in connexion with Crime No. I.

LIST OF THE INTERNATIONAL CRIMES PROPOSED BY MR. PELLA IN HIS MEMORANDUM¹⁶

120. Mr. SPIROPOULOS said that, during his stay in the United States in the preceding year, he had seen Mr. Pella who had told him that he would send him the list. However, he had only received a part of it. It

¹⁶ Doc. A/CN.4/R.3, which reads as follows:

LIST OF THE INTERNATIONAL CRIMES PROPOSED BY MR. PELLA IN HIS MEMORANDUM (A/CN.4/39)

I

The unlawful and direct use of force by one State against another State

1. The invasion of the territory of a State by the armed forces of another State.
2. Attack by the land, sea or air forces of a State on the territory, ships or aircraft of another State.
3. Attack by a State on the territory of another State by means of weapons already on the territory of the latter State.
4. The establishment by a State of a naval blockade of the coasts or ports of another State.
5. Declaration of war.

II

Threat of unlawful use of force and preparation for such use

1. The conclusion of treaties of an aggressive character or any arrangement to ensure the co-operation of one State with another State in the eventuality of the latter committing an aggression.
2. Threat of resort to force.
3. Mobilisation carried out with a view to intimidation or in preparation for an act of international aggression.
4. War propaganda.

III

The furnishing of direct or indirect assistance to an aggressor State

1. The furnishing of assistance to an aggressor State.
2. Refusal to lend assistance to the United Nations when the latter takes action for the maintenance of international peace and security.

IV

Failure to submit a dispute to the competent organs of the United Nations in the cases provided for under the Charter

V

Violation of the international obligation of States with regard to armaments

1. Recruitment of forces in excess of those authorised and the construction of forbidden strategical works.
2. The manufacture of, traffic in and possession of weapon of war forbidden by international agreements and the training of persons in the use of such weapons.

VI

The annexation of the territory of a State in violation of international law and any veiled form of annexation

¹⁵ See A/CN.4/19/Add.2.

appeared to him that the list contained a very comprehensive enumeration of international crimes. Should the Commission be of opinion that some of the crimes contained therein should be inserted in the draft code, he would willingly accept the Commission's suggestions on the subject.

121. Mr. ALFARO said that he had not yet occasion to study the list and pick out the items which might constitute a new crime for insertion in the code. He suggested that the Commission should examine the list and decide whether, apart from the crimes already provided for in the draft code, there were any others which had hitherto been overlooked.

122. The CHAIRMAN read Part I of the list, "The unlawful and direct use of force by one State against another State", and pointed out that the acts described in items 1, 2, 3, 4 and 5 thereof were already provided for in the draft code. He then proceeded to read Part

VII

Acts calculated to disturb the public order of another State

1. The furnishing of support by a State to armed bands organised on its territory who have invaded the territory of another State, or the refusal, despite the request of the invaded State, to take on its own territory all the measures in its power to deprive the said bands of help and protection.
2. The fomenting of civil strife in another State or the encouragement of one of the contending parties.
3. Abuse by a diplomatic representative of the privileges accorded him in order to commit acts prejudicial to international public order or infringements of international law directed against the State to which he is accredited.
4. Acts of terrorism affecting international relations.
5. The counterfeiting of currency and bank notes conducted, encouraged or tolerated by one State and detrimental to the credit of another State.
6. The forging of passports or other equivalent documents.
7. The cession, sale or distribution of arms, ammunition or explosives in violation of the national legislation of a State.

VIII

Various acts constituting failure on the part of States to observe their obligations to respect the dignity of other States and to conform to international usages

1. Admission by a State into its armed forces of deserters from the land, sea or air forces of other States.
2. Violation of diplomatic immunities.
3. Dissemination of false or distorted news or of forged documents in the knowledge that they are harmful to international relations.
4. Flagrant insult of a foreign State.
5. Abuse in the exercise of police powers on the high seas.

IX

Violation of the laws and customs of war

X

Crimes against humanity

1. Extermination or persecution of a population or of an element of the population on grounds of race, nationality, religion, political or other opinions by one of the following means: wilful homicide, torture, inhumane treatment, including biological experiments, the infliction of serious bodily injury or injury to health, deportation or illegal detention.
2. The encouragement by a State of slavery or analogous practices.

II, "Threat of unlawful use of force and preparation for such use".

123. Mr. CORDOVA pointed out that the Commission had decided to delete the term "threat" from the wording of Crime No. I. He was of the opinion that that word should be re-introduced.

124. Mr. HSU supported the proposal.

125. Mr. SPIROPOULOS was against it and said that a threat might be legitimate. If a State threatened to intervene if another State occupied the territory of a third, that constituted a legitimate defensive threat. The Commission had discussed this question at some length in the course of the examination of Crime No. I. He did not see why it should now take the idea of a threat up again and re-introduce it into Crime No. I.

126. Mr. CORDOVA pointed out that the case mentioned by Mr. Spiropoulos constituted a threat made for the purpose of legitimate defence, but Mr. Pella visualized the case of threats of the illegal use of force. The Commission should legislate for such cases by inserting an appropriate provision in the draft code.

127. Mr. SANDSTRÖM thought that the Commission would be well advised to leave it to the Drafting Committee to see whether it could find a formula suitable for insertion in the report.

128. The CHAIRMAN proceeded to read Part III of the list.

129. Mr. SPIROPOULOS recalled that the matter in question had been submitted to the General Assembly and examined by it. It had been mentioned in its first draft report, but in connexion with article 10 of the draft Declaration on Rights and Duties of States, the British representative, Mr. Fitzmaurice, had raised the point in the Assembly, as to what sort of assistance was contemplated.¹⁷ As a result of the discussion he had come to realize the difficulties inherent in the question of assistance to an aggressor State. It was for that reason that he had preferred to omit all reference to such action in his second draft.

130. The CHAIRMAN expressed the opinion that the case of direct or indirect aid was covered by Crime No. X of the draft code. In his opinion such acts undoubtedly amounted to complicity.

131. Mr. SPIROPOULOS did not agree. Assistance of this type could be given much later, when the act of aggression had already been committed.

132. The CHAIRMAN considered that complicity in the crime still existed. They might get over the difficulty by stating in the report that Part III of Mr. Pella's list was covered by Crimes I and X of the draft code.

133. Mr. ALFARO was of the opinion that in the case of Crime I the criterion to be observed was the following: If the act was done in legitimate defence or in the execution of a United Nations mandate, there would be no violation of international law.

134. Article 10 of the draft Declaration on Rights and Duties of States stipulated that: "Every State has the

¹⁷ See *Official Records of the General Assembly, Fourth Session, Sixth Committee, 172nd meeting, para. 17.*

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 CORDOVA, 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 (II) (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 consummated 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.

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. CORDOVA 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 arbitration. Chapter VII on the other hand did provide penalties. It might perhaps be possible to say that non-fulfilment 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. CORDOVA 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. CORDOVA 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 5²

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. CORDOVA 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 Dis-

cussion 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. Briery, 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 ex-

plain 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. CORDOVA 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. CORDOVA 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. 6⁴

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 refused", 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.

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

116. Mr. CORDOVA 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. CORDOVA 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-

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. 7⁸

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.

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Chairman: Mr. Georges SCELLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. Roberto CORDOVA, 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

confine itself to holding a general discussion on the subject and then referring it to the following year's session. It was essential to learn the points of view of the various governments. The organizations dealing with the question, such as the International Law Association, the Institut de Droit International, and so forth, were doing so from a purely scientific angle or from the viewpoint of the big oil companies. It would be very desirable for governments to give their views on that question before the Commission formulated specific proposals in regard thereto.

1 f. For the progressive development of international law, it was necessary for the Commission to know both the views of governments and the opinion of the scientific world.

1 g. He therefore proposed that the Commission should hold a general discussion first of all on which subjects to select and then on the subjects themselves, so as to determine what questions to put to governments; the General Rapporteur and the Special Rapporteur would then draft the questionnaires which would be inserted in the Commission's general report; after approval by the General Assembly, the questionnaires would be sent to governments with a request for an answer within four or five months; finally, the Special Rapporteur would submit a report on the replies received at the next session.

2. Mr. LIANG (Secretary to the Commission) wished to draw the Commission's attention to the document entitled: "Regime of the High Seas. Questions under Study by Other Organs of the United Nations or by Specialized Agencies" (A/CN.4/30) which had been drawn up by the Secretariat. He hoped that the Commission would take that document into consideration when selecting the questions to be dealt with.

2 a. He noted that Mr. François had mentioned the questionnaires which would be prepared by the General Rapporteur and the Special Rapporteur and then discussed by the Commission and incorporated in the report submitted to the General Assembly. When they had been approved by the Assembly, the questionnaires would be circulated to governments. That procedure, which was not that prescribed by the Statute, would involve delays, since the questionnaires could not be sent out before the end of the year at the earliest, and replies would not be received until May. A general questionnaire had already been sent out in 1949, and the replies of the governments had been incorporated in document A/CN.4/19. That questionnaire had necessarily been very general, and a number of governments had intimated that they could not reply to a request for general information and would like the questionnaires to be more specific. The questionnaire in question had been sent out in virtue of article 19 of the Commission's Statute. There was nothing in that statute to prevent detailed questionnaires being sent to governments through the Secretary-General without the latter having to await the General Assembly's decision. The questionnaires would in any case form part of the report submitted to the General Assembly, which would take note thereof.

2 b. He suggested that the drafting of the questionnaire should be completed in the course of the session. The Secretariat would at once transmit it to governments with a request for a reply before the end of the year.

3. Mr. YEPES said that he admired Mr. François' work, which was an admirable synthesis of almost all the problems relating to the high seas. He had noted that there were no specific conclusions in that report, but there were a number of such conclusions in the statement which Mr. François had just made. The problems proposed for discussion by the Rapporteur were of great interest—particularly those of collision and of the continental shelf—but there were other problems which should also receive the Commission's attention, among them those of the protection of marine resources and the regime of floating islands, the study of which would be of great service to the science of international law and to international politics. The protection of marine resources was necessary because otherwise they would soon be exhausted owing to modern technical advances in fishing and hunting methods. He proposed that those two questions should be added to those suggested for retention by Mr. François.

4. Mr. HUDSON said that he had been going to make the same observation as Mr. Liang. Delays had to be avoided, and the Commission had already consulted the governments. It had only received replies from ten governments, and four of those had confined themselves to making a short statement in a letter. The results obtained from the issue of the questionnaire were disappointing. Of course, the questionnaire was very general. He quoted the reply of the United Kingdom: "While the Government of the United Kingdom will be ready and willing to furnish detailed material which the International Law Commission finds to be necessary in the course of its study in the topics it has chosen, it does not consider that it would be practicable at this stage to supply the material requested in your communication, owing to its quantity and to the fact that the criteria of selection can only be decided by the International Law Commission itself." (A/CN.4/19, part I, section A) The Government of the French Republic had sent a similar reply. (*ibid.*)

4 a. If a particular topic were taken, useful replies might perhaps be obtained, but too much should not be expected from that method. They should enquire into the practice of States rather than concern themselves with what the various authors had said, since the latter repeated one another and ignored the practice of States.

4 b. Last year, the Commission had considered the question of the regime of territorial waters. It had distinguished between that regime and the regime of the high seas, and had included the latter in the first list of priority questions. Since then, the General Assembly had requested the Commission to include the question of territorial waters in that list also, and the Commission must therefore consider studying that question. The two subjects should be distinguished from

each other and treated separately if the Commission wished to conform with its decision of the previous year. For his part, he would like the Commission to take a decision on the matter, and he thought that the Rapporteur would say the same thing, since the report barely touched upon the question of territorial waters.

5. Mr. AMADO, in general, supported Mr. Hudson's view. He had read the report with the care due to its author, who had been Rapporteur on the question of territorial waters at The Hague Conference twenty years earlier. Caution was the hall-mark of the report: its author only proceeded after careful investigation. He first gave a theoretical dissertation, and then provided the definition of a ship. There seemed to be no reason for this, since the author did not reach any conclusion, merely stating that "It would seem that agreement on the definition of a ship would obviate certain difficulties and the Commission might communicate with governments on this subject." (A/CN.4/17, section 2)

5 a. With regard to the territorial quality of ships, the Rapporteur "considers that this controversy is of an academic nature and that it is unnecessary for the International Law Commission to retain this item." (section 3) The Rapporteur also considered that the questions dealt with in paragraphs 4, 5, 6 and 7 need not be retained. With regard to paragraph 8, "safety of life at sea", the Rapporteur does not consider that this subject is suitable for codification by the Commission. (section 8)

5 b. He thought that the Commission should concentrate upon the positive conclusions contained in the report, and then see whether it should study all or merely some of them. The Rapporteur proposed the questions of collision, the right of pursuit and the continental shelf. He (Mr. Amado) did not know whether the Commission would be able to deal with the latter question thoroughly, and thought that the Commission should devote its attention to not more than two or three subjects. He had no preference as to those subjects, but thought that the question of the continental shelf could be left until later.

6. Mr. HUDSON thought that four months did not give governments much time to reply. He suggested that the procedure proposed by the Rapporteur should be followed, but added that if the Commission fixed a time-limit, it should not expect it to be complied with.

7. Mr. FRANÇOIS admitted the justice of Mr. Hudson's remarks, but it was precisely for that reason that he had said that the questionnaire should confine itself to main principles. The draft questionnaire at the end of his report contained nine questions relating to those principles. He did not think it impossible for governments to reply to those questions in four or five months. He wished in this way to obtain some guidance for the continuation of the Commission's work since, in regard to collision, for example, there was great uncertainty as to principles. He saw no point in asking questions of detail.

8. Mr. LIANG had referred to the questionnaire transmitted to governments the previous year without the approval of the General Assembly, but that had

been a questionnaire which the Commission had sent to governments, in virtue of article 19, paragraph 2 of its statute, requesting them "to furnish the texts of laws, decrees, judicial decisions, treaties, diplomatic correspondence and other documents relevant to the topic being studied and which the Commission deems necessary". That was something quite different. It concerned existing texts, and was not a request to governments for their views as to which clauses should appear in a convention. The questionnaire they were now discussing was that referred to in article 17, paragraph 2 (b) of the Statute, which provided that the Commission "shall circulate a questionnaire to all Members of the United Nations and to the organs, specialized agencies and official bodies mentioned above which are concerned with the question, and shall invite them to transmit their comments within a reasonable time". He was not sure that the Commission would be entitled to send out that questionnaire without the assent of the General Assembly. That point had been discussed during the drafting of the Commission's Statute, when many speakers had held that the Commission should not be able to circulate questionnaires to governments without the General Assembly's authorization.

9. The CHAIRMAN thought that, as Mr. Liang and Mr. Kerno had said, the question had been thoroughly discussed the previous year, and that Mr. Koretsky had put forward an argument which the Commission had rejected, deciding that it was independent and could send questionnaires direct to governments.¹ The Sixth Committee of the General Assembly had approved that decision.²

10. Mr. FRANÇOIS pointed out that he had not been present at that time. Clearly, if questionnaires were sent to governments direct, it would speed up proceedings.

11. Mr. YEPES asked what the Rapporteur thought of the two questions he had proposed for study.

12. Mr. FRANÇOIS replied that as regards marine resources, the Commission could not study a subject of such wide scope and which differed so much in its various aspects from one part of the world to another that regulations concerning it could not be embodied in a general code; that question should be left for separate conventions dealing, for example, with seals, the large cetaceans, and so forth. A general codification could not include all the provisions which would be necessary.

12 a. With regard to the other question, that of floating islands, if the Commission took the line he had suggested, it would consult the governments. The last page of his report contained the following: "8. Do works and installations established in the waters in question for working the soil have territorial waters of their own? If not, may special security zones be claimed for them?" That did not cover the whole

¹ See 3rd and 4th meetings of the Commission.

² *Official Records of the General Assembly, Fourth Session, Sixth Committee, 158th and following meetings, particularly the 164th meeting.*

question of floating islands, but that question was nevertheless dealt with in relation to the continental shelf. It should be noted that that aspect of the subject was of great importance. If the Commission were to take up the question of the continental shelf and item 8 of the questionnaire he proposed, it would have gone a long way in the direction suggested by Mr. Yepes.

13. Mr. HSU said that Mr. François' report, which he had read with admiration, was remarkable for its precision. Mr. François had suggested that questions should be put to governments. That procedure was admissible where the subject dealt with was not ripe for codification; otherwise, the Commission first drafted a text and then submitted it to governments for their views.

13 a. He thought it neither desirable nor practicable to consult governments since the latter would be little inclined to reply. The main point was that by sending a questionnaire of that type to governments, the Commission appeared to imply that the subject was not ripe for codification. The previous year, the Commission had drawn up a list of subjects and had retained three of them on the ground that they could be codified. The Commission had not been set up solely to do research work; the most important part of its task was codification. If a subject did not lend itself to codification, the Commission should leave it alone. If governments were sent that questionnaire, they might reply that the Commission had made a mistake the previous year when it decided that the subjects were ripe for codification.

14. Mr. FRANÇOIS thought that to some extent the Commission's task in this respect related to the progressive development of international law.

15. Mr. ALFARO doubted whether satisfactory results would be obtained by sending a questionnaire to governments. Generally speaking, governments did not reply to questionnaires, or they sent replies which were of little use.

15 a. With regard to the problem of the continental shelf, the questionnaire drawn up by Mr. François was so important that it would be justifiable to circulate it. Nevertheless, he suggested that if it decided to send out the questionnaire, the Commission should indicate that its work would not be interrupted during the time needed for the replies to come in. If the replies were received within a certain time limit, the Commission would take them into account, but if not it would carry on with its work. It was a matter that concerned the progressive development of international law, and the circulation of a questionnaire could be justified on the basis of article 16, paragraph (c).

16. Mr. SPIROPOULOS associated himself with what the preceding speakers had said about the importance of Mr. François' work. With regard to the general discussion, the Commission should see clearly what was at issue. He had the impression that on important points there were divergencies between the report and the views held by certain members of the Commission.

16 a. With regard to the questionnaire, Mr. François had said that he had based himself upon an article relating to the progressive development of law. That

was most important, as he had thought that codification was involved and, if that were the standpoint adopted, there could be no questionnaire. As Mr. Liang had said, the Statute referred to questionnaires designed to elicit relevant documents, and those were the only questionnaires which could be circulated to governments. On matters connected with codification, the Commission should—according to the terms of its Statute—consult governments only after it had reached conclusions.

16 b. Of course, there was nothing in the Statute to prevent a questionnaire from being circulated to governments, but was it desirable to do so? Was it not the Commission's task to answer those questions and to submit its replies to governments? To proceed as Mr. François suggested would be to reverse the proper order. In his view, the Commission should avoid sending out a questionnaire. Governments did not like answering a scientific questionnaire; it was their duty to furnish the texts of laws and so forth for which they were asked, but they did not like replying to economic and legal questionnaires. He recalled that the questionnaire circulated in regard to his report had received only four replies and, of those, that of the Netherlands Government alone had been of any use. Governments had considered it useless to reply, or had not known what reply to make.

16 c. The Commission had to codify the legal status of the high seas. He had read his eminent colleague's report with great interest. That report made it clear that what was necessary was a code of the high seas which should contain only the main principles and leave details to be settled by special conventions. Codes of domestic law were drawn up in that way; they did not go into details, which were dealt with in individual laws. The question of fisheries, for example, could be regulated by conventions.

17. Mr. KERNO (Assistant Secretary-General) wished to add a few words to clarify the points relating to the circulation of a questionnaire to governments, and to the Commission's Statute. When the progressive development of international law was involved, a questionnaire should be circulated to governments immediately, in virtue of article 16 (c), but when the codification of international law was concerned, governments should be consulted at a later date in accordance with the provisions of article 21, paragraph 2. It should be noted that although, in the field of codification, the Commission was not required to circulate a questionnaire until the draft had been drawn up article by article, it was nevertheless free to do so. Article 19, paragraph 1, stated: "The Commission shall adopt a plan of work appropriate to each case." The procedure was therefore very flexible. In particular cases, it might appear appropriate to send a questionnaire at the outset.

18. Mr. el-KHOURY said that Mr. Spiropoulos had already expressed what he wished to say. He thought that the Commission did not fully appreciate how much it influenced the views of the various governments. There were very few persons who would venture to

advise the Commission. When the governments with which he was acquainted received a questionnaire from the Commission, they wondered what they were going to reply to those eminent jurists. They were afraid of exposing themselves to criticism by the members of the Commission, aware that the latter knew more than anyone else about the problem. When, on the other hand, governments were asked to state their views on a proposal by the Commission, they were no longer afraid to answer, as they took their own interests into consideration, whereas if they were asked for their views on theoretical questions, they hesitated to give them; in that case, the Great Powers alone perhaps were able to reply. He thought that in practice it would be useless to circulate a questionnaire to governments asking for their opinion before the Commission was able to add its own conclusions to their replies.

18 a. He had noted from the Rapporteur's explanatory statement that he had studied the question thoroughly, but confined himself to postponing questions till later, making no proposals which would allow of concrete results. For his own part, he thought that it would be preferable to deal with the points one by one, discuss them, reach a decision, and circulate a questionnaire relating to those decisions.

19. Mr. SANDSTRÖM said that after listening to what his colleagues had had to say he was not sure whether it was desirable to circulate a questionnaire at that time. He was afraid that such a step might be prejudicial to a solution, and he would prefer it to be postponed until later. He agreed with the Rapporteur on the choice of subjects for consideration. As regards territorial waters, in particular, he thought that it would facilitate the Commission's work if that item were discussed at the same time as the regime of the high seas.

20. Mr. BRIERLY said that he had at first agreed with the Rapporteur, but that he had been shaken by the arguments put forward by Mr. Spiropoulos, Mr. el-Khoury and other members of the Commission. He enquired whether the Rapporteur considered himself justified at this point in modifying his original proposals.

21. Mr. FRANÇOIS had listened carefully to the comments made by his colleagues, but they had not made him change his views about the desirability of consulting governments. It was true that the Commission was composed of scientific jurists, but the question of the continental shelf, for example, was not purely scientific. If the Commission only examined that question from the scientific point of view it would achieve nothing, since the draft would be submitted to governments, which based their decisions on political considerations. To achieve practical results the Commission should begin by obtaining the views of governments. It was difficult to interpret the absence of a reply in view of the proclamations made in recent years. If it were interpreted as signifying approval and if that interpretation did not correspond to reality, there was the danger that the Commission would be wasting its time in preparing a draft.

22. Mr. LIANG (Secretary to the Commission) stated

that the Secretariat was preparing a digest of the conventions, laws, proclamations, declarations and so forth concerning certain subjects, including the continental shelf, which would be completed within two or three months. The documents were being compiled with the help of the governments and delegations at United Nations Headquarters. He hoped that that work would fill a need. He agreed that the circulation of a detailed questionnaire drawn up in accordance with the proposal contained in the last page of Mr. François' report was not contrary to article 19 of the Statute. He recalled that the League of Nations Committee of Experts, which met before the 1930 Conference, had drawn up a questionnaire, and that the Council of the League had approved it before it was circulated to governments. He pointed out that the Commission's Statute had been approved by the General Assembly and therefore constituted prior authorization.

22 a. The opinion had been expressed not only by certain members of the Codification Commission of 1947, but also by authors of scientific articles, that too much importance should not be attached to the *ad hoc* replies to questionnaires sent in by governments. Those replies constituted a valuable source of information as to the view of the governments, but many of the latter, knowing that their replies would be taken into consideration for the drafting of a code, tended to send in statements about what they wanted to be adopted rather than about the current international law practice of their countries. As J. B. Moore had said, it should not be forgotten that "mere extracts from State papers or judicial decisions cannot be safely relied on as guides to the law" (J. B. Moore, *Digest of International Law*, Washington, D.C., 1906, preface, page IV). From the scientific point of view, the replies to questionnaires did not have the same value as the extracts from state papers contained in the works by Wharton, Moore and Hackworth on the practice of States.

23. Mr. AMADO thought that many governments had not hitherto had occasion to take up a position on certain present-day questions connected with the regime of the high seas—particularly questions relating to the continental shelf—and many countries had no legislation on the matter. What replies could those governments make to the Commission? He next pointed out the complex nature of the questions on which the report proposed to consult governments. He instanced the nine questions concerning the continental shelf, and pointed out that question 5, for example, "Is a right of sovereignty involved or merely rights of control and jurisdiction?" was already the subject of differences between several governments, and could not be treated as a purely theoretical controversy. He failed to see how a government, in the few months it would have in which to make its reply, could take a decision on the intentions with regard to problems in respect of which governments had not yet disclosed their views or enacted any legislation for their solution. He failed to see how the Commission could, in those circumstances, expect to receive, in a relatively short space of time, replies which would be sufficiently precise and nume-

rous for it to be able to draw internationally valid conclusions. The members of the Commission were aware that governments were showing more and more reluctance to reply to the questionnaires circulated by international organizations.

24. Mr. FRANÇOIS said that a deterioration in the attitude of chancelleries could indeed be noted in recent years. He recalled that in 1930, when the draft convention on territorial waters was discussed, specific questions had been put to the various governments, which had sent in very clear and explicit replies. The results obtained on the basis of those replies had not been bad; agreement had been reached on the regime of territorial waters, but not on their extent.

25. The CHAIRMAN said that no one was blind to the fact that it would be difficult to obtain replies from governments. For the moment, however, the Commission was considering what method to adopt; it had to decide whether it wished to consult governments before going on with its work on the question of the high seas, or whether it wished to go ahead immediately subject to asking governments for information which it would use next year. He thought that the Commission was entitled to draft its report without consulting governments.

25 a. He agreed that there had been a deterioration as compared with 1930. He knew that governments hesitated to reply, unless they had competent jurists who urged them to do so. He was also aware that in many cases governments merely replied that they did not have time to study the questions submitted, and that often they did not reply at all. Despite all the possible objections, however, he thought that it would be useful to send the questions to governments, so as to be able to make use of their replies at a later stage in the Commission's work.

26. Mr. AMADO repeated that he did not think that governments were able to state their views on questions which they themselves had not yet studied. The Commission should continue its work, but that in no way prevented it from circulating a list of questions.

27. Mr. YEPES said that he had wide experience of consulting governments; in his capacity as legal adviser to the Minister of Foreign Affairs of Colombia, he had often found himself obliged to reply to questionnaires. When asked to reply to questions of principle, his government always avoided doing so, but on questions relating to law or practice, it willingly furnished precise replies. He thought that it would hardly be possible to obtain replies to question 9, for example. Nevertheless, there would be some advantage in consulting governments, since their replies would furnish the Commission with systematic data which would be useful in drawing up a code. The Commission, however, should expect to receive replies bearing solely on points of fact, and not on points of principle.

28. The CHAIRMAN thought that there was nothing to prevent the Commission from asking governments for information, and it could decide later what to do with the replies received. It was, however, desirable for the Commission to study the questions first, in

order to decide which of them could be put to governments. He agreed with Mr. Yepes that the Commission could not draw up a code without systematizing the problems and questions.

28 a. He recalled that other United Nations bodies were working on subjects related to those dealt with in Mr. François' report. He thought that the Commission should not for the moment deal with questions which were already in the hands of other agencies, but should merely postpone them. The Commission had the right and the duty to examine them also, since it had a monopoly in the field of codification, and when it did so, it would be able to study what those other bodies had achieved. In the work of codification, however, the Commission should not go into too much detail. He recalled that when the French Civil Code had been drawn up, many questions of detail had been left undecided, the view being held that the judges would be able to decide them on the basis of the general provisions contained in the code. The Commission should follow that example, stating exactly which questions it meant to deal with, on the understanding that the Commission's competence was all-embracing.

29. He thought that the most practical procedure would be for the Commission to take up the points it intended to study, leaving aside for the moment the other points referred to in the report. He proposed that the Commission should take up the following questions: (1) collision; (2) right of pursuit; (3) the continental shelf. The Commission would then see whether it wished to consider other points, such as the question of territorial waters. That question could also be placed on the agenda of the present session, but he thought that the Commission would agree with him that it should be given a certain independence and be handled separately, except where the other questions which the Commission was to study were related to it.

30. Mr. FRANÇOIS proposed that when it considered the question of territorial waters, the Commission should confine itself to studying the extent of those waters.

31. Mr. YEPES proposed the addition of a fourth item: floating islands.

32. The CHAIRMAN said that that question could be taken up when the Commission dealt with the problem of the continental shelf.

33. Mr. SPIROPOULOS observed that at the beginning of his report, Mr. François had dealt with the conception of the freedom of the seas, which was one of the fundamental points in connexion with the problems of the high seas, and he wondered whether the Commission intended to define that conception. A general principle was involved, and he thought it desirable that the Commission should formulate that principle at the outset of its study of Mr. François' report.

34. Mr. FRANÇOIS feared that the Commission would only be able to formulate principles either too vague or much too detailed. If it proposed to go into details, the Commission would lose too much time in discussing the highly complicated question of the free-

dom of the seas, and would be unable to complete its study of the special subjects it wished to retain. He thought it better to begin consideration of the report by studying the three specific and practical points referred to by the Chairman. Then, if time remained, there was nothing to prevent the Commission from taking up the general questions.

35. The CHAIRMAN admitted that the consideration of special points would require less time, but nevertheless thought it better to study the question of the freedom of the seas, solely with the object of defining a general principle and without going into detail. By establishing that general principle, the Commission would give the Rapporteur at least one directive which he would find useful in drawing up the reports on the subjects retained.

35 a. Mr. YEPES thought that Mr. Spiropoulos' proposal was a useful one and should be acted on. He noted, however, that the Commission had begun its study of the report on the high seas without having defined the term "high seas".

36. Mr. SPIROPOULOS said that he had raised the question of considering a general principle for the conception of the freedom of the seas merely in order to draw the Commission's attention to that problem. He thought that the Commission could discuss the three or four points mentioned by the Chairman without first formulating a general principle. But, after examining those points, the Commission would have to establish a connexion between them in order to be able to include them in a draft code.

37. The CHAIRMAN proposed that the Commission should begin by considering the particular points and if general problems arose during the discussion, it could deal with them in passing.

38. Mr. BRIERLY thought that the Commission should confine itself to studying the particular points, or it would never complete its task.

39. The CHAIRMAN called upon the Commission to take up the following questions: (1) collision; (2) right of pursuit; (3) the continental shelf; and (4) breadth of territorial waters, beginning with the first. He asked the Rapporteur whether he wished to make an explanatory statement on that first question.

40. Mr. FRANÇOIS said that he had nothing to add to his report. The case of the *Lotus* had caused considerable anxiety at the time, and he thought that perhaps the Commission should study that case, particularly from the point of view of penal responsibility, which as a matter of fact was bound up with the question of civil responsibility. The systems for the regulation of penal and civil responsibility varied greatly from one country to another, and the Commission would meet with great difficulties if it sought to achieve systematization. It might, however, succeed despite those difficulties, which was why he had just enquired whether the Commission wished to take up the study of questions of competence.

41. Mr. SPIROPOULOS replied that the Commission had just decided not to deal with general questions,

and to confine itself to particular questions. Whether the problems were special or particular, the first essential was that the Commission should have before it precise texts for consideration; otherwise, the discussion would remain purely academic and vague.

41 a. He thought that the subject of collision had nothing to do with the regime of the high seas as the Commission should conceive it, but involved questions which belonged to municipal law. He wondered whether, in the case of the *Lotus*, for example, Turkey was entitled to prosecute under Turkish law an officer belonging to that French vessel after its collision with a Turkish vessel on the high seas. Lastly, if the Commission wished to study that problem, it would have to discuss the question of penal responsibility separately from that of civil responsibility.

42. The CHAIRMAN observed that consideration of the question of responsibility at once raised the question of the various competences as enumerated in Mr. François report (section 10): (1) exclusive competence of the courts of each flag State; (2) competence of the State of either the colliding vessel or the vessel collided with; (3) concurrent competence of the courts of both flag States; (4) competence of the courts at the vessel's first port of call or at the port where the crews seek refuge.

43. Mr. FRANÇOIS recalled that he had concluded in his report that in international civil law collision raised in the first place questions of the conflict of laws. Such conflicts arose in many connexions: responsibility for collision, causes of lapse of the action, competence of the courts responsible for taking cognizance of the consequences of the collision, the result being that no agreement has been reached on uniform regulations with regard to competence. Four systems had been proposed for the settlement of conflicts of law: they were linked respectively to what was called "general maritime law", the *lex fori*, the law of the flag State of the vessel collided with, and the law of the flag State of the colliding vessel. In fact, there was multiple and complex responsibility, and he doubted whether the members of the Commission were sufficiently experienced in maritime questions to be able to pronounce on so difficult and specialized a problem. With all those difficulties in mind, he had thought that questionnaires should be sent to governments to enable the Commission in the light of the replies it received, to reach a decision with a better knowledge of the facts. Nevertheless, he had no objection to the Commission's studying the problem itself so as to reach a conclusion.

44. The CHAIRMAN thought that the Commission should pronounce on the questions of competence without waiting for information from governments.

45. Mr. SANDSTRÖM said that very little information was available to the Commission on all those points at the present time, and he did not think that the Commission was any better informed in that regard than he was himself. In his view, the members of the Commission did not have the knowledge of maritime law essential to enable them to reach conclusions.

46. Mr. FRANÇOIS thought that the chief need for

the moment was for the Commission to select topics. If the Commission retained the question of collision, and wished to be able to pronounce upon it, should it not have before it a much more detailed report than his? He was perhaps under-estimating the abilities of the members, but he thought that, with the few lines of information available to it in the present report, the Commission could scarcely reach a decision.

47. The CHAIRMAN asked how, if that was so, the Commission could obtain information. Would each member have to collect sufficient documentary material and study it separately? That would mean postponing consideration of the report until the following year. If Mr. François said that he was not competent, who was there who could make a more detailed report?

48. Mr. AMADO said that, to be able to deal with the question of collision, the Commission should be familiar with the relevant rules of national and international law. It would never be able to establish a codification if it did not know the rules. Here again there were two possibilities: either there were rules, in which case a knowledge of them was essential for codification, or there were no rules, in which case codification was impossible.

49. The CHAIRMAN replied that if there were no rules the Commission would be asked to draw them up.

50. Mr. AMADO said that the first question that arose was that of the existence of rules of maritime law in general. If such rules existed, and if the Commission were able to reach agreement, it could and should formulate a rule of international scope. The Commission, however, was not required merely to accept the old rules of Roman law or other outworn principles, but should examine the possibility of arriving at a doctrine of maritime law which corresponded to the situation obtaining at the present time. It would not be necessary for the Commission to go into details, but it was essential that it should make a general declaration concerning maritime law.

51. Mr. SPIROPOULOS thought that the Rapporteur's task was to submit precise texts, and he would be glad if such could be available to the Commission. For his part, he had no views as to the method to be adopted, but he thought that in the end the Commission would have to agree upon the formulation of certain general principles—such, for example, as a principle whereby no State had jurisdiction over a vessel belonging to another State, except where that vessel engaged in the white slave traffic or the slave trade, or committed an abuse of the flag; a principle on the right to fish, the right to lay cables, and so forth.

52. The CHAIRMAN reverted to the question of collision, in regard to which certain rules essential in every organized society could be drawn up. Two vessels sailing on a national river or two automobiles proceeding along a national road were subject, in the event of a collision, to the legislation of the country concerned. There were national rules to cover such a case. It was true that those national rules were not applicable in the international field, but there were also certain interna-

tional rules. There were certain analogies between road traffic and navigation. One of the first rules to be established in regard to maritime matters was on the question of the choice of competent courts. What international courts would be competent to decide cases like those of the *Lotus*, the *Ortigia* or the *West-Hinder*?

53. Mr. SPIROPOULOS thought that it would be very difficult to base oneself, in international matters, on the competence of national courts. He also thought that the question should be considered from a more general standpoint. The specific task before the Commission was to enunciate the general principles of a code of the high seas. He repeated his view that it was essential for the Commission to have precise texts if it did not wish to discuss at random.

54. Mr. FRANÇOIS said that, in drawing up his report, his task had been to enumerate all the topics covered by the subject-matter. He had been unable to go deeply into those topics or to present a detailed report and hence he had been unable to devote more than one page to the question of collision. He had thought that he would be able to deal with the subject more fully on the basis of the replies of governments to the questionnaire which was to be sent to them. The Commission no longer wished to adopt that system and wanted to examine the various questions without further delay. In those circumstances he asked the Commission to defer consideration of the question of collision until the following year, when he would be able to submit a further special report on that subject. In that way, the Commission would achieve better results, whereas it would achieve no results at all if it began discussion of the question at the present time.

55. Mr. YEPES recalled that there was in existence a body of law formulated by the Permanent Court of International Justice, and that the award given by the Court in the *Lotus* case constituted a complete study of collision.

56. The CHAIRMAN could not share Mr. Yepes' view that the *Lotus* case had established a body of law.

57. Mr. SPIROPOULOS thought that he had found a solution for the question of the method of work. In his view, the Commission should set out on the basis of a general principle. Comparing Mr. François' report with that of Mr. Brierly, he had found a fundamental difference between them. Mr. Brierly's report contained precise texts, whereas Mr. François' report did not. The previous year, the Commission had given the special rapporteurs to understand that it expected working papers, and he had himself thought at first that he would be able to adopt the same method of presentation for his two reports. When he had set to work, however, he had realized that it was necessary to submit more precise reports, and had therefore included more concrete proposals in his reports, as Mr. Brierly had done.

57 a. He readily admitted that Mr. François' report was a most useful document, but it contained no conclusions. It was of the same kind as the report which the Secretary-General had submitted to the Commission at its first session, entitled "Survey of International

Law”.³ It therefore constituted a report for the first stage of the Commission’s discussions, and it was for the Commission to extract what it could therefrom, proceeding in the same manner as in the previous year. When studying the report, the Commission should enquire which questions were relevant to the regulation of the regime of the high seas. Whatever points the Commission retained would have to form the subject of a fresh report which Mr. François would submit the following year, and which would contain more precise rules. He thought that that was the best method for the Commission to adopt.

58. Mr. FRANÇOIS noted that Mr. Spiropoulos’ proposal was almost the same as his own.

59. Mr. AMADO thought that if the Commission proceeded in that way it would be able to limit to three or four days the time devoted to study of Mr. François’ report. He quite understood Mr. François, point of view, but thought that the Commission should forthwith reach conclusions on a number of principles, since otherwise it would have no precise texts available the following year. Those conclusions would constitute directives for Mr. François’ next report.

60. Mr. FRANÇOIS agreed that the question of collision should be postponed in favour of the questions of the right of pursuit and the continental shelf, which were less difficult than that of collision and in regard to which information was available that would enable the Commission to reach certain conclusions.

61. Mr. AMADO pointed out that in Mr. François, report it was stated (point 10) that “in international civil law, collision raises in the first place questions of the conflicts of laws. Such conflicts arise in many connexions: responsibility for collision, causes of lapse of the action, competence of the courts responsible for taking cognizance of the civil consequences of the collision”. That constituted a complicated and difficult question, and if the Commission undertook to study it in all its aspects, it would never complete its work. He accordingly proposed that the Commission should not study the question, but should take the report chapter by chapter, consider each one rapidly, and pronounce an opinion on each point without prolonging the discussion.

62. Mr. FRANÇOIS recalled that to avoid wasting time the Chairman had proposed eliminating all the points dealt with in the report except the three he had mentioned.

63. Mr. AMADO thought that the Rapporteur could not be given the very vague task of seeking the rules existing in regard to collision. He might well be overwhelmed with documents which, despite their number, might still be incomplete, and from which he would be unable to draw really valid conclusions. It was far better to study the principles one by one, and to state that such and such a principle could be retained with a view to the establishment of a code on the law of the high seas.

64. Mr. FRANÇOIS recalled that it was not the general principles which gave rise to difficulties; it was the exceptions to those principles which concerned the Commission, and the scope of which should be studied from the international point of view.

65. Mr. AMADO thought that if the Commission nevertheless wished to study the question of collision, it could only do so by considering the four systems which were capable of settling conflicts of law and which constituted four doctrines: general maritime law, the *lex fori*, the law of the flag State of the vessel collided with, and the law of the flag State of the colliding vessel. The Rapporteur had himself drawn attention to those four doctrines, and had noted that others existed (“among which”).

66. Mr. FRANÇOIS again asked that consideration of the whole chapter should be deferred to a later date.

67. The CHAIRMAN, reverting to Mr. Amado’s proposal, failed to see what the Commission could gain by reading the chapter “Conception of the Freedom of the Seas”.

68. Mr. SPIROPOULOS thought that in any case they should establish a principle in regard to that point.

69. Mr. CORDOVA reiterated that what was important was not the principle, it was the exceptions that the Commission should study.

70. Mr. SANDSTRÖM thought that the best procedure might be to begin by selecting the subjects which the Commission intended to retain, and then go on to discuss those subjects. With a view to that selection, he proposed that the table of contents should be read out, which would not take very long.

71. Mr. SPIROPOULOS said that there were international rules constituting principles of which a study should be made; the essential thing was to codify the existing rules. When that codification had been completed, it would be possible to establish rules which could be included in a draft code.

72. The CHAIRMAN thought that it was necessary for the Commission to establish which points were not in dispute, and he proposed to read the report so as to determine its principles.

SECTION 1: CONCEPTION OF THE FREEDOM OF THE SEA

72 a. The CHAIRMAN said that the report opened with the following words:

“According to the principles of international law, the sea, with the exception of the coastal belt called ‘territorial seas’ or ‘territorial waters’, can neither be owned by individuals nor be subject to State sovereignty.”

72 b. He asked the Commission whether it was agreed on that first principle, which constituted an important point in relation to the question of the continental shelf.

73. Mr. AMADO also had in mind the adjacent zone.

74. The CHAIRMAN agreed, adding that the regime of the continental shelf should not influence the regime

³ United Nations publication, Sales No.: 1948.V.1 (1).

of the high seas. That principle was supported by many American countries.

75. After Mr. YEPES had asked that the words "or ownership" should be inserted after the word "sovereignty", the CHAIRMAN said that he thought the same result could be achieved if the words "by individuals" and "State" were deleted, so that the sentence would read merely: "can neither be owned nor be subject to sovereignty".

75 a. He added that he would have reservations to make on that subject later on. He did not recognize state sovereignty over the "territorial sea". Like Mr. de La Pradelle, he believed in the indivisibility of the sea. The Rapporteur's definition of that principle was more general than he would have liked, for he considered that the whole sea, including the territorial sea, the adjacent zone, and so forth, was free. There were only "servitudes" with regard to its waters for the benefit of riparian States. He did not understand the distinction made between high seas, territorial sea, continental sea and adjacent zone. As far as he was concerned, there was just the sea, which could neither be owned nor be subject to sovereignty.

76. Mr. SPIROPOULOS recalled that the Commission's task was to establish a code of the high seas and—so as to make this clear—he asked that, in the principle that had just been read, the words "the sea" should be replaced by the words "the high seas".

77. The CHAIRMAN said that he agreed to that amendment. He then read the next sentence of Mr. François' report:

"It therefore follows that neither navigation nor fishing on the high seas can be forbidden to anyone."

77 a. He said that this constituted a second principle on which the Commission could express its agreement. He added that the remainder of the chapter on "The Conception of the Freedom of the Sea" contained no other principles requiring notice.

78. Mr. AMADO said that in the antipenultimate paragraph of section (1) of the report there was another principle which the Commission should consider. That principle was worded as follows:

"According to modern theory, the freedom of the seas is based rather on the idea that the attribution of exclusive sovereignty over the high seas to any State would be contrary to the interests of the international community."

79. The CHAIRMAN asked whether the Commission accepted the passage as a principle.

80. Mr. ALFARO said that the passage did not constitute a rule, but followed from the two principles which the Commission had just adopted.

81. Mr. FRANÇOIS agreed, saying that the passage quoted contained the underlying theory of the two principles already stated.

82. Mr. SPIROPOULOS stated that all that the Commission was doing at the present time was purely provisional. It had just accepted two principles which the Chairman had read, but he thought it necessary to point out that the second principle was not accurately formula-

ted. There were fisheries conventions which prohibited foreign vessels from fishing in certain zones of the high seas. The Commission could not formulate a principle which was contrary to the spirit and the letter of those conventions; the wording should specify that in certain circumstances the State was entitled to prohibit foreign vessels from fishing in certain zones of the high seas. He did not wish to press this point, however, since all the decisions which the Commission was taking were merely provisional.

83. Mr. KERNO (Assistant Secretary-General) wondered whether, in the second principle accepted by the Commission, the word "fishing" was sufficient at the present time. The sea was a source of wealth; without saying anything of petroleum and confining himself to the water itself, he had in mind certain processes being sought by scientists—for example, to use the difference in temperature between the various depths of the sea to produce heat or motive power. The application of those scientific processes would, like fishing—which was a source of wealth—constitute exploitation of marine resources. He therefore thought that the term "fishing" might soon become too narrow.

84. Mr. SPIROPOULOS proposed that the words "nor the exploitation of resources" should be inserted in the principle after the words "nor fishing".

85. The CHAIRMAN thought that it would be better to formulate the principles in positive terms instead of in the negative terms at present used. In his view, the exploitation of marine resources should be permitted to all.

86. Mr. SANDSTRÖM thought that the text was not clear, and that it would be better to change it and make it more precise.

87. Mr. CORDOVA said that it should be made clear that the exploitation of marine resources should not be carried on to the detriment of particular countries or of the international community. He recalled that whaling had been regulated, and that there were treaties in force between the United States of America and Mexico for the protection of certain fish in specific zones of the high seas. He thought that more and more of such treaties would be concluded to protect marine resources. Would fishermen who were nationals of States not parties to those conventions be able to disregard them and so destroy marine resources? He thought it essential, therefore, that the Commission should be very cautious in formulating a principle.

88. Mr. BRIERLY replied that States had declared on many occasions that they were not required to observe treaties of that kind concluded by others.

89. The CHAIRMAN thought that the problem could be solved by adding to the principle a few words excepting the special situations which might result from the provisions of certain conventions in force. He proposed that the Rapporteur should be left to draft a text which would take into account the reservations expressed by the Commission.

The meeting rose at 1 p.m.

64th MEETING

Monday, 10 July 1950, at 3 p.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 CORDOVA, 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) (continued)

2. Mr. AMADO announced that he had had the opportunity of studying afresh the question before the Commission, and had endeavoured to draw up a few principles relating to the high seas to serve as a basis for discussion. He had intended to communicate the results of his work to Mr. François, but had been unable to do so. He then read out the document.¹

¹ Doc. A/CN.4/R.4, which read as follows:

PRINCIPLES PROPOSED BY MR. AMADO

1. The high seas can neither be owned by individuals nor subject to State sovereignty.
2. Ships on the high seas are under the exclusive jurisdiction of the State whose flag they fly.
 - (a) Every sovereign State shall be entitled to decide to whom it will give the right to fly its flag and to establish the regulations governing the granting of that right.
 - (b) Every ship shall have the right to ascertain the nationality of vessels of doubtful nationality, (right of approach) and to exercise the right of visit and search in the case of ships without nationality. In the event of international conflict, warships shall also have the right of visit and search in respect of ships of enemy nationality in order to ascertain whether the rules concerning contraband and blockade are being observed.

SECTION 1: CONCEPTION OF THE FREEDOM OF THE SEA (continued)

3. Mr. HUDSON said that, having been obliged to absent himself from the end of the previous meeting, he would like to state that, in section (I) of the report, entitled "Conception of the freedom of the sea", he saw no reason for referring to right of ownership. The points of interest were freedom of navigation and freedom of fishing, and he thought it superfluous to do any more than re-affirm those two freedoms. The latter, in fact, were not derived from the absence of State sovereignty. Once those rights were recognized, the high seas could be subject to a right of sovereignty. In the treaty signed by the United Kingdom of Great Britain

(c) The ships of a riparian State shall have the right to continue, on the high seas, a pursuit commenced in territorial waters of a foreign vessel which has committed an offence within those waters. In case of the capture of such ship, the fact should be notified without delay to the State under whose flag it sails. Pursuit may not be continued in the territorial waters of another State and cannot be resumed after the ship has entered the port of another State.

(d) In the case of collision on the high seas, the courts of the two flag States shall be competent.

3. All States shall have the right to lay submarine telegraph or telephone cables on the high seas. As the provision of the Convention of 14 March 1884 have never given rise to criticism, I feel that the Commission might well adopt them for regulating the right to lay submarine cables. Below is an extract from the main provisions of the Convention, as quoted by Oppenheim (7th edition, page 573):

Intentional or culpably negligent breaking or damaging of a cable in the open sea is to be punished by all the signatory Powers, except in the case of such damage having been caused in the effort of self preservation.

Ships within sight of buoys indicating cables which are being laid, or which are damaged, must keep at least a quarter of a nautical mile distant.

For dealing with infractions of the interdictions and injunctions of the treaty the courts of the flag State of the infringing vessel are exclusively competent.

Men-of-war of all signatory Powers have a right to stop and verify the nationality of merchantmen of all nations which are suspected of having infringed the regulations of the treaty.

All stipulations are made for the time of peace only, and in no wise restrict the action of belligerents during time of war.

4. Vessels of all nationalities shall be free to engage in fishing on the high seas, subject to their observance of the police regulations in force in the fishing areas, as established by Convention, and of the principles embodied in the treaties for the protection of the products of the sea and especially the protection of seals and the large cetaceans.

5. A sovereign State may exercise specific administrative powers beyond the limit of its territorial waters in order to protect its fiscal or customs interests. The zone in which it may exercise these powers may not exceed twice the breadth of the territorial waters.

6. Where fishing has been carried out over a prolonged period at the same points by ships flying the flag of a particular State, all other States shall be required to respect such peaceable fishing operations.

7. The subsoil of the high seas is a *res nullius* which may be freely exploited by the riparian States, provided such exploitation produces no marked effect on the bed of the high seas.

and Northern Ireland and Venezuela in 1942,^{*} the signatories had shared out the high seas between them, declaring at the same time that freedom of navigation and freedom of fishing continued unimpaired. As far as he knew, no State had raised any objections to the treaty.

4. Mr. FRANÇOIS considered that the situation in point was a special one, and that no generalizations could be drawn from the solution adopted in that case. He could not accept the contention that the only rights protected by international law were the freedom of navigation and freedom of fishing, or that it was possible to claim a right of sovereignty over the high seas.

5. Mr. ALFARO declared that the principle was that the high seas could not be subject to State sovereignty, and it was from that principle that freedom of navigation and freedom of fishing were derived. He thought that the Rapporteur was right in beginning with that paragraph.

6. Mr. HUDSON expressed approval of the sentiment expressed in the first sentence on page 4 of the mimeograph text (A/CN.4/17, para. 9, printed text in Vol. II) of the report. It was indeed pointless to determine whether the high seas should be called *res nullius* or *res communis*. On the other hand, he did not approve of the tenor of the sentence quoted from Fauchille at the end of section 1.

7. Mr. SPIROPOULOS recalled that the last part of the previous meeting had been given up to an entirely general discussion on the report. Some texts had been adopted provisionally. Mr. François would submit texts to the Commission the following year for its consideration. He agreed with Mr. Hudson that the texts were not satisfactory, but it was not until the following year that the Commission would be able to discuss the texts proposed.

8. The CHAIRMAN observed that the belief had hitherto been that freedom of navigation and of fishing were consequences of the principle of the absence of sovereignty over the high seas. Mr. Hudson proposed to take as a principle what had been regarded as a consequence.

9. Mr. SPIROPOULOS considered that it was not necessary to say that freedom of navigation was the consequence of non-sovereignty. The question was a theoretical one, and he thought that any discussion on the point would be premature. The Commission could first lay down general principles and draw the conclusions from them later.

10. The CHAIRMAN thought that the Commission would have to draw a number of other conclusions from general principles. The question was to discover whether there was freedom of navigation and fishing or absence of sovereignty. It struck him as extraordinary that there should be a desire to pass that question over.

11. Mr. AMADO pointed that Mr. Spiropoulos had proposed enunciating general principles.

12. Mr. SPIROPOULOS asked that the Commission

lay down the principles of non-sovereignty and of the freedom of navigation and fishing.

13. Mr. YEPES recalled that, at the previous meeting, he had proposed reserving the question of floating islands. He would like to know whether the principle that the high seas could not be subject to a right of sovereignty was opposed to the principle of floating islands.

14. The CHAIRMAN replied that that question would be considered when the Commission came to it, together with the question of the right to exploit the continental shelf. The Commission would then have to decide whether a State should refrain from exploiting the continental shelf when such exploitation would involve exercising a right of sovereignty over the high seas. A similar question would arise with regard to floating islands. The exceptions would be discussed when the general principles had been laid down.

15. Mr. YEPES pointed out that the question of floating islands was independent of that of the continental shelf, since floating islands would be situated on the high seas. He enquired whether there was any incompatibility between the establishment of a floating island and the principle of non-sovereignty over the high seas.

16. The CHAIRMAN thought that there was definitely a clear relation between the two questions, but it was not the business of the Commission, at that moment, to concern itself with floating islands. He proposed to leave it to the Rapporteur to mention in his report the point raised by Mr. Hudson.

SECTION 2: DEFINITION OF A SHIP

17. Mr. HUDSON asked the Rapporteur whether it was necessary to deal with that question. He would prefer not to discuss it if Mr. François would agree.

18. Mr. FRANÇOIS explained that he had endeavoured to clear the ground, and had sought to establish what subjects the Commission might consider. He agreed with Mr. Hudson that the question in point was not a very urgent one. It was no longer necessary to keep it since the Commission had decided to confine itself to the three main points he had indicated at the last meeting. The continental shelf, collision and the right of pursuit would probably be sufficient for the programme of the next session of the Commission.

19. Mr. AMADO read out the last sentence of section 2: "It would seem that an agreement on the definition of a ship would obviate certain difficulties and the Commission might communicate with governments on this subject." In spite of that remark, he did not consider it necessary to dwell on the point.

The Commission decided provisionally to leave out the question of the definition of a ship.

SECTION 3: TERRITORIAL QUALITY OF SHIPS

20. The CHAIRMAN proposed leaving on one side that question, the subject of a controversy, which the Rapporteur described as "of an academic nature",

^{*} Treaty relating to the submarine areas of the Gulf of Paria, signed at Caracas, 26 February 1942.

adding that "it was unnecessary for the International Law Commission to retain the item".

21. Mr. HUDSON considered, on the contrary, that it was very important for the principle. He did not think, however, that it was correct to speak of the territorial quality of ships. What should be said was: "Every State has the right to exercise its authority over ships flying its flag." He noted that the report stated that the theory of the territorial quality of ships "has been upheld by the Government of the United States." Would the Rapporteur tell him what authority he could quote in support of his affirmation, apart from Gidel I, p. 241?

22. Mr. FRANÇOIS replied that the Government of the United States had upheld the theory of the territorial quality of merchant ships. Professor Gidel (vol. I, p. 241) related that in 1842 Webster had written the following to Lord Ashburton: "Every merchant vessel on the seas in rightfully considered as a part of the territory of the country to which it belongs. The entry therefore into such vessel, being neutral, is an act of force and is *prima facie* a wrong, a trespass which can be justified only when done for some purpose allowed to form a sufficient justification by the law of nations."

23. Mr. ALFORA thought that the principle contained in the sentence: "Every State has the right to exercise its authority over ships flying its flag" should figure in the code.

24. Mr. AMADO read out from the document he had submitted a formulation of the principle almost identical with the first sentence of the paragraph under study in the report of Mr. François.

25. The CHAIRMAN said that the Commission could request the Rapporteur-General to include the principle in his report.

The Commission adopted the principle.

SECTION 4: NATIONALITY OF SHIPS

26. Mr. Hudson said that he had for a long time been the follower of various French authors who claimed that one should not speak of the nationality of a ship but of the national characters of a ship. He recalled the convincing arguments of Niboyet³ on the subject. He felt that the last sentence of section 4 should find a place in the principle which the Commission was to formulate. He thought he was right in saying that the majority of countries kept a register of the ships flying their flag and that the right to fly that flag was conditional on such registration. He could find no mention of that fact in the paragraph.

27. Mr. AMADO was anxious for the document he had submitted to the Commission to be taken into consideration and would wait until it was published before taking part in the discussion.

28. The CHAIRMAN pointed out that it so happened that the report of Mr. François and the document submitted by Mr. Amado were in agreement. The texts in

question were section 4 of the report and sub-paragraph (a) of paragraph 2 in Mr. Amado's document.

29. Mr. FRANÇOIS remarked that Mr. Hudson seemed to consider that the Commission should endeavour to unify the various national laws.

30. Mr. HUDSON replied that that was not what he had in mind. To be more exact, he thought that the laws of States should be studied in order to see on what conditions they conferred their nationality on ships and perhaps in order to derive some general rules therefrom.

31. Mr. FRANÇOIS could not see the utility of considering that subject. There were no doubt certain rules which were the same in different countries, but since the attainment of a uniform system was almost out of the question, he wondered if it was worth while considering the subject dealt with in section 4 of his report.

32. Mr. YEPES thought that the question might be the subject of a recommendation by the Committee expressing the hope that "All States would unify the conditions under which they conferred their nationality on ships."⁴

⁴ Mr. Yepes submitted the following principles as a basis of discussion (A/CN.4/R.5):

1. Each State determines the conditions under which it confers its nationality on various ships, grants them the right to fly its flag and accords them its protection.
2. States having no seaboard have the right to possess their own fleet and flag, but such a right is only recognised in the case of States accepting the general principles of international law.
3. The nationality of a ship is proven by its ship's papers. The captain of a ship is bound to produce such papers whenever lawfully required to do so.
4. It is for the various maritime Powers to determine the conditions under which they recognise the nationality of foreign ships in their own territorial waters. Those conditions should not, however, be such as to render navigation and seaborne trade impossible or too difficult for a foreign nation.
5. It is not forbidden for a State, in time of peace, to confer its nationality on foreign ships by provisionally granting them the right to fly its flag and by according them the protection associated with the latter, but such right may not be exercised for fraudulent purposes or when prejudicial to already existing rights.
6. It is forbidden to fly the flag of a foreign State without the latter's authorization.
7. Ships in distress and their crews must be given all necessary assistance and be allowed free use of installation and equipment for rescue and salvage.
8. No one may seize the persons or property of shipwrecked persons. The right of flotsam and jetsam is abolished.
9. No State may, in time of peace, give orders to foreign ships on the high seas. The ship is covered by its flag.
10. No State has the right, in time of peace, to detain ships on the high seas, to send its officials on board, to demand the production of the ship's papers, or to carry out a search of the ship.
11. When the crew of a ship has committed crimes or offences on the territory or within the territorial waters of another State and is the object of pursuit by the authorities of that State, pursuit may be continued outside the territorial waters of the State and on the high seas. When, however, the ship has escaped pursuit, it may no longer be attacked on the high seas by the ships of the injured State.
12. Pirates are not tolerated and have no right to respect of

³ A. de la Pradelle et J. P. Niboyet, *Répertoire de droit international* (Paris, 1931), vol. X, "Navires de mer", by J. P. Niboyet, chapter II, paras. 15 and 18.

33. Mr. ALFARO pointed out that only treaties could change the practice followed. All that the Commission could do, apart from formulating a recommendation, would be to outline the principles as they existed at the moment. The report was quite clear on that point, since it stated that "Generally speaking, it is for every sovereign State to decide to whom it will give the right to fly its flag and to establish the regulations governing the granting of the right."

34. Mr. YEPES proposed deleting the word "sovereign", and saying merely "every State".

35. The CHAIRMAN asked whether the Commission was in favour of the principle that each State be free to grant the right to fly its flag, or whether it was in favour of considering the possibility of unifying the various national laws on that point. The Commission could confine itself to expressing the principle and reject the idea of seeking for unification.

36. Mr. CORDOVA thought that the situation was not quite as presented. Mr. Hudson had not suggested attempting to bring about uniformity of law but rather discovering whether any common rules existed which were followed by all States. The Chairman had proposed rejecting that suggestion. The fact that the Commission accepted the principle was no reason for rejecting the idea of attempting to find common rules.

37. Mr. HUDSON thought that the Commission could not unify laws but should study how the question of the nationality of ships was dealt with in the law of States.

38. The CHAIRMAN invited the Commission to indicate a means of arriving at some directives for the Rapporteur-General.

39. Mr. YEPES quoted the following sentence of Mr. François' report: "That is why it would be desirable, as Mr. T. M. C. Asser and Lord Reay stated in their report to the Institute of International Law at Venice in 1896, 'if not to bring about the adoption of absolutely uniform regulations with regard to the nationality of ships—this might be extremely difficult to bring about—at least to achieve a greater degree of similarity between the laws of the various States on the fundamental principles involved'."

The Commission decided by 9 votes to 2 that it was desirable to endeavour to determine the general prin-

their flag. They may be attacked at all times and be captured on the high seas.

Those ships which seek to seize persons or booty or to destroy for criminal ends the property of others shall be considered as pirates.

13. When there are grave reasons for suspecting that a ship is guilty of piracy, any ship of war of whatever State has the right to detain the suspect ship and to board it.

14. When a ship, without renouncing its nationality and without breaking its ties with a particular State, commits acts of pillage, brigandage or other offences at sea, the international regulations and jurisdiction admitted in cases of piracy may not be applied to it, and only the tribunals of the State to which the ship is amenable are competent to deal with it.

Note. — These principles have been taken from Bluntschli's text, and adapted to modern conditions.

ciples which might permit the achievement of a certain degree of uniformity in the matter.

40. The CHAIRMAN requested the Commission to take a decision on the principle contained in the last sentence of section 4 of the report of Mr. François: "The right to a maritime flag of States without a sea-board seems to have been recognized adequately by the Declaration of Barcelona of 20 April 1921."

41. Mr. ALFARO thought that the Commission should indicate what that principle was.

42. Mr. YEPES requested Mr. François to outline the general principles of the Barcelona Declaration.

43. Mr. FRANÇOIS complied.

44. The CHAIRMAN remarked that the Barcelona Declaration enunciated very general principles.

45. Mr. YEPES and Mr. ALFARO said that they would prefer the principle to be enunciated without the Declaration of Barcelona being quoted.

46. The CHAIRMAN thought that the Declaration might be mentioned in the commentary and not in the text of the principle.

It was so agreed.

47. Mr. el-KHOURY suggested that, to facilitate the discussion of each section, Mr. François should prepare a brief principle for submission to the Commission. In the case of the last paragraph, Mr. Amado had endeavoured to extract a principle from it. He hoped that Mr. François would receive his suggestion favourably.

48. Mr. FRANÇOIS said he had already stated that he had another conception of his task. He had wished to clear the ground and to invite the Commission to indicate what points it wished to study.

49. The CHAIRMAN declared that Mr. François was right, and that the decision taken by the Commission at its last meeting had changed the position. The Commission desired, on certain points, to adopt principles indicating its opinion. When Mr. Alfaro drew up his general report he would, in concert with Mr. François, formulate the ideas of which the Commission had expressed approval.

50. Mr. CORDOVA pointed out that Mr. Amado had already drafted some principles and that the Rapporteur had declared himself in agreement with him on certain points. He suggested that Mr. François and Mr. Amado together examine the document submitted by the latter, which could thus constitute a useful basis of discussion for the Commission.

51. Mr. HUDSON thought that the Commission was not seeking to draw up a text, but to choose the points it wished to deal with. Mr. François would give a precise formulation to those points in the light of the discussions and after having received certain directives from the Commission.

52. Mr. el-KHOURY was, on the contrary, under the impression that the Commission intended to adopt principles.

53. Mr. CORDOVA thought that the Commission should decide to draw conclusions from the report and to seek to formulate concrete declarations. It was for

that purpose that Mr. Amado had submitted a document to the Commission. He thought it most desirable for definite points to be discussed.

54. Mr. AMADO recalled that, at the previous meeting, the trend of the discussion had been in favour of seeking to arrive at conclusions on the subjects enunciated in the report, with a view to formulating general principles based on those conclusions. He also drew attention to the fact that Mr. Spiropoulos had urged that the Commission should enunciate the general principles implicit in the report. The conclusions he himself had submitted were derived from the report and all, with one exception, were affirmations of existing principles of international law.

54 a. A decision taken at the previous meeting could not be annulled. He could not accept Mr. Hudson's interpretation. The Commission should endeavour to draw conclusions from the report and to establish those general principles it considered it possible to formulate. He would stand by the decision taken by the Commission.

55. The CHAIRMAN did not consider that that was exactly what had been concluded at the previous meeting. He was under the impression that the Commission had decided that it was called upon to select certain principles but that it would be necessary beforehand for it to decide whether it should leave any particular subject out of account. Mr. Amado himself had, in fact, ruled out certain subjects and did not submit proposals on all the subjects broached in the report. He thought the Commission should decide whether it wished to deal with a particular question or not and then see whether the texts submitted by Mr. Amado and Mr. François were in agreement. If they were not, it would be necessary for the Commission to make its choice.

56. Mr. FRANÇOIS thought Mr. Amado's proposals were very useful, but might prejudice the result of the examination that the Commission was due to carry out at its next session. It was only after a more thorough preliminary study and after discussion of the report which he would submit at the next session that any decisions should be taken.

SECTIONS 5 AND 6: SHIPS WITHOUT A NATIONALITY; SHIPS POSSESSING TWO OR MORE NATIONALITIES

57. The CHAIRMAN declared that the principle was that "Every ship should have a nationality and not more than one nationality." He did not think that the Commission could go into the details of sections 5 and 6 which the Rapporteur had, in any case, suggested leaving on one side.

58. Mr. FRANÇOIS accepted the principle but considered that it was necessary above all to discover what the position was when a ship had two or more nationalities or none at all.

59. The CHAIRMAN thought that the principle in question was just as important at that which laid down that every State had the right to confer its nationality on a ship.

60. Mr. ALFARO shared the Chairman's views. The

principle must be enunciated. When any dispute arose it must be settled by another rule. The Chairman's formulation of the principle was ideal.

61. The Chairman proposed leaving on one side all the detailed conclusions relating to section 5 and 6 and enunciating only the general principle. He agreed however with the Rapporteur that by so doing they would not be making any very great contribution to knowledge.

62. Mr. HUDSON proposed substituting the words "national characters" for the word "nationality". He enquired how it could come about that a ship had more than one nationality and if such cases were at all frequent.

63. Mr. FRANÇOIS replied that it often happened that a ship was registered in more than one country. Registration in one country did not always cancel a previous registration in another. Such cases frequently occurred and were of great importance.

64. Mr. HUDSON would like to be able to determine the criteria for deciding whether a ship possessed national characters. He thought that section 5 could be eliminated, since the case could not occur very often. With regard to section 6, he did not see how it was possible for a ship to possess several nationalities.

65. Mr. Yepes recalled that the Commission had decided that each State was free to establish the conditions under which a ship was authorized to fly its flag.

66. Mr. SANDSTRÖM thought that there might be such a thing as ships without nationality, and quoted the case of ships flying the flag of a country which no longer existed as an independent State.

67. The CHAIRMAN pointed out that, generally, a ship without nationality was a pirate, and that the Commission had decided not to study the question of piracy. It might however be supposed that a ship flew two different flags alternately. It was possible to eliminate sections 5 and 6.

68. Mr. SANDSTRÖM recalled the fact that the question of Esthonian ships had caused some concern in Sweden, where they were uncertain what nationality to attribute to such ships, since Sweden had recognized the annexation of Esthonia by the Union of Soviet Socialist Republics.

69. Mr. HUDSON remarked that, in that case, the ships were no longer Esthonian ones.

70. Mr. ALFARO stressed the need for adopting an undisputed general principle. The principle of the right to a nationality was as important for ships as for men. A ship might, in fact, be without nationality pending its registration, and it might be necessary to draw up certain rules applicable to a ship during the period between two registrations in different countries. Those were, however, exceptions to the general principle and did not affect it. The Esthonian ships flying the Esthonian flag possessed that nationality for all those countries recognizing the Republic of Esthonia and, as far as all other countries were concerned, were without nationality. That, however, was an exception which did not concern the Commission at that moment.

71. Mr. el-KHOURY considered that there would continue to be cases of ships without a nationality and ships with two nationalities: it could not be denied that such a situation existed. The principle should be adopted that ships had one nationality and one only, and the Rapporteur could develop that principle later.

72. Mr. CORDOVA noted that the Commission was discussing the general principle and the exceptions to that principle. Everyone was in agreement on the general principle, and they would come to consider the possibility of applying that principle later. Ships without nationality did in fact exist. They would be subject to special regulations.

73. Mr. SANDSTRÖM suggested that the Commission should consider whether the exceptions were of sufficient importance to warrant its dealing with them.

74. Mr. SPIROPOULOS held a different opinion. In his view, the Commission was met to codify the rules of international law. Those rules were known and the task was to convert them into positive ones. Codification and progressive development should not be confused. He thought that there was a very clear distinction between the two. Should any lacuna or ambiguity exist, the Commission should lay down precise rules, but it was essential not to confuse codification with the other process.

74 a. International law merely stated that the nationality of ships came within the domestic competence of States. The Commission should therefore confine itself to the principle that every ship should have a nationality and one only. To go any further would be to tackle a problem of unification of law. In his opinion, the question of the nationality of ships had nothing to do with the regime of the high seas. With regard to the other question—that of absence or plurality of nationality—the Commission could, for ships without nationality, determine what regime should be applied to them. As for ships possessing several nationalities, he knew of no such case.

75. The CHAIRMAN could not accept the opinion expressed by Mr. Spiropoulos. Regulation of the question of the nationality of ships was a problem of public order which arose equally on the high seas. If, for example, a certain ship roaming the high seas was able to fly one flag or two, it would no longer be possible to police the high seas. If there were no regulations with regard to the flying of the flag, it might happen that a ship would hoist the Italian flag when passing a French ship and hoist the French flag when passing an Italian one. Any policing of the high seas would be inoperative. He did, however, think that a discussion on the point would go too far and would take up much of the Commission's time. For that reason he would like there and then to consult Commission as to whether it intended to include in its draft code a general principle relating to ships without a nationality and to ships possessing two or more nationalities, or whether, on the contrary, it did not wish to deal with the question. He would begin by asking the Commission whether it accepted the principle that a ship should sail under a flag and only one flag.

76. Mr. HUDSON maintained that that question con-

tained two points. The second point might prove to be contrary to some municipal laws.

77. The CHAIRMAN said that, to put the question more precisely, he would submit the following first proposal to the Commission: "Every ship must sail under a flag." He thought the Commission accepted that proposition.

It was so agreed.

77 a. The CHAIRMAN then submitted the second proposition, worded as follows: "Every ship may sail under only one flag."

The Commission adopted that proposition by 9 votes to 1.

SECTION 7: DISTINCTION BETWEEN PUBLIC AND PRIVATE SHIPS

78. Mr. el-KHOURY observed that private ships were those belonging to private persons. They should fly the flag of the country of their owner. But there were ships with several owners. He enquired of Mr. Spiropoulos what he thought would be the nationality of a ship, equal shares in which were held by two private persons, one of Greek and the other of Egyptian nationality. What flag should the ship fly in that case?

79. Mr. SPIROPOULOS replied that he was not acquainted with Egyptian law but that, according to Greek law, a ship belonging to a Greek must be registered in Greece and fly the Greek flag.

80. The CHAIRMAN remarked that the discussion on that point was hardly likely to lead to any precise conclusions. He would like to ask the Rapporteur whether he agreed that the Commission should deal for the moment solely with public ships.

81. Mr. FRANÇOIS replied that the question of public ships did not require discussion, as it was regulated by the Brussels Convention for the Unification of Certain Rules relating to the Immunities of State-owned Ships, signed on 10 April 1926, and by the additional Protocol of 24 May 1934 relating to the Immunities of State-owned Ships.

82. Mr. HUDSON pointed out that that convention regulated the question of the immunities of public ships in port. On the high seas, the distinction to be made between public and private ships was less important and for that reason he thought that the Commission need not consider the point.

83. Mr. FRANÇOIS stated that it was for the same reason that he had suggested in his report that the Commission should not deal with the point.

84. Mr. el-KHOURY and Mr. CORDOVA declared themselves of the same opinion as Mr. Hudson and Mr. François.

85. The CHAIRMAN concluded that consideration of the question could, in the view of the Commission, be postponed.

SECTIONS 8 AND 9: SAFETY OF LIFE AT SEA;⁵ SIGNALS

86. Mr. HUDSON noted that under section 8 the

⁵ See also 66th meeting, paras. 1-5.

Rapporteur mentioned those regulations which had been described as "the maritime rules of the road". It was a question worthy of careful examination. Such rules had been in existence since 1863, and had been revised in 1889 by a Conference held at Washington, D.C. They had since been received in 1929 and in 1948.⁶ The rules in question were not in the nature of international conventions, and their international application was not compulsory. They were only adopted and applied by States in their municipal laws. In his report, Mr. François said that the regulation annexed to the Final Act of the London Conference of 1948 could be ratified separately. He did not think that was correct, and had heard nothing about such ratifications. He would accordingly like to see inserted in the draft international code some provisions similar to those rules and which could be ratified by all States.

86 a. It was regrettable that there were no compulsory international regulations of general application in existence so far, but only a concordance between municipal laws; it was probable however that the rules mentioned by the Rapporteur had been adopted by the majority of States.

86 b. However that might be, the matter was one of great importance from the standpoint of international law. Any ship sailing the high seas was in danger if each ship was free to navigate as it pleased. Gidel, talking of the *Lotus* case, had remarked that on the question of navigation on the high seas, some of the rules adopted by States were uniform, but others were not. Uniformity alone could not, however, guarantee the safety of navigation on the high seas. He considered, therefore, that the rules, as amended in 1948, should be adopted by all governments. He hoped that the Rapporteur would be able to study the matter and to deduce from existing rules a principle which the Commission could discuss the following year with a view to its insertion in a draft code.

87. The CHAIRMAN attached great importance to Mr. Hudson's suggestion. Since national regulations were in agreement on a large number of points, the Commission could express the desire to see such rules codified with a view to their ratification by States.

88. Mr. HUDSON added that he knew of no other case of a subject of such great international significance being left to a concordance of municipal laws instead of being regulated by international convention.

89. Mr. FRANÇOIS pointed out that the London Conference of 1948 had elaborated two sorts of rules, the first category of which related to the construction etc. of ships, and the second to the prevention of collision. Until 1948, those two categories of rules had been combined in a single treaty text, but the Final Act adopted at London contained, in two annexes, regulations concerning the construction etc. of ships (Annex A) and an international regulation for the pre-

vention of collisions at sea (Annex B). The said Annex B could be ratified separately by States without the adoption either of Annex A or of the Final Act. In the texts established before 1948, no provision had been made for the ratification of the rules by the signatories. He suggested that the Commission should express the hope that all States would accept and ratify Annex B.

90. Mr. HUDSON said that at one time the Government of the United States of America had mistakenly sought to ratify the earlier Convention of 1929, and had then discovered that the rules contained in that Convention were simply rules that the various States could adopt but that they were not required to ratify.

91. Mr. FRANÇOIS pointed out that, since 1948, the rules could be ratified.

92. Mr. HUDSON agreed that the Final Act of 1948 marked a great step forward.

93. Mr. SPIROPOULOS observed that the point raised by Mr. Hudson was of the greatest importance. While recognizing that the Commission should deal with it, he thought it his duty to point out that the Commission did not seem to him to be prepared for dealing with questions as technical as those raised by certain problems of navigation on the high seas and particularly by that of the safety of human life. He thought that the best solution would be to ask the Rapporteur to study existing rules and conventions and to submit the following year a precise account to the Commission which could not enunciate a general principle that States could then judge in full possession of facts.

94. The CHAIRMAN agreed with Mr. Spiropoulos that the Commission was quite unable to draw up a series of technical rules, and he accordingly supported the latter's proposal to invite the Rapporteur to examine the question, bearing in mind that it appeared to be the desire of the Commission for international unification to be achieved in that field.

95. Mr. ALFARO wondered whether the Commission could not enunciate a general principle that States should, in the field of navigation on the high seas, employ measures guaranteeing a minimum of safety to persons on board ship. It seemed to him highly desirable to enunciate such a principle, which would serve as a means of urging every State to adopt the best possible measures for safety at sea. The technical details could be settled by special convention.

96. Mr. AMADO was afraid that discussion of the question might be re-opened when the Commission came to consider the general report to be submitted to it. He agreed that the principle formulated by Mr. Alfaro was a very important one, but, in view of the fact that the Commission would not have a great deal of time for consideration of the general report, he was not very much in favour of adopting that principle which had not been advanced so far either by navigational experts or by the competent authors. Before formulating such a principle, it was essential, he thought, to ascertain the views of such experts and authors. A recommendation by the Commission would undoubtedly draw their attention to that point, but he feared that at that stage the

⁶ International Convention for the Safety of Life at Sea, signed at London, 31 May 1929. See Final Act of the International Conference for the Safety of Life at Sea, signed at London, 10 June 1948.

Commission would waste too much time discussing the terms of such a principle.

97. The CHAIRMAN said, in reply to the fears expressed by Mr. Amado, that he had intended proposing that the Commission discuss the general report next week. It would thus have a fortnight for its consideration instead of the week it had had the year before. On a number of points, the decisions taken by the Commission had been somewhat vague and would no doubt give rise to new discussions. That being so, he thought that the Commission should commence consideration of the general report the following week. He enquired whether the Rapporteur-General approved that proposal. As for the principle formulated by Mr. Alfaro, he considered it too self-evident to be of much use.

98. Mr. ALFARO said he accepted the Chairman's proposal with regard to the consideration of his report. He thought that, in spite of the fears expressed by certain members of the Commission, the report should contain a principle such as he had formulated. After the *Titanic* disaster, all States had recognized the need for more intensive safety measures than were previously in force. All States, or at least a large number of them, had endeavoured to protect human life more effectively, either by their own laws or through agreements. No means should, however, be neglected of urging States to recognize that human life was sacrosanct and to seek and apply the best safety measures.

99. Mr. HUDSON thought it would be premature to formulate a general principle for insertion in a code. He would like the principle suggested by Mr. Alfaro to be formulated with reference to historical development, and on the basis of the rules which had been in existence for nearly ninety years and which were gradually being perfected. He thought the best solution would be to leave it to the Rapporteur to study the question thoroughly, and to submit his findings to the Commission the following year. The Commission should not, however, undertake the premature enunciation of a principle which would certainly not go far enough. He himself, in any case, would not be in a position to judge the question until more familiar with the texts. For that reason, he would like to study the Final Act of 1948 and its Annexes and the latest edition of international or national regulations on the question.

100. Mr. FRANÇOIS shared Mr. Hudson's opinion. He saw no use in enunciating, at that stage, rules which would of necessity be too vague and of slight practical value for the purpose envisaged by the Commission.

101. The CHAIRMAN concluded that there was a suggestion before the Commission that the Rapporteur-General should mention in his general report the discussions which had taken place in the Commission, and that Mr. François should collect all available information and submit it in the form of an analysis to the Commission at its next session.

102. Mr. AMADO enquired whether the Rapporteur-General, in his general report, would include his own comments or whether he would confine himself to giving

an objective statement of the opinions expressed in the course of discussion.

103. Mr. ALFARO replied that he had no intention of making comments of a personal nature, and that he would endeavour to give an objective report of the discussions.

SECTION 10: COLLISION

104. The chairman pointed out that the question of collisions was a very difficult and complex one raising problems of conflicting laws and of competence. He wondered whether the Commission would be in a position to arrive at any conclusion. The Committee would recall that Mr. Amado had made a proposal offering a drastic solution.

105. Mr. AMADO said that, when submitting his proposal, he had wondered whether the Commission would be prepared to accept it. He had been in the same position as the Rapporteur, who found himself confronted with four different theses:

- (1) exclusive competence of the courts of each flag State;
- (2) competence of the State of either the vessel collided with or of the colliding vessel;
- (3) concurrent competence of the courts of both flag States;
- (4) competence of the courts at the vessel's first port of call or at the port of refuge.

105 a. He thought that at that moment no jurist would be in a position to choose between the four hypotheses, or even to combine them. He had tried to picture the position of the Permanent Court of International Justice when it had had to deal with the *Lotus* case. In his opinion, it was not possible for the Court to give satisfaction either to France or to Turkey. Its judgment had, in any case, been strongly criticized. In that field, as in that of safety of human life at sea, he thought that the best solution would be to invite the Rapporteur to study the question and to submit a detailed report the following year. That would enable him to study the question thoroughly and to formulate positive conclusions on points which there was hardly any use in the Commission discussing at that stage.

106. Mr. FRANÇOIS was entirely in favour of Mr. Amado's proposal. He only wished to know whether the Commission was prepared to study the question and to invite him to submit a more detailed document the following year. He would, however, like the Commission to decide whether it wished him to deal with the civil aspect as well as the criminal one. It would be recalled that the criminal question had aroused deep concern in the *Lotus* case. He could confine himself to the criminal question, but felt that there was a very strong connexion between the criminal and the civil aspects, and that it would therefore be rather difficult to leave the civil aspect entirely out of the question. There was another institution, the International Maritime Committee, which was also dealing with the matter. He could obtain information about the work of that Committee and give analysis of it in his report.

107. Mr. CORDOVA asked if Mr. François would inform the Commission whether collisions on the high seas were very numerous.

108. Mr. FRANÇOIS and Mr. HUDSON replied that there were a large number of collisions on the high seas every year.

109. Mr. AMADO declared that, as far as the question of conflicting laws was concerned, the Commission was entrusted with the codification of public international law but not of private international law, and that it therefore seemed wiser to him to leave out of consideration for the moment the question of private international law. He proposed, therefore, that the Rapporteur should not venture into that very complex and difficult field.

110. Mr. SPIROPOULOS said that three questions arose in connexion with collisions:

- (1) What law decided on the question of civil responsibility?
- (2) What law was applicable in regard to criminal responsibility, for instance, when a collision caused loss of life?
- (3) What was the competent court in cases of collision?

The first question belonged to the sphere of private international law with which the Commission was not for the moment dealing. The second question fell within the field of the codification of international criminal law, which likewise was not on the Commission's agenda. The Commission could study the third question, but he wondered whether it really belonged to public international law of the high seas. He rather thought that the third question should also be left out of account.

111. Mr. el-KHOURY noted that, according to Mr. Hudson's assertion, collisions on the high seas were very numerous. He would like to know what the practice was in such cases in order to have a little information on which to base his opinion. What courts claimed competence in the matter?

112. Mr. HUDSON recalled that the whole world had followed with great attention the deliberations of the Permanent Court of International Justice on the *Lotus* case. The court had ruled that Turkey, in instituting criminal proceedings under Turkish law against the captain of the French ship *Lotus* after it had collided with a Turkish ship on the high seas, had not acted in contradiction to the principles of international law. In coming to that decision, however, the Court had been extremely divided and it was only by the casting vote of the President that the matter had been decided. The Court, on that occasion, had been the target of a very large number of criticisms from all countries, and the International Maritime Committee had in 1933 adopted a resolution on the subject.⁷

112 a. He, personally, would be sorry if the Commission did not deal with the question of collision. After the *Lotus* case and its repercussions throughout the

world, he did not feel it possible for the Commission to keep silent and would request the Rapporteur to examine the question. He still felt that in the *Lotus* case the Court had come to a just decision. The Rapporteur could present a detailed report on the point the following year.

113. The CHAIRMAN noted that the Commission seemed to be agreed on requesting Mr. François to submit to the Commission the following year a principle of a positive character to supplement the negative ruling given by the Permanent Court of International Justice.

It was so agreed.

SECTION 11: ASSISTANCE AND SALVAGE

114. Mr. HUDSON considered section 11 very important, and was in agreement with the conclusions reached by the Rapporteur in his report. He would like to get something positive out of the Brussels Convention of 1910 which, to his knowledge, had not been very widely ratified. Hence, it was perhaps difficult to assert that the matter was governed by customary law. The Commission could not pass over the question and fail to establish principles based on the rules enunciated in the Convention. Many countries had passed legislation rendering salvage compulsory. In the United States of America, failure to render assistance was assimilated to a crime. It seemed to him that the Commission should formulate some rules for inclusion in a code of international scope.

115. Mr. FRANÇOIS thought that the principles might be formulated on the basis of articles 11 and 12 of the Brussels Convention.⁸

116. The CHAIRMAN presumed that the Commission was in favour of inviting the Rapporteur to submit a more detailed report on that point the following year.

117. Mr. HUDSON thought that the Commission, before taking a decision, should be acquainted with the text of the Convention and with the principles of assistance in general.

118. The CHAIRMAN requested Mr. François to bring the text of the Convention to the Commission's next meeting.

SECTION 12: CEREMONIES ON THE HIGH SEAS

119. The CHAIRMAN thought there was no need for the Commission to examine the paragraph and invited it to pass on to section 13.

SECTION 13: POLICE OF THE HIGH SEAS

120. Mr. FRANÇOIS said that the paragraph concerned general police measures allowed in time of peace by international law—namely, the right to ascertain the identity and nationality of the ship. The right was the subject of international regulation.

121. The CHAIRMAN asked Mr. François if he thought that the right of approach was the sole exception

⁷ For the text of the resolution, see *La Revue du droit maritime comparé*, vol. 29 (Jan. - June 1934), p. 23.

⁸ Convention for the Unification of Certain Rules with respect to Assistance and Salvage at Sea, signed at Brussels, 23 September 1910.

permitted to the general principle which forbade, in time of peace, any interference in the navigation of ships of another nationality on the high seas, unless there was serious ground for suspecting that the ship was engaged in piracy.

122. Mr. HUDSON drew the attention of the Commission to the control measures taken by the coastal State in the contiguous zone to prevent infringement of its customs or sanitary laws or regulations, or interference with its security by foreign vessels. He wondered whether such measures could be applied by a State when, for example, a ship was trans-shipping its cargo on the high seas for delivery at one of its ports. If the Rapporteur considered that the right of approach was allowed in such cases only within a certain distance from the ports, he might declare himself in agreement, but he would like the report to be more definite on the point.

123. Mr. FRANÇOIS asked whether Mr. Hudson would agree to accept the principle formulated by Pearce Higgins, which he had reproduced in his report—namely:

“Any interference with a foreign vessel on the high seas is, apart from treaty, an act for which the State may have to answer; it is allowable only if there is reasonable ground for suspicion that the character of the ship is feigned”,

or Gidel's formulation quoted in the previous paragraph.

124. Mr. HUDSON replied that he was in agreement neither with Pearce Higgins nor with Smith, who was also quoted in the same paragraph. He tended rather to agree with Gidel, though the latter did not go far enough. Before committing himself, he would like to have further information on more recent developments. However, he was basing his opinion neither on Higgins nor on Smith nor on Gidel. He wished to ascertain the practice of States.

125. The CHAIRMAN observed that when the Commission came to examine the question of the continental shelf it would discover that that point was also liable to give rise to difficulties with regard to smuggling.

126. Mr. BRIERLY thought that the whole question was in principle related to the problem of the continental shelf and the contiguous zone, and that the Commission might discuss it when it came to examine those points. He wondered whether the rules enunciated in the report were not sufficient for the high seas.

127. Mr. HUDSON thought that there was, in practice, greater latitude in the application of rules of police; a warship meeting a ship on the high seas could call for verification of the flag.

128. Mr. FRANÇOIS replied that there was no international regulation on that question and that the French had always contested the practice.

129. Mr. AMADO remarked that the discussion showed the importance attached to the nationality of a ship. It was for that reason that he had formulated his proposal. States often doubted whether the flag denoted the true nationality of a ship.

130. The CHAIRMAN noted that the right of ap-

proach was not in doubt; but that the longer the Commission considered the point, the more it was forced to the conclusion that there were a large number of exceptions to the rule. He thought that the Commission could enunciate a principle on the right of approach, adding that there were a number of exceptions to the right which it would consider later.

131. Mr. AMADO observed that reference had been made to the continental shelf and the contiguous zone. Those points would be considered later and the question at the moment was that of police of the high seas.

132. The CHAIRMAN thought that the two questions mentioned came within the regime of the high seas.

133. Mr. FRANÇOIS affirmed that right of approach outside of the territorial waters and of the contiguous zone should exist. There were cases in which there was a presumption of piracy, of slave trade or of arms traffic in which it was necessary to be able to exercise a control and to take the appropriate measures.

134. Mr. AMADO said that in case of doubt as to the nationality of a ship, any State had the right of approach.

135. The CHAIRMAN replied that such a right did exist, but not the right of investigation; it was sufficient for a ship to show its flag in order to satisfy the provisions relating to the right of approach.

136. Mr. SPIROPOULOS thought that the right of verification of the flag did exist. Mr. François could inform the Commission the following year on any exceptions to the right of approach.

137. Mr. FRANÇOIS declared that he did not admit the right of verification of the flag.

138. The CHAIRMAN thought that the Commission was agreed to postpone detailed examination of the question of the right of approach until the following year, and that it was preferable not to formulate any principle that year.

The meeting rose at 6 p.m.

65th MEETING

Tuesday, 11 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 CORDOVA, 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. Yuan-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) (continued)

SECTION 13: POLICE OF THE HIGH SEAS (continued)

1. The CHAIRMAN read out sub-paragraph (b) of paragraph 2 of the principles proposed by Mr. Amado¹ "Every ship shall have the right to ascertain the nationality of vessels of doubtful nationality (right of approach) and to exercise the right of visit and search in the case of ships without nationality. In the event of international conflict, warships shall also have the right of visit and search in respect of ships of enemy nationality in order to ascertain whether the rules concerning contraband and blockade are being observed."
2. Mr. FRANÇOIS thought that the second part of the text could be deleted since the Commission was not dealing on that occasion with the law of war. He also thought that ships of neutral nations ought to have been mentioned as well because it was particularly in connexion with neutrals that warships had the right of visit.
3. Mr. AMADO agreed to the deletion of the second part of his text.
4. Mr. FRANÇOIS felt the first part of the text was every widely phrased. He agreed to it provided that it really applied to ships without nationality. He thought it would be better if the first line were to read "Every warship", since merchant ships did not possess the rights granted in the text to warships.
5. Mr. BRIERLY was of the opinion that the words "of doubtful nationality" could be deleted, because warships always had the right to ask a vessels' nationality.
6. Mr. AMADO pointed out that a case might arise in which a warship asked a vessel to hoist its flag and then found afterwards that the vessel had previously flown a different flag; that was why a warship had the right not to confine itself to a request for the flag. The right of visit clearly restricted the principle of freedom of navigation, but it was impossible to know whether or not the ship was a pirate unless it were visited. He proposed that the Rapporteur collate the texts and come to a decision.
7. The CHAIRMAN pointed out that Mr. Amado's text was only a suggestion and the Rapporteur remained entirely free.

8. Mr. YEPES wished to know how the principle would be worded.

9. The CHAIRMAN replied that it would be worded according to the classical law on the matter. "Every warship may ascertain the nationality of ships it encounters and exercise the right of visit if the ship is of doubtful nationality."

10. Mr. YEPES doubted whether the general principle was that warships had the right of visit.

11. The CHAIRMAN stated that in effect the right of visit did not exist.

12. Mr. SANDSTRÖM wished to know whether the right to examine papers were not the right of visit.

13. Mr. FRANÇOIS replied that the right was exercised on the responsibility of the State under the flag of which the warship was sailing.

14. The CHAIRMAN felt that the Commission could leave it to Mr. François to draft the rule.

15. Mr. HUDSON did not believe that States had the right of visit. It would be regrettable if it were granted to warships. The text was not sufficiently explicit. Ortolan, who was not a jurist but a naval officer, was less severe.

15 a. Mr. FRANÇOIS, at Mr. Hudson's request, read out a passage from "Le Droit international public de la mer", (1932, vol. I, p. 300) by Professor Gidel: "Ortolan concluded on the same cautious note: 'In time of peace exercise of the right to verify the flag of a foreign merchant vessel must usually be confined, unless in exceptional circumstances and where justified by necessity, to obliging the vessel to hoist its flag. In certain cases a right also exists to stop and examine the vessel provided it is not put off its course'."

16. Mr. YEPES felt that the principle was drafted in very general terms. It was undesirable to allow it to be understood that a warship had the right to examine papers.

17. The CHAIRMAN declared that all members of the Commission were in agreement on that point.

18. Mr. HUDSON asked why Ortolan was not to be followed more closely.

19. Mr. YEPES read out the corresponding article in Bluntschli's Code: "No State has the right, in time of peace, to detain ships on the high seas, to send its officials on board, to demand the production of the ship's papers, or to carry out a search of the ship."

"When there are grave reasons for suspecting that the ship is not sailing under its true nationality a right of visit exists, but on the responsibility of the State exercising it."

20. The CHAIRMAN and Mr. ALFARO thought that the wording of the principle could be left to the Rapporteur.

SECTION 14: SLAVE TRADE

21. The CHAIRMAN felt that no purpose would be served by reviving that archaic question.

22. Mr. HUDSON was not sure that it was unnecessary to do so. He had studied the question and wished

¹ See previous meeting, footnote 1.

to pay a tribute to the part played by the British Government in connexion with it. He did not know whether it would be possible to formulate a general principle, but he thought it desirable to try to do so. Conventional law had long contained special provisions for certain areas such as the Persian Gulf and the east coast of Africa. He did not know whether those provisions could be generalized. He hoped it would be possible to make a general declaration on the subject. He requested the Rapporteur to look into the conventional rules so as to produce from them a general principle applicable to ships engaged in the slave trade. The slave trade still existed.

23. Mr. BRIERLY supported Mr. Hudson. He thought that the matter might be left to the Universal Declaration of Human Rights.

24. Mr. HUDSON still felt that it should be dealt with in "The regime of the high seas", not left to the Declaration of Human Rights. It ought not to be omitted.

The Commission decided that the subject be retained.

SECTION 15: ARMS TRADE

25. Mr. HUDSON observed that that was another question covered chiefly by conventional law. The St. Germain Convention of 1919² had only come into force between a small number of States. The Geneva Convention of 17 June 1925 relating to the Supervision of the International Trade in Arms and Ammunition and in Implements of War, applied to special areas. Moreover, it had not come into force. He did not think that principles suitable for codification could be drawn from conventional law.

26. The CHAIRMAN felt that it was nevertheless a similar question to that of the slave trade.

27. Mr. HUDSON pointed out that the conventions on the trade in arms applied to special areas.

28. Mr. FRANÇOIS thought that there was a difference between the slave trade and the trade in arms. In his opinion the matter did not lend itself to codification.

The Commission decided that the subject be omitted.

SECTION 16: SUBMARINE TELEGRAPH CABLES

29. The CHAIRMAN read out paragraph 3 of Mr. Amado's text: "All States shall have the right to lay submarine telegraph or telephone cables on the high seas."

30. Mr. HUDSON thought that the provisions of the Convention of 14 March 1884 mentioned in Mr. Amado's text had given rise to criticism. What was of most importance in connexion with telegraph cables was their terminal points. If both points occurred on the territory of the same State no difficulty arose. But for a case in which one of the points occurred in the territory of a foreign State the principle was worded too widely.

31. Mr. AMADO stated that section 16 of the report contained the words: "As far as we know, the provisions of the Convention have not been subjected to criticism." He had assumed that the Rapporteur had made a thorough study of the subject.

32. Mr. HUDSON proposed that the question be left to the International Telecommunication Union.

33. Mr. SPIROPOULOS agreed with Mr. Amado on the matter. The principle involved was very important, as important as freedom of navigation and the freedom to fish. If two States could conclude a treaty on a submarine cable it was because the principle just read out gave them the right to do so.

34. Mr. HUDSON felt that it was meaningless to say that a cable might be laid on the high seas; the cable must end somewhere. He asked whether the actual right to lay cables had ever been questioned. The conventions only referred to protection of a cable that had been laid.

35. Mr. SPIROPOULOS stated that many of the principles being laid down by the Commission had not been questioned. Nevertheless they had to be formulated. It would be a mistake to leave out the present principle; it must be retained.

36. Mr. ALFORA supported Mr. Amado's proposal. The principle was a sound one. It concerned one of the uses to which the sea could be put. The question of the terminal points of cables was a different matter. The laying of a cable involved two things: use of the sea bottom and the establishment of terminal points.

37. Mr. HUDSON asked why, if the Commission wished to retain the principle, it might not be extended. There were also pipe-lines, and they were very important. During the war one ran between England and France. There was also the question of tunnels. There had long been talk of a tunnel between France and Great Britain and of another between Spain and Morocco.

38. Mr. AMADO reminded the Commission that its task was to codify principles recognized in the practice of States. The principle of the right to lay cables freely was admitted by all writers. It could not be omitted. The laying of pipe-lines and the excavation of tunnels did not as yet form part of the peaceful practice of States. The Commission's present work was confined to recording the principles of international law in time of peace.

39. Mr. SANDSTRÖM wondered whether the principle proposed by Mr. Amado might not have disadvantages. Mr. Hudson had mentioned the other types of installations which might be established on the high seas. To mention only one type might be dangerous: it would give the impression that the text was restrictive, which it was not. The freedom to lay cables followed from the principle of non-sovereignty. He did not see any need to insert the provision.

40. Mr. HUDSON thought the Commission ought to establish the principle that once a cable was laid it must be protected. Protection was more important than the right to lay. The same applied to pipe-lines. It was possible to imagine a pipe-line running from the coast of Iran to Dahrán.

² Convention for the Control of the Trade in Arms and Ammunition, signed at St. Germain-en-Laye, 10 September 1919.

41. The CHAIRMAN remarked that Mr. Amado had quoted a provision concerning protection of cables occurring in the 1884 Convention.

42. Mr. AMADO stated that in the first place there was the principle of freedom of the seas, from which arose freedom of navigation, the freedom to fish and the right to lay submarine cables; writers unanimously accepted those three consequences. A number of conventions, such as the London Conventions of 20 January 1914 and 31 May 1929 for safety of life at sea, introduced limitations to those principles. In his opinion it was unthinkable that the principle sanctioning the right to lay submarine cables should not be introduced into the codification of the regime of the high seas.

43. The CHAIRMAN believed that the Commission accepted the principle. He thought mention should also be made of measures to protect cables. He asked the Rapporteur if he would be willing to introduce something to that effect in his preliminary draft.

44. Mr. FRANÇOIS replied that he was willing to do so.

45. Mr. KERNO (Assistant Secretary-General) felt that it would be well to consult the International Telecommunication Union on the point. Article 25, paragraph 1, of the Statute of the Commission read as follows:

“The Commission may consult, if it considers necessary, with any organs of the United Nations on any subject which is within the competence of that organ.”

and paragraph 1 of article 26:

“The Commission may consult with any international or national organizations, official or non-official, on any subject entrusted to it if it believes that such a procedure might aid it in the performance of its functions.”

45 a. He thought that the Commission ought to profit by the interval between the second and third sessions to effect such consultations. On many special subjects the organs of the United Nations or international organizations could provide much valuable information and assist the work of the third session.

46. Mr. FRANÇOIS thought that was a very useful suggestion.

47. The CHAIRMAN asked whether the Commission wished the principle to be extended, that was to say whether mention should be made of pipe-lines and tunnels.

48. Mr. YEPES held that the question of tunnels raised by Mr. Hudson differed from that of cables. Tunnels related to the subsoil of the high seas. Cables related to the sea. The two questions must be kept apart, and if tunnels were mentioned they should be dealt with separately.

49. Mr. SPIROPOULOS was not sure that he agreed. Those questions were everywhere dealt with in connexion with constructions on the ocean bed. The constructions belonged to those who built them. A tunnel therefore belonged to whoever had excavated it. That it was excavated in the subsoil was not material. The question of

tunnels was bound up with that of the high seas.

50. Mr. FRANÇOIS felt that the question was closely bound up with those of the subsoil and the continental shelf. He would rather the question were omitted for the moment and taken up again after study of the continental shelf.

51. Mr. SPIROPOULOS did not know whether the Commission would retain the idea of the continental shelf, which was still a political one. A tunnel was already contemplated between France and Great Britain. The Commission might be able to speak of constructions on the sea bed. If the Rapporteur preferred, the question could be deferred till later.

52. The CHAIRMAN thought that the Commission could in practice confine itself to what took place in the water; the question of pipe-lines might therefore be retained.

The Commission decided that the principle applying to cables should also apply to pipe-lines.

SECTION 17: POLICING OF FISHERIES

53. Mr. HUDSON observed that in connexion with that subject the report had very properly mentioned the important 1882 Convention. An important development had recently taken place. The Government of the United States had adopted a very active fisheries policy, since fish constituted an important item of human diet. It had concluded agreements with a number of governments, including the Convention of 8 February 1949, which was not mentioned in the report and which regulated the fisheries of the north-west Atlantic. The States signing that Convention, the United States, Canada, France, the United Kingdom, Denmark, Italy etc., had accepted the measures it contained for the protection of fisheries. They were States whose nationals engaged in fishing in the north-west Atlantic. No attempt had been made to forbid nationals of other States access to those fisheries. The signatory States exercised a certain supervision over their own nationals in order to protect fish in that area. All States which might desire to fish in the area would be permitted to become parties to the Convention.

53 a. The United States had also concluded conventions with Mexico, Costa Rica and Canada for the preservation of certain fish in certain areas: in particular, tuna, which was fished on a large scale. A number of States had attempted to take part in that fishery and there had been no thought of preventing them, in spite of their not being signatories to the Convention. It should be noted that the 1949 Convention did not allow a State to prevent nationals of another non-signatory State from engaging in certain practices.

54. Mr. FRANÇOIS felt there was some misunderstanding. He had mentioned the Conventions referred to by Mr. Hudson, in section 19 of his report, which read: “In 1920 the Committee of North American Fisheries was instituted in America; there are also joint committees of the United States, Canada and Mexico. A Convention of 8 February 1949 established an International North-West Atlantic Fisheries Commission”.

54 a. The paragraph being considered by the Commission dealt with policing of fisheries, that was to say, the means whereby observance of the Conventions was to be supervised on fishing grounds. No special provision on the matter appeared in the Convention mentioned by Mr. Hudson. Only the Conventions of 1882 and 1887 provided for some form of policing.³ The question raised by Mr. Hudson might be held over until the Commission came to section 19.

55. Mr. HUDSON asked whether the two subjects ought to be separated. The conservation measures decreed in 1949 involved policing.

56. Mr. FRANÇOIS thought that there was a great difference between the two subjects. The creation of supervisory bodies was a step further than the prohibition of certain practices. That was why he wished to insist on the special character of police measures, but he did not deny that they were related to the questions mentioned by Mr. Hudson.

57. Mr. HUDSON pointed out that the 1882 and 1887 Conventions only applied to a special area and doubted whether a general principle could be drawn from them.

58. The CHAIRMAN stated that those Conventions applied to the North Sea and that all the littoral States except Norway had become parties to them. He wished to know what the difference was between the Conventions mentioned in section 17 and the Convention relating to protection of marine resources.

59. Mr. FRANÇOIS replied that the difference lay in the nature of the supervision. The purpose of the 1882 Convention was to stop the trade carried on by the boats known as "floating cabarets" and the operations of certain fishing vessels which destroyed competitors' nets. It was to combat those practices that policing had been instituted. Protection of marine resources was a separate matter.

60. Mr. CORDOVA felt there was hardly any difference between the two questions. Policing of fisheries was to prevent fishermen from harming one another and to regulate fishing, but it would also extend to protecting marine resources so as to prevent the fishermen from exhausting them. The latter activity might be regarded as bound up with the idea of policing. In a case in which two countries had signed a convention concerning tuna fishing in order to protect the tuna, what would happen if another State claimed that its nationals had the right to go and fish in the areas to which the convention applied without observing its restrictive provisions?

61. Mr. HUDSON pointed out that the United States and Mexico were not attempting to exclude other countries.

62. Mr. CORDOVA thought that there was no object in trying to protect tuna if nationals of other countries were able to go and fish it. It would be different if the sig-

natories of the treaty had the right to police the fisheries.

63. The CHAIRMAN stated that what was in question was a treaty, and treaties only bound those who had signed them. The same applied to conventions concerning the North Sea. Police powers could not be exercised over nationals of non-signatory States.

64. Mr. CORDOVA thought that something must be done in connexion with third States. The conventions under discussion amounted to laws of the high seas.

65. Mr. HUDSON held that treaties had a different basis. If Japanese fishermen appeared on tuna fishing grounds an attempt would be made to obtain the co-operation of Japan. If the attempt were not successful the fishery would be less profitable for American and Mexican vessels.

66. Mr. CORDOVA reminded the Commission that in point of fact the United States had proposed to Mexico that provision be made to exclude fishermen of every other country from the fisheries in order to ensure respect for the provisions of the convention. It had finally been decided however that existing international law would not allow it. Means must be found to enable those treaties which protected resources required by mankind to become applicable to all. That meant developing, not codifying international law.

67. Mr. YEPES believed that Mr. Córdova was right. Natural resources were in danger of exhaustion. But nothing more could be done in the present state of international law. Exercise of supra-national authority would be required.

68. Mr. SPIROPOULOS understood what Mr. Córdova meant. What Mr. Córdova proposed involved, as he had said, further development of international law. It meant introducing a new rule. It was not a matter of applying a bilateral convention to all States, but of distilling from that convention a principle to be applied to all States. He wondered whether a rule of that kind would stand any chance of being adopted. He thought that it would be premature: difficulties would be encountered and many States would be prevented from accepting the draft code. He suggested that the Rapporteur should study the problem.

69. Mr. SANDSTRÖM was also considerably attracted by Mr. Córdova's idea. The following appeared towards the end of section 2 of the Report:

"Are you in favour of recognizing the existence of a zone on the high sea contiguous to the territorial sea in which the coastal State will be able to exercise the control necessary to prevent, within its territory or territorial sea, the infringement of its Customs or sanitary (or if need be: 'fishing') laws or regulations or interference with its security by foreign vessels?"

He asked if that were what was referred to.

70. Mr. FRANÇOIS replied that it was.

71. The CHAIRMAN was most interested in what Mr. Córdova had said. The proposal was not as revolutionary as it appeared. Something of the sort already existed for the Straits and the Suez and Panama Canals: certain States had signed conventions the provisions of which were applicable to all the States

³ International convention for regulating the police of the North Sea Fisheries, signed at The Hague, 6 May 1882; International convention respecting the liquor traffic in the North Sea, signed at The Hague, 16 November 1887.

in the world. It meant delegating the power of the international community to those of its members who were on the spot. The idea was not entirely new; though it was bold there were precedents for it. The Commission would be doing a great service if it followed Mr. Córdova's lead.

72. Mr. SANDSTRÖM stated that the development would benefit everyone and the exception it involved to the principle of freedom of the high seas could therefore be accepted.

73. Mr. FRANÇOIS approved.

74. Mr. CORDOVA pointed out that once a treaty for policing fisheries was signed the other States observed its provisions.

75. Mr. HUDSON observed that Mr. Córdova's remark did not apply to the north-west Pacific. A development of the kind envisaged would be reactionary in connexion with fisheries. Fishing did not have the political implications of the Straits. He added that the Panama Canal was not the high seas.

76. The CHAIRMAN pointed out to Mr. Hudson that the principle of free navigation was applied to the Panama Canal.

77. Mr. CORDOVA found it hard to see how the idea of making all nations respect a treaty the purpose of which was to protect marine resources in the interests of mankind, could be called reactionary. When some States in the general interest signed a treaty whereby they undertook not to fish in such a way as to exhaust certain fish resources, it might be laid down as a principle of international law that other States had a duty, in the general interest, to observe that convention, which was the law of the high seas. The high seas were public property subject to international law. The United Nations, through one of its organs, such as the Economic and Social Council, might ensure that all countries observed the Convention. If it accepted the principle the Commission would be striking out into a new field.

78. Mr. KERNO (Assistant Secretary-General) stated that according to the Charter the United Nations was to develop and codify international law. Any decision to do pioneering work on the part of the Commission was therefore welcome. International law was not static; it must adapt itself to the changing needs of the community of nations. Mr. Córdova's suggestion deserved support.

79. The CHAIRMAN asked the Rapporteur if he was willing to extend his studies to the question of generalizing fishing treaties.

80. Mr. FRANÇOIS replied that he was, but wished to know what authority would decide whether or not a treaty was one in the general interest.

81. Mr. CORDOVA stated that that was a question which frequently arose in connexion with the application of laws. For a treaty to be general its object must be fish conservation. The matter could be settled by arbitration.

82. The CHAIRMAN remarked that the Rapporteur's objection was equally valid in many other cases. Frequently there was a kind of implicit recognition. Nobody had raised difficulties about recognizing the

system of regulations applied to the Suez Canal.

83. Mr. HUDSON said that the Government of the United States spent large sums for the protection of salmon breeding on the coasts of Alaska. If another country were to station its fishermen at the mouths of rivers and begin to catch the salmon no provision of international law would prevent their doing so. Canada and the United States had signed a treaty. Did that treaty prevent a third country from fishing on the high seas?

84. Mr. CORDOVA reminded Mr. Hudson that the United States had proposed the insertion of a provision to that end in the treaty with Mexico, but it had been found that international law did not allow it. Since then, however, it had been realized that the only way to protect marine resources for the benefit of all was to lay it down as a principle that when a treaty was signed for the protection of marine resources, all States must abide by it.

85. The CHAIRMAN stated that the organs of the United Nations, in particular the Economic and Social Council, could rouse public opinion. He reminded the Council of the arbitration over fur seals. It was true that that arbitration took place between the parties to a Convention, but an arrangement had been arrived at which satisfied everybody.

86. Mr. HSU was much in agreement with the end Mr. Córdova had in view. But if two countries signed a treaty the other countries could not be bound by it. Like Mr. François he wondered who would act as judge in the event of the acceptance of an exception to the principle proposed by Mr. Córdova. The United Nations existed, however, and the case could be submitted to that body.

87. Mr. el-KHOURY thought that the point was whether or not the principle was of importance to mankind. If it was, an attempt must be made to put it into force. It would be difficult to accept that the signatories of the treaty bound themselves and left other States free to destroy valuable resources. All States must accept and observe the principle. In the particular case in point the difficulties could be surmounted. The United Nations was in existence and could overcome opposition. Treaties of the sort must be submitted to the United Nations for conversion into universal treaties. He asked that the Rapporteur should propose a procedure whereby such treaties could be made applicable to all.

88. Mr. LIANG (Secretary of the Commission) drew the Commission's attention to the memorandum submitted by the Secretariat (A/CN.4/30). Paragraph 3 showed that the United Nations was actually already concerned with protection of marine resources. During the past six months attention had frequently been drawn to the importance of the fact that the United Nations was taking increasing interest in the need for promoting such protection. The FAO, among other agencies, was concerning itself with the matter. Under the terms of its Constitution it was instructed to study the distribution of fishery products, and it was studying the question very carefully. Before the Commission formulated a general principle on the subject it would

be well advised to study the work done in that field by other bodies, the FAO in particular. Conservation and protection of the natural riches of the sea was an international problem of common interest to all nations. The document he had just mentioned might also be referred to in connexion with other questions. When the Commission came to examine the problem of pollution of the sea it would find that to be another question closely bound up with protection of the sea's natural riches.

89. The CHAIRMAN declared that work of great value had been accomplished at the meeting. The Commission had got out of the rut of mere codification to which it frequently allowed itself to be confined. He reminded the Commission that the Assistant Secretary-General had drawn its attention to the importance of consulting other organizations dealing with the protection of marine resources. Mr. Liang had just added his own remarks on the subject. If Mr. François agreed, as he thought he would, the question would be gone into more deeply; but not till the session of the following year. In the meantime Mr. François could study the question of protecting marine resources by generalizing the measures provided for in bilateral or multilateral treaties, a work which would benefit all mankind. The Commission would rely on him to bring back the following year conclusions from which principles could be formulated. He thanked Mr. Córdova for the leading role he had played during the meeting.

SECTION 18: RIGHT OF PURSUIT

90. The CHAIRMAN invited the Commission to consider section 18.

91. Mr. HUDSON said that he had read the report with great interest; the Rapporteur had assembled a large amount of material in it. He suggested, however, that it might well be extended, for example, to include the very important decisions taken at one time by Canada and the United States in connexion with alcohol smuggling. Nevertheless he did not feel that much of the Commission's time need be given to the question of the right of pursuit, since it had been studied very thoroughly by the Conference for the Codification of International Law at The Hague in 1930.

92. Mr. FRANÇOIS considered that Conference had reached satisfactory conclusions on the right of pursuit. Only a few points had given rise to controversy or been left unsettled. They were listed in section 18 of his report. He had however refrained from drawing conclusions in that connexion. If members of the Commission cared to make suggestions they would undoubtedly be most useful and he would examine them with care. All he had wished to do in his report was to present the question to the Commission, reserving the right to revert to it in greater detail in his report of the following year.

93. Mr. AMADO stated that the Commission was perfectly free to omit the proposal he had put forward in paragraph 2 (c) of his proposal (64th meeting, footnote ¹). He would be glad to accept any other solution that the Commission might wish to adopt.

94. The CHAIRMAN thought that the Commission was engaged at that moment in establishing principles,

not in preparing detailed texts. He believed that the Commission agreed with him on that point and could therefore limit itself in the present year simply to formulating a general principle.

95. Mr. YEPES felt that the right of pursuit ought to be extended to offences committed not only in territorial waters but on land. That point was not covered by Mr. Amado's proposal. Mr. Amado did, however, speak of "a foreign vessel which has committed an offence". The ship could not commit an offence, only the crew of the ship could do so. Mr. Amado's text ought therefore to be amended so as to read: "a foreign vessel the crew of which has committed an offence".

96. Mr. FRANÇOIS held that the text could be accepted in the form Mr. Amado had drafted it. He thought it necessary to point out, however, that in his opinion it left unsettled the debatable points that he (Mr. François) had enumerated in his report.

97. Mr. HUDSON did not agree with Mr. Amado's proposal that the right of pursuit on the high seas should only exist when the pursuit commenced in the territorial waters of the pursuing ship. In the five points listed by Mr. François pursuit commenced outside territorial waters was also considered. In particular he mentioned the point dealing with the case of a ship which, while itself outside territorial waters, caused offences to be committed therein by her boats.

98. Mr. FRANÇOIS thought that it was not Mr. Amado's intention to exclude such cases. In view of the complexity of the problem of the right of pursuit, he urged that the question be left open till the following year. He thought it preferable for the Commission not to adopt a principle concerning the right of pursuit during the present year. More thorough study might make it possible to lay down rules concerning the extent of the right and exceptions thereto.

99. Mr. HUDSON stated that the wording of Mr. Amado's principle excluded the right of pursuit in the case of an offence committed on land by the ship's crew. He added that he had never heard of a ship being pursued as a result of an offence committed on land by its crew or a man belonging to its crew.

100. Mr. SPIROPOULOS thought members of the Commission were under a misapprehension. Mention had just been made of persons who had committed an offence in the territorial waters of, or within, a country. He agreed with Mr. Hudson that the rule of the right of pursuit applied only to ships, not to the crew. If a sailor committed an offence or crime in a port, the right of pursuit did not obtain.

101. The CHAIRMAN believed he was expressing the view of the Commission in saying that it was preferable to leave the question over till the following year. The Rapporteur would then be in a position to submit a new, more detailed report on the subject.

SECTION 19: PROTECTION OF THE PRODUCTS OF THE SEA

102. Mr. HUDSON pointed out that in item (a) "International bodies", the Rapporteur was not proposing a principle for adoption by the Commission.

103. Mr. FRANÇOIS stated that the whole question of protection of the products of the sea (marine resources) was closely bound up with the problems of the continental shelf and contiguous zones. If the Commission could reach conclusions on those two problems, the whole question of protection of marine resources would be settled too. It seemed to him very difficult to examine the problem of marine resources separately from that of the continental shelf. One of the chief difficulties arose from the fact that some countries insisted that the continental shelf be subject to rules concerning protection of marine resources. The two questions appeared to him so closely connected that he had made no concrete proposals regarding protection of the marine resources, since he felt the question ought to be settled at the same time as that of the continental shelf.

104. Mr. HUDSON pointed out that at the end of item (c) "Protection of the large cetaceans" the Rapporteur had given no conclusion, probably because he thought there was no need for one. He asked the Rapporteur if the same applied to item (b) "Protection of seals".

105. Mr. FRANÇOIS replied that he had given no conclusion on items (a), (b) and (c) because he thought that the Commission did not need to examine those items at the present time.

The Commission concurred.

106. The CHAIRMAN observed that, in that case, the Commission would proceed to examine item (d) "Pollution of the sea".

107. Mr. FRANÇOIS proposed that that item should not be discussed because it was being considered by other bodies.

108. Mr. HUDSON stated that it concerned a purely technical matter which the League of Nations had caused to be examined at length in 1935 by the special committee of experts, which had drawn up a draft international convention. The conference which the League of Nations Council had wished to convene to deal with the matter had been unable to meet. He thought that the Commission ought not to broach the subject because there was no international legislation in connexion with it. There was consequently nothing to codify. He proposed therefore that item (d) of paragraph 19 should not be examined.

It was so decided.

SECTION 20: BREADTH OF THE TERRITORIAL SEA; CONTIGUOUS ZONE

109. Mr. HUDSON felt that the Commission could hardly deal with the question of the breadth of the territorial sea or methods of demarcating a line separating interior waters from territorial waters, because those questions were now before the International Court of Justice in the case between the United Kingdom and Norway concerning fisheries. The question had also been submitted to the 1930 Codification Conference. He had been struck by the divergence of the views expressed by various governments at that Conference. Moreover, a number of countries had instituted legis-

lation concerning the contiguous zone and it appeared difficult to deny that they had rights in that zone. Many States however denied it.

109 a. At the end of section 20 of his report, Mr. François proposed to return to the question of the breadth of the contiguous zone when the Commission came to examine the items in his report dealing with the continental shelf. The Commission would be well advised to follow Mr. François' suggestion.

110. Mr. AMADO desired to explain why he had given his principle No. 5 the following wording:

"A sovereign State may exercise specific administrative powers beyond the limits of its territorial waters in order to protect its fiscal or customs interests. The zone in which it may exercise these powers may not exceed twice the breadth of the territorial waters."

110 a. He was aware of the inherent difficulties of the subject and of the fact that States were not unanimous regarding the limits of territorial waters. The great majority accepted the limit of three nautical miles, others wished to establish a six-mile limit. The principle of the contiguous zone had been formulated by various scientific bodies and many writers had attempted a formulation. The great majority of writers held that the contiguous zone should not exceed twelve nautical miles. That twelve-mile limit had not been challenged by any writer except in cases in which certain States had concluded special agreements. The 1930 Codification Conference had accepted recognition of a zone of territorial sea beyond the three-mile limit in the case of certain specially mentioned States, and had adopted the principle of a contiguous zone which should not extend more than twelve nautical miles from the coast.

110 b. He had been unwilling to mention the figure of twelve miles himself because he knew that it would give rise to objections in the Commission. That was why he had said that the contiguous zone in which a State might exercise administrative powers might "not exceed twice the breadth of the territorial waters". He thought the formula satisfactory and could imagine no other capable of taking its place.

110 c. The Commission had accepted Mr. Córdova's proposal that certain bilateral treaties should become laws which other States must observe. In the case of the contiguous zone he thought that an agreement already existed laying down that it was not to exceed twelve miles. He could not accept the principle that some States, in normal times, could establish the limit of the contiguous zone for defence purposes at 300 nautical miles, as had been done in Panama in 1939. Such decisions were measures for defence and protection taken as a result of war.

110 d. He reminded the Commission of the formula: The breadth of the supplementary zone may not exceed nine nautical miles. His proposed principle contained no mention of nine miles, or of the question of security. It referred simply to the right of sovereign States to exercise administrative powers in order to protect their fiscal and customs interests.

111. Mr. HUDSON said that within that zone a

sovereign State had also the right to protect its sanitary interests. A number of American States set great store by that principle. He asked Mr. Amado to agree to the word "sanitary" being inserted in his text.

112. Mr. AMADO agreed to the insertion.

113. Mr. HUDSON had no objection to the first sentence of Mr. Amado's proposed principle, provided the word "sanitary" were inserted in it. He found it difficult however to accept the second sentence. He had never heard of the breadth of the contiguous zone being formulated in the way Mr. Amado had formulated it. The variety of local conditions called for a variety of solutions. If the Commission wished to specify the breadth, its formula must take account of the interests of littoral States. Even if the Commission accepted the principle of the contiguous zone being delimited, it would not necessarily be able to specify the delimitation very precisely. The Hague Conference had very rightly refrained from doing so.

114. Mr. AMADO observed that in 1925 the American Institute of International Law had stated in a draft submitted to the Governing Council of the Pan-American Union, that: "The American Republics may extend their jurisdiction beyond the territorial sea parallel with such sea for an additional distance of . . . marine miles, for reasons of safety and in order to assure the observance of sanitary and customs regulations."

115. Mr. HUDSON pointed out that the American Institute of International Law had not said that the contiguous zone might be twice the breadth of the territorial waters.

116. Mr. AMADO agreed that the American Institute of International Law had not defined the zone in that manner; it was an innovation of his own. So far as he was aware the formula appeared for the first time in his proposed principle. He mentioned that he had stated at the beginning that he thought the Commission would not be ready to accept his formula. He believed, however, that it would be taken up in the future.

116 a. He pointed out that the Committee of Experts for the Progressive Codification of International Law set up by the League of Nations had also accepted the idea of the contiguous zone and declared that in that zone States might exercise administrative rights based on custom or on essential security requirements, but not rights to exclusive economic use. In face of the texts he had mentioned he thought he was right in saying that his formula was at the same time a modest and a practical one.

117. Mr. SPIROPOULOS congratulated Mr. Amado on the text he had submitted. He thought the first sentence of it completely satisfactory. The second sentence, establishing a limit to the contiguous zone, he felt, raised a question of the greatest importance, but one on which agreement would be extremely difficult. The first Codification Conference had broken down on that same question of the limits of the territorial sea. Fundamental differences had appeared between the great Powers, some of them wishing the limit to be twelve nautical miles, others ten or six. Italy and Roumania, for example, together with a number of other Mediterranean

powers, wished to fix it at six nautical miles, whereas Norway, for practical reasons, desired the limit to be four. He thought it unlikely that the Commission would be able to reach agreement. He wondered whether fixing a limit were really necessary. The difficulty was aggravated by the lack of international understanding on the matter and the fact that some States fixed several limits. Greece, for example, had established a number of contiguous zones, one for customs purposes, another for security, and so on.

117 a. He thought the simplest solution would be to follow Mr. Hudson's suggestion and delete the second sentence of Mr. Amado's proposed principle. Codification would clearly be more difficult if the sentence were left out; but if, in spite of the difficulties of reaching agreement, the Commission wished to undertake delimitation with a view to a subsequent codification, it ought perhaps to provide for several limits.

118. Mr. AMADO pointed out that the Institute of International Law had gone further at its 1928 session. It had stated that: "In a supplementary zone contiguous to the territorial sea a coastal State may take the measures required for its security, observance of its neutrality and its sanitary, customs and fishing policy. It has power to take cognizance of breaches of laws and regulations concerning those matters. The breadth of the supplementary zone may not exceed nine nautical miles." (*translation*) (Article 12, *projet de règlement relatif à la mer territoriale*)⁴ The words used by the Institute were not "contiguous zone" but "supplementary zone". He also drew attention to the fact that in some cases, in the text of the Institute of International Law, for example, the limit fixed was nine nautical miles. He did not insist however on his proposed principle being accepted in its entirety, although he would have liked the Commission to go a step further and fix a limit. In view of the difficulties that had been brought to light, he thought it better for study of the question to be deferred until the following year.

119. Mr. HUDSON pointed out that in the Rapporteur's opinion delimitation of the contiguous zone was bound up with the question of the continental shelf. He therefore asked that discussion of the question be deferred till the Commission came to examine the problem of the continental shelf.

120. Mr. CORDOVA thought that the question of the breadth of the contiguous zone was nevertheless bound up with that of the breadth of the territorial waters. If the Commission failed to fix a limit for the territorial waters it would be difficult for it to do so in the case of the contiguous zone. The Commission was not however required to consider zones of neutrality such as those established, for example, to protect the Panama

⁴ *Annuaire de l'Institut de droit international*, 1928, p. 758. Original French text reads as follows: "Dans une zone supplémentaire contiguë à la mer territoriale, l'Etat côtier peut prendre les mesures nécessaires à sa sécurité, au respect de sa neutralité, à la police sanitaire, douanière et de la pêche. Il est compétent pour connaître, dans cette zone supplémentaire, des infractions aux lois et règlements concernant ces matières. L'étendue de la zone supplémentaire ne peut dépasser neuf milles marins."

Canal; it was concerned solely with the contiguous zone to be delimited by littoral States. As far as the Commission was concerned the question of security did not arise. He thought that the subject ought to be left aside for the moment and considered when the Commission came to consider the continental shelf.

121. Mr. AMADO thought that the question of the contiguous zone ought not to be studied with that of territorial waters, but with that of the high seas. He had only referred to the Panama Canal as a matter of historical interest.

122. Mr. SPIROPOULOS failed to see why the Commission should consider the question of the contiguous zone with that of the continental shelf. He felt that the Commission could declare that States had certain administrative rights within a zone of up to three nautical miles in breadth and that they could take security measures in the contiguous zone. He held that the contiguous zone was not part of the territorial waters but of the high seas. In any event the question of the contiguous zone ought not to be considered with that of the continental shelf, which was an extremely difficult subject in itself.

123. Mr. FRANÇOIS admitted that he agreed in principle with Mr. Spiropoulos, but for practical reasons he would have preferred the discussion to be adjourned until consideration of the continental shelf.

124. Mr. HUDSON believed that no one denied that contiguous zones existed. The point in question was their breadth, and that breadth was connected with the continental shelf. He supported Mr. François' proposal.

125. Mr. AMADO was also of the opinion that the contiguous zone should not be considered at the same time as the continental shelf. He drew the Commission's attention to the following passage from a recently published book:

"Navigation on the high seas is free for all States. But in a zone of the high seas bordering the mainland, a State may decree such measures as may be necessary to enforce, within its territory or its territorial waters, the laws and regulations concerning customs, navigation, hygiene and policing required for its immediate security." (*translation*)

125 a. As he had mentioned already, he felt that the issues ought not to be confused. The sea was a field for scientific study and activity. All that was at present in question was the limits to be fixed for the territorial sea or the contiguous zone. Mr. Hudson agreed with him that the State had the right to exercise certain administrative functions outside the zone of the territorial sea. The second sentence of his proposed principle failed to meet the approval of the majority of the Commission, but in the case of the first sentence he thought agreement might be reached.

126. The CHAIRMAN asked whether the Commission desired to continue discussing the contiguous zone.

127. Mr. FRANÇOIS thought that the Commission might accept the first sentence of Mr. Amado's proposed principle. In the case of the second sentence concerning the breadth of the contiguous zone he thought that a

solution might perhaps be possible when the Commission had reached agreement on matters connected with the continental shelf.

128. The CHAIRMAN stated that in his opinion the territorial sea and contiguous zone were identical. Littoral States did not possess rights over those waters but merely a servitude. Nor, in his opinion, were questions relating to the continental shelf and territorial waters connected; occurrences in the one could, however, have consequences in the other.

129. Mr. HUDSON was sure that the Commission would be unable to reach agreement if it was its intention to delimit the breadth of the contiguous zone. In no circumstances would it be possible for it to lay down a rule concerning the maximum breadth of that zone. He thought that the Commission might accept the first sentence of Mr. Amado's proposed principle, but that it could not go further.

130. Mr. SPIROPOULOS thought that the Commission was not ready to settle the question during the present year. He suggested that the Commission request the Rapporteur to collect the fullest possible documentation on the limits fixed for the contiguous zone in different legal systems or in agreements between States.

131. Mr. CORDOVA felt that the Commission accepted the idea that States could exercise certain administrative powers in the territorial waters and the contiguous zone. Questions arising in connexion with those two zones were bound up with exercise of sovereignty on the part of littoral States. They ought not to be considered in connexion with the question of the continental shelf, since that was related to exploitation of the sea-bed. The question of the contiguous zone was more closely related to that of territorial waters and the régime of the high seas than to the problem of the continental shelf. He thought, however, that the Commission was not sufficiently well versed in maritime law to be able to arrive at conclusions at the present juncture. It would be preferable for consideration of all the questions to be deferred till the following year.

132. Mr. AMADO agreed that considerations should be deferred till the following year. He thought, however, that exercise of rights in the contiguous zone was not linked with the exercise of sovereignty by a littoral State. The full sovereignty of States could only be exercised in territorial waters.

133. Mr. HUDSON thought that such a position could hardly be held in 1950. Thirty years ago it might have been defended. But in view of the action taken by certain countries, such as Argentina, it had to be recognized that according to the ideas at present proclaimed by many governments, a State was justified in exercising its sovereignty over all maritime waters.

134. The CHAIRMAN stated that the discussion showed that the Commission desired to retain the first sentence of Mr. Amado's proposed principle, but was not agreed concerning acceptance of the second sentence dealing with the extent of the contiguous zone. In his opinion there were in reality several contiguous zones, as Mr. Spiropoulos had said. He thought that the time had come to bring discussion of the item to an end.

When the Commission came to examine the question of the continental shelf it would have an opportunity, if it wished, to return to the question of the breadth of the contiguous zone.

135. Mr. BRIERLY desired the Rapporteur to be requested to collect the fullest possible documentation concerning the claims made by States and the measures taken by them in connexion with rights in the territorial sea and in the contiguous zone. The documentation should include detailed information on the various limits set by States.

136. Mr. FRANÇOIS accepted Mr. Brierly's proposal. He pointed out, however, that in 1930 governments had been asked to make their views known on the matter and a number of replies had been received. The situation had changed since that time and in connexion with the item under discussion it would therefore be advisable to ask governments once again to reply to very specific questions about the contiguous zone. Relevant data could not in his opinion be found in books or other publications. Governments should be asked what rights they claimed in the contiguous zone and how wide they thought it ought to be.

137. Mr. YEPES said that the Commission had already discussed the advisability of sending out a questionnaire to governments and it had decided against it. In the case in point, however, such a questionnaire was justified because governments would only be asked for information concerning law and practice, not on matters of doctrine. He thought that the Commission would consequently obtain a certain amount of information from them.

138. Mr. KERNO (Assistant Secretary-General) thought he was right in saying that the United Nations was already collecting documentation on the subject.

139. Mr. LIANG (Secretary of the Commission) confirmed that the Secretariat was at the moment engaged in collecting conventions, laws, decrees, etc. concerning certain matters relating to the law of the high seas, including the continental shelf and the contiguous zone. The documentation would be at the disposal of the Commission and in the first place of the Rapporteur, whom the Secretariat would also be very glad to supply with any other information which might come to hand later. Such being the case he was not sure whether it was necessary to send out a questionnaire. He did not feel that the Commission ought to limit itself to examining the replies given by governments in 1930.

140. Mr. HUDSON reverted to Mr. François' statement to the effect that some governments had adopted a position on the matter twenty years before. He was sure that many of them had changed their attitude since. They must therefore be asked for fresh information.

141. Mr. FRANÇOIS also felt that a request should be made for information concerning fact and practice. It would also have been desirable to receive governments' views on doctrine, but if Mr. Yepes' fears were grounded governments might perhaps hesitate to reply.

142. Mr. SPIROPOULOS stated that if the Commission desired to consider the question of the contiguous

zone, it must have full information on the subject.

143. Mr. KERNO (Assistant Secretary-General) said that the Secretariat would attempt to keep all the information up-to-date.

144. Mr. HUDSON asked whether the enquiries would be confined to matters of law or of practice.

145. Mr. LIANG (Secretary of the Commission) thought that it would be difficult to obtain replies from governments concerning their attitude on matters of doctrine.

146. The CHAIRMAN was sure that many States had changed their attitude since 1930. The Commission had need of more exact information. The Secretariat would be able to provide it. Other methods of obtaining the information, however, ought to be used as well. What was required was knowledge of law and practice, not of views on doctrine.

The meeting rose at 1 p.m.

66th MEETING

Wednesday, 12 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 CORDOVA, 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) (*continued*)

SECTION 8: SAFETY OF LIFE AT SEA (*resumed from the 64th meeting*)

1. Mr. FRANÇOIS pointed out that the Commission had instructed him to ascertain the exact position with regard to the International Convention for the Safety of Life at Sea, 1948. He had found that the 1948 Conference had drawn up a Final Act which included the following:

"As a result of its deliberations, the Conference prepared and opened for signature and acceptance The International Convention for the Safety of Life at Sea, 1948, to replace the International Convention for the Safety of Life at Sea, 1929. . . .

"The Conference also had before it and used as a basis for discussion the present International Regulations for Preventing Collisions at Sea. The Conference considered it desirable to revise these Regulations and accordingly approved the International Regulations for Preventing Collisions at Sea, 1948, but decided not to annex the revised Regulations to the International Convention for the Safety of Life at Sea, 1948. The Conference invites the Government of the United Kingdom to forward the International Regulations for Preventing Collisions at Sea, 1948, to the other Governments which have accepted the present International Regulations for Preventing Collisions at Sea, and also invites the Government of the United Kingdom, when substantial unanimity has been reached as to the acceptance of the International Regulations for Preventing Collisions at Sea, 1948, to fix the date on and after which the International Regulations for Preventing Collisions at Sea, 1948, shall be applied by the Governments which have agreed to accept them."

(Great Britain Command papers 7487-7519, paper 7492, pp. 6 and 8)

2. Some slight change had been made as compared with the procedure laid down in the 1929 Convention in regard to the regulations for preventing collisions. The document consisted of the Convention itself with two separate annexes. Mr. Hudson had been right: both in 1948 and 1929 the States ratifying the Convention had not agreed to the regulations for preventing collisions at sea. However, the Final Act showed that those regulations had been examined during the Conference, and that a text had been drawn up asking governments to approve them. It was also provided that as soon as the necessary majority was obtained, the United Kingdom Government would determine the date on which the regulations were to come into force. In those circumstances, the Commission could do no more than express the hope that all the Member States would accept the regulations.

3. Mr. HUDSON said that there had been no change in the position since 1889. The regulation then adopted remained the basis of all municipal law. The provisions of the Final Act of 1948 were substantially the same as the corresponding provisions of the 1929 Convention, which in turn followed the procedure laid down in 1889. He hoped that Mr. François would be able to ascertain the general principle underlying those precedents. He believed the Commission would be going beyond its terms of reference in recommending that States should embody those regulations in their domestic legislation. Should it do so, it would be necessary to fix a date; but the United Kingdom Government had been made responsible for fixing such a date. The consultation on the date for the entry into force of the regulations provided for in the 1929 Convention had never taken place. He

did not think it necessary to spend any more time on the matter, adding that any conclusion at which Mr. François might arrive would be acceptable to him.

The Commission decided to ask its special rapporteur to endeavour to establish a general principle.

4. Mr. FRANÇOIS stated that there was a Convention in existence for the unification of certain rules of law respecting collisions and another for the unification of certain rules of law respecting assistance and salvage at sea, both signed at Brussels on 23 September 1910. Mr. Hudson had expressed the opinion that the principle underlying those conventions could be adopted. He then read out the first paragraph of article VIII of the first of those Conventions:

"Subsequent to a collision, the master of each of the vessels in collision is bound, so far as he can do so without serious danger to his vessel, her crew and passengers, to render assistance to the other vessel, her crew and passengers."

and the first paragraph of article XI of the second:

"Every master is bound, so far as he can do so without serious danger to his vessel, her crew and passengers, to render assistance to everybody, even if an enemy, found at sea in danger of being lost."

Did the Commission desire to adopt regulations similar to those contained in the above conventions?

5. Mr. HUDSON was of the opinion that the Commission should adopt a principle based on the above articles.

It was so decided.

SECTION 21: EXCLUSIVE RIGHTS TO THE SEA BED AND THE SUBSOIL

(a) *Sedentary Fisheries*

6. Mr. HUDSON considered that the Commission must take into account the fact that a number of States had established control over sedentary fisheries situated outside their territorial waters. He hoped that the propriety of such action would be recognized. He was not quite clear what was meant in section 21 (a) of the report by "This question could be dealt with in relation to the problem of the continental shelf." He agreed with the passage from Sir Cecil Hurst's work quoted, but he was not in agreement with what Professor Gidel had said on the matter. He did not know how a right of control could arise from the occupation of the sea bed. From the historical standpoint, it could not be denied that States were able to exercise such control. Vattel had raised the question in connexion with pearl fisheries. He had himself studied the question and was in a position to say that, in the Persian Gulf, fishing was free to all. Control over sedentary fishing had been assumed by other States, as, for instance, many in South America. He believed that Mexico had done so, and suggested that the Rapporteur should study the way in which the regulations relating to sedentary fisheries had been drawn up; they were quite separate from the question of the continental shelf.

7. Mr. AMADO shared Mr. Hudson's views as regards

the words he had quoted. The question of sedentary fisheries was linked with that of freedom of the seas. The principle of the freedom of the seas was now accepted and implied the freedom of fishing. Governments were inclined to turn a sympathetic or indifferent eye on peaceful sedentary fisheries.

7 a. The question of the continental shelf involved that of territorial waters and of the contiguous zone. Some authorities were inclined to link the question of the continental shelf with that of the high seas, as they considered that the question of the continental shelf was bound up with that of the contiguous zone and that the contiguous zone formed part of the high seas. That was the reason why Mr. François had linked the two problems. He himself did not share that view, and he read out paragraph 6 of his proposal as follows:

"Were fishing has been carried out over a prolonged period at the same points by ships flying a flag of a particular State, all other States shall be required to respect such peaceful fishing operations."

7 b. He quoted that principle so as to clarify the discussion. The regulation of sedentary fisheries formed part of the regulation of the regime of the high seas. Continued fishing operations and their continued tacit acceptance by other States had established a principle, but, in his opinion, that principle bore no relation to the continental shelf.

8. Mr. HUDSON was of the opinion that Mr. Amado did not go far enough. It could not be said that long use was necessary. A State might undertake the exploitation of oyster beds which had not hitherto been worked. It was not sufficient that ships flying the flag of that State should work such beds. In his opinion it was necessary that control should be exercised by the State itself. In Ceylon control had been exercised (since 1814) by virtue of a legislative act; a fishing permit was required. The Newfoundland banks had been visited by fishing vessels for a very long time, but such vessels had not acquired any exclusive rights. Access to the banks was free to all. The provision in question should not be applied to fishing in general, but confined to such things as oyster beds.

9. Mr. AMADO pointed out that the term "sedentary fishery" should have been used instead of "fishing", in paragraph 6 of his proposal.

10. Mr. CORDOVA asked the Commission to avoid any hasty decision on that very important point. What was at issue was the right of a State to set up a sort of servitude on the high seas. According to the wording of paragraph 6 (quoted above) the States to which the sedentary fisheries belonged would be entitled to regulate the fishing. The fisheries of some States covered a wide area and they had already taken possession of the high sea. He was thinking of the gulf separating lower California from Mexico. If the principle were accepted that some countries with highly developed fishing industries were entitled to the exclusive control or regulation of the fisheries, other States would never be able to develop their fishing industry. He therefore

asked the Commission to act with circumspection and to postpone any decision until the following year.

11. Mr. HUDSON pointed out that the northern part of the Gulf of California belonged to Mexico and further, that it was a fishing area and not one with sedentary fisheries.

12. Mr. BRIERLY remarked that any decision taken by the Commission at that stage would be provisional; he was of Mr. Hudson's opinion. It was a question of a right acquired by occupation. The criteria of occupation were well established and could be applied in that case. He did not believe there was any connexion between sedentary fisheries and the continental shelf, or that the question of sedentary fisheries should be related to that of contiguous zones. Those questions should be treated separately and, so far as sedentary fisheries were concerned, the principle of occupation should be borne in mind.

13. Mr. SPIROPOULOS was also of the opinion that caution was needed. The principle under discussion reminded him of the one recognizing that the sovereignty of States sometimes extended beyond territorial waters. He had in mind historic bays. The problem had been raised at the Codification Conference at The Hague in 1930. As in the case of historic bays, the right of sovereignty over sedentary fisheries had been exercised from time immemorial. The legal basis was the same.

14. Mr. AMADO said his colleagues would doubtless remember that by sedentary fisheries were meant permanent establishments constituting a derogation of the principle governing the high seas. Mr. Brierly had corroborated what he had said. The question had nothing whatever to do with the continental shelf or the contiguous zone.

14 a. Mr. Córdova's objection had been anticipated in the report which in section 21 (a) stated that: "The principle of freedom of the seas grants to all the right to fish freely in the open sea in the absence of an international convention limited in its application to the high contracting parties." They were not at the moment dealing with anything else but sedentary fisheries, the study of which was included in the general study of the regime of the sea bed.

14 b. He was ready to agree to any solution providing a clearer definition of the question, and felt that the Rapporteur should be instructed to prepare such a definition for the following year's session.

15. Mr. FRANÇOIS said that the question had given rise to a considerable divergency of views to which he had attempted to give expression at the end of section 21 (a) of his report:

"A number of authorities consider that States must be given a general right to occupy the sea bed with a view to working the oyster beds, coral reefs and so forth which it contains. Others, however, refuse to recognize sovereign rights except in the case of 'effective and continued use'—without any formal and repeated protest against such use having been made by other States, and particularly by such States as by

¹ See 64th meeting, footnote 1.

reason of their geographical situation could put forward objections of particular weight."

15 a. If he rightly interpreted the views of the Commission, the majority was in favour of the second concept. It was effective and continued use that constituted a right which they could recognize. He asked the Commission to enlighten him on that point.

16. Mr. CORDOVA remarked that to say "others, however, refused to recognize sovereign rights..." was to go further than Mr. Hudson, who had spoken only of control.

17. The CHAIRMAN pointed out that they were dealing with a very characteristic case of usucapion, one of the rare instances in international law where acquisitive prescription was admitted. It was a question of confirming a right of usucapion arising from long, peaceful and recognized possession. French law contained an identical provision. In principle, no one had the right to take possession of state property. Nevertheless, the existence of legalized encroachments (*établissements fondés en titre*) was recognized. Those encroachments, existing before 1789, had been recognized and had never been contested. The case of sedentary fisheries was exactly similar and the underlying idea was the same as that of the second opinion quoted in the report.

18. Mr. HUDSON asked the Chairman whether the same regulations were applicable to any sort of fishery.

19. The CHAIRMAN answered in the affirmative.

20. Mr. HUDSON was not prepared to go as far as that.

21. Mr. FRANÇOIS read the following sentence from his report which had been taken from Professor Gidel's work: "Fisheries may be described as sedentary, either by reason of the species with which they are concerned, that is to say species attached to the soil or irregular surfaces of the sea bed, or by reason of the equipment employed, for example stakes driven into the sea bed." It was therefore not only a question of the fish caught, but also of the equipment used for the purpose.

22. The CHAIRMAN was of the opinion that both the above conditions had to be fulfilled—i.e., an exploitation of sedentary species by means of static equipment. The existence of a fishery could not be admitted where there was nothing to fish.

23. Mr. el-KHOURY said that at the preceding meeting the Commission had studied the question of the protection of certain species and had come to the conclusion that it could not force third party States to respect treaties signed for the protection of certain species, unless the treaties had been concluded under the auspices of the United Nations. The question under discussion was a similar case. It was customary for a State to require other States to respect its monopoly. He did not believe that the rules regarding acquisitive prescription were applicable to the case under consideration, as there was a difference between State property and the high seas. A certain type of right might arise out of use of State property, continued for a certain length of time, without protest on the part of the authority concerned. That could not apply to the high seas, as

there were States which were not aware of what was taking place. The principle that continued use could create a monopoly could not therefore be applied to the high seas.

23 a. The question should be treated in the same way as that of the protection of certain species. States could not be required to accept a *fait accompli*. That would be contrary to the principle of freedom of the high seas. Again, in speaking of a continued use, what was to be understood by "continued"? What period of time was required? It would be preferable either to ask the Rapporteur to study the question with a view to arriving at a general principle, or to ask the Economic and Social Council to put it down on its agenda, so as to arrive at a text that could be submitted to all States for their acceptance. A definite result could only be achieved by the adoption of a general convention.

23 b. He noticed that Mr. Amado's text stated that "all other States shall be required". This should read: "are requested to respect such peaceable fishing operations, should they see fit to do so".

24. Mr. BRIERLY was doubtful of the wisdom of excluding the possibility of a State exercising a right of control, if there were any real prospects of new sedentary fisheries being set up along its shores. That was not, however, in his opinion a problem of any practical import, as all existing banks had doubtless already been discovered.

25. Mr. HUDSON considered that further study should be devoted to the question. He did not attach any importance to the pronouncements of the authorities, as they were only repeating what had been written by other authorities and had paid no attention to the practice of States. He had not been able to find any work dealing with the practice of States and had been obliged to find that out for himself. States did not exclude foreign fishermen, they merely wished to control the fishing. In Ceylon, Arab fishermen from the Sea of Oman and the Persian Gulf were required to obtain a special permit. Although Ceylon appeared to claim the Gulf of Manar as part of its territorial waters, it did not attempt to exclude foreign fishermen. In his opinion, the Commission should examine the laws of the various States, and pay no attention to what had been said by the authorities who had not studied those laws. The laws of certain South American States were very interesting.

25 b. Along the coast of Florida and in the Gulf of Mexico there were very extensive sponge beds. So far as the United States of America was concerned, the inhabitants of a certain locality had the exclusive right to work those beds. But the State of Florida only attempted to regulate exploitation in so far as its own citizens were concerned. Mexicans were allowed to work the sponge beds without hindrance and nobody thought of regulating their operations. Anyone could come and work the sponge beds. The case was different as regards the Ceylon oyster beds, which were considered as forming part of that country's territorial waters. He had made a collection of laws on the subject which was entirely at Mr. François' disposal.

26. Mr. CORDOVA said that the situation regarding

the sponges of the Gulf of Mexico was satisfactory, and that it should be possible to request all States to conform to the regulations set up by certain countries for the conservation of sponges. In his opinion, however, it would be going too far to try to exclude a State on account of regulations established for purely commercial purposes. The high seas were common property and free to all. On the other hand, in regard to the protection of fish, everyone should observe the established regulations.

27. The CHAIRMAN remarked that they were not dealing with the acquisitive prescription of a fishing right, but with a right of sovereignty.

28. Mr. CORDOVA was not prepared to admit any prescription when it came to the exploitation of a high seas fishery. He pointed out that Mr. Briery had said that the principle of occupation was the crux of the whole problem. In his opinion occupation and prescription were on and the same thing. He proposed to use the word "usucapion" as the Chairman had done.

29. Mr. BRIERLY pointed out he had said that they were dealing with a separate principle which had nothing in common with the contiguous zone or the continental shelf.

30. Mr. CORDOVA wished to refer to a specific case. The Californian fishing industry was very important, but it was dependent on the catch of small fish in the Gulf of California to serve as bait. Fishing boats first came to fish in the Gulf and then proceeded to the high sea. The success of their fishing obviously depended on the catch of those small fish. Mexico had always allowed vessels to come and fish in her waters, but if that were to lead to the acquisition of a prescriptive right to fish within her territorial waters, she would probably reconsider her attitude.

31. Mr. BRIERLY pointed out that only the high seas were in question.

32. Mr. AMADO remarked that the principles of Roman law had created a great deal of confusion in international law; he trusted that they would not once again complicate the question of sedentary fisheries. The principle of freedom of the seas propounded by Grotius was a clearly recognized principle of international law, and the Rapporteur had mentioned it in his report. That principle comprised the right of all to fish freely on the high seas. There was no need to confirm it by a convention, as it was already universally accepted.

The report said:

"It should, however, be noted that many sedentary fisheries have never given rise to objection by other States. Hence, it may be concluded that, in so far as sedentary fisheries are concerned, the international community accepts within certain limits this derogation from the principle of freedom of the seas in specific portions of the sea situated outside territorial waters but close to the coast."

32 a. There again they had a concept which did not require the support of conventions or the practice of

States. It was a principle that was recognized in practice; if that point had been recognized earlier the discussion would not have been so lengthy. Sedentary fisheries should be accepted, provided they had been recognized by custom over a long period and without protest by the various States. He wished to repeat that the question had nothing to do with the contiguous zone or the continental shelf. The principle of freedom of the seas had been subjected to two restrictions of which the recognition of sedentary fisheries was one. It was, to all intents and purposes, a recognized principle in the practice of States that continued occupation implied recognition by other States of the right of control by one or more States.

33. Mr. SPIROPOULOS proposed that the Rapporteur be instructed to study the question in the light of the discussion and of Mr. Amado's and Mr. Hudson's proposals, and to submit his conclusions in the following year.

34. Mr. KERNO (Assistant Secretary-General) said that certain points had emerged from the discussion. The question at issue was that of sedentary fisheries on the high seas and there was possibly, but not necessarily, a factual connexion between that question and that of the continental shelf. In most cases, sedentary fisheries were found where there was a continental shelf. In regard to the definition of sedentary fisheries, Professor Gidel was of the opinion that sedentary fisheries were established, either because the species of fish caught were stationary, or because the equipment used to catch them was stationary. However, some members of the Commission took the view that those two criteria should be combined. Finally, it had to be established whether it was a case of occupation or of prescription. He would go into all those points.

35. Mr. CORDOVA wanted the Rapporteur to study the rights of States, and to see whether they were in a position to exclude all other States.

36. The CHAIRMAN said that if the Commission agreed, it might be left to the Rapporteur to ascertain the Commission's views.

It was so decided.

(b) Installations on the high seas

37. The CHAIRMAN remarked that the question was closely connected with that of fisheries.

38. Mr. HUDSON did not see any connexion between the two problems. Sedentary fisheries did not imply the existence of installations. In most cases there were no permanent installations for fisheries. The theoretical question of installations on the high seas had never raised any difficulties. He saw no reason why the Commission should devote any time to it. There had never been any objection to lightships.

38 a. As regards the drilling of oil wells, the report stated that "in 1894 petroleum was discovered for the first time in the continental shelf with the drilling of a well from a platform erected in shallow water off the coast of California". It should be noted that in California the drilling of wells took place in the soil

itself without the use of a platform. In the Gulf of Mexico, the question of the continental shelf arose. It was possible to contemplate the establishment of an airport on the high seas, but he felt that that question could be left on one side in view of the technical progress being made in aviation.

39. The CHAIRMAN then read the following extract from the report:

“To a greater or lesser degree all these installations restrict the possibility of using the high seas and their erection must therefore be subject to the express or tacit agreement of the other States.”

40. Mr. HUDSON did not dispute that statement.

41. Mr. FRANÇOIS considered that the drilling of wells did not necessarily have any connexion with the concept of a continental shelf, but if Mr. Hudson wished to link the two questions, he had no objection.

42. The CHAIRMAN had observed from the report that “Mr. Schüking had suggested the establishment of an ‘International Waters Office’”. That, he said, was very interesting, and related to the domestic practice of States. In the case of State property, no installations could be established without the authorization of a government, and for the same reasons.

43. Mr. SPIROPOULOS remarked that, so far as an international organization with judicial powers was concerned, it was mainly a question of historic bays, at the 1930 Conference had not considered the question of installations on the high seas. The problem had existed for a very long time and had nothing to do with the continental shelf, which was a concept of recent origin. For practical reasons, however, the two questions could be studied at the same time. For the sake of order, he himself would prefer to deal with the question of installations on the high seas straight away, though he felt that the Commission would do better to leave it aside.

44. The CHAIRMAN agreed Mr. Spiropoulos. The point at issue was whether any State could establish any installations it wished, and wherever it wished.

The Commission decided to leave the question aside for the time being.

45. Mr. KERNO (Assistant Secretary-General) pointed out that at the end of that section of his report the Rapporteur had said, “At the present time the International Maritime Committee is studying the possibility of setting up an International Maritime Court.” He took it that the Commission’s decision to leave aside for the moment the question of installations on the high seas did not mean that the Rapporteur should not deal with the problem in his report for the following year, or that he should not consult the International Maritime Committee.

46. The CHAIRMAN said it had been decided to instruct the Rapporteur to deal with all questions which the Commission had found it necessary to set aside for the time being, or to leave outstanding.

47. Mr. YEPES wished to point out that his proposal (A/CN.4/R.5) on the regime of the high seas was simply intended as a memorandum for the use of the Com-

mission and its rapporteur. He did not ask for that proposal to be discussed that year, but he hoped the Rapporteur would take it into consideration, when preparing his next report. In drawing up the principles included in his proposal, he had been guided by the study made by Mr. Bluntschli, at the same time endeavouring to adapt them to modern conditions.

48. Mr. FRANÇOIS expressed his agreement with what Mr. Yepes had said, and would duly take account of his proposal.

(c) *Subsoil of the High Seas*

49. Mr. HUDSON said that, in regard to that part of Mr. François’ report there were some doubts in his mind as to the distinction which he made between the subsoil and the bed of the sea. The Rapporteur had said, “In no case, however, where the installations were not connected directly to the subsoil of the territorial waters would it be possible to use them without at the same time occupying a certain portion of the sea bed.” In his opinion, the sea bed and the subsoil were one and the same thing. Incidentally, in a large number of treaties, those two terms were frequently used in juxtaposition and with the same meaning.

50. Mr. FRANÇOIS replied that the principle on which he had taken his stand was to be found in the second paragraph of the part of his report under discussion where it was stated that “the arguments on which recognition of the principle of the freedom of the high seas is based cannot be invoked in regard to the subsoil. There are no rules of positive law which prohibit States from establishing their jurisdiction over the subsoil of the sea. The right of States to occupy portions of the subsoil of the high seas must therefore be admitted”. Obviously that principle only applied to the subsoil of the high seas and on condition that the freedom of the high seas itself were not called in question. No provision of international law forbade the occupation of the subsoil, provided that it did not prejudice the freedom of the high seas. However, as soon as installations touched the surface of the soil of the sea—that is to say, the sea bed—the freedom of the high seas was involved. That was why he had stated in his report that “in no case, however, where installations were not connected directly to the subsoil of the territorial waters would it be possible to use them without at the same time occupying a certain portion of the sea bed. In this case the objections to such occupation are valid”. As soon as there was a direct connexion between the installations in the subsoil and the coast, exploitation of the subsoil was possible without touching the surface of the soil of the sea. Therefore, in principle, the occupation of the subsoil did not affect the freedom of the high seas.

51. The CHAIRMAN felt that Mr. François did not admit that utilization of the subsoil affected the sea bed.

52. Mr. FRANÇOIS gave as an example a tunnel or mine beneath the sea the entry to which was situated within territorial waters. In such cases there could be no doubt that States had the right to occupy the parts

of the subsoil of the high seas in which those works were situated.

53. Mr. CORDOVA asked the Rapporteur whether, in his opinion, a State had the right to work a mine in the subsoil of the high sea if the entry and exit were on dry land.

54. Mr. FRANÇOIS replied in the affirmative.

55. Mr. HUDSON thought that the definition of freedom of the seas as given in section 1 of the report was very vague. It stipulated that neither navigation nor fishing on the high seas could be forbidden to anyone. He would have preferred the interests of humanity to be mentioned as essential elements of such freedom. He recalled that during the First World War the freedom of the seas had been the slogan of both sides; nevertheless, it had not been respected.

55 a. He then asked what was the distinction made by the Rapporteur between the "subsoil of the high seas" and the "sea bed of the high seas", and also whether a slight occupation of the bed of the high seas should be considered as a violation of the principle of freedom of the high seas. Such an occupation might, in his opinion, have only a slight effect on sea fishing. In any case, he was opposed to the tendency to exaggerate the difference between the two concepts of the bed and the subsoil. It was a mistake to go too far in that direction even in regard to the continental shelf. For instance, in the treaty of 26 February 1948, concluded between Venezuela and the United Kingdom on the submarine areas of the Gulf of Paria, under which the two countries reciprocally recognized certain rights of sovereignty over the high seas, the terms "subsoil of the high seas" and "bed of the high seas" were given the same meaning. Nevertheless, Mr. François made that distinction, which was not at all clear to him.

56. Mr. BRIERLY asked Mr. François whether, in his opinion, it was not true that it was impossible to distinguish between the sea bed and the subsoil of the sea, except in the case of operations starting out from the dry land.

57. Mr. FRANÇOIS agreed.

58. Mr. BRIERLY was not opposed to the principle whereby the exploitation of the subsoil did not represent a violation of the principle of freedom of the seas, provided that it started out from the land or from territorial waters. If, however, the exploitation took place through the waters of the high seas, it did involve a violation.

59. Mr. HUDSON reverted to that part of the report which dealt with the case of installations not directly connected to the subsoil of territorial waters, which it would be impossible to work without at the same time occupying a certain portion of the sea bed. He asked Mr. François what he had in mind in saying that the objections to such occupation "are valid".

60. Mr. FRANÇOIS replied that his report had, in the first place, been drawn up in French and that in that respect the English translation was not correct. What he had said in his French text was that the objections to such occupation "valent en la circonstance" (hold

good). That wording was not so strong as the English expression "are valid".

61. Mr. HUDSON would have liked a distinction to be made between the sea bed and the subsoil on the one hand, and the waters which covered them on the other, so far as the continental shelf was concerned.

62. Mr. SPIROPOULOS was under the impression that the Commission was engaged in a discussion of the question of the subsoil of the high seas. He felt that it should recognize in principle the possibility of acquiring rights for the exploitation, as well as the occupation of the high seas. He was, moreover, of the opinion that the Commission was in agreement on that point.

63. Mr. el-KHOURY said that, according to Islamic law, the owner of a territory was also the owner of the air above it and of anything that might be found below the surface of the soil. What was to be found above and below the territory formed a continuous whole. He therefore failed to understand the distinction it was sought to make between the subsoil and the bed of the high seas, which, in his opinion, formed a whole. The State owning a portion of the sea bed had the right to take possession of anything that might be found under the bed and, therefore, of the so-called subsoil. Again, according to Islamic law, water could not be owned by anyone. As against that, however, the place where the water was found could be owned. It followed that the subsoil and the bed of the high seas could be owned by a State, and that they could not, therefore, constitute international territory. For those reasons he was unable to understand the distinction it was desired to make between the two terms.

64. The CHAIRMAN asked the Rapporteur to which standpoint he adhered. The Commission appeared to be agreed that, where the subsoil could be reached from territorial waters or from the land itself, the right of States to occupy that portion of the subsoil of the high seas was indisputable. The only divergence of opinion within the Committee was with respect to cases where it was necessary to pass through the high seas to reach the subsoil.

65. Mr. FRANÇOIS said that his reply was to be found in section 21 (b) of his report, where it was stated that "To a greater or lesser degree all these installations [the working of petroleum deposits by means of wells drilled out at sea] restrict the possibility of using the high seas and their erection must therefore be subject to the express or tacit agreement of the other States." He felt that a violation of the principle of freedom of the high seas would occur, whenever such waters had to be passed through in order to reach the subsoil.

66. Mr. SPIROPOULOS believed the Commission to be of the opinion that an occupation of the subsoil of the high seas, through its waters was admissible, provided that the installation of the equipment required for exploitation was agreed to by the other States.

67. The CHAIRMAN pointed out that the question at issue was dealt with in section 21 (b) of the report on which the Commission had not yet taken a decision.

68. Mr. CORDOVA asked the Rapporteur what he

thought about installations which did in fact constitute an obstacle to navigation and fishing.

69. In reply, Mr. FRANÇOIS referred to a passage in his report which stated that: "It cannot be denied that in fact this freedom of navigation will of necessity be curtailed through the existence of various fixed or mobile installations for the exploitation of the natural resources of the continental shelf."² In support of that statement he had quoted a report by Mr. Feith, Legal Adviser to the Royal Dutch, to the International Law Association, in which Mr. Feith stated: "One need not be a born cynic to have misgivings as to whether" proclamations of freedom of navigation over those parts of the high seas situated above the continental shelf "will mean much in practice. When the interests of international shipping come to be weighed against America's exploitation of submarine petroleum resources, will shipping come out on the winning side? Is it not inconsistent to suppose that if important oilfields are discovered under the high seas, American rights will extend over those fields but not over the surface of the sea above those fields? Will America find that she can allow Russian cruisers or Japanese fishing craft to make trips between American drilling derricks erected in the open sea over American oilfields?" And yet, he added, Mr. Feith was a defender of the Royal Dutch interests.

70. The CHAIRMAN said that the Commission seemed prepared to admit the possibility of installations in the subsoil of the high seas. It might make a further examination of the question from the standpoint of obstacles to navigation on the high seas, when it had studied the question of the continental shelf.

SECTION 22: THE CONTINENTAL SHELF

71. Mr. HUDSON said that the matter was one of great importance. He felt that in taking it up the Commission should be guided by a social philosophy. The continental shelf was not only a legal or juridical concept, but was also of economic and social significance. There were means of exploiting submarine resources for the benefit of mankind. The exploitation of such resources was at the moment confined mainly to petroleum, but methods would be found of obtaining other minerals, foodstuffs, etc. Undertakings for the exploitation of submarine resources would therefore increase rapidly in the future. It was said that the mineral oil resources now under exploitation would give out sooner or later. It would therefore be necessary to exploit submarine resources; but even if existing resources did not become exhausted, he did not imagine that that would prevent the establishment of concerns for the exploitation of the resources of the high seas. For the time being, such undertakings were hampered by technical difficulties, but it should not be forgotten that some years ago wells had been drilled at Lake Maracaibo in water more than a hundred feet deep. On the Californian coast, drillings had been started on dry land in order to tap submarine resources.

² See A/CN.4/17, para. 114 (printed text), p. 37 (mimeographed English text).

71 a. Since there were resources underneath the high seas, the successful exploitation of which was already feasible, it should certainly not be prohibited by law. Developments over recent years did not cover the whole world but, for the time being, were confined to the waters around America and to the Persian Gulf. That did not mean that similar resources did not exist in other parts of the high seas. The fact that such developments would take place sooner or later throughout the world should not prevent the Commission from stating that all such undertakings should be carried out for the benefit of mankind. He agreed with Sir Cecil Hurst that means must be found of protecting the interests of the States concerned without hampering operations for the benefit of mankind.

72. The CHAIRMAN said that Mr. Hudson's statement reminded him of the discovery of America by Christopher Columbus. It had to be conceived in order to be transformed into reality.

73. Mr. HUDSON said that the best illustration of his argument was furnished by the Persian Gulf. In that gulf, there was no continental shelf; its waters were not very deep and nowhere exceeded 75 fathoms. The geologists had ascertained that the geological structure of the soil beneath the sea was the same as that of the adjacent territory which contained immense reserves of mineral oil. Consequently fantastic deposits of oil would certainly be discovered in the subsoil of the Persian Gulf. He felt that lawyers had no right to prevent the exploitation of those resources for the benefit of mankind. The Commission should bear social considerations in mind when examining the question of the continental shelf. It should consider in what way it could adapt the rules of international law to the requirements of humanity.

74. The CHAIRMAN pointed out that the scope of Mr. Hudson's statement went far beyond the continental shelf, in the strict sense of the word. It was concerned with the problem of sea resources.

75. Mr. AMADO had listened with great interest to Mr. Hudson's statement to the effect that submarine resources must be placed at the disposal of mankind, but he wondered what conclusions the Commission could draw, and from what angle it could most usefully consider the problem. Should it study the report, examine the International Law Association's conclusions, or merely adjourn the discussion? It did not seem to him possible to draw any practical conclusions from Mr. Hudson's statement. The principle stated by him was universally recognized, but how could the Commission give practical effect to it? In spite of those slight reservations, he fully agreed that the question should be examined from the social standpoint. Nevertheless, the Commission's main purpose was to settle the legal problem.

76. Mr. el-KHOURY was greatly impressed by Mr. Hudson's statement, and agreed with him that the resources of the high seas should be exploited for the benefit of mankind. He did not see, however, how that principle could be applied in practice. He thought that the Rapporteur should reflect on the matter. He went

on to say that the question of the continental shelf, with which the Commission was at present dealing, had nothing to do with territorial waters or their subsoil. The extent of territorial waters had been or could be determined. But he knew of no reliable method for determining the extent of the continental shelf, or where deep waters began. In some cases the continental shelf extended for five miles, in others for fifty miles, from the coast.

77. Mr. AMADO held that the Commission should examine the question from the standpoint of the possible formulation of principles based on existing regulations. That seemed to him to be the first question to be tackled. He was not sure, however, whether the time had yet come to formulate a principle in a field in which there were as yet hardly any regulations.

78. Mr. FRANÇOIS expressed his agreement with Mr. Hudson's ideas. As to the way in which the Commission could deal with the question, he thought the best thing would be to have a general discussion during which the different points of view could be expressed. The Commission might take the nine questions listed at the end of his report as a basis of discussion, examine them and make known its views. As to the point raised by Mr. Amado, he agreed that the question of the continental shelf was comparatively recent; but a large number of proclamations by States already existed, which constituted a starting point for the formulation of positive law. The Commission, whose duty it was not only to codify the existing rules of international law, but also to study the progressive development of that law, would do well to press on with its work, so as not to be overtaken by events. It should not wait until a multitude of regulations had given international law an orientation incompatible with the interests of mankind. It was more difficult to amend a law that had already been established by States, than to guide it into the desired channel by the enunciation of certain rules or principles. The Commission should not be too timid but should set forth the principles that, in its opinion, were in the interests of humanity.

79. Mr. SANDSTRÖM shared the Rapporteur's view. It seemed to him highly desirable that they should proceed forthwith to the establishment of principles of international law concerning the continental shelf.

80. Mr. YEPES considered that to discuss the size of the continental shelf was pointless. It had already been defined by scientists and all the necessary data were available. The Commission should approach the question from another angle. Was it prepared to admit that the continental shelf was a prolongation of the territory of riparian States, or, on the contrary, to rule that it was *res nullius*? If the Commission should take its stand in favour of *res nullius*, its action in the matter would be revolutionary, for he was convinced that no State would admit the concept of *res nullius* in regard to the continental shelf. Although the question had only recently arisen and had only been the subject of contemporaneous study, certain rules had already been established, and the practice followed was becoming a custom. Since President Truman's statement in 1945, the South

American republics and the Arab countries had already, by defining their attitude, established certain factors which might serve as a basis for discussion on the possibility of formulating rules for the continental shelf. The great importance of the economic resources of the continental shelf for the world as a whole could not be denied. But the problem should be studied with special reference to the claims of riparian States on that shelf.

81. Mr. SPIROPOULOS said that the continental shelf was undoubtedly the most important question with which they had to deal. The subject was entirely new. It was therefore all the more important that the Commission should approach it from the angle suggested by Mr. Hudson. The Commission could not sacrifice the interests of humanity to a purely legal concept. International law might impose limitations or restrictions on such and such a point, but what the Commission was concerned with was something different. It had to establish rules. Hence, it must take a decision which could be embodied in its code.

81 a. Mr. François had said that the Commission should not be timid. He was quite right. But timid or not, one thing was certain, namely that the States concerned might not be able to comply with the principles it enunciated. He recalled what had happened in regard to the air before the First World War. The first works published on that subject had laid down the principle that navigation in the air was as free as navigation on the high seas. But from the moment war broke out none of the belligerent States had observed that principle. As soon as the issues at stake became sufficiently important, States no longer observed rules which did not suit them. There could be no doubt that States possessing a continental shelf would impose their will on the others. He wondered whether the question was ripe enough for international regulation. The first Air Convention had only been concluded in 1919. It established the sovereignty of States over the air above their territories. He doubted, however, whether the Commission was as yet in a position to draw up rules for the continental shelf.

81 b. In none of the other matters so far discussed had the Commission come up against any new problems. But the field of the continental shelf was a new one, and if the Commission were asked to define the relevant law, it could only formulate some very vague principles. It seemed to him impossible to try to limit the extent of the continental shelf. Even if they wanted to, how were they to go about it? By determining its length or alternatively its depth? The report showed the divergence of opinion existing on that point. It had not so far been possible to determine the extent of territorial waters or of the contiguous zone and yet those were very old concepts. The most that the Commission could venture to do in regard to the continental shelf would be to enunciate a very general principle.

82. Mr. HSU wished to make a suggestion, although he felt sure it would not be accepted by the Commission. He took his stand on the universally recognized principle that the high seas were the property of the international community. Why then not entrust the development of the continental shelf resources to the international

community? Why not a joint exploitation of continental shelf resources?

83. Mr. HUDSON wished to draw attention to two points in the report. Mr. François had said: "The number of proclamations laying claim to special rights is, it is true, increasing but it is still small. Up to the present, most States have not laid claim to such rights nor have they specifically recognized the validity of such claims."³ To his knowledge, a certain number of States had been consulted before President Truman made his proclamation in 1945. No protest had been raised against that declaration by the States in question. Due weight should be attached to the absence of such protest.

84. Mr. FRANÇOIS pointed out that there had been protests as soon as proclamations had been issued laying claim to sovereignty over the continental shelf, as for instance the proclamations of some South American countries.

85. Mr. HUDSON replied that the cases cited by Mr. François had nothing to do with the exploitation of continental shelf resources. The other point on which he wished to speak was to be found on page 40 of the report, where it was stated that: "With regard to the industrial utilization of the marine soil and sub-soil, the present stage of technical development is far from being such as to permit the working of the natural resources situated more than 200 metres from the surface. However this may be, it must be borne in mind that the adoption of a depth line of 100 fathoms as the outer limit of the continental shelf is likely to allot to the various States portions of the high seas varying greatly in extent. This would establish an unjustifiable inequality between States."⁴ He could not agree with that statement. He did not believe that an unjustifiable inequality between States would be created by adopting a depth line of 100 fathoms. That depth was commonly used by geologists. Further, most countries suffered from inequality in regard to the continental shelf. The continental shelf of the United States on the Pacific coast was extremely narrow owing to the fact that the sea depth increased rapidly. On the other hand there was a large continental shelf on the Atlantic coast of the United States. He hoped the Rapporteur would not lay too much stress on the idea of inequality.

86. Mr. BRIERLY said that it was purely a question of geography.

87. Mr. HUDSON said that the problem of the continental shelf had been exhaustively discussed for what was really a very short period. As regards air navigation, the law had taken shape quite suddenly. In the case of the continental shelf, they were likewise faced with very rapid development. He hoped the Commission would find some means of establishing a principle. He had been greatly struck by a statement made by Mr. Altamira twenty years ago, to the effect that there was a time when a new thing blossomed forth and developed

rapidly; one should not allow oneself to be overtaken by the event, but should try to direct it into the required channel. He hoped the Commission would bear in mind those very wise words.

88. The CHAIRMAN asked the Commission whether it was prepared to search for a general principle which would cover the matter.

89. Mr. el-KHOURY would prefer to discuss the question raised by Mr. Yepes in regard to the continuity of territory. It would be as well know what was the extent of that territory.

90. Mr. HUDSON said that there was yet another principle, that of contiguity. That principle had been adopted in a certain number of proclamations, and Prof. Max Huber had published a remarkable word on the principle of contiguity in international law. He would like the Commission to take note of that study.

The meeting rose at 1 p.m.

67th MEETING

Thursday, 13 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. Shulsi 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) (*continued*)

SECTION 22: THE CONTINENTAL SHELF (*continued*)

1. Mr. YEPES stated that the problem was the most important one that the Commission had to discuss. It was confronted with what was perhaps an entirely new conception of international law and was dealing with a phenomenon which might be classed among the great events in the history of international law. It had

³ See A/CN.4/17, para. 114 (printed text), p. 37 (mimeographed English text).

⁴ Mimeographed English text; para. 122 of printed text.

been suggested the day before that it would be better not to take up the problem of the continental shelf at that stage, because there were no legal rules on the subject to be codified. All the more reason then for undertaking the study. It was the Commission's task not only to codify existing law but also to work for the progressive development of international law, as laid down in sub-paragraph a of paragraph 1 of Article 13 of the Charter. It should be pointed out that progressive development could only be in a forward direction. The Commission had been reproached with being more static than dynamic, but the study of the problem of the continental shelf would enable it to show that new questions held no terrors for it.

There was no need to expatiate on the importance of the continental shelf from the point of view of the production of wealth at a time when the increase in the earth's population made it necessary to exploit the whole of its resources. He would confine himself to the legal aspect of the question.

1 a. The various theories relating to the formation of the continental shelf, those of abrasion, sedimentation, accession etc., could only be of interest to the Commission in so far as they justified the rights of the coastal State over the said shelf. The theory of accession was the one he preferred. There was naturally a considerable difference between the type of accession generally covered by civil law and that involved in the case of the continental shelf which had existed for centuries. It was nevertheless a fact that the latter was the result of a process of sedimentation through which a coastal State recovered, on the sea-bed, land which it had lost by erosion.

1 b. Just as in private law, accession was a legitimate source of increment to property so, in international law, the conclusion must be reached that the continental shelf "must belong to the countries with whose coasts it was contiguous". That was clearly a fiction. But was not international law a body of more or less justified fictions and hypotheses? The legal equality of States, the territorial sea, the theory of extra-territoriality, the pacific intentions of States when in fact they were preparing for war, were not all those things also fictions? The theory of accession by sedimentation was likewise a hypothesis and perhaps also fiction, but it would serve to establish the right the coastal State possessed over the continental shelf. It only remained then to draw conclusions from that juridical fiction.

1 c. The first and the most important was the rule of continuity, according to which the continental shelf was only the submarine continuation of the territory above water. That rule required that, as far as possible, a State should exercise over its continental shelf the rights of exclusive sovereignty that it exercised over its terrestrial territory. As geology had shown, the natural resources of a country, minerals, coals, oil, did not stop at the edge of the sea. In that connexion, the old doctrine of Roman law that the accessory followed the principal, which explained why the small islands around a country belonged to it *de facto* and *de jure* even without effective occupation, had some bearing.

1 d. It might perhaps be objected that the continental shelf could not be effectively occupied by a coastal State, but that was a fact which remained to be proved. The progress achieved by science as each day passed justified the boldest conclusions and it was the duty of jurists to allow for all hypotheses and not to reject the possibility that in the near future the continental shelf might be effectively occupied by a coastal State. On the other hand, it was questionable whether effective occupation was a condition required by international law for a State to exercise exclusive jurisdiction over its territory. The old manuals of international law said it was, but if one investigated the practice of States very different conclusions would be reached. The Rapporteur himself spoke of a "theoretical" occupation. It was also possible to talk of symbolic occupation. Could it be asserted that all States occupied the whole of the space over which they claimed to exercise their jurisdiction? How would such an assertion fit, for example, the polar regions or the Amazon basin? The great novelty of the Monroe doctrine lay in its declaring, one hundred and thirty years ago, that there was no ownerless land in America.

1 e. A further objection which could be raised with regard to the theory of the continental shelf was that it limited the principle of freedom of the seas. That was not correct however because the navigable portion of the ocean was not affected by anything carried out on or under the continental shelf. If it was not admitted that the continental shelf came under the jurisdiction of the coastal State, it would be necessary to say that it was *res nullius* or *res communis* and neither of those doctrines was admissible.

1 f. From the Proclamation of President Truman of 28 September 1945, and from the measures adopted by certain Latin American republics and some Arab countries, could be derived the basic elements justifying the subjection of the continental shelf to the jurisdiction of the coastal State. That Proclamation and those measures could be considered, if not as a veritable customary law in the sense already given to that expression by the Commission, at least as an embryonic customary law. There was, as the Commission had decided, no need at all for the practice to date back a long time. It was sufficient for States to recognize it as constituting law and for it to have aroused no protests from other States. The United Kingdom, which had been the champion of maritime law, had hastened to claim that the territory of the islands of Jamaica and the Bahamas extended to the limits of their continental shelf, thus recognizing the existence of a custom whereby the continental shelf belonged to the State to which it was contiguous.

1 g. The study of some of the paragraphs of President Truman's Proclamation would show that the theory of the continental shelf possessed sound legal bases. The Proclamation began by mentioning "the long range world-wide need for new sources of petroleum and other minerals". That was the social and humanitarian justification for the Proclamation, which then affirmed that: "jurisdiction over these resources is required in

the interest of their conservation and prudent utilization when and as development is undertaken", and continued: "the effectiveness of measures to utilize of conserve these resources would be contingent upon co-operation and protection from the shore". Those words showed that, in his Proclamation, President Truman had spoken not merely from a narrow national standpoint but in the general interest of the whole international community. That explained why a number of nations, both medium and small, had hastened to follow the example given by the President of the United States of America to the world. After recognizing the need for a partition of the continental shelf, when the latter was common to different States, the Proclamation ended by re-affirming the principle of the freedom of the seas.

1 h. It could be seen then that the Proclamation of 28 September 1945 might rightly be regarded as one of the most important documents of our epoch and that it constituted a veritable customary law to which the Commission should give recognition by incorporating it in its code of international law.

1 i. He proposed that the Commission should confine itself, during that session, to defining the legal status of the continental shelf, i.e.—to declaring whether it considered, as he himself did, that it was a submarine continuation of the terrestrial domain of the coastal State or whether, on the contrary, it was *res nullius* or *res communis*. It was for the Commission to say what the legal status of the continental shelf was; it could leave to others the task of determining the detailed application of that status. He finally proposed that the Commission should appoint a special rapporteur to deal with the problem of the continental shelf.

2. The CHAIRMAN reminded the Commission that it had decided to endeavour to lay down certain general principles and suggested that perhaps the wisest method would be to consider one by one the questions at the end of the report (A/CN.4/17).

3. Mr. FRANÇOIS thought that some of the questions might perhaps be left aside.

Question 1

4. Mr. HUDSON affirmed that the questions formulated by the Rapporteur were, in his opinion, ones on which governments could be consulted. If, for its own guidance, the Commission desired to take a decision on the principle involved, it might examine that principle before drafting the questions to be submitted to governments. The previous day, the Chairman had suggested a very interesting idea to him, pointing out that either a continental shelf or shallow waters might be involved. The principle of shallow waters was broader than that of the continental shelf.

4 a. He wondered whether it would not be possible to say, roughly reproducing the words of the report of the Committee of the International Law Association to be submitted to the Copenhagen Conference, that:

1. Control and jurisdiction over the sea-bed and subsoil of submarine areas outside the marginal

sea may be exercised by a littoral State for the exploration and exploitation of the natural resources therein contained, to the extent to which such exploitation is feasible.

2. Such control and jurisdiction do not affect the right of free navigation of the waters above such submarine areas, or the right of free fishery in such waters.

In other words, the utilization of the high seas, of their bed and subsoil for the good of mankind was thereby made possible while at the same time the freedom of navigation and fishing was maintained.

5. The CHAIRMAN noted that Mr. Hudson's communication corresponded fairly closely to the first question of the report: "Should recognition of special rights as regards the working of the marine subsoil and the protection of marine resources be linked with the presence of a continental shelf?"

6. Mr. HUDSON explained that he had endeavoured to interpret the Chairman's idea. A continental shelf was not always present; in the Persian Gulf, for example.

7. The CHAIRMAN agreed with Mr. Hudson and said that were the latter's idea accepted the question would go beyond that of the continental shelf.

8. Mr. HUDSON considered that from a practical standpoint it was impossible to exploit the bed of the sea or the marine subsoil beyond the limit of the continental shelf.

9. Mr. KERNO (Assistant Secretary-General) noted that Mr. Hudson drew a distinction between the waters and the soil and enquired where the boundary-line occurred. Under which element would sponges be classified, for instance?

10. Mr. FRANÇOIS thought that Mr. Hudson had provided a very useful answer to the first question asked in his report, since by not mentioning the continental shelf, his proposal implied that the recognition of special rights should not be linked with the presence of a continental shelf. In the example of the Persian Gulf which Mr. Hudson had mentioned, no continental shelf existed.

11. Mr. HUDSON declared that if it was desired to use the expression "continental shelf" he would ask for shallow waters to be assimilated to it. He wished to make it clear that he did not desire to discuss the questions to be put to governments: he thought the Commission wished to take up a position on the general principle.

12. The CHAIRMAN mentioned that the questions listed at the end of the report were intended for the Commission.

13. Mr. SANDSTRÖM said he was in agreement, in the broad outline, with the ideas of Mr. Hudson. He wondered whether the Commission should confine itself to stating that the utilization of the sea-bed and subsoil did not affect free navigation and fishing. He thought that an attempt should be made to find a formula to the effect that such utilization should not seriously affect the freedom of navigation and fishing.

14. Mr. HUDSON, explaining that he was endeavouring to formulate directives for the Rapporteur,

stated that he was quite prepared to modify his text in that sense by substituting the words "must not substantially affect".

15. Mr. CORDOVA approved the general principle laid down by Mr. Hudson, but the extension of the zone as far as exploitation was possible was a rather frightening suggestion since the zone was undetermined. No country had hitherto asked for so much; in the case of the continental shelf they had not gone beyond 200 metres in depth.

16. An exchange of views between Mr. HUDSON, Mr. CORDOVA and Mr. SANDSTRÖM made it clear that, in Mr. Hudson's view, exploitation became impossible beyond a depth of 200 metres. The first paragraph of his proposal was, in fact, restrictive, but claim rights beyond that limit nevertheless seemed to him justifiable if exploitation actually took place.

17. The CHAIRMAN considered that the purpose of the true conception of the continental shelf was to permit States to exploit the marine subsoil in the common interest of mankind as a whole. If exploitation could be properly carried out beyond the continental shelf why should not such wealth be exploited? Mr. Hudson's formula did not limit exploitation to the continental shelf but said "to the extent to which such exploitation is feasible".

18. Mr. HUDSON said he was concerned solely with the practical problem. Some very costly experiments in boring for oil had been made in the Persian Gulf. Naturally, he left it to the Rapporteur to find a solution for cases in which several States would be operating in the same area.

19. Mr. YEPES wished to raise a point of order. He had put forward a proposal and asked that the Committee first decide whether or not the coastal State had rights over the continental shelf.

20. The CHAIRMAN considered that that was precisely the matter the Commission was discussing.

21. Mr. ALFARO drew attention to the fact that the question proposed by Mr. Hudson was very closely linked with the question Mr. Yepes wished to be considered. It was not possible to consider the right of coastal States to exploit the sea-bed wherever that was feasible, even if part of the continental shelf belonging to another State was involved, without first determining whether there was a continental shelf and to whom it belonged. Once that was done, the formula proposed by Mr. Hudson "... to the extent to which such exploitation is feasible" was a very sound one. The Commission should first decide whether a continental shelf existed, what it was and who had rights over it. Unless it did that it would have no solid basis from which to approach the problem.

22. Mr. AMADO pointed out that the problem had a number of political implications. The first point to discuss was the question whether the right that may be exercised by the coastal State was a right of control based on the right of sovereignty that that State might claim over the continental shelf. If the conclusion was in the affirmative, then the Commission would deny any value to the Proclamations of Argentina, Chile and

Peru, those States having no continental shelf. The Governments of Argentina, Chile and Peru left out of account the question of the continuation of the super-marine territory of a State. Following on President Truman's Proclamation, Argentina, Chile and Peru had claimed rights of sovereignty over a certain zone extending from the coast.

22 a. The Commission might endeavour to determine what the continental shelf was but it should first fix the rights of coastal States, independently of the existence of such a shelf and of geological researches.

23. The CHAIRMAN had also interpreted Mr. Hudson's proposal, in which no mention was made of the continental shelf, in the same manner. The first question of the Commission to resolve was whether the rights of coastal States were bound up with the existence of a continental shelf. Personally, he did not think so but the Commission might clearly be of another opinion.

24. Mr. HUDSON said he was endeavouring to keep in mind the world interest underlying the extension of the control and jurisdiction of a State for the exploration and exploitation of natural resources. He thought they should confine themselves to the need to explore and exploit natural resources, though perhaps, at some later date, it might prove possible to go beyond the continental shelf. He had wished to emphasize the idea enunciated by President Truman concerning the need for natural resources to be utilized.

25. Mr. FRANÇOIS noted that, so far, no member of the Commission had declared himself in favour the recognition of special rights with the presence of a continental shelf. He felt therefore that he had been given sufficient guidance on that question.

26. The CHAIRMAN understood that Mr. François drew the conclusion that the exploitation of natural wealth was not bound up with the presence of a continental shelf. States possessing and States not possessing a continental shelf enjoyed the same rights, provided of course they were coastal States.

27. Mr. CORDOVA thought it would be necessary to make clear whether the coastal State could exclude other States from exploitation, particularly in cases where a continental shelf existed. He was not referring to the exploitation of the high seas or of their subsoil. He merely wished to know to what extent the coastal State had rights over certain submarine areas described as the continental shelf and what those rights were.

28. The CHAIRMAN pointed out that if there were no continental shelf, the coastal State had no special rights.

29. Mr. YEPES thought the question was whether the Commission considered that the coastal State had or had not rights of control over the continental shelf contiguous to its territory.

30. Mr. SPIROPOULOS found a certain confusion in the Commission's discussion which sometimes dealt with the continental shelf and sometimes with the exploitation of natural wealth. The question of the continental shelf was the main one, and the question whether it was desired to link the exploitation of natural wealth with the

presence of a continental shelf was a secondary matter. The point to be decided was whether beyond the bounds of the territorial sea, the State could exercise any rights and what those rights were; the right of control was a right of sovereignty. On that point, there was no rule of international law. They were faced with a vacuum. No State had so far considered exploiting the wealth of the continental shelf, as technique was not sufficiently advanced.

31. The CHAIRMAN thought there was at least one rule—namely, that no right existed beyond the limit of the territorial sea.

32. Mr. SPIROPOULOS agreed that so far as the water was concerned, a rule existed, but no work on international law made mention of the subsoil. As, furthermore, the majority of jurists ignored the question, there was in his opinion no rule of international law relating to the continental shelf. Must the Commission therefore conclude that no solution could be reached? When the International Court at The Hague had given a ruling on the right of the United Nations to intervene to protect its representatives, it had likewise been unable to find any rule of international law but had interpreted existing rules in order to recognize that the United Nations had that right. Similarly, the Commission would manage to derive rules relating to the continental shelf. There were no prohibitive rules forbidding a State to exercise rights over the continental shelf but there were, on the other hand, no permissive rules either. They were faced with a question to be regulated for the first time. It was for that reason that, at the previous meeting, he had inquired whether the Commission should codify the matter. What was involved was rather the establishment of a new right, a matter which came within the sphere of the progressive development of international law and was a very delicate question.

32 a. With regard to Mr. Hudson's proposal which was based on technical possibilities, it might be dangerous to permit a State to extend its rights to the middle of the ocean. The issue was whether the Commission wished to limit the rights of the coastal State to a certain distance from its coasts or whether it should be permitted to extend them to any distance whatsoever, so long as exploitation was feasible. Was it desired to reserve the right of exploitation of the subsoil to the coastal State and to leave the rest of the sea at the disposal of all? It seemed to him difficult to give any ruling on the series of questions he had just formulated.

32 b. President Truman's Proclamation and the proclamations of the other States were quite natural ones. Needs existed, and when there was no rule, man could not stand still but must act. Divergent interests and conflicts would arise but in the end the members of the international community would come to an understanding. They stood at the beginning of a process of development. The proclamations were the first manifestations of a new right but as yet there was nothing definite on the matter. He wondered therefore whether the time had come to lay down rules. He did not think the Commission should confine itself to codification. It might lay down a general principle but in doing so

must proceed with extreme caution. If the principle laid down was not approved by the majority of the States concerned, the success of the text which the Commission was to submit to the General Assembly might thereby be jeopardized.

33. Mr. AMADO considered that Mr. Spiropoulos' presentation of the question was correct. The treaty relating to the Gulf of Paria and the proclamations made showed that the United States of America and the United Kingdom were among the first States to seek to extend their sovereignty over the continental shelf. If the continental shelf and the waters above it could already at that stage be occupied, modern technique also enabled its exact extent to be measured. True, a principle of international law could not be based solely on the proclamations of a few States. However, the absence of any protest from the other members of the international community was very significant and justified the conclusion that the legal concept of the continental shelf was accepted. History showed that the law of the sea had been built up rather from a series of unilateral declarations by States than from general conventions. The Declaration of Panama of 3 October 1939 which had nevertheless received the signature of almost all the countries of the American continent had not succeeded in imposing the security limit of 300 miles. An international convention to determine in detail the number and extent of the rights that each State might have over the continental shelf seemed to be most desirable and even necessary. Should the continental shelf extend to the shore of another State, it would be divided between the two States.

33 a. In short, as the law stood, claims to sovereignty over a zone 200 sea miles in breadth were exaggerated, since one State could not alone exploit such an expanse. The continental shelf had a natural limit beyond which the efforts of technicians were at present of no avail. He would like to emphasize the vagueness of the rules of both conventional and customary law on the subject.

34. Mr. HUDSON proposed modifying as follows the first paragraph of the text he had submitted to the Commission: for "to the extent that such exploitation is feasible" to substitute "to the extent that those areas are located on the continental shelf connected with its territory."

35. Mr. FRANÇOIS said that the change was a very important one which entirely altered the sense of the original text.

36. Mr. el-KHOURY said he had given his opinion on the presence of a continental shelf the day before. Since then, he had become more than ever convinced that after a decision had been taken on the presence of a continental shelf, it would be desirable to leave to specialists the determination of its breadth.

36 a. With regard to Mr. Hudson's proposal, he was prepared to accept the change the latter had just suggested. He also accepted, in principle, that the continental shelf should be considered as a continuation of the national territory. Finally, he accepted the second paragraph of Mr. Hudson's text, on condition that fisheries should not hamper the exercise of the right

enunciated in the first paragraph. It was clear that the subsoil of the territorial sea belonged to the coastal State. Mr. HUDSON's text must hence apply to the high seas. As for the expression "to the extent to which such exploitation is feasible", he would like to draw attention to the fact that what was not feasible at that time might become so in the future. The expression was therefore too broad and should be made more precise.

37. Mr. BRIERLY feared that the Commission was rather in the air and that it could not, in those circumstances, arrive at any conclusions. After the long discussion which had taken place, in the course of which various members had stated their ideas, each dealing with different aspects of the problem, the Commission should turn to Mr. HUDSON's proposals and take a decision on the first one.

38. The CHAIRMAN accepted Mr. Briery's suggestion, remarking that he too had observed that the various members of the Commission were envisaging the problem of the continental shelf from entirely different viewpoints.

39. Mr. AMADO was in favour of Mr. HUDSON's first proposal which seemed to him to offer the possibility of reaching an agreement in principle. The proclamation so far made by various States constituted the beginning of a practice which was gradually becoming established. Mr. HUDSON's proposal did not conflict with the spirit of the various proclamations and he had accordingly no objection to its being discussed.

40. The CHAIRMAN suggested that the Commission should take a decision on Mr. HUDSON's first proposal, which ran as follows:

"Control and jurisdiction over the sea bed and subsoil of submarine areas outside the marginal sea may be exercised by a littoral State for the exploration and exploitation of the natural resources therein contained, to the extent to which such exploitation is feasible."

41. Mr. YEPES thought that Mr. HUDSON had suggested an amendment to that proposal.

42. Mr. HUDSON replied that he had not done so, but had submitted a second proposal which was exactly the opposite of that which the Chairman had just read out. He would like to read the text of the second proposal, which was as follows:

"Control and jurisdiction over the sea bed and subsoil of submarine areas outside the marginal sea may be exercised by a littoral State for the exploration and exploitation of the natural resources therein contained to the extent to which such areas are located on the continental shelf connected with its territory, including regions which may be assimilated to the continental shelf by reason of the shallowness of their waters."

43. The CHAIRMAN noted that Mr. HUDSON's proposal was entirely bound up with the presence of the continental shelf.

44. Mr. HUDSON said that, in his opinion, the Commission should begin by voting on the first of the

proposals he had made. Should it be rejected, it could then examine the second proposal.

45. Mr. CORDOVA said that, as far as the first proposal was concerned, he was obliged to vote against the second part of it beginning with the words "to the extent to which". He did not think that the Commission would be able to agree on that clause. On the other hand, he accepted the first part of the proposal because it seemed to him that an agreement was possible on the principle it enunciated. He called for a vote by show of hands.

46. Mr. YEPES would like the word "exclusive" to be inserted before the words "control and jurisdiction". Such qualification seemed to him essential if misinterpretations were to be avoided. He enquired whether Mr. HUDSON would accept that addition to his text.

47. Mr. HUDSON replied that he had not wished to submit a precise text to the Commission and that his proposals were only in the nature of suggestions for the Rapporteur who could take account of them or not, as he chose. It seemed to him, in any case, that in his wording the notion of exclusiveness was already implicit.

48. The CHAIRMAN put to the vote the first part of Mr. HUDSON's first proposal, down to "therein contained".

The Commission adopted the proposal by 10 votes to 1.

49. Mr. YEPES explained that he had voted for the first part on the understanding that it referred to exclusive control and exclusive jurisdiction.

50. Mr. AMADO said he wished to explain his vote. He had voted in favour of the proposal because it constituted a first attempt at the formulation of a principle. He would not have been prepared to vote for a text which went any further than that because the question as a whole did not seem to him ripe enough for codification.

51. The CHAIRMAN invited the Commission to take a decision on the second part of the first proposal submitted by Mr. HUDSON, which ran as follows:

"to the extent to which such exploitation is feasible".

52. Mr. CORDOVA enquired whether Mr. HUDSON intended by those words to limit control and jurisdiction to the breadth of the continental shelf. He thought that the delimitation of the breadth of the continental shelf was extremely difficult. It was, in fact, a purely technical question on which technicians alone were qualified to express an opinion. The Commission was certainly not in a position to decide on a delimitation of the continental shelf and for the time being should leave the question aside but request the Rapporteur to reflect upon it and to give in his next year's report some more definite conclusions which would perhaps make it possible to undertake such a delimitation.

52 a. The Commission had just decided that the coastal State had the exclusive power of control and jurisdiction over the sea bed and subsoil of the submarine areas outside its territorial waters. That was a principle which might be applied in practice, but it would be premature to take a decision on the breadth of the continental shelf. Who was to define it? Certainly not

the Commission. The only possibility that remained for it was to fix a very vague limit, and he did not think that would be desirable.

53. Mr. BRIERLY said it would be desirable for the Commission to decide whether the control and jurisdiction, on which the Commission had just taken a decision, depended on the possession or non-possession of a continental shelf by the coastal States. Personally, he did not think they were. Legally speaking the presence or absence of a continental shelf was of no importance. Chile, for instance, possessed no continental shelf, but if that State wished to explore or exploit the subsoil of the sea and was able to do so, there was nothing against it from a legal standpoint.

53 a. He accordingly suggested first submitting the following proposal to the Commission:

“Control and jurisdiction do not depend on the presence of a continental shelf.”

54. The CHAIRMAN accepted that suggestion. He pointed out that the first part of Mr. Hudson's proposal which had been adopted by the Commission a few moments ago did not presuppose the presence of a continental shelf. The vote that the Commission was now called upon to take bore on the question whether the exercise of control and jurisdiction required the presence of a continental shelf.

55. Mr. HUDSON thought Mr. Brierly's thesis was correct. The exercise of control and jurisdiction did not depend on the presence of a continental shelf.

56. Mr. CORDOVA confessed that he failed to grasp the point which the Commission was discussing. It had spoken of the presence of a continental shelf over which the coastal State could exercise its control and jurisdiction. At the same time it spoke of the high seas. Did it wish to give States exclusive control and jurisdiction? But to what States and, moreover, over what? If the problem was envisaged in relation to the continental shelf, he could understand the discussion and the proposals put forward. But in any case he considered that a limit must be set to the rights conferred on States, and it seemed to him that such a limit was the breadth of the continental shelf. Would the United Kingdom not be authorized to exploit the wealth of the Mexican Gulf solely because Mexico claimed exclusive control and jurisdiction over those waters? The idea of control and jurisdiction must be linked with something clearly defined. It was essential to limit to a specific zone the exclusive control and jurisdiction which it was intended to attribute to States. Such a limitation seemed possible so long as one kept to the zone of the continental shelf, but on the high seas all limitation seemed impossible.

57. Mr. BRIERLY thought Mr. Córdova was misinformed. The Commission had taken no decision with regard to a delimitation of the zone over which a State might exercise its control and jurisdiction. That question had been left entirely open and would have to be considered later. The Commission had simply decided that the coastal State should have a right of control and jurisdiction over certain zones without so far delimiting them.

58. The CHAIRMAN agreed with Mr. Brierly that no limit had been set, but that one would have to be established later.

59. Mr. el-KHOURY thought that Mr. Brierly's opinion would be correct had the Commission not accepted the first part of Mr. Hudson's proposal. That part expressly provided for exclusive control and jurisdiction of the coastal State over certain zones which, it was true, had not so far been delimited. A limitation was, however, necessary; otherwise the right of control and jurisdiction of a State would be completely unlimited. If, for example, Norway claimed exclusive rights of control and jurisdiction over the North Sea of which she was a coastal State, the United Kingdom would no longer have any right to such control and jurisdiction, simply as a result of Norway's claim. A limitation to that right must therefore be laid down. Before it could vote on Mr. Brierly's proposal, the Commission would have to annul the vote it had just taken.

60. Mr. CORDOVA said he had voted under the impression that it was a question of the continental shelf.

61. Mr. BRIERLY said that, if the Commission was of the opinion that the right of control and jurisdiction depended on the presence of the continental shelf, it was committing an injustice towards certain countries, such as Chile, that possessed no continental shelf.

62. Mr. CORDOVA thought that any injustice there was, was at the most a geographical one.

63. The CHAIRMAN felt that the discussion was becoming more and more involved.

64. The CHAIRMAN invited Mr. Brierly to act as mediator and make a proposal.

65. Mr. BRIERLY was not sure whether he would have any success in his task as mediator. The Commission had adopted, as a directive, the first part of the proposal made by Mr. Hudson. The question had then arisen whether the zone in which the coastal State could exercise an exclusive right of control and jurisdiction depended on the presence of a continental shelf or not.

65 a. As he had already said, he felt that the right did not depend on the presence of a continental shelf. Certain countries not possessing a continental shelf might desire to exploit the marine subsoil and the number of such countries was fairly large. If, for technical reasons, they were unable to exploit that subsoil, there was nothing to be done about it. On the other hand, there were regions where such exploitation was feasible and should be permitted to coastal States. Those areas required definition but not necessarily one based on the presence of a continental shelf. If the Commission conferred the right of control and jurisdiction on countries possessing a continental shelf, it would be committing an injustice towards countries which were without one. For that reason he had said and would repeat that the area over which the right could be exercised would need definition, but it need not depend on the existence of a continental shelf. It was of course difficult to define a continental shelf. One might say that where a continental shelf existed, it would be the limit of the

submarine area envisaged in the text which the Commission had just adopted. Where there was no continental shelf, the criterion could be the depth of the water or the number of miles. He did not think the Commission at that stage could select either criterion. For that reason he submitted the following proposal:

“The area for such control and jurisdiction will need definition, but it need not depend on the existence of a continental shelf.”

66. Mr. SPIROPOULOS thought that the proposal to define the area later should be left out. He thought that, as a matter of fact, no definition was possible. How could the Commission really attempt to define an area which so far was not in existence? If the Commission said that control and jurisdiction could be exercised over the subsoil, without defining the area, he could support that opinion, but he doubted whether the Commission would ever be in a position to resolve the problem of delimitation. Only a conference of experts would be capable of doing that.

67. Mr. SANDSTRÖM stated that there were already certain technical limits to the exploration and exploitation of the seabed or the marine subsoil. The determination of a limit had its utility in waters such as the Gulf of Mexico, the North Sea or the Baltic, but in such areas the delimitation of the respective zones would be made by a convention between the States concerned.

68. Mr. CORDOVA thought the matter was a very important one. The question, as presented by the Rapporteur, was one relating to the rights of a State over certain zones of the high seas limited to the continental shelf. In the proclamations of certain States, however, the right was claimed of control and jurisdiction over the high seas. The Commission was not dealing with those rights over the high seas. It was examining the rights of control and jurisdiction from the point of view of the sea bed and the marine subsoil. The Commission did not seem to him to be very clear on the point. He thought therefore that the best solution would be to leave it to the Rapporteur to study the question afresh in the light of the views expressed. The question of the depth of the waters was entirely distinct from that of the continental shelf. Moreover, the idea that certain States might extend their territorial waters beyond certain limits had likewise nothing to do with the question of the continental shelf. It was essential for the Commission to confine its discussion to the problem of the continental shelf.

69. Mr. SANDSTRÖM did not understand the explanations just given by Mr. Córdova, who wanted the right of a State to explore and exploit the marine soil and subsoil to be limited to the continental shelf. He wondered why Sweden, for example, a country without a continental shelf, should not have the right of exploring and exploiting the subsoil of the Baltic in so far as, by so doing, she did not prejudice the freedom of the seas, from the point of view of navigation and fishing in particular.

70. Mr. CORDOVA replied that Sweden could not do so because it was the high seas which were involved.

71. The CHAIRMAN noted that the same question

continued to arise, namely: was the marine subsoil a continuation of the territory of the contiguous State? If the Commission concluded that it was, it would be going against existing international law. He also observed that some of the members of the Commission appeared to take the view that the territorial waters should be extended as far as the continental shelf.

72. Mr. FRANÇOIS moved that a vote be taken.

73. The CHAIRMAN said he would consult the Commission on the question whether it considered that the control and jurisdiction that a State might exercise over certain submarine areas depended on the presence of a continental shelf. He would recall that the Commission had taken as its starting point the idea that an interest of the international community was involved.

74. Mr. LIANG (Secretary to the Commission) thought that if the Commission wished to take a vote, the best formula on which it could vote was that submitted by Mr. Brierly. By taking a decision on that formula and thus determining whether the exercise of the right of control and jurisdiction depended on the presence of the continental shelf or not, it would have cleared up a certain amount of confusion. That formula would not however settle the other important question of the breadth of the continental shelf.

75. The CHAIRMAN shared Mr. Liang's view. The Commission should break the present deadlock by voting on Mr. Brierly's formula. The problem of the breadth of the submarine regions in question would be dealt with later. The Commission had already accepted the first part of Mr. Hudson's first proposal establishing the right of control and jurisdiction. The formula proposed by Mr. Brierly further clarified the proposal already accepted by the Commission. He would therefore consult the Commission on that formula which ran as follows:

“The area for such control and jurisdiction will need definition but it need not depend on the existence of a continental shelf.”

The Commission adopted the formula by 6 votes to 4 with 2 abstentions.

76. Mr. AMADO wished to explain his vote. In his opinion the principle the Commission sought to establish could not yet be enunciated by it because neither conventional law nor customary law was sufficiently developed on the point. As however the vote it had just taken constituted only a tentative conclusion, he had not wished to vote against the adoption of the formula and had accordingly abstained.

77. Mr. ALFARO declared that he had abstained because the formula conflicted with the principles he favoured. He approved of the thesis that any exploration and exploitation of the marine subsoil should be for the benefit of mankind. He was also in favour of the principle of avoiding the establishment of inequality with regard to States which possessed no continental shelf. He could have accepted the formula only if the Commission had expressly recognized those two principles, if it had furthermore clearly defined the sense attached

to the words "control and jurisdiction", and finally if it had recognized that the term "coastal States" could give rise to difficulties in maritime zones such as those of the Baltic, the North Sea, the Gulf of Mexico and the Persian Gulf where the submarine areas of the different coastal States overlapped. The formula as adopted might be interpreted as giving a State the right to penetrate for purposes of control and jurisdiction into the area of another State. Had the text been so drafted as to eliminate those difficulties he would have voted in favour of the formula.

78. The CHAIRMAN invited the Commission to vote on Mr. Hudson's second proposal that: "such control and such jurisdiction should not substantially affect the right of free navigation of the waters above such submarine areas nor the right of free fishing in such waters".

79. Mr. HUDSON repeated that the text was not a formal proposal on which a vote should be taken but had been submitted by him with the idea that it might serve as a very general directive to the Rapporteur.

80. The CHAIRMAN accepted that statement, adding that he, likewise, did not regard it as a final text.

81. Mr. KERNO (Assistant Secretary-General in charge of the Legal Department) asked Mr. Hudson whether he regarded the word "substantially" as essential.

82. Mr. HUDSON replied that he did not and had inserted it simply to meet a suggestion of Mr. Sandström.

83. Mr. BRIERLY thought that that word or a similar phrase was essential. Any control was liable to affect navigation and fishing. There would also be installations on the sea that ships would be obliged to avoid or go round. Finally, it was possible that the installations and operations might give rise to pollution of the water. He was afraid that freedom of navigation and fishing could not always be maintained unimpaired. The word "substantially" did not seem to him indispensable but he was nevertheless in favour of keeping it since States should be compelled to reduce to a minimum the obstacles which control measures or installations might create for navigation and fishing.

84. Mr. HSU proposed that the words "should not substantially affect" be replaced by the words "should be such that they avoid affecting".

85. The CHAIRMAN thought that the point in question was one on which the Rapporteur should be left free to choose his own terms.

86. Mr. KERNO (Assistant Secretary-General in charge of the Legal Department) agreed with the Chairman's suggestion. He felt bound to point out however that as soon as there was anything on the surface of the sea, it constituted an impediment to the freedom of navigation, though it would always be possible for a ship to go round such obstacles, provided they were not too voluminous. By using the word "substantially" the Commission emphasized the necessity for States to see that the installations did not constitute an excessive impediment to the freedom of navigation.

87. The CHAIRMAN requested the Commission to take a decision on Mr. Hudson's second proposal.

The Commission adopted the proposal by nine votes.

88. The CHAIRMAN remarked that one difficulty had been eliminated but that a few others remained for the Commission to deal with. He invited the Commission to pass to consideration of the definition of the breadth of the continental shelf (question 2 formulated by the Rapporteur, at the end of his report).

Question 2

89. Mr. FRANÇOIS thought the whole question should be left aside.

90. Mr. YEPES said that the question could be settled only by geographers or geologists. The Commission had neither the competence nor the requisite knowledge.

91. Mr. AMADO wished to draw the Rapporteur's attention to a text submitted to the International Law Association by Mr. Govare, Mr. Blondel, Mr. Le Gall and Mr. Zuber, containing a criterion which the Rapporteur might take into consideration in his study. The passage in question read as follows:

"In the event of the break in the continental shelf occurring at a distance less than 20 sea miles from the coast, sovereignty, together with control and the exclusive right of exploitation would be prolonged to 20 sea miles from that coast."

He had quoted the passage because it could be applied to countries without a continental shelf and because the rights of such States would be unlimited unless a limit were prescribed to them. Those who had studied the problem thought that that limit should be established at 20 sea miles from the coast. He requested the Rapporteur to take the text into account in his future work.

92. The CHAIRMAN pointed out that Mr. Brierly's formula, adopted by the Commission, likewise stipulated that a limit should be fixed.

93. Mr. CORDOVA thought that after the two decisions taken by the Commission with regard to the right of exploration and exploitation of the marine subsoil, the delimitation of the zone in which that right could be exercised should be fixed quite independently of the presence of the continental shelf as well as in relation to States which possessed one.

94. Mr. BRIERLY wondered whether the Commission might not be willing to accept a formula in some such terms as the following:

"When a continental shelf exists, its limit is also the limit of the zone in which the State has the right to explore and exploit the marine subsoil."

95. Mr. FRANÇOIS and Mr. CORDOVA thought that account should be taken of the fact that in certain cases the continental shelf was very narrow. Mr. Brierly's formula might accordingly lead to an inequality in favour of States possessing no continental shelf.

96. Mr. SPIROPOULOS thought that if it adopted Mr. Brierly's proposal, the Commission might also commit an injustice towards States possessing perhaps only 20 metres of continental shelf, whereas others had a shelf extending for 200 kilometres. He wondered whether, precisely in order to avoid any injustice, it would not be fairer to fix a limit.

97. Mr. HUDSON shared the view of Mr. Spiropoulos that Mr. Brierly's formula adopted by the Commission (para. 75 above) did not entirely eliminate the factor of the continental shelf. A great variety of cases existed: the case of the State which had no continental shelf; cases where the continental shelf existed; the cases mentioned by Mr. Alfaro of zones to which there were concurrent claims by several States. It seemed to him difficult to find a single formula which would cover all those cases. When there were concurrent claims by several States to a single zone, he thought that those States should and could arrive at a solution by a mutual agreement. That was the point mentioned by the Rapporteur in his seventh question. There remained the question whether a limit should be set to the continental shelf. The geologists were not unanimous on the point. There were geographical facts that none of the countries could escape. The solution offered great difficulties. The Commission might perhaps consider question 2 of the report without however fixing a limit. In any case, he thought that in every instance the possibility of exploration and exploitation would always be limited by the configuration of the ocean bed.

98. Mr. AMADO thought it should be possible to find a certain limit. It might assist the Commission if he read another passage from the report submitted to the International Law Association by the French branch.

The passage read:

"This limit (of 20 sea miles) is more than adequate to cover all the possibilities of exploitation which may occur even within a fairly distant future, in cases where the continental shelf does not exist or does not stretch far from the coast. The claim of sovereignty (control and protection) for as far as 200 sea miles, formulated by certain States, cannot, in this same case, apply to anything but fisheries. . . ."

He thought the Commission could accept the thesis put forward in the report, making allowance however for the possibility of waivers by bilateral agreement. Just as it was difficult to adopt a uniform delimitation of the zones for purposes of customs, fiscal and sanitary control, there were also difficulties in arriving at a uniform delimitation of the zone of exploration and exploitation. The Rapporteur might perhaps reflect on the idea and see whether there was a possibility of fixing a limit.

99. Mr. HUDSON was unable to accept the thesis in the report of the French branch of the International Law Association. In the Persian Gulf, for example, exploration and exploitation operations could be undertaken by the various States if there was an agreement between them. He saw no need for fixing a limit. States, for instance the United States of America and Mexico, frequently came to such agreements. The report quoted by Mr. Amado did not seem to him to be at all relevant.

100. The CHAIRMAN also thought that there was no need to fix a limit, but for another reason—namely, that he did not accept the legal notion of the continental shelf.

101. Mr. CORDOVA asked the following question: if Mexico and the United States of America, for exam-

ple, came to an agreement on certain points with regard to the Gulf of Mexico, could they thereby exclude other countries from the zone?

102. Mr. HUDSON replied that they could.

103. Mr. AMADO thought that if Mr. Hudson's thesis were accepted, it would mean a return to the principle of *res nullius*. However, if the problem was correctly formulated, it would have to be admitted that, according to the principles of international law, all States had the right of exploration and exploitation on the seas or in the Gulf of Mexico or, again, in the Persian Gulf. If other States could be excluded, it would be a violation of the principle of the freedom of the high seas.

104. Mr. SPIROPOULOS repeated his opinion that any attempt to fix a limit was doomed to failure from the start. It had not proved possible so far to arrive at an international definition of the breadth of territorial waters and the Commission would be no more successful in arriving at an international delimitation of the breadth of the continental shelf.

105. The CHAIRMAN replied that delimitations of territorial waters existed, but each State defined that limit to suit itself; some fixing it at 3 sea miles, others at 6 sea miles. In spite of all such divergencies, States had managed to find a *modus vivendi*.

106. Mr. SPIROPOULOS said that, in point of fact, each State would establish its own rule. As far as codification from the point of view of international law was concerned, that was quite another question.

107. Mr. CORDOVA thought that if no limit was fixed to the zone in which a State had the right of exploration and exploitation, the whole idea of freedom of the high seas was abandoned.

108. The CHAIRMAN said that the situation was identical with that occurring in the case of territorial waters, in which no one had ever succeeded in determining the line of the waters in a precise and uniform manner. In the case in point the Commission could therefore also accept the idea of reasonable limits to be provisionally fixed by the States themselves.

109. Mr. SPIROPOULOS thought that all States should be left free to establish their own limits and to come to agreement with other States.

110. The CHAIRMAN agreed but thought that some sort of limit should be prescribed. He repeated that the situation was the same as in the case of territorial waters.

111. Mr. Yepes said that the Commission had not so far defined the legal status of the continental shelf. That was of no importance, he thought, so long as the zone was a fairly broad one, but difficulties would be bound to arise unless a clear definition of the legal notion was reached.

The meeting rose at 1 p.m.

68th MEETING

Friday, 14 July 1950, at 10 a.m.

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Chairman: Mr. A. E. F. SANDSTRÖM

Rapporteur: Mr. Ricardo J. ALFARO

Present:

Members: Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. Roberto CORDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris el-KHOURY, 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) (*continued*)SECTION 22: THE CONTINENTAL SHELF (*continued*)Question 2 (*concluded*)

1. Mr. YEPES pressed for a definition of the legal status of the continental shelf. It was essential to know whether it was *res nullius*, *res communis*, or the submarine extension of state territory. At the previous meeting, the Commission had started out by studying the extent of the continental shelf. In his opinion, it would be advisable to decide first of all what was the continental shelf. He asked the Commission to look into that fundamental question. In 1945, President Truman had issued a proclamation which had revolutionized international law; the Secretariat had submitted to the Commission a most valuable report (A/CN.4/32); scientific periodicals studied the question; why should the International Law Commission not do so? The scientific world awaited its decision, and it must tackle the problem.

2. Mr. HUDSON said he would be happy to support Mr. Yepes' proposal; but he wondered whether Mr. Yepes could submit a text which the Commission could discuss, and which he hoped would not take too definite a stand confining itself rather to urging the right of exploitation by the littoral State.

3. The CHAIRMAN said he was going to propose discussion of the same question under questions 5 and 6 on the list at the end of Mr. François' report. He suggested that the Commission continue the study of those questions in their proper order.

4. Mr. YEPES pointed out that when the meeting rose the previous day, the Commission was discussing

question 2: "If so how should this continental shelf be defined? Should an ocean depth line of 200 metres (a hundred fathoms) be adopted as the outer limit?" He would like the Commission to define the legal nature of the continental shelf.

5. Mr. ALFARO thought Mr. Yepes' proposal was quite apposite. On the previous day, the Commission had tried to evade the question, but it cropped up again continually. The Commission had decided to mention the continental shelf in the principle it had adopted at the previous meeting. In fact, the moment the basis for discussion emphasized the manner in which control and jurisdiction must be exercised in exploiting and exploring the sea bed and its subsoil, the problem of the continental shelf was back again.

5 a. He hoped the Commission would reject the expression "continental shelf". In some instances the shelf surrounded islands. In the Persian Gulf, there was no continental shelf; there were merely shallow waters. He suggested "the submarine platform", an expression used by the earliest writers on the subject—e.g., Bustamante. That would obviate the difficulty of shallow water areas. The submarine platform was the extension of the land up to a depth of 200 metres. That was what was generally understood by the expression "continental shelf". If the notion were accepted that in regard to the submarine platform there might be some limitation to the freedom of the high seas, it would be well first of all to determine the legal nature of the submarine platform. Was it *res nullius*, *res communis*, or part of the territory of the littoral State? They could then go on to the question how such a State should exercise its control and jurisdiction over that submarine platform. The Commission had a great many research monographs at its disposal. It must show that it was not bypassing the question, which was most important in contemporary legal thinking.

6. Mr. HUDSON found himself obliged to differ with regard to the continental shelf. He thought the Commission should define it as the area contiguous to the coast, and stretching as far as the point where the deep waters began. This drop to the deep ocean water was found at varying depths. The question was where the continental shelf ended. He did not think it was possible to fix any depth limit; the bottom of the sea must be taken as it was. It was out of the question to adopt an outer limit—an ocean depth line of 200 metres—as question 2 suggested. Mr. Yepes and Mr. Alfaro had put very forcibly the question whether the surface of the continental shelf should be regarded as a part of the territory of the littoral State and subject to its sovereignty. Was the area—obviously an area outside territorial waters—*res nullius* or *res communis*? He would like to avoid describing the continental shelf as either. The existence of the continental shelf could be granted. It was the area between the coast and the sudden drop to the ocean depths. It might be anywhere between zero and 200 metres. That was the point on which the claims of States were mainly founded; and he hoped the Commission would not fix any outer limit.

7. The CHAIRMAN explained how he had envisaged

the discussion. At the previous meeting, the Commission had found a starting point by adopting the formulas put forward by Mr. Hudson and Mr. Brierly. He had felt that once those decisions were taken, the question of the legal status of the continental shelf had ceased to be important and had become purely academic. But there still remained the question what rights littoral States had over the sea-bed and its subsoil outside territorial waters. That was the main question.

8. Mr. BRIERLY had had the impression that the question raised by Mr. Yepes and Mr. Alfaro was different from what Mr. Hudson suggested. They were not asking for a definition of the extent of the continental shelf; they merely asked the Commission to give its opinion on the legal nature of the shelf.

8 a. There were three possibilities for that area of control: it might be argued that it was *res nullius*. That must be counted out as being incompatible with the principle adopted the previous day. If the shelf were *res nullius*, it could be acquired by any State, whether littoral or not; and that was inadmissible. It could be argued again that it was *res communis*; but that too was incompatible with the previous day's decision. *Res communis* was common property, and the continental shelf in that case could not be subject to the control and jurisdiction of any particular State. It would be better to say that the continental shelf belonged *ipso jure* to the littoral State. Whether the littoral State had sovereign rights over the continental shelf hardly mattered, though he was inclined to think that control and jurisdiction, which were exclusive, amounted to sovereignty and could be so described. If this right belonged *ipso jure* to the littoral State, there was no necessity for the latter to make any claim or annexation. Such a proclamation or annexation might of course serve to indicate that a state had begun to work its zone of control, but legally it was not necessary.

9. Mr. KERNO (Assistant Secretary-General) thought the Commission was actually carrying out Mr. Yepes' proposal. His own view was that the problem was most important. When public opinion took an interest in the work of the Commission, it connected it almost exclusively with the Nürnberg principles and the continental shelf. Hence public opinion would find it odd if the Commission did not devote any of its discussions to the latter problem. Obviously, the Commission could find that there was no such legal concept, or that it could not be defined, or that it could not be defined as yet. But he thought the Commission should pay special attention to the problem and should lead the way. It must of course proceed cautiously, but it must tackle even the most intricate problems.

10. Mr. CORDOVA considered that there were two questions at issue: first of all there was the subsoil and the sea bed of the submarine platform; and then there were the waters, which might have a slightly different status from the sea bed, since they were subject to a sort of easement. Even where a State had full control over the waters of the sea, as in the case of territorial waters, it was not at liberty to prevent peaceful navigation through them. Hence there could be no

question of absolute sovereignty over such waters.

10 a. The Commission had not yet decided what type of control and rights littoral States could have over the submarine platform, which he thought belonged to the State of whose territory it formed an extension. In the case of exploitation of the resources of the seabed or subsoil starting from the mainland, and passing through any territory emerging from the waters, there was no question of its affecting the freedom of the high seas. The Rapporteur had declared that he did not feel such exploitation to be illegal. Mr. Hudson's formula adopted by the Commission on the previous day recognized exploitation via the surface of the waters as well. Hence, the real question to be decided was that of the nature of the right of control over the submarine platform vested in the littoral State.

11. Mr. FRANÇOIS felt that a distinction must be made between the regime of the sea bed and that of the waters above it. With regard to the sea bed and subsoil, he saw no objection to recognizing the sovereignty of the littoral State; with regard to the waters, on the other hand, he did not agree with Mr. Brierly's three possibilities. He wondered whether there might not be a fourth—namely, that such waters were part of the high seas—subject to certain restrictions for the benefit of the littoral State. Mr. Brierly had argued that such restriction amounted to saying that there was sovereignty, or control and jurisdiction. He himself was not altogether sure. If there were sovereignty, the State would have full right over such waters, and an agreement would be necessary to restrict those rights. Failing an agreement, the right of sovereignty would exist in full. If it were maintained that there was control and jurisdiction, the State would have only specific rights. What was not expressly recognized in that sphere would not belong to the State. There would be no question of State sovereignty, and the high seas would remain free. From the practical point of view, the consequences of adopting one or other of those courses were important—e.g., in regard to the air above the waters.

12. Mr. BRIERLY explained that he had no intention of suggesting control and jurisdiction, or sovereignty over the waters, still less over the air. He referred merely to the sea bed and subsoil. If the littoral State had exclusive rights of control and jurisdiction over the subsoil, it could be regarded as enjoying sovereignty.

13. Mr. HUDSON recalled that the Commission had stated that there would still be freedom of navigation and fishing.

14. Mr. FRANÇOIS was glad to find that Mr. Brierly and he were agreed as the subsoil. The decision taken amounted to admitting sovereignty. With regard to the high seas, it was one thing to speak of sovereignty subject to restrictions, and another to speak of control or jurisdiction. As to the sea above the continental shelf, there could be no question of sovereignty there. He could see serious objections. What would be the position in case of war? Possibly the chances of neutrality were not great; but of the sovereignty of littoral States over that area of the sea were recognized, it could not be the theatre of war operations so long as littoral States

remained neutral. He did not think that consequence could be accepted. He thought it would be a good thing for the Commission to stipulate that there was no question of recognizing any sovereign rights over the waters covering the submarine platform.

15. Mr. KERN (Assistant Secretary-General) considered that if the Commission could reach the preliminary conclusion that the expression "continental shelf" signified merely the sea bed and its subsoil, that would be something. The public should know exactly what the position was. It was also desirable to study the effect of the existence of the continental shelf on the waters over the shelf.

16. Mr. HUDSON said he had made an attempt to set out the problem on the basis of what Mr. François and Mr. Brierly had said, and he read out the following text, in which he had used the terminology of the Treaty of 1942 between Great Britain and Venezuela:

"Is the submarine area (sea bed and subsoil) of the continental shelf off the coast of a littoral State and outside the area of its territorial waters (1) *res nullius*, (2) *res communis*, (3) subject *ipso jure* to the control and jurisdiction of the littoral State, or (4) subject to the exercise of control and jurisdiction by the littoral State for the limited purpose of exploring and exploiting the natural resources?"¹

He would say no to the first three questions, and yes to the fourth. His suggestion was in response to Mr. Yepes' appeal to the Commission to define the legal status of the continental shelf.

17. Mr. FRANÇOIS said he would say yes to the fourth question also.

18. Mr. ALFARO was glad to see that the Commission was at least dealing with the crux of the problem, and was on the way to a practical solution. He congratulated Mr. Brierly on the extremely lucid way in which he had explained the legal aspect of the problem; and he felt that the Commission agreed with him that the submarine region could not be either *res nullius* or *res communis*. Mr. Hudson's text would no doubt enable the problem to be solved. It was important for the Commission to express its opinion on the four questions put by Mr. Hudson. Doubtless, in doing so, the Commission would wish to make reservations as to some of the phraseology used in the questions; but it should not prejudice the final wording of the text to be inserted in due course in the draft code.

19. Mr. CORDOVA thought that after such a lengthy discussion, the Commission should go ahead and discuss the four points of Mr. Hudson's text, which constituted a concrete basis for solving the problem. The right of a State to control and jurisdiction was completely independent of exploration and exploitation of the subsoil. He agreed with Mr. Brierly that the sea bed and the subsoil of the sea over the continental shelf formed, *ipso jure*, part of the territory of the littoral State.

20. Mr. YEPES thought Mr. Hudson's text was most interesting. He was extremely pleased to find that the

Commission had finally agreed to discuss the fundamental problem. On the previous day the Commission had stated that the exercise of control and jurisdiction was independent of the existence of a submarine platform. In doing so, it had neglected its duty to take a decision on the problem of the continental shelf. It should now make amends and take a definite stand on the problem. He was glad to see that it was on the way to doing so.

20 a. He submitted to the Commission a further proposal which read: "A littoral State has a right to exercise control and jurisdiction over the submarine continental shelf along its seaboard." This proposal rounded off Mr. Hudson's; though, like the latter, it did not give a definition of the continental shelf. Such a definition could be given only by geologists or geographers, not by the International Law Commission, which had not the requisite knowledge. The continental shelf differed in different parts of the world. That was at the bottom of the great difficulty of finding a definition; whereas, if scientists provided a definition, they would know what rights over their continental shelf could be vested in States.

21. Mr. AMADO drew the Commission's attention to the fact that while Mr. Hudson's formula under point 4 was most ingenious, it made the right to exercise control and jurisdiction conditional on effective exercise of exploration and exploitation. Hence, Mr. Hudson was replying to Mr. François' third question, whether theoretical occupation was sufficient. If there was no exploitation, there were no rights. This suggestion called for close examination. Mr. Hudson took the interests of the community as his starting point. The Commission was not called upon to regard matters from that angle. On the contrary, it must ascertain how far the right of States went.

22. The CHAIRMAN said he would like to give his personal opinion. The starting point of the discussion had been the decision reached by the Commission the day before. He would have been willing to accept the principle that a littoral State had a right to exercise control and jurisdiction for the purposes of exploring and exploiting the subsoil, and that this right was exclusive. He would have voted against Mr. Hudson's third point and in favour of the fourth. What seemed to him important was that there should be exclusive rights to explore and exploit. The question of sovereignty seemed to him purely academic.

23. Mr. ALFARO pointed out that the formula adopted by the Commission the previous day referred to "a littoral State" and not to "the littoral States". Hence, the question remained completely in the air where there were several littoral States whose rights over the continental shelf might overlap—as might happen, for example, in the Persian Gulf or the Gulf of Mexico. The problem would be discussed at a later stage. But he thought the situation would be greatly clarified if the Commission spoke of "the littoral States" instead of "a littoral State".

24. Mr. HUDSON said he had no objection to the

¹ See text in *British and Foreign State Papers*, vol. 144, pp. 1065-1068.

use of this form, though he thought the problem worrying Mr. Alfaro would still remain.

25. Mr. FRANÇOIS recalled that it had been decided on the previous day that control and jurisdiction could be exercised even if there was no continental shelf. The texts submitted by Mr. Hudson and Mr. Yepes went back on that decision when they spoke of the continental shelf. Possibly, it was merely a matter of redrafting to bring their proposals into line the decision already taken by the Commission. But he wondered if the originators of the proposal had really intended to go back on the decision of the day before.

26. Mr. HUDSON said that he had no intention of going back on the decision taken by the Commission on the previous day. He was simply returning to the crux of the problem—the continental shelf. His proposal referred to this. If the Commission so desired, he was prepared to draw up a text covering cases where there was no continental shelf.

27. Mr. YEPES thought that the previous day's meeting had been rather unfortunate. It might have given the impression that the Commission was anxious not to discuss the question of the continental shelf, though it was of the utmost importance to the progressive development of international law and to the formulation of that new law which the world expected of them. They should have the courage to consider new problems in a genuinely progressive spirit.

28. Mr. CORDOVA said that the Commission had decided on the previous day that the exercise of control and jurisdiction was independent of whether a continental shelf existed. Hence, it had decided that States had certain rights, even though there might not be a continental shelf. But the question of the continental shelf had remained open. The formula put forward by Mr. Yepes said the same thing as the decision of the previous day, with the difference that it applied to the continental shelf. The Commission was thus reverting to that question, though it referred only to its seabed and subsoil. But the issue was not only the sea bed and subsoil; there were also the waters covering them.

29. Mr. BRIERLY pointed out that the Commission was discussing only the subsoil and the sea bed.

30. Mr. CORDOVA wondered why the question should be confined to the subsoil and sea bed. In a discussion of the continental shelf, the waters covering the sea bed and subsoil must be discussed too.

31. Mr. HUDSON pointed out that his second proposal of the previous day, which had been adopted by the Commission, referred to those waters and stipulated that freedom of navigation and fishing in waters overlying exploitation or exploration areas should not be appreciably affected by the control and jurisdiction exercised by the littoral State.

He repeated that the text he had presented during the present meeting was based on the decision taken on the previous day; but it referred specifically to the continental shelf.

32. Mr. CORDOVA hoped the Commission would take Mr. Yepes' proposal as the basis for discussion.

33. Mr. HUDSON thought it would be easier to reach a conclusion by passing judgment on the four points of his text. When they had been voted on, it might be possible to return to Mr. Yepes' proposal.

34. The CHAIRMAN put to the vote the first point of Mr. Hudson's proposal.

Point 1 was unanimously rejected.

35. The CHAIRMAN put to the vote point 2 of Mr. Hudson's proposal.

Point 2 was rejected by 8 votes to none, with one abstention.

36. The CHAIRMAN put to the vote point 3 of Mr. Hudson's proposal.

Point 3 was adopted by 6 votes to 4.

37. Mr. HUDSON said that the Commission's vote meant that the right to explore and exploit did not depend on any claim to that right by a littoral State; yet the right should be conditional upon such a claim. The situation might arise in various forms. A littoral State might declare that it had no intention of exploring or exploiting the subsoil or sea bed of its continental shelf. It might leave it to others to do so, even without granting them a formal concession. On the other hand, it might equally exercise its right over the continental shelf by granting a concession. In such circumstances, another State would have no rights over this shelf, and the right to exercise control and jurisdiction would still be vested in the littoral State. The historical development of the question of territorial waters showed that for the last hundred years or so, States had rights over their territorial waters *ipso jure*—i.e., without formally claiming such rights. The situation was somewhat analogous to that of the continental shelf. Personally, he thought that the right of littoral States to exercise control and jurisdiction over the continental shelf should not be granted to them *ipso jure*, but should be subject to the exercise of the right for the purposes of exploring and exploiting the continental shelf. Hence, he would have liked the Commission to reject point 3 and to adopt point 4 of his proposal.

38. Mr. CORDOVA remarked that the Commission had just taken a decision on the point.

39. Mr. HUDSON felt that the Commission had voted without fully realizing the scope of its decision.

40. Mr. AMADO said he would be prepared to accept a formula drawn up more or less as follows:

"The continental shelf off the coast of a littoral State is subject ipso jure to the exercise of control and jurisdiction of the littoral State for the purpose of present or future exploitation of its resources."

41. Mr. HUDSON thought that the words "the exercise of" were superfluous. The question was whether the right was conferred automatically, or whether there was any authorization to exercise it. But he agreed that the distinction he had just made was somewhat subtle.

42. Mr. ALFARO said that the vote on point 3 of Mr. Hudson's proposal was the logical consequence of rejecting points 1 and 2. The submarine platform

was neither *res nullius* nor *res communis*. The only thing to do was to wait and see what the littoral State would decide to do. He wondered, however, what was the position when a littoral State did not wish either to exploit or to explore the subsoil of the continental shelf. Could the resources of the subsoil be explored or exploited by another State so long as they had not been explored by the State itself?

43. Mr. HUDSON replied that a littoral State could at any time evict an intruder, by itself exercising its proper right.

44. Mr. BRIERLY thought that the Commission was discussing not so much the question of codification of existing international law as the development of international law; and he thought point 3 just adopted by the Commission was a principle on which future law might be based. He did not share Mr. Hudson's view that it was too early to consider the development of international law in that direction.

45. Mr. CORDOVA, referring to Mr. Brierly's statement, agreed that the Commission was faced with a new problem which had not yet produced a series of rules; but certain principles had already been put forward and provided an immediate basis. For example, he thought that the sea bed and subsoil were part of the territory of a littoral State, which had the right to explore and exploit the wealth of that subsoil. From the international law standpoint, the right must be recognized, with the stipulation that it must be subject to certain limitations.

46. The CHAIRMAN wondered how it would be possible to reconcile the vote on point 3 with the decision taken by the Commission the previous day.

47. Mr. HUDSON pointed out that, if the Commission had accepted point 4 of his proposal, littoral States could occupy the subsoil areas by either effective or "national" occupation. The question was very succinctly put in a report to the International Law Association by its Committee on Rights to the Seabed and its Subsoil.² This report, prepared by the Copenhagen Conference in 1950, stated that if the theory of the continental shelf outside territorial waters as "*res nullius* capable of acquisition by occupation by whichever State wishes to get control and jurisdiction over it" were recognized as current international law, the practice which had grown up in that connexion showed "a strong tendency to change the law". By this change international law could recognize that control and jurisdiction over the exploitable submarine areas—i.e., the continental shelf outside territorial waters (a) vested *ipso jure* in the coastal State, or (b) could be vested in the coastal State (without effective occupation if necessary by notional occupation (e.g., a proclamation) by that State).

He would be inclined to accept the suggestion under paragraph (b). If paragraph (a) were adopted, the idea of possible occupation was eliminated.

48. Mr. AMADO said he would like to read the following passage from the proposals made by that Com-

mission: "Control and jurisdiction by the coastal State (or States) over the seabed and subsoil of the continental shelf outside territorial waters... should be recognized as vested in it *ipso jure*—i.e., even in the absence of a proclamation."

49. Mr. HUDSON said that reading on further in that passage of the report, they would find the statement that "*A fortiori*... control and jurisdiction over the seabed and subsoil of the continental shelf outside territorial waters can be vested in the coastal State by a proclamation to this effect." The passage read by Mr. Amado seemed to state the very opposite of the passage he had just read himself.

50. The CHAIRMAN said that, in view of the vote on the third point of Mr. Hudson's proposal, the fourth point did not apply; he assumed the Commission agreed.

51. Mr. LIANG (Secretary to the Commission) on behalf of the Secretariat, strongly supported the attitude taken by Mr. Brierly. It was desirable that the Commission should pay more attention to article 15 of its statute, which made a distinction between codification of international law "as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice" and the progressive development of international law "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". In regard to many topics coming under the regime of the high seas, it was possible to go ahead with codification as defined in article 15, since the above conditions were fulfilled. In respect of these topics, there was already considerable state practice, precedent and doctrine. On the other hand, in regard to the continental shelf, those conditions were not fulfilled. There were doctrines concerning the continental shelf, but it could not be held that at the moment there were fully crystallized rules of positive international law.

51 a. The Commission had so far discussed the negative aspect of the problem—i.e., the fact that certain rights had not been granted by international law. He thought the only solution was to regard the problem as part of the Commission's task of encouraging the progressive development of international law, on the lines laid down for it in the Statute, including the preparation of a draft convention as prescribed in article 15.

52. Mr. HUDSON remarked that Mr. François had feared that by discussing the question of the continental shelf the Commission was going back on its decision of the previous day. He did not feel that was so. Today, the Commission was dealing with the continental shelf proper. Mr. François had urged the Commission to turn back to the question of countries not possessing a continental shelf, once it had examined the question of countries possessing one. Could the Commission not stipulate that where there was no continental shelf, littoral States would have no rights *ipso jure*? To grant the right to exercise control and jurisdiction it was essential

² See International Law Association, *Report of the Forty-fourth Conference, Copenhagen, 1950*, p. 112.

to wait until the littoral States had made a claim, the reason being that in a great many instances it was impossible to determine the boundaries of the continental shelf. He reminded those members of the Commission who had voted in favour of point 3 of his proposal that there were great variations in the matter of the continental shelf—for example, there were waters such as the Persian Gulf where there was no continental shelf, and where the littoral States were entitled to have their rights over the submarine areas recognized. It must be granted that such States had those rights.

53. The CHAIRMAN agreed that it was not possible to vote on Mr. Hudson's fourth proposal. But the Commission had to decide as to the scientific basis of its attitude; hence, it would be a good thing all the same to take a vote on point 4 to see which Members were in favour of the principle it laid down.

After some discussion, the Commission decided that it need not vote on point 4.

The meeting rose at 11.45 a.m.

69th MEETING

Monday, 17 July 1950, at 3 p.m.

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Chairman: Mr. Georges SCALLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. Roberto CORDOVA, 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) (*continued*)

SECTION 22: THE CONTINENTAL SHELF (*continued*)

Questions 3 and 4

1. The CHAIRMAN observed that the decisions

adopted at the last two meetings had already answered questions 3 and 4 on the last page of Mr. François' report.

Question 5

2. The CHAIRMAN read out the text of question 5: "Is a right of sovereignty involved, or merely rights of control and jurisdiction?"

3. Mr. HUDSON recalled that the Commission had used the terms "control and jurisdiction", and had thereby decided to leave aside the concept of sovereignty.

4. Mr. FRANÇOIS agreed that the Commission had set aside the concept of sovereignty on that point.

Question 6

5. The CHAIRMAN read out the question: "What is the competence of the littoral State in the areas in question (continental shelf or contiguous zone) in regard to:

(a) Working the mineral resources of the sub-soil;

(b) Marine resources?

How far may nationals of the riparian State be given special treatment?"

He pointed out that, according to the Rapporteur, the question concerned the continental shelf and the contiguous zone.

6. Mr. HUDSON pointed out that the Commission had not discussed the question of the contiguous zone, and had left in abeyance the question of the exercise of control and jurisdiction by the littoral State in the submarine areas where there was no continental shelf. He hoped that the Commission would leave things as they stood. He considered that the Commission should not deal with sub-paragraph (b), since marine resources were contained in the waters of the sea and not in its subsoil. The right of control and jurisdiction referred to in that context applied to the sea bed and the subsoil. When he (Mr. Hudson) had submitted his text at the 68th meeting, Mr. François had raised no objection to the use of the words "sea bed".

7. The CHAIRMAN confirmed that the Commission was dealing with the sea bed and the subsoil, and was not discussing the rights exercised by littoral States over the waters.

8. Mr. HUDSON recalled that the Commission had stated that control and jurisdiction should not affect either navigation or fishing.

9. Mr. SANDSTRÖM said that was clear from paragraph 2 of the text proposed by Mr. HUDSON at the 67th meeting.

10. Mr. FRANÇOIS favoured a clarification of the rights enjoyed by littoral States over the waters lying above the continental shelf. It was not enough, he thought, to say that such control and jurisdiction must not affect either navigation or fishing.

11. Mr. HUDSON thought that those waters should continue to be subject to the regime of the high seas.

12. Mr. FRANÇOIS stated that there was of course no right of sovereignty over those waters. He asked to

be enlightened as to the meaning of the words: "must not . . . affect . . . nor the right of free fishery in such waters". He wished to know whether the littoral State was entitled to lay down regulations for the protection of fish.

13. Mr. HUDSON pointed out that the right to regulate fishing was not related to the question of the continental shelf.

14. Mr. FRANÇOIS observed that proclamations subsequent to the second proclamation of the President of the United States dated 28 September 1945, concerning coastal fisheries in certain areas of the high seas, linked that question with the continental shelf.

15. Mr. SANDSTRÖM recalled that the Commission had already discussed the question of fisheries in connexion with the contiguous zone.

16. Mr. YEPES considered that the question of the continental shelf was distinct from that of fisheries and navigation in the contiguous zone. The former, in fact, represented the underwater continuation of the land-mass.

17. The CHAIRMAN asked whether the Commission agreed with Mr. Hudson that the question should not be discussed.

18. Mr. FRANÇOIS said that he personally would be very sorry if the question were not discussed. The Argentine proclamation of 11 October 1946 went so far as to claim sovereignty over the waters covering the submarine platform.

19. Mr. BRIERLY said the Commission was under no obligation to accept the Argentine proclamation. Moreover, it had already adopted resolutions which were in contradiction with that proclamation.

20. Mr. KERNO (Assistant Secretary-General) pointed out that the continental shelf should be taken to mean the sea bed and the subsoil, and to exclude the waters covering them. He had previously drawn attention to the fact that it might be desirable to specify what the regime of those waters would be.

21. Mr. FRANÇOIS thought that Mr. Hudson considered that the Commission had already defined its attitude by stating that there was no sovereignty over those waters and no restriction of freedom of fishing and navigation.

22. Mr. el-KHOURY confirmed that the Commission had decided that the waters covering the continental shelf and lying outside territorial waters constituted the high seas.

23. The CHAIRMAN shared that impression.

24. The CHAIRMAN asked what was meant by the "areas in question"; did that relate to the waters or the sea bed?

25. Mr. FRANÇOIS replied that they covered both, since marine resources comprised the waters, the fisheries, etc.

26. Mr. HUDSON pointed out that the Commission was dealing only with the sea bed and the subsoil, and should therefore leave fishing out of account, unless it wished to mention the catching of fish living at the

bottom of the sea. He thought that those problems were subject to the rules governing the high seas.

27. Mr. BRIERLY felt that, there being no single answer to the whole question, it should be divided up, the continental shelf being taken first and the contiguous zone left aside for the time being.

28. Mr. HUDSON considered that mention of the contiguous zone was needed for cases where there was no continental shelf. The Rapporteur would try to find a wording which would be equally applicable to cases where there was no continental shelf.

29. Mr. FRANÇOIS recalled that the first paragraph of the text adopted by the Commission at its 67th meeting was not confined to the continental shelf.

30. Mr. HUDSON replied that the text adopted at the 68th meeting was limited to the continental shelf. It was, in fact, worded as follows: "The submarine area (sea bed and subsoil) of the continental shelf off the coast of a littoral State and outside the area of its territorial waters is subject *ipso jure* to the control and jurisdiction of the littoral State."

31. Mr. FRANÇOIS was afraid some ambiguity might arise from the fact that paragraph 1 was not limited to the continental shelf, and that paragraph 3 spoke only of the continental shelf.

32. The CHAIRMAN repeated his question regarding the sense of the word "area" in question 6.

33. Mr. HUDSON replied that the texts adopted concerned only the sea bed and the subsoil. It was no longer necessary to reply to the first sub-paragraph of question 6.

34. Mr. FRANÇOIS felt that it might be necessary to deal with the question of the nature of the rights concerning marine resources hidden in the waters covering the continental shelf.

35. Mr. HUDSON said that those rights were the same as those existing on the high seas.

36. Mr. SANDSTRÖM explained that the littoral State had rights for the protection of fishing but that question was separate from that of the continental shelf.

37. Mr. FRANÇOIS accepted the interpretation that, as the littoral State's right of control and jurisdiction applied only to the sea bed and the subsoil, it would have no special rights over the waters covering the continental shelf.

38. The CHAIRMAN observed, in connexion with the second sub-paragraph of question 6, that at previous meetings the members of the Commission had already decided to recognize that if rights were reserved to the littoral State, it was the latter's nationals that would enjoy them.

Question 7

"Where the continental shelves—or contiguous zones as the case may be—of the different States overlap, how should they be delimited?"

39. Mr. HUDSON pointed out that the International Law Association's committee on rights to the sea bed

and its subsoil had stated in its report that, when continental shelves overlapped, criteria for their delimitation should be studied.¹ Custom and theory gave no enlightenment on the subject, and in his view the question should therefore be set aside.

40. Mr. ALFARO pointed out that, the previous day, the Commission had agreed to say "the littoral State" instead of "a littoral State", in the first paragraph of Mr. Hudson's proposed text, and that there was therefore no problem to settle.

41. Mr. el-KHOURY stated that, as a general rule, when two States were separated by waters, the frontier was fixed in the middle of those waters. When continental shelves overlapped, they should be divided.

42. Mr. HUDSON considered that there was no such principle. In the case of rivers, the thalweg was followed. He pointed out that the States concerned must come to an agreement.

43. Mr. YEPES observed that the case mentioned by Mr. el-Khoury was provided for in President Truman's first proclamation of 28 September 1945 concerning the continental shelf. Agreements would be concluded between States to determine the boundaries of their continental shelves. He considered the solution advocated by President Truman to be the best one.

44. The CHAIRMAN asked what would happen in cases where the States concerned failed to reach agreement.

45. Mr. AMADO recalled that, in the case of the utilization of the water power of a frontier river, the countries concerned had failed to reach agreement at the Barcelona Conference. Nor at the Pan-American meetings at Havana in 1928 and at Montevideo in 1933, had some South American States been able to agree on that point. It might in fact happen that a State more highly developed economically than its neighbour State might draw off all the water power of a river, thus impairing the development of its neighbour. He considered that in the matter of the sea, recourse must be had in each instance to an arbitral authority which would examine the situation and give a ruling on the particular case. It was impossible to adopt a general principle.

46. The CHAIRMAN asked whether the Commission agreed to admit the principle of compulsory arbitration for the solution of such difficulties.

47. Mr. AMADO had not meant to go so far.

48. Mr. ALFARO pointed out that Mr. Hudson's proposal as adopted by the Commission provided that control and jurisdiction should belong to the littoral State to the exclusion of other States. He asked how the question would be settled between littoral States situated on one and the same sea, such as, for example, in the Gulf of Mexico.

49. Mr. YEPES thought that the resolution was for States to conclude agreements. In the absence of such agreements recourse would be had the means pro-

vided under international law for the settlement of disputes between States.

50. The CHAIRMAN observed that merely amounted to pushing the difficulty a little further away.

51. Mr. HUDSON read out a passage from the previously mentioned report of the Committee on "rights to the sea bed and its subsoil": "Criteria for the division of the sea bed (and subsoil) of a continental shelf shared by two or more coastal States should be developed, taking into account factors such as the configuration of the coastlines, the economic value of proven deposits of minerals, etc."² The problem was bound up with that of the division of territorial waters between two adjoining States.

51 a. At The Hague Conference in 1930, the United States delegation had canvassed a scientific formula for the division of territorial waters. The "American Journal of International Law" for 1930 contained an article on the subject.³ There might also be one or two books on the subject. Nevertheless there could not be said to be a principle governing the establishment of frontiers in territorial waters, nor a principle enabling the continental shelf to be divided up between two adjoining States, such as between Mexico and the United States, for example. He doubted the possibility of establishing a general principle at the present time.

52. Mr. KERNO (Assistant Secretary-General) observed that Mr. Hudson had just quoted a passage from the report to be submitted to the International Law Association's conference, to the effect that it would be desirable to develop criteria. At the same time, Mr. Hudson had stated that it was not possible at present to establish a criterion of general ability. He asked whether the Commission agreed with Mr. Hudson's view, or whether the Rapporteur might examine the question and attempt to submit proposals.

53. Mr. HUDSON said he would hesitate to establish a criterion. Geographical differences prevented the formulation of a general principle. The littoral States on the Persian Gulf were trying to fix a frontier by negotiation. The 1942 Treaty between the United Kingdom and Venezuela concerning the Gulf of Paria did not enunciate a general principle but merely defined a line.

54. Mr. FRANÇOIS said that all he could do was to study the question and see whether he could propose something the following year.

55. The CHAIRMAN suggested that the Commission might perhaps put forward a recommendation.

56. Mr. SPIROPOULOS thought the Commission was engaged in codification and not in the drafting of a convention. Recommendations could not be included in a codification. The Commission would remember that the Hague Conference of 1930 had failed to reach agreement on the extent of the territorial sea. In the present case where it had nothing to work on, how could the Commission establish principles on the mode of

¹ International Law Association, *Report of the Forty-fourth Conference*, Copenhagen, 1950, p. 125.

² International Law Association, *Report of the Forty-fourth Conference*, Copenhagen, 1950, p. 135, sub-para. (3).

³ S. Whittemore Boggs, *Delimitation of the territorial sea*, pp. 541-555.

measuring the continental shelf, etc. ? Such a proceeding would be pure legal speculation which would jeopardize the whole of the Commission's work.

The Commission decided to omit question 7.

Question 8

57. The CHAIRMAN read out the text of question 8: "Do works and installations established in the waters in question for working the soil have territorial waters of their own? If not, may special safety zones be claimed for them?"

58. Mr. FRANÇOIS read out paragraphs (4) and (5) of the report previously mentioned (para. 39 above):

(4) The coastal State which is erecting or has erected any installation of the description referred to in I (5) above, being an installation which reaches above sea-level, should be entitled to exercise over a limited portion of the waters above the continental shelf such control and jurisdiction as is required for the protection of such installation, but no such installation should of itself be considered as an "island" or an "elevation of the sea bed" for the purposes of international law. Such limited portions of the high seas above the continental shelf should be referred to as "safety zones".

(5) Each safety zone should normally be defined by a circle with a radius of 500 metres around the installation in question."

That text denied by implication that such installations had territorial waters of their own, and quite rightly so; on the other hand, the States concerned needed to be able to take certain precautions in respect of a certain area so as to prevent ships from damaging the installations. A safety zone of 500 metres around such installations was quite acceptable.

59. Mr. SANDSTRÖM thought that the establishment of such a zone was inherent in the right of control granted to the littoral State. That, he thought, was obvious, and there was no need to give a ruling on the point.

60. Mr. FRANÇOIS pointed out that the Commission had not recognized any right of control and jurisdiction above the continental shelf; some provision must therefore be made.

61. Mr. HUDSON considered that the answer to the first part of question 8 should be in the negative, and the answer to the second part in the affirmative. There were territorial waters around the coasts of a State, but installations established in the waters were temporary and should not have territorial waters. All that was necessary was to make provision for safety measures.

62. Mr. el-KHOURY cited the solution adopted in Moslem law. A well dug in the desert enjoyed an easement. It was forbidden to dig another well within a radius of 300 metres. He thought that an affirmative answer should be given to the second part of the question so as to ensure the safety of such installations and prevent competition. Delimitation of the safety zone was a matter for experts.

63. The CHAIRMAN asked whether the Commission was agreed to reply in the negative to the first part of

the question and in the affirmative to the second part without seeking to decide, in other terms, whether it was agreed merely to accept the principle.

It was so agreed.

Question 9

64. The CHAIRMAN read out the text of question 9. "To what extent can there be any question in this connexion of rights already recognized under existing international law?"

65. Mr. FRANÇOIS said that the Commission had already answered that question by accepting the formula submitted by Mr. Brierly, according to which the international right of control and jurisdiction of the littoral State existed *ipso jure*.

66. Mr. BRIERLY disagreed. He thought that the question of the continental shelf was a matter which concerned the development of international law, and he had submitted his formula in the hope that it might serve as a basis for a right to be determined later.

67. Mr. HUDSON considered that the Rapporteur had all the data he needed for drafting his text, and that there was no point in discussing those questions.

68. Mr. FRANÇOIS observed that, after the explanation furnished by Mr. Brierly, the two sections of the Commission were not so far apart.

69. Mr. el-KHOURY explained that, in voting for the text containing the words "*ipso jure*", he had thought, not that the Commission was confirming existing law, but that it was indicating what the law should be and that it would be preferable to grant such control and jurisdiction to the littoral State. It was a question, in his opinion, of making a recommendation.

70. Mr. AMADO stated that international law arose from custom and agreement. Custom evolved. The point to be established was whether a declaration created custom. The Commission should note that such or such a rule already existed in custom. If it could not do so, it should merely note the evolution of international law.

71. Mr. YEPES thought, on the contrary, that the Commission should create law. Otherwise there would never be any progress.

72. The CHAIRMAN pointed out that if Napoleon had clung to the attitude adopted by Mr. Amado, they would never have had a civil code. Codification was not just compilation. It could also abolish or create law.

73. Mr. AMADO thought that what was true in the case of the codification of municipal law was not necessarily true in respect of the codification of international law.

74. Mr. el-KHOURY drew the Commission's attention to a passage in article 15 of its statute, in which it was stated that "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." The General Assembly was expecting the Commission to do something. The Commission should

not merely record existing law—it could also create law.

75. Mr. KERNO (Assistant Secretary-General) wished to make a friendly protest against Mr. Amado's view that the Commission had no authority. The Commission was an important United Nations body, consisting of fifteen members "who shall be persons of recognized competence in international law" (article 2 of the Statute).

76. Mr. AMADO protested in his turn. He had said that, in his opinion, international law was made up of custom and agreement and could not be created out of scientific opinions. He wished to state that he was full of respect for the United Nations and the Commission.

77. Mr. YEPES asked whether he could take it that the proposal⁴ he had submitted at the previous meeting had been adopted.

78. The CHAIRMAN was under the impression that by its decision at the previous meeting the Commission had adopted Mr. Yepes' proposal by implication.

79. Mr. HUDSON was of the opinion that the Commission had not adopted the proposal, but had merely given an affirmative answer to a question on the same subject. He himself had expressed the view that the proposal in question should be clarified. The Commission was in fact dealing solely with the sea bed and its subsoil. He personally agreed with Mr. Yepes.

80. The CHAIRMAN asked whether any member had further questions to raise, particularly on the subject of contiguous zones.

81. Mr. FRANÇOIS pointed out that the Commission had merely accepted the existence of submarine areas outside territorial waters. It was difficult to go further in the matter. He thought that the Commission need not go into greater detail.

82. The CHAIRMAN recalled that, in connexion with section 21 of the report, it had been decided to pass over the following three questions:

- a. Sedentary fisheries
- b. Installations on the high seas
- c. Subsoil of the high seas,

on the understanding that it might revert to them after discussion of the continental shelf. The Commission had therefore not defined its attitude on those subjects.

83. Mr. HUDSON thought that the Commission had defined its attitude with regard to sedentary fisheries and installations on the high seas, and that the only question to which the Commission had decided to revert was sub-paragraph (c) (subsoil of the high seas). There was no reason, in his view, to take a decision with regard to the sea bed of the high seas.

84. Mr. FRANÇOIS pointed out that, once the principle of the existence of rights over the continental shelf had been adopted, those questions lost some of their importance.

85. Mr. BRIERLY pointed out that the Commission had decided to revert to section 20 after examining the question of the continental shelf.

86. Mr. FRANÇOIS considered that to some extent the Commission had taken a decision by stating in connexion with the right of control and jurisdiction of the sea bed and subsoil of the submarine areas outside territorial waters, that it: "... must not substantially affect..." The provision applied to contiguous zones since it was not limited to the continental shelf. By implication, the Commission had recognized the existence of contiguous zones.

87. Mr. HUDSON could not accept that interpretation. He thought that the Commission's decision related solely to the sea bed and subsoil. Contiguous zones only concerned the waters. He recalled that a United States law of 1790 had instituted a contiguous zone for the surface of the actual waters. The Commission might define its attitude on that point.

88. Mr. AMADO thought that the contiguous zone related to certain administrative prerogatives of States. Over territorial waters, the State had complete sovereignty. In the contiguous zone, the State merely exercised certain fiscal, customs or sanitary activities. The contiguous zones were distinguished from the territorial waters in that they belonged to the high seas. He thought that the Commission should say: "A sovereign State may exercise specific administrative powers beyond the limit of its territorial waters in order to protect its fiscal or customs interests."⁵ When the United States had gone over to prohibition the contiguous zone had assumed tremendous importance. The United States had wished to protect itself against the smuggling of alcoholic beverages.

89. Mr. BRIERLY considered that the question differed from that of rights over the contiguous zone. The latter was chiefly concerned with the protection of fishing, and was taken in that sense in President Truman's second proclamation of 1945 in which he claimed the right to protect fishing in the contiguous zone.

90. Mr. AMADO pointed out that, in issuing his proclamation concerning the continental shelf, President Truman had laid down the principle that the United States was entitled to exercise control and jurisdiction over a part of the high seas, though he had explained that he did not seek to infringe navigation and fishing rights.

91. Mr. HUDSON read out the final passage of Mr. Truman's proclamation concerning fishing:

"In view of the pressing need for conservation and protection of fishery resources, the Government of the United States regards it as proper to establish conservation zones in those areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been or in the future may be developed and maintained on a substantial scale. Where such activities have been or shall hereafter be developed and maintained by its nationals alone, the United States regards it as proper to establish explicitly bounded conservation zones in which fishing activities shall be subject to the regulation and control

⁴ See 68th meeting, para. 20 a.

⁵ See 64th meeting, footnote 1, para. 5.

of the United States. Where such activities have been or shall hereafter be legitimately developed and maintained jointly by nationals of the United States and nationals of other States, explicitly bounded conservation zones may be established under agreements between the United States and such other States; and all fishing activities in such zones shall be subject to regulation and control as provided in such agreements. The right of any State to establish conservation zones off its shores in accordance with the above principles is conceded, provided that corresponding recognition is given to any fishing interests of nationals of the United States which may exist in such areas. The character as high seas of the areas in which such conservation zones are established and the right to their free and unimpeded navigation are in no way thus affected."

91 a. The proclamation, he continued, applied to the zones contiguous to the United States. Those were the zones referred to in paragraph 20 of Mr. François' report. They were the zones in which a State could take measures normally relating to its fiscal, customs and sanitary protection. President Truman's proclamation, however, related to the conservation of fish in those waters, and to that end established certain rules applicable to vessels flying the United States flag.

92. Mr. FRANÇOIS observed that the term "contiguous zone" had been used by The Hague Codification Conference in 1930, but the questions dealt with at that time in connexion with the contiguous zone did not include the conservation of fish.⁶ He thought it difficult at that stage to consider the contiguous zone and the area referred to in President Truman's proclamation as being identical.

93. Mr. SPIROPOULOS thought that, judging by the text of the proclamation read out by Mr. Hudson, the question it dealt with had nothing to do with that of the contiguous zone. The proclamation dealt with the conservation and protection of fish. Furthermore, the proclamation even contained a reference to the high seas. The interesting point about President Truman's proclamation was that it laid down rules concerning fisheries which applied solely to United States nationals. A government's right to control its own nationals was fully acceptable; furthermore, President Truman did not claim the right to exercise any control over foreigners, but envisaged the conclusion of agreements on the subject with States concerned. There was therefore no question of claiming special rights. However that might be, the subject dealt with in President Truman's proclamation had, he felt, no connexion with the question of the contiguous zone.

94. Mr. AMADO thought that the Commission might leave the Rapporteur free to examine the problem and to submit fresh conclusions the following year. The Rapporteur should be enlightened by the views expressed during the discussion.

95. Mr. HUDSON pointed out in reply that the Commission had not defined its attitude on section 20 of

the report. At a previous meeting, it had decided to leave the question in abeyance, and to consider it a later stage, after examining the paragraph concerning the continental shelf. So far, it had not resumed consideration of paragraph 20.

96. Mr. AMADO asked Mr. Hudson whether he intended to submit a proposal.

97. Mr. HUDSON replied that he would like to propose the following text.

"A littoral State may exercise its fiscal, customs and sanitary laws on a region of the high seas extending to a limited distance outside its territorial waters."

He would put his proposal in writing for subsequent distribution to the Commission. He could not say what limit might be fixed for that area. It might be ten, fifteen or twenty nautical miles.

97 a. His proposal, moreover, did not apply to the question he had mentioned earlier concerning the right of States to adopt measures for the protection and conservation of fish. That question had already been dealt with by The Hague Conference of 1930 and more recently by a conference of South Pacific countries held in the Philippines. It was important not to confuse the two questions arising at that stage; firstly, the question of the contiguous zone, and secondly, the entirely separate question of fish protection and conservation. He thought that the proposal concerning the first of those questions as roughly drafted by himself would doubtless be accepted by Mr. Amado.

98. Mr. BRIERLY asked whether Mr. Hudson's suggestion concerning the protection and conservation of fisheries related solely to the contiguous zone.

99. Mr. HUDSON replied that, judging by the measures taken in the United States, the zone under consideration was a larger one. The United States had asked foreign vessels fishing in the areas south of Newfoundland to take measures for fisheries conservation and protection and had suggested the conclusion of agreements on the subject.

100. Mr. BRIERLY observed that the case in point represented a complete innovation. Nevertheless, while it did not relate, he thought, to the contiguous zone as hitherto conceived, it did relate to a contiguous zone.

101. The CHAIRMAN noted that Mr. Hudson's proposal tacitly implied the recognition of contiguous zones.

102. Mr. FRANÇOIS considered that the proposal was a very useful one, and in keeping with the principle unanimously agreed by The Hague Conference. That principle should also be formulated by the Commission. He noted that the proposal did not mention control of fishing, which was a different matter. He proposed the adoption without discussion of Mr. Hudson's proposal in the form read out by the Chairman.

103. Mr. el-KHOURY accepted the proposed text as a principle. It represented a first step in the direction of the development of international law in the matter of the protection of marine resources against all forms of unrestrained exploitation. It should be inserted in the report.

⁶ See A/CN.4/17, para. 92 (printed text), p. 30 (mimeographed English text).

104. Mr. SPIROPOULOS felt that there was nothing new in the proposal, but that it was very skilfully formulated. He questioned the desirability of retaining the word "limited", which was too vague.

105. The CHAIRMAN thought it necessary to avoid giving the impression that the area might be unlimited. The word "limited" should therefore be maintained. He asked Mr. Hudson whether he wished to go further and specify a limit.

106. Mr. HUDSON said he had not wished to establish a precise rule; his proposal was intended to serve as a guide to the Rapporteur in his consideration of the problem.

107. Mr. KERNO (Assistant Secretary-General) felt that certain members of the Commission had misgivings with regard to fisheries and fish protection, and felt that the latter question was quite unrelated to that of the contiguous zone.

108. Mr. FRANÇOIS thought that was true, particularly so far as President Truman's proclamation was concerned. But there were other proclamations, such as, for example, that of the Government of Chile, in which the latter "confirms and proclaims its national sovereignty over the seas adjacent to its coasts whatever may be their depths, and within those limits necessary in order to reserve, protect, preserve and exploit the natural resources of whatever nature found on, within and below the said seas, placing within the control of the Government especially all fisheries and whaling activities with the object of preventing the exploitation of natural riches of this kind to the detriment of the inhabitants of Chile and to prevent the spoiling or destruction of the said riches to the detriment of the country and the American continent". That proclamation, he continued, went much further than that of President Truman and applied to a much wider area.

109. The CHAIRMAN said he thought it essential for the Commission to define its attitude in face of a proclamation of that kind.

110. Mr. CORDOVA thought that the Chilean proclamation related primarily to an extension of Chile's territorial waters since it claimed sovereignty over the seas it mentioned. It was therefore not a matter of a contiguous zone.

111. Mr. BRIERLY said Mr. Córdova was right. The Chilean proclamation represented a claim to extend the country's territorial waters to a very large area.

112. The CHAIRMAN thought that the Commission could not countenance such a claim.

113. Mr. CORDOVA asked Mr. François whether the proclamation by Chile actually claimed sovereignty over all the waters adjacent to its territory.

114. Mr. FRANÇOIS replied in the affirmative. Chile had, however, herself fixed the limit at a distance of 200 nautical miles from her shores. Further, Chile did not claim sovereignty for all purposes, but solely for the purpose of protecting natural riches so as to prevent their being spoiled or destroyed to the detriment of the country and the American continent. The Chilean proclamation related solely to that precise point.

115. Mr. HUDSON pointed out that the Chilean proclamation comprised several paragraphs. The first paragraph proclaimed the national sovereignty of Chile over all the continental shelf adjacent to the continental and island coasts of Chilean territory. The second proclaimed the sovereignty of Chile over the seas adjacent to its coasts for the purpose of preserving the natural resources found on, within or below the waters. The third established immediately the demarcation line of the protection zone which it fixed at 200 nautical miles from the coasts, with the reservation that it might be amplified or modified at a later date to conform with the progress of knowledge, the interests of Chile, etc. The fourth stated that the proclamation in no way disregarded the similar legitimate rights of other States and did not affect the rights of free navigation on the high seas. It did not therefore represent a mere proclamation of full rights of sovereignty.

116. Mr. CORDOVA thought that the Commission had been agreed to formulate a principle concerning the protection of fishing and fish. He asked the Rapporteur whether he thought it possible to provide for a principle for the protection of certain species of fish. Littoral countries were extremely interested in the protection and conservation of those species which represented a source of income and food for their peoples. He thought that the Rapporteur would be able to draft a text which would take into account, not only the protection of fish, but also the problem of the police rights which could and should be exercised by littoral States. Such a text might form the basis for future international regulations.

117. Mr. HUDSON thought that President Truman's proclamation represented a better solution than that adopted by Chile, since it provided for the regulation of fisheries on the basis of agreements concluded between the countries engaging in fishing. Of course, if a country was unwilling to conclude such an agreement, nothing could be done about it.

118. Mr. FRANÇOIS thought the difficulty in practice would be precisely that of obtaining the consent of all the countries engaged in the fishing operations. That solution was therefore not a very effective one.

119. The CHAIRMAN thought the Commission might provide that, in the contiguous zone, the protection of fisheries could be carried out by the littoral States but that the question of the right of policing fishing on the high seas should be settled by means of agreements concluded between the States concerned.

120. Mr. FRANÇOIS pointed out that The Hague Conference of 1930 had not even discussed the establishment of a contiguous zone within which fishing rights would be regulated by the littoral State, because its Preparatory Committee had concluded that it would not be possible to reach agreement on the subject.

121. Mr. CORDOVA said that the Food and Agriculture Organization was also concerned with the question of fish protection. He suggested that the Rapporteur might study the Food and Agriculture Organization's activities in that field, and give the Commission his views on the subject next year. His personal view was

that, at the present stage, it would be premature to decide whether or no the littoral State had any rights in the matter.

122. Mr. FRANÇOIS said that he would try to do as Mr. Córdova suggested. It would, however, be very useful for him to have the views of other members of the Commission, so as to ensure that next year he did not submit a proposal on which the Commission could not agree, as had happened in 1930 at The Hague.

123. Mr. CORDOVA replied that the 1930 Conference had been a conference of government delegates who had been obliged to act in accordance with their instructions. Their failure to reach agreement did not mean that the Commission, which was composed of non-governmental experts, would not succeed in so doing.

124. The CHAIRMAN thought provision might be made for the establishment of two zones. In the first, the right of police and control would be exercised by the littoral State. In the second and wider zone, the exercise of control would be regulated by international agreements.

125. Mr. FRANÇOIS was afraid that making provision for the establishment of a second zone of that kind would not lead to the desired results. It would be precisely the countries which fished indiscriminately that would be unwilling to conclude agreements. In his view, it would be advisable to delimit a contiguous zone in which the littoral States would have certain rights under certain conditions and subject to certain reservations.

126. The CHAIRMAN asked Mr. François whether it was an extensive zone that he had in mind.

127. Mr. FRANÇOIS replied in the affirmative. He thought that such a zone might be delimited by an international body of experts.

128. Mr. KERNO (Assistant Secretary-General) thought that the Commission should be clear as to its intentions. It had decided that a littoral State could exercise fiscal, customs and sanitary control in a limited area of the high seas up to a certain distance outside its territorial waters. In the case of fish conservation, protection could not be limited to a certain zone. Mr. Córdova had asked the Commission to enunciate the principle that fish should be protected and conserved and to say how and to what extent such conservation could be ensured. Such conservation would probably be best ensured by the littoral State adjacent to the areas in question. He thought that to be the sense of the Commission's discussion, and those were the questions it wished to submit to the Rapporteur.

129. The CHAIRMAN agreed with Mr. Kern. He added that, in his view, the zone should be limited.

130. Mr. CORDOVA thought it essential to lay down a limit but felt that the Commission was not in a position to fix one. What were the waters in which certain fish were found? Where were the fish banks? Those waters were usually near the coasts, at places where the sea was not too deep. But the Commission was totally uninformed on such subjects. It should there-

fore wait until the Rapporteur supplied it with information so that it could reach a decision with full knowledge of the facts.

131. Mr. el-KHOURY noted that Mr. Hudson's proposal related solely to fiscal, customs and sanitary control, which could be exercised on the high seas within a certain distance of the territorial waters of a State. In that respect, two possibilities needed to be considered: either the distance was uniform for all States and all coasts; or the distance could vary from case to case. Coasts were not always the same, nor was the depth of the waters off the coasts. In present circumstances he thought it impossible for the Commission to continue the discussion. It should wait until the Rapporteur supplied it with fresh information concerning the limits laid down by the various States.

131 a. As for the control of fishing, the Commission should not make a distinction between the contiguous zone and the high seas. The question of fishing was entirely separate from that of fiscal, customs and sanitary control. He thought that, for the time being, the question of fish protection should be left in abeyance, owing to the absence of precise data on which the Commission might base its conclusions.

131 b. Asked by Mr. François whether he had declared in favour of freedom of fishing, and against measures of fish conservation and protection, he replied that he had merely meant that in his view no distinction should be drawn between fishing in the contiguous zone and fishing on the high seas.

132. Mr. FRANÇOIS said that fish protection measures were particularly necessary near the coasts. The waters near the coasts contained the young fish, and that was why protection was required. At the present time, there were no rules of international law on the subject.

133. Mr. HUDSON mentioned the Convention of 8 February 1949 establishing an International North-West Atlantic Fisheries Commission.

134. Mr. FRANÇOIS observed that in the case of that convention, protective measures would only be compulsory for the contracting States.

135. Mr. CORDOVA pointed out that it was usual for States to protect their commercial interests, but fish protection and conservation both in the coastal areas and on the high seas were of the greatest importance to humanity. Such measures had been necessary for the protection of seals and whales. Without such regulations, those species would have been doomed to early extinction. He thought it desirable to grant littoral States special rights for the protection of fish near the coasts, having regard to their particular interests, but the problem must also be studied from the general standpoint of the interests of humanity.

136. Mr. SPIROPOULOS thought the Commission should be careful not to confuse its two tasks—namely, the codification of international law and the progressive development of international law. The Commission's main task was codification, which must always relate to the law in force. It was, of course, sometimes possible to fill in gaps in existing law and even to pro-

mote the progress of law. As for the protection of humanity's major interests—that, he thought, could not be ensured by international codification. The Commission was dealing with the protection of mariner sources and particularly with the conservation of fish. In his view, such protection was a matter to be dealt with under the administrative law of the various countries concerned, and the Commission had no power to carry out codification work in that field. He did not dispute the need for protecting certain of humanity's interests, but if the Commission tried to ensure such protection, its reports and draft codes would be encumbered with a plethora of detailed provisions, with the sole result that they would become unacceptable for governments precisely because of the accumulation of rules they contained.

136 a. The Commission was at that moment discussing the proclamations of President Truman and the Government of Chile. Could it accept President Truman's suggestions? Was it prepared to agree to the limit of 200 nautical miles claimed by Chile for its protection zone? The Commission, he thought, could not accept such rules as standards of international law for the protection of particular interests.

137. Mr. HSU reminded Mr. Spiropoulos of the terms of article 23 of the Commission's Statute. He asked why that article had been included if the purpose had not been to enable the Commission to fill in gaps in existing international law, to develop international law and to see whether and to what extent such development was acceptable. Article 23 had been given its present wording precisely because the Commission had a task of a very varied nature. It even enjoyed the right to recommend the General Assembly to convoke a conference to conclude a convention based on texts drawn up by the Commission. He therefore did not share the fears of Mr. Spiropoulos. There was no danger in the Commission's wishing to take action in another field. The Commission's task was to examine the subject and try to reach the best possible results.

138. Mr. SANDSTRÖM agreed with Mr. Spiropoulos' view that a particular code should not be a conglomeration of miscellaneous ingredients and particularly of administrative details. In the present instance, it was not the Commission's task to lay down protective measures, which were a matter for administrative decision, but to decide whether there was a right to adopt such measures and how far that right extended.

139. Mr. KERO (Assistant Secretary-General) pointed out that, in pursuing its work of codification, the Commission should make a distinction between (1) zones for the protection of marine resources, and (2) zones of fiscal, customs and sanitary control. A large number of countries had found themselves insufficiently protected by territorial waters in fiscal, statute customs and sanitary matters and there was therefore "extensive State practice" in the matter of the contiguous zone.

139 a. Thus, in adopting Mr. Hudson's proposal, the Commission had carried out a task of codification proper. In the case of fish protection, the situation was

different, and the Commission was faced instead with a question of progressive development. The Rapporteur could therefore examine the question and make suggestions the following year. One point to be established was whether littoral States should be given a kind of "trustee" role which they would perform in the general interest. It should be added that, in principle, the need for the protection of marine resources was felt everywhere, even outside a "contiguous" zone.

140. The CHAIRMAN shared Mr. Spiropoulos' view that the Commission should not go into too much detail. But in the present instance the questions before them were far from matters of detail. The Commission was enquiring into the extent of the competence of States in the matter of fishery control. The Commission was not exceeding its functions in seeking to establish and delimit the right of control which countries could exercise in the matter of fish protection and conservation. That was a point of prime importance on which it should define its attitude.

141. Mr. FRANÇOIS thought that the discussion they had just had would provide him with sufficient data from which to draw up his report for the following year.

142. The CHAIRMAN concluded by saying that at its next session the Commission would attempt, on the basis of Mr. François' further report, to discover a formula defining the rules concerning the competence of littoral States in the matter of fish protection and conservation in the waters of the contiguous zone and the high seas, on the understanding that provision would have to be made for a limit within which such right of protection could be exercised.

The CHAIRMAN declared the general discussion on Mr. François's report closed, and agreed that the Commission should take up consideration of his report at the next meeting.

The meeting rose at 5.55 p.m.

70th MEETING

Tuesday, 18 July 1950, at 10 a.m.

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Chairman: Mr. A. E. F. SANDSTRÖM.

Rapporteur: Mr. Ricardo J. ALFARO.

Present: .

Members: Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. Roberto CORDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris el-

KHOURY, 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).

Arbitral Procedure: report by Mr. Scelle (item 6 of the agenda) (A/CN.4/18)

The CHAIRMAN called upon the special rapporteur to submit his report.

GENERAL COMMENTS

1. Mr. SCELLE, commenting on his report, explained that he had confined his investigations to arbitration between States, or inter-governmental arbitration, in other words, arbitration in the sense of Article 37 of The Hague Convention of 1907 on the pacific settlement of international disputes, which had for its object "the settlement of disputes between States by Judges of their own choice and on the basis of respect for law". In the latter connexion he had been obliged to abandon the purely legal conception in order not to eliminate the *amiable compositeur*. Judgment *ex aequo et bono* was included in the definition under Article 37 because the arbitrator then passed judgment by analogy and on the basis of respect for law. On the other hand, the *amiable compositeur* often acted contrary to law. But arbitration and friendly settlement were traditionally taken together and he had followed that principle in his report.

1 a. His task was facilitated by the fact that the ground had already been largely covered. Codification in this field had begun as long ago as 1899 and 1907. The main difficulty was to define custom, since it varied. The General Assembly of the United Nations, at its 1949 session, had renewed and revised the General Act of Arbitration, which provided a basis for codification. He had kept as closely as possible to previous works and borrowed a wide variety of procedures already adopted.

2. Mr. HUDSON said he regarded the General Act of Arbitration of 1928 as the most important, adding that it had been ratified by a number of States, whereas the revised General Act had only been ratified by one State.

3. Mr. SCELLE, referring to innovations, said that arbitration as conceived in earlier attempts at codification left almost complete freedom to the parties. While a solution was offered, none was imposed except where an agreed undertaking existed. It might be observed that the "effectiveness" of arbitration procedure was always uncertain, since there were always plenty of loopholes. States apparently regretted having accepted arbitration and sought to evade their obligations. The report was designed to find methods of forcing Governments to observe the obligation to resort to arbitration and to implement arbitral awards. A prominent position was given in many texts concerning arbitration to the intervention of politicians and to political objectives.

Arbitration should be "depolitized" and "jurisdictionalized". Normally, when a court of arbitration was set up, politicians were appointed to serve on it. In a recent case the Secretary-General of the United Nations had been called upon. He was opposed to such procedure, and thought the proper course would be to appeal to the President of the International Court of Justice.

3 a. He had thought it necessary to submit directly a number of texts the central idea of which might be adopted by the Commission. This preliminary draft was subdivided into 16 paragraphs, each of which dealt with a particular point.

4. Mr. HUDSON agreed with the method of work outlined by the Rapporteur.

Paragraph I of the proposed draft text

5. Mr. SCELLE said that the acceptance of a compromissory undertaking, on whatever grounds, created a new legal situation. Arbitration was founded on the undertaking by States to settle an existing dispute or any future dispute in such a way as to ensure that no disagreement on a specific subject remained between them. Such an undertaking laid an absolute obligation on States in international jurisprudence. It was not a contractual obligation, but a legal principle which they should not be able to evade. It was a new rule in law which was legally valid. Such undertakings might be extremely varied in origin. There might be a special or concrete undertaking, or an abstract undertaking on a series of questions. They might be embodied in general or special treaties; or again, they might be based on an exchange of letters, or even be purely verbal. But of all methods the solemn instrument was the best.

5 a. The compromissory clause was designed to remove a cause of friction in the legal relations between States by introducing a judge to propound the law and to make a compulsory award. Two difficulties had to be faced in examining this problem. Firstly, there was the question of the designation or the "arbitrability" of the dispute. It had to be ascertained whether a dispute was covered by the undertaking given by both States to resort to arbitration, and the undertaking concerned might be either abstract or concrete. The nature of the dispute might itself be in dispute. Then someone must arbitrate between the States and decide whether the dispute was covered by the treaty. In that respect the field was not clear, since the problem had already been raised in the treaties of arbitration concluded by the United States in 1911 and 1913. That was a point which his report had omitted to deal with. The question had been studied by two United States Secretaries of State, Messrs. Bryan and Knox, who had suggested the use in such cases of commissions of inquiry responsible for examining the nature of the dispute and deciding whether there was an obligation to resort to arbitration, in other words, to decide a question of fact and interpretation. But that was somewhat outside the scope of an ordinary commission of inquiry, since it entailed actual pre-arbitration or the settlement of a legal question by the commission of inquiry concerned. He would

prefer to entrust such a task to a legal rather than a political organ. That conception had not yet emerged when the treaties of 1911 and 1913 were concluded and Messrs. Bryan and Knox put their idea into practice. He would like to go a little further and say that the question should be settled by a judge and that that was an absolute obligation. In 1911 they had not dared to go as far as that. A commission of six members had been set up and its decision, to have binding force, had to be voted by five members. If the same verdict was returned by five members, including four nationals, there was obviously no doubt about the question. But he thought the matter should be referred to the International Court of Justice for a decision binding on the parties. That could be done by means of summary procedure and direct application. He suggested the conclusion of a convention under which States would undertake to submit such questions to the International Court of Justice by direct application. Since the more diligent party would be the one to petition the Court, one party might compel the other to submit the quarrel as to the arbitrability of the dispute to the Court.

5 b. For the sake of preserving the essence of the arbitration procedure—namely, its superior flexibility as compared with jurisdictional procedure—he would agree that the method of settling this preliminary question might be left to the parties. This he had stated in the interpolation at the end of the second sub-paragraph of paragraph I of the proposed preliminary draft text, on page 93 of his report: “(except where the parties to the dispute have expressly agreed on a different procedure for deciding this preliminary question)”. But it would be more in accordance with the spirit of arbitration to state that the International Court of Justice already had coercive competence. The preliminary draft text on page 93 contained the ideas he had just outlined: “the compromissory clause or undertaking to have recourse to arbitration may apply to questions which may arise eventually or to questions already existing”. Thereafter he had merely reproduced the text of Article 39 of the 1907 Convention: “Whatever the instrument or agreement on which it is based, the clause is strictly obligatory and must be implemented in good faith”. That point must be stressed. “In the event of dispute as to whether this obligation exists, the matter shall be referred to the International Court of Justice by a direct application submitted by the more diligent party, and the International Court of Justice shall pronounce final and binding judgment on the arbitrability of the dispute in a Chamber of Summary Procedure and in application, in particular, of Articles 29 and 41 of its Statute (except where the parties to the dispute have expressly agreed on a different procedure for deciding this preliminary question)”. As could be seen, the text might be subdivided.

6. Mr. HUDSON said he had examined the first paragraph of the preliminary draft text and was somewhat disconcerted at the juxtaposition of the compromissory clause and the undertaking to have recourse to arbitration. The compromissory clause was the undertaking to resort to arbitration in a special case and did not, he thought, appear in treaties of arbitration. In his view,

the true distinction was that between provisions concerning disputes in general and those concerning specific disputes.

6 a. He recalled the difficulties which had arisen in connexion with declarations made under article 36, paragraph 2, of the Statute of the Court, because certain declarations referred only to future disputes, while others referred to dispute which had arisen after a certain date. It was frequently difficult to determine the exact date when a particular dispute had arisen.

6 b. The second sentence of the first sub-paragraph of paragraph I had his full support. With regard to the second sub-paragraph, he asked whether the introductory words “In the event of disputes as to whether this obligation exists”, accurately represented the Rapporteur’s views. The English text of the footnote to paragraph 15 of the report—the sense of which, in his view, differed from that of the French text—ran:

“Article III . . . It is further agreed, however, that in cases in which the parties disagree as to whether or not a difference is subject to arbitration under Article I of this Treaty, that question shall be submitted to the joint high commission of inquiry; and if all or all but one of the members of the commission agree and report that such difference is within the scope of Article I, it shall be referred to arbitration in accordance with the provisions of this Treaty”.

He thought that was a more concise rendering of what the Rapporteur wished to say. The question was not whether the obligation existed or not, but whether it applied to a particular dispute. He thought the text should be reworded along the lines of Article III.

6 c. With regard to the terms used, he considered that “questions” should be replaced by “disputes” in the English text. The word “direct” before “application” was unnecessary and the phrase “the more diligent party” might be replaced by “one of the parties”. Further, there was no need to state that the judgment would be “final and binding” since every decision of the Court was final. So far as “arbitrability” was concerned, he thought the term rather vague. The question was whether the dispute belonged to the category of disputes to which the treaty of arbitration applied.

6 d. In his view the reference to articles 29 and 41 of the Statute of the International Court of Justice was open to question. Article 29 merely provided for the creation of a Chamber of Summary Procedure which had existed since 1922. Article 41 dealt with measures of conservation and he failed to see its application to the question under discussion. Its actual words were: “The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party”. That was not the situation which the report envisaged here. The Rapporteur might perhaps be prepared to consider the deletion of the phrase: “and in application, in particular, of Articles 29 and 41 of its Statute”. In conclusion, he warmly welcomed the principle behind the last sub-paragraph.

7. Mr. LIANG (Secretary to the Commission) refer-

ring to certain inaccuracies in the English text of the report, said that the translation had been done very hurriedly because the report had been received rather late. As an example, the phrase "questions which may arise eventually", on page 14 of the mimeographed English text, was an incorrect rendering of the corresponding French phrase "contestations éventuelles" and should be replaced by "questions which may possibly arise". Similarly, the rendering of "question préjudicielle" by "pre-judicial question" might give rise to misunderstandings.

8. Mr. SCELLE fully agreed with Mr. Hudson except with regard to his observation on articles 29 and 41 of the Statute of the International Court of Justice, and there he thought he differed from Mr. Hudson mainly in the matter of terminology. He had borrowed the rather special terms of procedural jargon as used in the French courts, which sometimes differed from that used in English courts. The addition of the word "direct" to "application" was unnecessary; but it was the normal practice in French. So far as the "final and binding" judgment was concerned, he had used the expression because at a later stage in his report he expressed the view that the arbitral judgment should not be regarded as final and binding. He had intended to show that the decision on the arbitrability of a dispute should be immediate and final.

9. Mr. HUDSON observed that the Court was bound by its Statute, article 61 of which stated that application might be made for the revision of any judgment, whereas article 60 stated that "the judgment is final and without appeal".

10. Mr. SCELLE said that he did not dream of modifying article 61, and that he had used the terms of article 60.

11. Mr. HUDSON accepted the repetition of the words "final and binding", but said that the provisions of article 61 could not be evaded.

12. Mr. SCELLE had alluded to article 29 to show that the Chamber of Summary Procedure was referred to; but he was prepared merely to insert a note "see Articles 29 and 41 of the Statute". He would repeat that the text before the Commission was not final. His intention was to indicate that resort to the Chamber of Summary Procedure was obligatory. The position was different with regard to article 41. He was well aware that the latter applied only when a case was pending; but the Statute required broadening to some extent. He thought his proposal was valuable, however bold it might be. If one of the parties to a dispute intended to evade arbitration, he could kill the suit by changing its nature. A State might claim that it was not obliged to resort to arbitration, but it might also decide to act in such a way as to eliminate the suit.

13. Mr. YEPES asked the Rapporteur whether it was his view that the Court could adopt measures of conservation before taking a decision on the arbitrability of a dispute.

14. Mr. SCELLE replied in the affirmative.

15. Mr. YEPES thought that should be brought out more clearly in the text.

16. Mr. SPIROPOULOS, referring briefly to the question of method, asked whether the Commission, which had before it a text and proposals occupying 6-8 pages, intended to discuss the latter in a general way or to make a detailed study. For the time being only the guiding principles of Mr. Scelle's report should be discussed. The criticism of words here and there would only be of limited use. He thought that discussion should be limited to the guiding principles of the draft. The main point was whether, in the event of a divergence of views on arbitrability, the question could be settled by the arbitral tribunal or should be submitted to the International Court of Justice. Mr. Hudson had rightly asked what was to be understood by arbitrability. The question was that of the entering of a demurrer or a plea in bar by one of the parties which claimed that the Court had no competence.

17. Mr. SCELLE disagreed. At that stage there was merely an undertaking to resort to arbitration; but the Court had not been formed, so that it could not be claimed that it was not competent. The only point in dispute was whether the parties were bound by a bare undertaking, that was to say, an abstract undertaking to submit any one of a more or less wide range of questions to arbitration. The question of arbitrability would arise where a dispute occurred and one of the parties maintained that it was not covered by the undertaking.

18. Mr. SPIROPOULOS asked whether abstract undertakings of that type existed.

19. Mr. SCELLE replied that all special or general treaties of arbitration were abstract undertakings. The compromissory clause was an abstract undertaking because, when it was accepted, the circumstances of any future dispute were unknown.

20. Mr. SPIROPOULOS said he was acquainted with many treaties of arbitration all of which, when referring to arbitration, indicated the procedure to be adopted. He had never seen a convention which did not contain such an indication, even if only in the form of a reference to the Hague Convention of 1907. Assuming that there was a very general provision on arbitration, he asked who would be competent to settle the question of arbitrability.

21. Mr. SCELLE replied that no one would be competent if no provision as to competence existed. That was why the treaties signed by Messrs. Bryan and Knox had provided for commissions of inquiry, a procedure stipulated in over a hundred treaties concluded between the United States of America and other States.

22. Mr. SPIROPOULOS asked whether it was not the Rapporteur's view that, when a treaty stated that the parties had agreed to resort to arbitration and to observe the terms of the Hague Convention, the Court would be competent to pass judgment.

23. Mr. SCELLE did not think so, since the party denying the arbitrability of the dispute was opposed to the setting up of the Court.

24. Mr. SPIROPOULOS observed that that would be a violation of international law.

25. Mr. SCELLE asked who would be judge in that case. Denials of arbitrability were frequent. Disputes of this kind should be submitted, not to commissions of inquiry, which were generally composed of politicians, but to the International Court of Justice.

26. Mr. SPIROPOULOS assumed that the arbitral tribunal would be set up beforehand.

27. Mr. SCELLE replied that, in that case, a certain freedom could be left to the parties, as he had provided at the end of the second sub-paragraph of paragraph I. But where no tribunal existed there was no provision under international law. That point should be clarified.

28. Mr. SPIROPOULOS observed that the judge of the action was the judge of the exception.

29. Mr. SCELLE said that the adage held good when the Court had been formed and was then judge with regard to its own competence.

30. Mr. SPIROPOULOS pointed out that in such a case Mr. Scelle did not suggest an application to the International Court of Justice.

31. Mr. Scelle thought that there would be no point in such an application. In the general structure of the draft which he had submitted, the first difficulty, as he had already pointed out, was the question whether the dispute was arbitrable or not, while the second was the setting up of the tribunal.

32. Mr. SPIROPOULOS thought that a State which did not wish to resort to arbitration and refused to set up the tribunal would be violating international law.

33. Mr. SCELLE disagreed, because the dispute might not be arbitrable. A State would not be violating international law if the dispute was not covered by the provisions of its contractual obligations. Whether there had been a violation of international law would remain unknown until the judge had made his award.

34. Mr. SPIROPOULOS asked Mr. Scelle whether he thought there was an obligation to submit to arbitration the dispute concerning the application of the Peace Treaties by Bulgaria, Hungary and Romania.

35. Mr. SCELLE replied that that was a matter which should be submitted to the International Court of Justice for decision.

36. Mr. SPIROPOULOS recalled that the International Court of Justice had declared that it was obligatory to set up the tribunal.¹

37. Mr. CORDOVA thought that Mr. Scelle had in mind two cases. In the first there existed a general compromissory clause, the parties having agreed beforehand to submit to arbitration any matter outside the national jurisdiction. Provision was made for the appointment of arbitrators when an actual case occurred. When it did occur, one of the parties thought it was arbitrable and the other disagreed, so that the question had to be submitted to the International Court of Justice. If the arbitral tribunal had already been formed the procedure should be different; but all the text said was that "in the event of dispute as to whether this

obligation exists, the matter shall be referred to the International Court of Justice". Hence it seemed to be suggested that all cases would be referred to the Court, whereas that would occur only where the parties had not set up an arbitral tribunal.

38. Mr. SCELLE agreed that the sentence was not sufficiently clear.

39. Mr. el-KHOURY said he wished to begin by congratulating Mr. Scelle on the excellent report which he had submitted to the Commission. So far as the preliminary draft text prepared by Mr. Scelle was concerned, he noted that the first sub-paragraph of paragraph I referred to the obligation to have recourse to arbitration, and that the second sub-paragraph referred to the question of arbitrability.

39 a. He thought it advisable to draw the Commission's attention to the special situation of eastern countries which applied Islamic law, under which arbitration procedure could never be obligatory. Even when a State agreed to accept the rules of arbitration procedure, it could always refuse to apply them to the settlement of a specific dispute. Furthermore any arbitral judgment had to be submitted to a regularly constituted national court which would pronounce on the validity of the judgment and give the *exequatur*. Islamic States could hardly accept rules at variance with Islamic law which, as he had already stated, did not accept arbitration as obligatory and under which only legally constituted tribunals were competent to settle disputes. He would therefore prefer arbitration procedure to be optional.

39 b. In the field of international law there was no court competent to ensure the observance of compulsory arbitration procedure, and he thought that could be achieved only by means of agreements whereby States undertook to apply compulsory arbitration procedure to any disputes arising between them. Furthermore, Article 33 of the Charter of the United Nations contained provisions for the pacific settlement of disputes. Paragraph 2 of the said Article stated that "the Security Council shall, when it deems necessary, call upon the parties to settle their dispute" by means of their own choice. Paragraph 1 of the same Article listed possible methods of settlement as "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements" or other pacific means. But these provisions were in no sense obligatory.

39 c. Nevertheless he thought it advisable, in view of the progress and development of international law, to provide some means or other of establishing a compulsory arbitration procedure. In his view the best means was the conclusion of conventions between States desirous of establishing such procedure. But in eastern countries even such conventions were not obligatory wherever any one of their provisions was contrary to Islamic law. Such conventions could only be deemed obligatory by eastern countries where they were in complete harmony with Islamic law. If the method of conventions or agreements was not adopted, there was little likelihood of creating an authority capable of making arbitration compulsory. In these circumstances

¹ International Court of Justice, Report of judgments, advisory opinions and orders, 1950, p. 65 et seq.

it was the International Court of Justice which might, in view of its prestige, be regarded as the competent authority in the matter.

39 d. Moreover, experience showed the preference of governments for settling disputes through domestic tribunals rather than by the arbitration procedure. So far as arbitrability was concerned, the decision should be left to the parties to the dispute. In the conventions to which he had referred, the Contracting States could specify the cases in which they must have recourse to arbitration. Failing such clauses they might agree to apply whatever arbitration procedure might be agreed between the parties in each case.

39 e. In conclusion he thought that, in accordance with Article 33 of the Charter of the United Nations, arbitration procedure should be optional rather than obligatory. He feared that, if the principle enunciated by Mr. Scelle were adopted, many countries would hesitate to accept or to ratify the convention.

40. Mr. KERN (Assistant Secretary-General) pointed out that the International Court of Justice was that very day rendering its judgment on the obligation of States to appoint representatives to the commissions of arbitration provided for in the treaties.

41. Mr. YEPES asked Mr. Scelle whether the arbitrability of the dispute was, in his view, a *de facto* or a *de jure* question.

42. Mr. SCELLE said he regarded it as a *de jure* question. The Court examined the facts and decided whether the dispute was arbitrable or not. That decision of the Court's was itself a form of arbitration. Nevertheless, the Court could not deal with the question without examining the facts, and that examination was a *de facto* question. But when it gave a verdict on the facts, that was a *de jure* question. The situation was the same as for national courts.

43. Mr. ALFARO warmly congratulated Mr. Scelle on the report he had submitted. He himself supported the principle that arbitration should be made effective and obligatory. The report was an excellent initial step towards that goal. But it might perhaps be wondered whether the text as drafted by Mr. Scelle should be adopted as it stood. He was inclined to consider that it should be modified in certain respects with scrupulous regard, however, to its guiding principles.

43 a. The compromissory clause was a new departure in treaties, which frequently contained a provision to the effect that every dispute arising from the interpretation of clauses in the treaty should be submitted to arbitration. That was the sort of obligation which the Commission was then discussing.

43 b. As regards the question of arbitrability, Mr. Scelle's suggestion that disputes as to the existence of the obligation to have recourse to arbitration should be submitted to the International Court of Justice struck him as excellent. The Court existed and was, in his view, the only tribunal competent to decide the arbitrability of a dispute. That was a *de jure* question. The Hague Conventions of 1899 and 1907 already provided international arbitration procedure for the pacific settlement of international disputes. The Inter-American

General Treaty of Arbitration, signed at Washington on 5 January 1929, made disputes of the kind referred to in article 36 of the Statute of the International Court of Justice subject to arbitration. A later text had excepted cases coming under the domestic jurisdiction of States and cases where the dispute concerned three States one of which was not a party to the Convention on Arbitration concluded between the two other countries.² If a dispute had arisen between States A and B, and State A accepted arbitration, whereas State B held that the matter came under its domestic jurisdiction, the treaties offered no solution, whereas Mr. Scelle's proposal furnished the possibility of arbitration in such a case.

43 c. So far as the references to articles 29 and 41 of the Statute of the International Court of Justice were concerned, he thought they were justified in the case of article 29, but with regard to article 41 it was hard to conceive of special cases in which measures of conservation were necessary, except cases of conflicts between two States in the course of which one of the States sought to damage the interests of the other after the arbitration procedure had been instituted. It was clear that measures of conservation might serve to prevent the interests of one of the States parties to the dispute being injured so long as the arbitral judgment had not been rendered. Hence, he thought the reference to article 41 was of value. In brief he considered that, subject to some re-wording of the text, paragraph I expressed an essential principle and it had his full support.

44. Mr. FRANÇOIS also congratulated the Rapporteur on his work and said he merely wished to ask him a question. It had been said that no institution existed at the present time capable of making resort to arbitration obligatory. He asked the Rapporteur whether the International Court of Justice was not such an authority in the case of States which had accepted the optional clause contained in Article 36, paragraph 2, of its Statute.

45. Mr. SCELLE replied in the affirmative, adding that he would mention the fact in paragraph I and that the provision in the said paragraph under which the International Court of Justice became such an authority was in no sense a new departure.

46. The CHAIRMAN noted that Mr. Alfaro had very clearly defined the scope of paragraph I as formulated by Mr. Scelle and thought that the Commission as a whole favoured acceptance of this point, excepting perhaps Mr. el-Khoury, who considered that countries observing Islamic Law could not accept the compulsory arbitration procedure. He thought that the Commission might leave it to Mr. Scelle to pay due regard in his next report to the opinions expressed by the members.

47. Mr. SCELLE said that Mr. Hudson had just suggested to him a text which seemed to him superior to his own and which he accepted. It read as follows:

² Article 26 of the draft peace code submitted by Mexico to the Montevideo Conference of 1933.

"If the Parties disagree as to the existence of a dispute or whether an existing dispute is within the scope of the obligation to have recourse to arbitration, this question may, in the absence of agreement between the Parties upon another procedure for dealing with it, be brought before the Chamber for Summary Procedure of the International Court of Justice by a written application, and the judgment rendered by the Chamber for Summary Procedure shall be final and without appeal".

47 a. He pointed out that Mr. Hudson mentioned both cases, namely the question of disagreement as to the existence of a dispute and the question whether a dispute was within the scope of the obligation to have recourse to arbitration, whereas he himself had not specified these two cases in his draft, and he considered that they should be mentioned separately. So far as the reference to article 41 of the Statute of the International Court of Justice was concerned, he thought that the only difference of opinion between some members of the Commission and himself was as to whether the International Court of Justice could apply the provisions of the said article 41.

48. Mr. BRIERLY thought that the difficulty could be solved by omitting the reference to article 41 of the Statute of the International Court of Justice, while at the same time inserting in Mr. Scelle's draft convention some provisions on the lines of the provisions in the said article 41.

49. Mr. HUDSON pointed out that the Chamber for Summary Procedure of the International Court of Justice could always indicate the measures of conservation provided for in article 41 of the Statute, so that no reference to them was necessary. Nevertheless such measures would continue in being until such time as the Court had passed judgment, but not after that judgment. In some cases the decision would be immediate and the provisional measures would be suspended. He thought that there was no substantial difference between Mr. Scelle's point of view and his own.

50. Mr. SCELLE replied that he thought there was a difference, in the sense that the Court might, through its Chamber for Summary Procedure, decide on measures of conservation only in cases where such measures were aimed at preserving the *status quo* existing at the time when the dispute was referred to the Court. It was only in such cases that these measures could be decreed. For example, in the case of a dispute between two riparian States concerning a watercourse, where one of the States refused to accept arbitration and to attain its ends—i.e. to evade arbitration—diverted the waters of the river, the adoption of measures of conservation was impossible because the *status quo* had been modified before the dispute had been referred to the Court and could not be restored. He wished to avoid such a situation. The Court should be in a position to take such measures with a view to facilitating arbitration on the basis of the maintenance of the *status quo* which was the cause of the dispute. He thought that the Court should adopt measures of conservation, on the understanding that, when the maintenance of the *status quo*

was no longer essential, its decision would cease to apply.

51. Mr. CORDOVA considered the text submitted by Mr. Hudson excellent, but regretted that it made no mention of measures of conservation and no reference to article 41 of the Statute of the International Court of Justice. He regarded the latter as very important and said it must not be forgotten that the cases in question were referred to the Court in pursuance, not of its Statute, but of the treaty of arbitration.

52. Mr. HUDSON replied that the Court could take no action outside its Statute. If article 41 of the latter was mentioned, reference would also have to be made to all the subsequent articles of the Statute which dealt with procedural points. Although it did not mention the various articles, the text which he had proposed entailed an obligation on States to defer to the Court and to its Statute as soon as the dispute was referred to the Court. He added that, despite the obligatory character of the Articles of the Statute, the decision with regard to the adoption of measures of conservation took effect only if it was based on a judgment of the Court and was notified to the parties.

53. Mr. SCELLE accepted Mr. Hudson's text, while regretting that it contained no reference to the question of measures of conservation, although he agreed with Mr. Hudson that such a reference was unnecessary inasmuch as the Court and the parties to the dispute were bound by the Statute of the Court and could not depart in any way from its provisions.

54. Mr. CORDOVA thought that article 41 meant that the *status quo* should be maintained. But as soon as the Court had decided that the case referred to it was arbitrable, the measures of conservation would cease to apply. He thought that the maintenance of the measures of conservation after judgment had been passed by the Court could be provided for by means of a convention.

55. Mr. HUDSON repeated that in his view the Court could not depart from the provisions of article 41 of its Statute. Mr. Córdova's object might be achieved if the parties, after referring the question of arbitrability to the Court, also referred to it, without mentioning article 41 of the Statute, a second question, namely what measures of conservation the Court could prescribe for the period up to the time when the arbitral judgment was rendered.

56. Mr. YEPES was of opinion that the International Court of Justice had the right to prescribe measures of conservation as soon as a case was referred to it under article 40.

57. Mr. SCELLE replied that such measures ceased to be applicable as soon as the Court had rendered judgment, but they should be maintained until that moment and the parties could so decide in the treaty of arbitration.

58. Mr. CORDOVA thought the Rapporteur should express this view clearly in his report. It was an idea regarding the continuation of the *status quo* which should be explicitly stated in the report.

59. Mr. HUDSON thought that a mere reference to

article 41 of the Statute of the International Court of Justice would not cover the cases which Mr. Córdova had in mind. The most important article of this Statute from the point of view of such cases was article 53, which was the one that should be quoted. He had just prepared a text which might be included in Mr. Scelle's preliminary draft and which would, in his opinion cover the cases mentioned by Mr. Córdova. It read as follows:

"The judgment given by the Chamber may also indicate the steps to be taken by the Parties for the realization of the arbitration and for the protection of the interests of the Parties pending a final arbitral award."

The principle concerning measures of conservation was a good one, but the circumstances in which such measures could be prescribed should be defined.

60. The CHAIRMAN proposed that it be left to the Rapporteur to examine the two texts submitted by Mr. Hudson and take them into consideration in the conclusions of the report which he would submit in the following year.

61. Mr. SCELLE agreed with this proposal, adding that he was completely satisfied with both texts.

62. Mr. HUDSON replied that he himself was opposed to the second text which he had just submitted and that he had prepared it merely for the Rapporteur's guidance.

63. Mr. KERNO (Assistant Secretary-General) thought that, so far as the consensus of opinion within the Commission was concerned, a distinction should be made between the two texts submitted by Mr. Hudson. The first of these texts was acceptable to the Commission, whereas the second, which was a suggestion for the Rapporteur's use, did not, in his view, meet with the unanimous approval of the Commission.

64. The CHAIRMAN thought that the whole question should be left to Mr. Scelle.

Paragraph II of the proposed draft text

65. Mr. SCELLE explained that paragraph II dealt with the setting up of the arbitral tribunal. After reading the first sub-paragraph, he said that it was not a proposed article, but was intended to form a link between paragraphs I and II and was therefore merely a transitional provision.

66. Mr. HUDSON requested Mr. Scelle to revise the wording of his text, with particular reference to the expressions "cannot be settled" and "a reasonable time", the sense of which should perhaps be defined. He again noted that Mr. Scelle referred to the obligation of States to appoint an arbitrator or to set up an arbitral tribunal. He wondered whether the appointment of an arbitrator could be the equivalent of the setting up of an arbitral tribunal.

67. Mr. SCELLE replied that he regarded the appointment of an arbitrator and the setting up of an arbitral tribunal as identical. A single arbitrator constituted a court competent to undertake arbitration. The meaning of this paragraph in his report was that once the arbitrability of a dispute was established, the parties should

be left free to nominate an arbitrator or an arbitral tribunal in accordance with their undertaking to accept arbitration. The "reasonable time" allowed for the possibility of the parties amicably settling the dispute without recourse to arbitration. After reading the second sub-paragraph of paragraph II of his report, he said the best method in that connexion was to follow the procedure prescribed in the General Act of Arbitration, as revised by the General Assembly.

68. Mr. HUDSON agreed with the idea formulated in the second sub-paragraph, but said he was opposed to the reference to articles 22 and 23 of the General Act of Arbitration, adding that the said articles had not been amended when the Act was revised.³

69. Mr. SCELLE stated that the second sub-paragraph was not a finished text, but merely a draft designed to convey his idea, which the Commission might amend if it so desired.

70. Mr. CORDOVA asked whether a time limit should not be set for the appointment of an arbitrator or the setting up of an arbitral tribunal by the parties. If that was not done there was a danger that one or other of the parties might procrastinate.

71. Mr. SCELLE replied that he had thought of setting a time limit, but realized that it would be a rather delicate matter. The term "reasonable time" was well established, having been used in a large number of treaties. He could not see on what basis a definite time limit could be fixed at that stage.

72. Mr. CORDOVA pointed out that the General Act of Arbitration fixed a time limit of three months, which should be adopted in the texts prepared by Mr. Scelle.

73. The CHAIRMAN requested Mr. Scelle to consider the suggestion just made by Mr. Córdova.

74. The CHAIRMAN thought the Commission was agreed on the principle expressed in this sub-paragraph, and invited comments on the third sub-paragraph of paragraph II of the preliminary draft text prepared by Mr. Scelle.

75. Mr. HUDSON asked Mr. Scelle why he had put in the last sentence of the third sub-paragraph, namely "the tribunal so constituted shall hear the case and its judgment shall be binding".

76. Mr. SCELLE agreed that it was superfluous and could be omitted.

77. Mr. SCELLE, after reading out the fourth and fifth sub-paragraphs of paragraph II of his preliminary draft text, said that the latter were merely designed to indicate the present state of custom. He thought that the parties should be allowed a certain freedom in the choice of the personalities or judicial institutions they wished to appoint as arbitrators. At the present time a movement was beginning in favour of jurisdictional arbitration, as opposed to diplomatic arbitration, which had long been the rule. He should perhaps add that the appointment of the Head of a State as arbitrator seemed inadvisable to him, since in most cases he would lack legal or technical qualifications.

³ General Assembly Resolution 268 (III).

78. Mr. HUDSON said he had difficulty in following Mr. Scelle's reasoning. Many examples existed of successful arbitration by Heads of States. In every case the arbitral award had been drawn up by legal experts, and not by the Head of the State, who had merely signed it.

79. Mr. SCELLE replied that in such cases the legal experts concerned were nearly always diplomats as well.

80. Mr. SPIROPOULOS thought that this sub-paragraph went into too much detail with regard to the persons entitled to be appointed as arbitrators. It was self-evident that the persons appointed as arbitrators would always be properly qualified. It was preferable to say nothing on this point.

81. Mr. CORDOVA said that Mr. Scelle's text in no way debarred the Head of a State from being appointed as arbitrator, but merely said that arbitrators should be selected in the light of experience, which was an excellent principle. Nevertheless, he shared Mr. Scelle's view with regard to the Heads of States. The latter would always be inclined to base their decisions on political considerations, and it was essential to avoid arbitral judgments of that type.

82. Mr. el-KHOURY observed that in the previous year certain Eastern countries had appointed two kings to arbitrate and they had rendered a fair and true judgment which, when submitted to the tribunals in the contending countries, had been accepted by them and implemented by the parties. He saw no need to lay down such conditions regarding the appointment of arbitrators, and was even inclined to think that jurists regarded disputes as more complicated than they really were.

83. The CHAIRMAN thought that the Rapporteur had had no intention of restricting the number of persons eligible for appointment as arbitrators.

84. Mr. SCELLE confirmed this view and said that here again he was not proposing the text of an article, but had merely expressed an idea, so that the Commission could amend his text in accordance with its preference for a particular procedure. He personally thought that the arbitration provided for should be jurisdictional rather than diplomatic or political. He had thought so for a long time, and considered that arbitration procedure should be developed along those lines. An arbitral judgment which was a model of its kind was that rendered by Professor Huber in the case of Las Palmas Island. It was a true example of jurisdictional arbitration, and that way lay progress.

85. Mr. HUDSON agreed with Mr. Scelle that it was advisable to restrict the number of arbitrators. It was obvious that in very important cases five arbitrators might be of great value, but in most cases a smaller number seemed preferable. Some consideration should also be given to the financial aspect of the problem, i.e. to the arbitrators' fees, which were usually very high. Some States would hesitate to have recourse to arbitration if it cost them too much. That material aspect of the problem occurred to him because he would not like to see arbitration limited to important international

disputes, but would prefer it to form the basis for the settlement of disputes even of lesser importance.

86. Mr. ALFARO pointed out that the term "direct interest" was used in the fifth sub-paragraph. He thought that the reference should be not only to direct interest, but also to indirect interest, and he therefore proposed the addition of the word "indirect".

87. Mr. SCELLE thought it would be simpler to delete the word "direct" leaving the word "interest" unqualified.

88. Mr. HUDSON said he would prefer the term "special interest".

89. Mr. KERNO (Assistant Secretary-General) recalled that the Economic and Social Council had referred to the Commission a proposal concerning the question of the nationality of married women, and that the General Assembly had referred to the Commission the question of territorial waters. He requested the Commission to take up these questions with a view to advising the Economic and Social Council and the General Assembly thereon.

90. The CHAIRMAN said that the two questions would be placed on the agenda of the Commission's next meeting.

The meeting rose at 12.55 p.m.

71st MEETING

Wednesday, 19 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 CORDOVA, 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).

Nationality of married women (Letter from the Secretary-General) (A/CN.4/33)

1. The CHAIRMAN read document A/CN.4/33, in

which the Economic and Social Council requested the Commission to state whether it could deal with that question and when it would do so.

2. Mr. ALFARO thought that the only reply to make was that the Commission was prepared to proceed with the drafting of the Convention, that it could do so at its next session, and would give that task such priority as the other items on its agenda permitted.

3. Mr. HUDSON felt that any reply to the fourth paragraph of the Council's resolution would have to take into account the fact that the Commission, as at present constituted, had only eighteen months of life before it. The procedure provided for in article 17, paragraph 2, of the Statute was complicated but it had to be followed. Sub-paragraph (b) appeared to call for the issue of a questionnaire, but that questionnaire need not perhaps be sent to the Economic and Social Council, since the latter had already laid down the main lines which it thought the Commission should follow. In virtue of sub-paragraph (c), however, the Commission would have to submit a report to the Assembly and perhaps even an interim report to the Council. Under sub-paragraph (d), the Commission would apparently have to wait for the Assembly to invite it to proceed in accordance with article 16. He felt that the whole procedure was ill-suited to the case in hand.

3 a. If the Commission knew exactly what was wanted, it was faced with a problem of drafting. The convention containing the proposal of the Commission on the Status of Women would be very short, and would not take long to draft. It would be remembered that the Pan-American Convention adopted in 1933 had consisted of only one article. He thought that the Commission could draft the required Convention with its present membership, but it had to submit a report to the General Assembly and await the latter's reply.

3 b. The Commission could say that it was prepared to draft the Convention as recommended by the Economic and Social Council. It was not bound by that recommendation, however, as its third paragraph stated that: "The Economic and Social Council . . . proposes to the International Law Commission that it undertake . . ." Since it consisted in embodying the principles which formed the subject of the recommendation, the task would not be difficult. The Hague Convention of 1930 on the same subject was also available, but it was based on different principles. He therefore thought that the Commission would be able to do the work quickly and easily, but that if it wished to complete it the following year, it should include the question in its report to the Assembly on the work of the current session.

4. Mr. HSU thought that Mr. Hudson was right to consider that the question was a simple one, and that the Convention would contain only one or two articles. That was precisely why he was not sure that the Commission should agree to the Council's request. The Council proposed that the Commission should endorse the principles contained in the recommendation issued by the Commission on the Status of Women and reproduced in sub-paragraphs (i) and (ii) of that Commission's resolution. Those principles were clear, so that drafting

was all that was necessary; it was, however, important to decide whether the International Law Commission had been set up for the purpose of drafting conventions for the other organs of the United Nations, or whether it had a different task.

4 a. Article 17, paragraph 1, of the Statute did not give a complete picture of the Commission's work. Reference to article 16 showed that "When the General Assembly refers to the Commission a proposal for the progressive development of international law . . ." Article 1, paragraph 1, stated that "The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification." It had to be decided whether the Commission's task was to develop international law and, where necessary, to draft conventions, or whether the Commission had been set up for the purpose of drafting conventions for other bodies. He thought that the latter task did not belong to the Commission. That body was being told that a certain principle had been adopted, and was being asked to draw up a convention. Inasmuch as the mere drafting of a convention could not constitute the Commission's principal task, the only solution was for the Commission to refer the question back to the Economic and Social Council, stating that it could not undertake the task.

5. Mr. SANDSTRÖM wondered what interpretation should be given to the communication which the Commission had received. The Economic and Social Council resolution stated that: "The Economic and Social Council, noting further that the International Law Commission, at its first session, included among the topics selected for study and codification 'nationality, including statelessness', proposes to the International Law Commission that it undertake as soon as possible the drafting of a Convention to embody the principles recommended by the Commission on the Status of Women." That recommendation could be interpreted as a request to the Commission to undertake the study of the question of nationality as soon as possible. If that was so, the request was not open to objection, and the question was when the Commission would study the matter.

6. Mr. YEPES considered that the Commission should give the highest possible priority to the Economic and Social Council's recommendation and should proceed with the problem at once if the rules of procedure could be interpreted in such a way as to permit this, since the problem of the nationality of married women was one of extreme importance. He proposed that the Commission should at once consider the two principles adopted by the Commission on the Status of Women, and should inform the General Assembly that it was prepared to draft a convention on the basis of the principles contained in sub-paragraphs (i) and (ii). The Commission would thus perform a useful task, and would have time to announce a decision before the end of the session. He proposed that the Commission should study the substance of the problem, and should come to some conclusion in regard to it.

7. Mr. CÓRDOVA stated that if the request made by

the Council really was that the Commission should draft a convention, the latter could do so immediately, but it was bound under article 17 of its Statute to consider proposals submitted by other organs, and so on. The Commission could say that it would consider the question submitted to it when it took up the general problem of nationality. As Mr. Hudson had pointed out, however, the agenda for the following year was already very heavy, and he himself did not think that the Commission could embark upon a study which would take longer than the term for which its members had been elected. Before taking up any new question, the Commission should complete its study of the questions already before it.

8. Mr. FRANÇOIS shared the apprehension of Mr. Hsu and Mr. Córdova. It was inadmissible that the Commission should be given a mere task of drafting, but it was perhaps unnecessary for the Council's resolution to be interpreted in that manner, and it could perhaps be said that it was a question of examining the problem, taking into account the recommendations of the Commission on the Status of Women. He wondered whether the Commission had the time to deal with that question, since it had been appointed for a term of three years, and sat for a few weeks each year. In those conditions it was better to draw up a programme for three years, since it was uncertain that the future membership of the Commission would remain the same. It was not practical to initiate a study which would be completed by a commission composed of different members. Since the Commission had sufficient work for the following year, the Commission would be unable to deal with the matter which had just been submitted to it before the expiry of its term of office.

9. Mr. el-KHOURY observed that the Council was aware that the Commission had placed nationality, including statelessness, on the list of topics to be studied, and that it was with this knowledge that it proposed that priority should be given to the question of the status of married women. The Council was asking the Commission to separate a particular question from the more general problem of nationality. The point to be decided was whether the Commission would agree to make a separate study of the problem of the nationality of married women. If so, it would take up the question and reply to the Council. If not, it would reply that the question of nationality was already on the agenda for its next session, and that the nationality of married women would be studied within the framework of that more general problem. He understood Mr. Yepes' point of view, but did not think that the matter was so urgent. He thought that the Commission should take a vote to decide whether it agreed to make a separate study of, and give priority to, the question of the nationality of married women.

10. Mr. KERNO (Assistant Secretary-General) noted that one speaker had said that the Commission had been set up for a period of three years, and that too much could not be undertaken in that period. It was true that article 10 of the Statute stated that "the members of the Commission shall be elected for three years", but

it added that "they shall be eligible for re-election". The Commission was a permanent body, and it was on that basis that it had drawn up its programme of work and selected fourteen topics for codification.

10 a. With regard to the proposal submitted by the Economic and Social Council, the Commission need not confine itself to a mere task of drafting, since the question was one of substance. In accordance with article 17, paragraph 2, the Commission should state whether it deemed it appropriate to undertake the study proposed by the Economic and Social Council and, in the affirmative, should state when it would proceed to that study.

10 b. He agreed with Mr. Hudson that articles 16 and 17 were clumsy and complicated, but thought that article 17 could be made more flexible, since it stated that the Commission "shall follow in general procedure on the following lines". The Commission could therefore adapt its procedure to each individual case. Article 17, paragraph 2 (b), provided for the issue of a questionnaire, but a questionnaire had already been circulated, and it was on the basis of the replies received that the Commission on the Status of Women and the Economic and Social Council had studied the question. A great part of the procedure outlined in article 17 had already been followed, and it was perhaps possible to ask the General Assembly forthwith whether the Commission could go ahead. Hence, the first question to be decided was whether the Commission deemed it appropriate to proceed with the study of that proposal.

11. The CHAIRMAN read the proposal which Mr. Hudson had submitted to him in the following terms:

"The Commission deems it appropriate to entertain the proposal of the Economic and Social Council in connexion with its contemplated work on the subject of 'nationality, including statelessness'.

"The present agenda is so charged that the Commission does not contemplate the initiation of that work before 1952."

12. Mr. AMADO recalled that during the discussion on Mr. Scelle's report the previous evening, the expression "the more diligent party" had been used on several occasions. He had attended the Montevideo Conference in 1933, and he was able to state that the representatives of the women's organizations were extremely diligent. They would certainly persuade the Commission to decide the question submitted to it. Mr. Hudson had perceived that the problem to be decided was one of expediency. The Council had at once realized that the task formed part of the general study of nationality. It had then proposed to the International Law Commission "... that it undertake as soon as possible the drafting of a convention" and requested the International Law Commission "to determine at its present session whether it deems it appropriate to proceed with this proposal". It was therefore for the Commission to decide the question of expediency and to make known the approximate time when it would proceed to a study of the question. He supported Mr. Hudson's proposal.

13. Mr. SPIROPOULOS found it difficult to express an opinion and thought that the Commission should not

interpret its task in a narrow sense. Although the Commission had met for the purpose of developing and codifying the law, he wondered whether the proposal should be rejected. The Commission was an expert organ of the United Nations, and should assist the other organs of the United Nations. He did not think that it should say that it refused to do anything but develop and codify the law. The work which the Economic and Social Council was asking the Commission to do was connected with the progressive development of law on a limited subject, and was not solely a matter of drafting. The Council was not asking the Commission to do this thing or that but to assist it in drawing up a convention, as was fitting. It was a question of progressive development. He did not know whether the Commission would create a good impression by refusing to deal with the question, since the Council would not understand such a refusal of assistance. There was no need to consider whether the principles involved were principles of international law; the Economic and Social Council wished to make them principles of international law, and wanted to know whether the Commission would assist it in that task.

13 a. Although the problem was complicated, the Commission would have time to study it. He agreed with Mr. Kerno that although the members of the Commission had been elected for three years, the Commission itself was permanent. The Commission could try to study the question as soon as possible, but even if it did so, it would be unable to complete the study the following year, since, in accordance with article 16 (h) the draft would have to be submitted to governments. All that the Commission could say was that it would study the question but it could not say exactly when it would complete that study. He thought that, from the practical point of view, some action should be taken.

14. Mr. AMADO proposed that Mr. Hudson's suggestion should be amended as outlined by Mr. Spiropoulos.

15. The CHAIRMAN said that the only difference was a slight shade of meaning.

16. Mr. HUDSON had been shaken by the arguments of Mr. Hsu, Mr. Córdova and Mr. François but thought that Mr. Sandström had found the solution to the problem in drawing the Commission's attention to the second paragraph of the Council's resolution. It was conceivable that the Council had in mind the incorporation of the recommendation of the Commission on the Status of Women within a wider framework, and Mr. François appeared to think the principles relating to nationality of married women would not be studied without examining the question of nationality as a whole. The Commission wished to be polite to the Council and since the organs of the United Nations thought it the Commission's duty to deal with legal problems, he felt that the reply to the Council should not be discouraging.

17. Mr. KERNO (Assistant Secretary-General) quoted two extracts from statements made by the United States representative during the discussion on the reso-

lution in question in the Social Committee. "The International Law Commission had already discussed the question of nationality and, though it had not included it among the three to which it was giving top priority, it evidently intended to give consideration to such problems of nationality as statelessness and the nationality of married women. His delegation did not ask that the International Law Commission should necessarily frame a separate convention on the nationality of married women but would be satisfied if that question were included in a general convention on nationality." (E/AC.7/SR.133, pp. 8 - 9)

17 a. In another statement concerning an amendment submitted to the Economic and Social Council by the representative of Mexico, the United States representative had said: "Yet the International Law Commission might find it preferable to include these principles in an entirely separate convention, dealing only with the nationality of married women. In any case, the International Law Commission should not be tied down to one course of action alone." (E/SR.389, pp. 7 - 8) It was therefore clear, he concluded, that the Commission was not bound to adopt any particular course.

18. Mr. LIANG (Secretary to the Commission) thought that Mr. Hudson's draft resolution would be strengthened by the fact that the question of statelessness had been considered by an *ad hoc* Committee of the Economic and Social Council, and that the latter's recommendation also requested the Commission to undertake the drafting of a convention as soon as possible. The Economic and Social Council had not yet studied that recommendation, and it was possible that it would submit to the Commission a recommendation on the same lines as the one at present under discussion. Those questions could be considered within the framework of a general convention on nationality.

19. Mr. AMADO agreed that the Commission should make every effort to meet the Economic and Social Council's request, and should understand that it was obliged to take action. It should not be forgotten that the Council was well aware of what it was asking and had indicated that the question should be considered in the light of related problems. The Commission should state whether it was prepared to undertake the work and should announce the approximate time when it might proceed to do so.

20. The CHAIRMAN pointed out that Mr. Hudson's proposal could be split into two parts, the first of which could state: "The Commission deems it appropriate to entertain the proposal of the Economic and Social Council in connection with its contemplated work on the subject of nationality, including statelessness." That wording was satisfactory.

21. Mr. HSU also thought that the Commission should be very polite to the other United Nations organs and should co-operate with them. There should, however, be a delimitation of functions and those of the Commission should be defined. Should the Commission develop and codify law, or should it help the other organs to draw up conventions? The Council's resolution should be carefully examined to see what the

Council was asking, and it should not be overlooked that the Commission could take certain liberties with the principles set out in the recommendation of the Commission on the Status of Women.

22. The CHAIRMAN pointed out that Mr. Hudson's proposal took care of all Mr. Hsu's scruples.

23. Mr. HSU said that in that case he accepted Mr. Hudson's proposal.

24. Mr. CORDOVA said that the Economic and Social Council had shown great wisdom in doing no more than transmit the resolution of the Commission on the Status of Women. That Commission wanted those principles to become principles of international law, but the International Law Commission was entitled to study them and estimate their intrinsic value.

25. The CHAIRMAN and Mr. HUDSON replied that that went without saying.

26. Mr. YEPES disagreed with the manner in which the Commission had dealt with the question. The mere fact that the Economic and Social Council had devoted four meetings to that problem showed that it had not referred the matter to the Commission in order to get rid of it. It had done so because the Commission was the body competent to deal with the problem. Moreover, it was not a new problem; many books and articles had dealt with it, including James Brown Scott's book on the equality of the sexes. The Commission could at least devote one meeting to the principles adopted by the Commission on the Status of Women, accept those principles, and so inform the General Assembly; the following year it could give priority to the study of the question.

27. Mr. BRIERLY was also unable to support the proposal. He agreed with Mr. Yepes that the Economic and Social Council was making a very limited request to the Commission — it was asking the Commission to give priority to part of a more general question.

28. The CHAIRMAN thought that it was merely a question of referring a subject to the Commission for later consideration, but he might be mistaken. He had never interpreted the Council's decision as Mr. Yepes and Mr. Brierly had just done.

29. Mr. CORDOVA quoted a passage from the Council's resolution:

"Requests the International Law Commission to determine at its present session whether it deems it appropriate to proceed with this proposal and, if so, to inform the Economic and Social Council as to the approximate time when the International Law Commission might proceed to initiate action on this problem."

The Council was already aware that the Commission intended to give priority to the study of nationality and statelessness, and was asking what the Commission could do with regard to the nationality of married women.

30. The CHAIRMAN pointed out that his interpretation of the resolution was based on a conversation he had had with a member of the French delegation. The

latter had said that the Council intended to submit that resolution to the Commission for consideration when studying the question of nationality.

31. Mr. AMADO thought that the previous history of the question should be taken into account. The Commission on the Status of Women had already made a certain amount of progress. He hoped that the Commission would perform its task to the general satisfaction.

32. The CHAIRMAN indicated, with regard to Mr. Yepes' proposal, that the agenda was already very heavy, and that the Commission would probably not be able to devote sufficient time to so important a question the following year. He did not think that time should be spent on questions which were not on the agenda.

33. Mr. SPIROPOULOS could only reiterate that the Council had not asked the Commission to incorporate various provisions in the general convention on nationality, but had asked it to submit a draft convention on a limited subject. The Economic and Social Council "proposed to the International Law Commission that it undertake as soon as possible the drafting of a convention to embody the principles recommended by the Commission on the Status of Women". He could only interpret that in the following way: the Council was asking the Commission to take up certain principles; this constituted progressive development of law, but the Council did not interpret this in the same way as the Commission; the Council was saying that it wanted a convention and was not asking the Commission for its views.

34. The CHAIRMAN pointed out that Mr. Kerno had quoted passages from the records which contradicted what Mr. Spiropoulos had just said.

35. Mr. SPIROPOULOS replied that they had to go by the decision itself and not by what certain representatives had said.

36. The CHAIRMAN said that in that case he was in favour of rejecting the request, since the Commission had not met to do drafting work.

37. Mr. SPIROPOULOS asked whether the task was a humiliating one. The Council was telling the Commission that it was the most competent body to deal with that question. There was nothing humiliating in drafting a text; he considered it a scientific operation of great delicacy, it was not at all easy to formulate these principles properly. The Council was asking the Commission for its collaboration.

38. Mr. YEPES recalled that the General Assembly had made the same request to the Commission with regard to the Nürnberg Principles.

39. Mr. AMADO asked Mr. Spiropoulos why the Economic and Social Council had used the following words: "Noting the recommendation of the Commission on the Status of Women (fourth session) in regard to the nationality of married women, and noting further that the International Law Commission, at its first session, included among the topics selected for study and codification 'nationality, including statelessness'." If the Council were asking the Commission to

deal merely with the nationality of married women, it would not have inserted in its resolution that second and more important paragraph.

40. The CHAIRMAN felt that a vote should be taken on Mr. Hudson's proposal.

41. Mr. YEPES submitted the following amendment:

"The International Law Commission decides to give priority at its next session to the problem of the nationality of married women and to examine, in particular, the two principles in regard to the nationality of women which were adopted by the Commission on the Status of Women and transmitted by the Economic and Social Council."

42. The CHAIRMAN put Mr. Yepes' amendment to the vote.

Six votes were cast in favour of the amendment, and six against.

43. The CHAIRMAN accordingly declared the amendment rejected.

44. Mr. AMADO asked whether, in the event of priority being given to the problem of the nationality of married women, a report would have to be submitted to the General Assembly at the next session.

45. Mr. HUDSON thought that Mr. Yepes' amendment would have the effect of instructing the Commission to study at its next session the preliminary draft convention on the nationality of women without including in it the question of statelessness.

46. Since a number of members had queried the result of the voting on Mr. Yepes' amendment, the CHAIRMAN put that proposal to the vote a second time.

Six votes were cast in favour of the proposal and six against.

The proposal was rejected.

47. The CHAIRMAN proposed that the Commission should vote on Mr. Hudson's resolution, which was worded as follows:

"The Commission deems it appropriate to entertain the proposal of the Economic and Social Council in connexion with its contemplated work on the subject of 'nationality, including statelessness'.

"The present agenda is so charged that the Commission does not contemplate the initiation of that work before 1952."

48. Mr. ALFARO thought that the proposal should be split up for voting purposes. He considered that the Commission should begin its study of the question at its next session, and he would therefore vote for the first part of Mr. Hudson's proposal which did not state when the Commission would undertake that study.

49. The CHAIRMAN put to the vote the first half of the first sentence of Mr. Hudson's proposal, ending with the words "Economic and Social Council".

The half-sentence was adopted unanimously.

50. The CHAIRMAN put to the vote the second half of the sentence "in connexion with its contemplated work on the subject of 'nationality, including statelessness'".

The half-sentence was adopted by 8 votes to 4.

51. Mr. YEPES explained that he had voted against that half-sentence because its effect would be to defer consideration of the question of the nationality of women indefinitely. Once that question was linked with that of nationality in general, years would pass before it would be possible to reach specific conclusions. The nationality of women was the most important aspect of the problem and should be dealt with as quickly as possible.

52. Mr. AMADO had voted in favour of the half-sentence. He thought that the question of statelessness was as urgent as that of the nationality of married women, it not more so. He shared the Chairman's doubts as to whether the Commission's function was merely to draft the texts submitted to it by the United Nations or a specialized agency. Pure drafting work of that kind should be done by the Secretariat. In his view, the Commission's functions went much further than that and it was competent to pronounce on the substance of the principles contained in resolutions submitted by other agencies and to amend or amplify them.

53. Mr. KERNO (Assistant Secretary-General) drew attention to the fact that the Commission had applied article 17 of its Statute for the first time. It was therefore important that the interpretation of that article should be clear. The various organs referred to in article 17, paragraph 1, could submit proposals and drafts. Hence, in the first instance it was for them to decide whether the proposed study would be useful and desirable for the development or codification of international law. Under article 17, paragraph 2, however, it was for the Commission to decide, in the second instance, as to the utility of the proposed study. The Commission therefore had the last word. It could state that it did not consider the study useful, but it could not, of course, reply that it had no time to deal with the question proposed. He wished to ask Mr. Hudson what he meant by the expression "initiation" in his proposal. Did it mean that the Commission would not be able to apply the procedure outlined in articles 16 and 17 until its 1952 session?

54. Mr. HUDSON replied in the affirmative.

55. Mr. CORDOVA thought that the second sentence of Mr. Hudson's proposal was unnecessary. He saw no reason why the Commission should indicate a date.

56. Mr. HUDSON replied that the Economic and Social Council had asked the Commission to do so. He thought that the agenda for the Commission's coming sessions was extremely heavy and that therefore the Commission could not possibly consider the question before 1952.

57. Mr. ALFARO remarked that at the beginning of the discussion, Mr. Hudson had stated that the question at issue was extremely simple and could easily be dealt with at the current session. He shared that view, which Mr. Hudson appeared to have discarded. The Commission was not justified in deferring until 1952 consideration of a question which had to be studied in relation to the general problem of nationality. The Commission had just decided that it wished to deal with the matter, and it was only a question of deciding when

it would do so. He thought that the Commission should take up that study the following year. He proposed to submit a new resolution stating that the Commission would deal with the question at its next session in 1951, and he intended to draft a text to enable the Commission to decide with a full knowledge of the facts.

58. The CHAIRMAN stated that the Commission had two texts before it. There was first of all the second sentence of Mr. Hudson's proposal, the first sentence of which the Commission had already adopted. A decision still had to be taken on the second sentence. Secondly, there was the amendment submitted by Mr. Alfaro in the following terms:

"The Commission will consider the proposal to draft a Convention as a specially important part of the topic of nationality and will initiate discussion on the problem referred to it by the Economic and Social Council at the 1951 session of the Commission."

59. Mr. SANDSTRÖM asked Mr. Alfaro whether he intended his amendment to mean that the question of the nationality of married women should be studied separately.

60. Mr. ALFARO having replied in the affirmative, Mr. SANDSTRÖM said that that was contrary to the decision taken by the Commission.

61. The CHAIRMAN felt that the Commission agreed with him in thinking that he could not put that proposal to the vote, inasmuch as it was contrary to a decision already taken.

62. Mr. AMADO thought that account should be taken of the argument that the members of the Commission would reach the end of their term in 1951, and that it was therefore difficult for them to initiate the study of so important a subject during the last session for which their terms were valid.

63. At Mr. Alfaro's request, the CHAIRMAN put to the vote the question whether a vote should be taken on Mr. Alfaro's proposal.

Two votes were cast in favour of a vote being taken.

64. The CHAIRMAN regretted that in view of the voting he could not put Mr. Alfaro's proposal to the vote. He proposed that a vote be taken on the second sentence of Mr. Hudson's proposal.

65. Mr. ALFARO pointed out that that part of Mr. Hudson's proposal did not answer the question put to the Commission by the Economic and Social Council. If the Commission stated that it could not initiate work on that question before its 1952 session, that meant that the work would perhaps not be begun before 1953 or 1954, or even later. If, on the other hand, the Commission gave no date, that might be taken to mean that it was rejecting the Economic and Social Council's request. He therefore felt that the Commission should not give an evasive answer but should name a date, which, he thought, should be the following year.

66. Mr. BRIERLY asked whether adoption of Mr. Alfaro's proposal would prevent the Commission from holding a general discussion on the question and appointing a rapporteur in 1951. He thought that the first step was to appoint a rapporteur.

67. Mr. HUDSON thought that it would be very difficult for the Commission to appoint a rapporteur, as it would not be sure that the person it selected would be re-elected to membership of the Commission by the General Assembly in 1951.

68. Mr. SPIROPOULOS considered that a rapporteur should be appointed forthwith, as this would provide the Commission the following year with a working document which it could study without delay.

69. Mr. CORDOVA recalled that the Commission had decided to study the question of the nationality of women in relation to the question of nationality in general. It should therefore appoint a rapporteur for the question as a whole.

70. Mr. HUDSON was opposed to accepting decisions taken by other United Nations organs or specialized agencies to the effect that a certain subject should be given priority over other work of the Commission. The Commission should itself determine the order of priority. Even the General Assembly was not entitled to tell the Commission which topics should be given priority. The decision rested with the Commission.

71. The CHAIRMAN pointed out that if the Commission wished to appoint a rapporteur, the latter would, in accordance with the Commission's decision, have to deal with the whole question of nationality. He thought that Mr. Hudson's argument about the difficulty of appointing a rapporteur was pertinent. The Commission should take into account the fact that the rapporteur it appointed the following year would perhaps not have his term of office renewed by the General Assembly. He also agreed with Mr. Hudson that no other organ could determine the priority of the topics which the Commission was to codify.

72. Mr. CORDOVA thought that the General Assembly was entitled to tell the Commission which topics had priority, but that other organs or agencies, such as the Economic and Social Council, were not so entitled.

73. The CHAIRMAN agreed.

74. Mr. SPIROPOULOS thought that no one could claim that the Economic and Social Council was asking the Commission to change the order of priorities. If, however, an urgent question were submitted to the Commission, the latter could alter the priority of the topics on its agenda. He even thought that it should change that order if for any special reasons or practical considerations a particular topic required urgent study. The Commission undoubtedly had control over its agenda and its system of priorities, but it should take special cases into account.

75. The CHAIRMAN reminded the Commission that it was only being asked to inform the Economic and Social Council as to the approximate date when it might proceed to initiate action on the problem referred to.

76. Mr. CORDOVA noted that the English version of the resolution said "approximate time", and not "approximate date".

77. Mr. YEPES said that the Economic and Social Council had just submitted to the Commission the broad outline of a draft convention as drawn up by the Com-

mission on the Status of Women. Under article 17 of its Statute, the Commission was required to consider draft conventions submitted by the principal organs of the United Nations or by specialized agencies. That being so, the Commission could not reply that its agenda was too heavy for it to be able to consider that question. In his view, the Commission should tell the Economic and Social Council when it would initiate that study.

78. The CHAIRMAN observed that the Commission had already decided that it would make the study.

79. Mr. el-KHOURY pointed out that the Commission had decided to study the question in relation to that of nationality in general. He suggested that Mr. Hudson's proposal be amended to say that the Commission had a heavy agenda, but would nevertheless be able to initiate the study of the question in the course of its next session. Mr. Spiropoulos had proposed the appointment of a rapporteur. If the Commission appointed a rapporteur the following year, that would mean that it would actually initiate the study in the current year. Lastly, he thought that the question of the nationality of married women could be separated from the general problem of nationality. That would enable the Commission to study the former question without excessive delay.

80. The CHAIRMAN asked Mr. Hudson whether he agreed to Mr. el-Khoury's amendment.

81. Mr. HUDSON thought that it would not make sense to appoint a rapporteur the following year, since the Commission was not certain that the person it selected would be re-elected by the General Assembly.

82. Mr. el-KHOURY explained that he had not proposed that the Commission should appoint a rapporteur at its next session, but should hold a general discussion.

83. Mr. AMADO said that the Commission was not a political body, and that its function was not to settle immediate problems, but to codify and develop international law. Work of that kind was always of a long-term nature, and could extend over many years. The Commission worked steadily for future generations, and it was not proper for it to decide questions hastily; the work it did should be as perfect as possible. Moreover, the question at issue, although serious, was not absolutely urgent.

84. Mr. el-KHOURY recalled that he had proposed an amendment to Mr. Hudson's text. He had not meant by that amendment that the Commission should appoint a rapporteur forthwith, but that it should take up the question of the nationality of women without too much delay.

85. Mr. KERNO (Assistant Secretary-General) thought that the question of what the Commission would be able to do in 1951 was most important. The Commission could not and should not anticipate the General Assembly's decisions with regard to the election of the Commission's members, but the Commission's uncertainty in that regard should not result in its complete inactivity in the interval between its third and fourth sessions. Provision could be made, for example, for the Commission to hold a very short session after the

conclusion of the sixth General Assembly and adopt whatever decisions it had had to leave in suspense pending the appointment of its members by the Assembly. Be that as it may, the problem was a serious one. The Commission should nevertheless not allow itself to sink into inertia.

86. The CHAIRMAN said that two texts were awaiting decision by the Commission: Mr. el-Khoury's amendment to the effect that the Commission would initiate study of the question of the nationality of women in the course of its 1951 session, and the second part of the proposal submitted by Mr. Hudson who did not want to initiate that study before 1952. He first put to the vote Mr. el-Khoury's amendment, which read as follows:

"The Commission proposes to initiate study of the question of nationality at its 1951 session."

He added that by adopting that proposal the Commission would be undertaking to consider the general problem of nationality in 1951.

Six votes were cast in favour of the proposal, and six against.

87. The CHAIRMAN declared the proposal rejected.

He asked Mr. Hudson whether he was prepared to agree to the deletion from his proposal of the words: "The present agenda is so charged that..."

88. Mr. HUDSON agreed to the deletion.

89. Mr. AMADO was in favour of retaining those words, as they demonstrated the Commission's goodwill to the Economic and Social Council.

90. The CHAIRMAN put to the vote the whole of the second part of Mr. Hudson's proposal—i.e., including the words: "The present agenda is so charged that..."

Six votes were cast in favour of the proposal, and six against.

91. The CHAIRMAN declared the proposal rejected.

91 a. He noted that as a result of that vote, the Commission had adopted only the first sentence of Mr. Hudson's proposal, which read as follows:

"The Commission deems it appropriate to entertain the proposal of the Economic and Social Council in connection with its contemplated work on the subject of nationality, including statelessness."

92. Mr. HUDSON submitted a new text to replace the second sentence of the proposal which had just been rejected. That text was as follows:

"The Commission proposes to initiate that work as soon as possible."

93. The CHAIRMAN thought it unnecessary to take a vote on that text, as it certainly had the Commission's unanimous approval.

The proposal was adopted.

94. Mr. KERNO (Assistant Secretary-General) thought it appropriate that the Chairman should reply to the Economic and Social Council, informing it of the Commission's decision. He noted that the problem was settled as far as the Commission was concerned, but not

as far as he himself was concerned. The Economic and Social Council would undoubtedly ask him to explain the meaning of the decision and, above all, to indicate the probable date on which the Commission would initiate study of the question.

95. Mr. SANDSTRÖM thought that the outcome of the discussion was that the study would not be initiated in 1951, but would probably be undertaken in 1952. Mr. Kerno might find that a useful indication.

96. Mr. KERNO (Assistant Secretary-General) thanked Mr. Sandström.

Regime of territorial waters

97. The CHAIRMAN reminded the Commission that it had to decide another question, that of territorial waters, which had been referred to it by the General Assembly with a request that it be included in its list of priorities (resolution 374 (IV) of 6 December 1949).

98. Mr. KERNO (Assistant Secretary-General) thought that the Commission was acquainted with the problem. The General Assembly recommended the Commission to include that problem in its list of priorities. It was for the Commission to decide. It would have to decide whether it intended to study the question and to appoint a rapporteur.

99. The CHAIRMAN read the General Assembly resolution, and proposed that it be included in the list of priorities.

100. Mr. HUDSON supported that proposal, but pointed out that the Commission would be unable, before the expiry of its term of office in 1951, to complete all the topics already on its agenda or already begun. He therefore proposed the following text:

“The Commission decides to include in its list of priorities the topic of territorial waters, in response to the request emanating from the General Assembly.”

101. Mr. FRANÇOIS agreed with that proposal. He noted that if the Commission also initiated a study of the question of territorial waters in 1951, it would no longer have time to deal with other topics. The study of the report on the high seas which the Commission was to begin in 1951 would take up a great deal of its time, so that, with the question of territorial waters, the Commission would be devoting almost all its time to questions of maritime law. He thought that Mr. Hudson's proposal could give the General Assembly a certain measure of satisfaction. He thought it inexpedient to appoint a rapporteur on the question of territorial waters in 1951, for the reasons already given by Mr. Hudson.

102. Mr. HUDSON said that if the Commission decided to place the question of territorial waters on its agenda for 1951 in response to a request from the General Assembly, it would be faced with four items on which it would have to reach results in that year. It had, in particular, to complete its study of the vital question of the draft code of offences against the peace and security of mankind, and should not therefore think of dealing with any fresh topics whatsoever in 1951. It was better to leave open the question of studying the

problem of territorial waters, although the Commission could inform the General Assembly that it was including that topic in its list of priorities.

103. Mr. ALFARO and the CHAIRMAN supported Mr. Hudson's proposal.

104. Mr. SPIROPOULOS asked whether, despite the objections put forward by Mr. Hudson, it would not be possible for the Commission to take up the question of territorial waters at its 1951 session. It could appoint a rapporteur to deal with the question.

105. The CHAIRMAN said that he had been most impressed by Mr. Hudson's extremely pertinent arguments. The Commission could take up the question of territorial waters at a later date and, for the present, should merely inform the General Assembly that it was including the topic in its list of priorities.

106. Mr. YEPES thought that Mr. Spiropoulos' proposal was a reasonable one. By acting on it, the Commission would demonstrate its goodwill to the General Assembly.

107. Mr. CORDOVA felt that it would be wise to take account of Mr. Hudson's arguments, and agreed with the latter that it would be very difficult to appoint a rapporteur in 1951.

108. Mr. HUDSON observed that the question of territorial waters was of great importance, and recalled the failure of The Hague Conference of 1930 in dealing with that question. All that the Commission could do for the moment was to include the topic in its list of priorities.

109. The CHAIRMAN said that the general report would contain the text proposed by Mr. Hudson.

Per diem allowances of the members of the Commission

110. The CHAIRMAN raised a further administrative question. In its 1949 report, the Commission had dealt with the question of the allowances paid to its members. Since then a new factor had arisen—namely, the appointment of the members of the United Nations Administrative Tribunal, with allowances fifty per cent higher than those of the members of the Commission. He believed that he was expressing the view held by all members in saying that there was no reason why the members of the Tribunal should receive larger allowances than the members of the Commission. He thought that the question should be referred to in the report, with particular emphasis on the new development since the previous year, and with the additional observation that the Commission had the impression that it was being treated like a poor relation.

111. Mr. LIANG (Secretary to the Commission) said that the Secretary-General was required to submit to the General Assembly a report on the *per diem* allowances of the members of all the Commissions and that the aim was to achieve absolute equality.

112. Mr. AMADO noted that the position of the members of the Commission was prejudiced by the interpretation given by the General Assembly's Fifth Committee to the word “expert”. Mr. Brierly, rap-

porteur of the Commission for the Codification and Progressive Development of International Law (A/AC.10/51 and A/331) had emphasized that the members of the Commission were legal advisers. The present position of those members derived from a decision adopted by the General Assembly's Fifth Committee on the basis of article 13 of the Commission's Statute, which stated that: "Members of the Commission . . . shall receive a *per diem* allowance at the same rate as the allowance paid to members of commissions of experts of the Economic and Social Council." The Commission must endeavour to secure the amendment of article 13. If the Commission was to last, and if its work was worthy of perpetuation, it had to be recognized that the members of the Commission were not merely experts. He therefore proposed that they request that article 13 be revised so as to give the members of the Commission their due status.

113. Mr. HUDSON stated that Mr. Amado's contention was supported by the provisions of article 16 (e) of the Commission's Statute, which said that "it may consult with . . . individual experts . . ." Hence, the Commission could have experts at its disposal, and, consequently, its members could not themselves be experts.

114. Mr. SPIROPOULOS agreed with Mr. Amado and Mr. Hudson. The previous year, the General Assembly had decided that the members of the Commission were experts, and should be paid at the same rate as experts. He had been astonished to see the members of the Commission described as experts. Nowhere was that stated and, in any case, everyone was an expert in his own field: cooks, chauffeurs, judges were all experts. The members of the Commission, on the other hand, were legal advisers. The question had been discussed in the Sixth Committee and its sub-committee, whose verdict had been that the members of the Commission were legal advisers. Many delegates had shared that view. The matter had then been referred to the Fifth Committee which had mishandled it by studying it on the basis of article 13 of the Statute. It was essential to submit the question to the General Assembly once more, so that the members of the Commission should be recognized as having the status of legal advisers. If the General Assembly wished to have highly qualified persons as candidates for membership in the Commission, it must afford them a status which took due account of their abilities and competence.

115. The CHAIRMAN said that the Rapporteur would mention the matter in his report.

116. Mr. HUDSON announced that he had drafted a text for submission to the General Assembly, in the following wording:

"The Commission would again draw the attention of the General Assembly to the inadequacy of the *per diem* allowances provided for by article 13 of its Statute. The assimilation of its members to members of commissions of experts of the Economic and Social Council fails to take account of the position of the International Law Commission which is endowed with a formal Statute. The assimilation is invidious, moreover, by reason of the larger allowances

provided for members of the Administrative Tribunal of the United Nations."

It was decided that that text should be incorporated in the report.

117. Mr. KERNO (Assistant Secretary-General) said that before the discussion on that question came to an end, he wished to recall the efforts made by Mr. Hudson during the 1949 General Assembly. Despite the unfavourable atmosphere in the Fifth Committee, Mr. Hudson had persevered in his efforts to obtain recognition for the status due to the members of the International Law Commission. He could say that Mr. Hudson had left no stone unturned.

118. The CHAIRMAN thanked Mr. Hudson on behalf of all the members of the Commission.

The meeting rose at 1 p.m.

72nd MEETING

Thursday, 20 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 CORDOVA, 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).

Advisory opinion of the International Court of Justice concerning the constitution of an arbitral tribunal

1. The CHAIRMAN observed that the members of the Commission had no doubt read in the newspapers extracts from the advisory opinion given by the International Court of Justice on 18 July.¹ The Assistant

¹ International Court of Justice, Reports of Judgments, advisory opinions and orders, 1950, p. 221.

Secretary-General had supplied him with the text of that opinion. It was a most important one and came at the right moment. The Court had given a negative opinion; that is to say it had given a negative reply to the third question submitted in General Assembly Resolution 294 (IV): "If one party fails to appoint a representative to a Treaty Commission under the Treaties of Peace with Bulgaria, Hungary and Roumania where that body is obliged to appoint a representative to the Treaty Commission, is the Secretary-General of the United Nations authorized to appoint the third member of the Commission upon the request of the other party to a dispute according to the provisions of the respective Treaties?" It was not for the Commission to discuss the Court's opinion, but it might note that the opinion showed the rightness of the Commission's decision concerning article 23, paragraph 3, of the General Act of Arbitration which had it been ratified would have made impossible what had just occurred.

1 a. The Court declared in the first phase of the case² that there had been a dispute, that the three States were obligated to appoint their representatives to the Commissions, that, by not doing so, they had committed an international offence within the wide meaning given to the term by Mr. Basdevant and that their responsibility was involved. Later, however, interpreting the Paris Peace Treaties, the Court had stated that it was unable to proceed further since those Treaties did not permit the constitution of two-member Commissions. The Court had delivered its opinion by 11 votes to 2, the dissenting votes being those of Judges Read and Azevedo. Its interpretation of the two articles was based mainly on exegetic reasoning. The Commission must bow to the Court's decision.

1 b. He observed that in the present state of international law a State could evade its obligation to submit to arbitration simply by failing to appoint its arbitrator. The Commission had been well advised to recommend support for article 23, paras. 1, 2 and 3 of the General Act of Arbitration, which put a stop to such evasion. He was distressed at the thought of the effect this opinion would have on the non-legal public. "There has been failure to meet an obligation," said the Court, "but we can do nothing about it". Public opinion would wonder what the Court was for.

2. Mr. HUDSON felt that the views expressed by the Commission on a recent occasion were much in advance of the present legal situation. The Commission's statement that there would be compulsory jurisdiction to determine whether a dispute existed and whether the dispute came within the obligation accepted by a State, was not inconsistent with what was to be found in the Court's opinion on the second question. In its first opinion the Court had declared in the same sense as the Commission, only it had given an advisory opinion whereas the Commission wished the Court to exercise its compulsory jurisdiction in ruling on those points.

3. Mr. el-KHOURY had read the passage concerning

the advisory opinion in the press, but had not received quite the same impression from it as the Chairman. The Court had based its opinion on existing law. In the absence of a rule of international law giving it the necessary authority, it could not have acted otherwise. The Commission was attempting to establish a new convention with a view to its enforcement. That convention would lay an obligation upon States, but at the present moment, in the absence of a rule of law, the Court could not give any opinion different from the one it had already given.

4. The CHAIRMAN thought that Mr. el-Khoury would alter his view when he read the text of the Court's opinion and in particular the dissenting opinion of Judge Read. The Court had pronounced *de lege lata*, interpreting the law in an opinion voted by 11 of its members. The Commission had pronounced *de lege ferenda*.

5. Mr. KERNO (Assistant Secretary-General) agreed with Mr. Hudson that there was no contradiction between the Court's opinion on the first and second questions submitted to it by the General Assembly, and the provision adopted by the Commission at its last meeting. The Court had given an advisory opinion. The Commission had wished the Court to be able to pronounce a decision. In connexion with the third and fourth questions the Court had ruled that when a State refused to appoint an arbitrator nothing could be done. The Commission had adopted article 23 of the General Act of Arbitration under which the present gap could be filled by the President of the International Court of Justice being requested to appoint the arbitrator.

6. The CHAIRMAN read article 23 of the General Act of Arbitration as adopted by the Commission and stated that thenceforward the gap was filled.

Preparation of a draft code of offences against the peace and security of mankind (resumed from the 62nd meeting). Text prepared by the Drafting Committee (A/CN.4/R.6)³

7. Mr. SANDSTRÖM felt that the first question to

³ The text prepared by the Drafting Committee read as follows:

Article I

The following acts are offences against the peace and security of mankind, and are punishable as crimes under international law:

1. The employment or threat of employment of the armed forces of a State against another State for any purpose other than self-defence or execution of a decision by a competent organ of the United Nations.

2. The planning of or preparation for the employment of the armed forces of a State against another State for any purpose other than self-defence or execution of a decision by a competent organ of the United Nations.

3. The incursion into the territory of a State by armed bands coming from the territory of another State and acting for a political purpose.

4. The undertaking, encouragement or toleration by the authorities of a State of organized activities calculated to foment civil strife in the territory of another State.

5. The undertaking, encouragement or toleration by the authorities of a State of organized activities intended or calcu-

² International Court of Justice, Reports of Judgments, advisory opinions and orders, 1950, p. 65.

consider was whether or not the draft was to be included in the general report. If the Commission decided against inclusion it might perhaps be as well not to examine it.

8. The CHAIRMAN did not agree. That question ought not to prevent the Commission from examining the text prepared by the Drafting Committee. He asked whether the Commission wished the draft code prepared by the Drafting Committee to remain simply for the use of the members of the Commission, or whether it wished it to be included in the report submitted to the General Assembly.

9. Mr. HUDSON observed that as the Commission wished to give the Special Rapporteur some guidance for his work the following year, the Drafting Committee had attempted to draft what it believed to be the Commission's provisional conclusions. Its sole object had been to provide guidance for the Special Rapporteur, who remained free to alter what he thought fit. In his opinion the text ought not to be included in the general report. He thought that the discussion should not be resumed. If members of the Commission felt that the document did not precisely reflect the Commission's views, they could say so, and the Rapporteur would bear what they said in mind.

10. The CHAIRMAN agreed with Mr. Hudson. The three members of the Drafting Committee had endeavoured to produce a document faithfully reflecting

lated to create a state of terror in the minds of particular persons or a group of persons or the general public in another State.

6. Acts by the authorities of a State in violation of international treaty obligations designed to assure international peace and security, including but not limited to treaty obligations concerning:

- (a) the character or strength or location of armed forces or armaments;
- (b) the training for service in armed forces;
- (c) the maintenance of fortifications.

7. Acts by authorities of a State resulting in or directed toward the forcible annexation of territory belonging to another State, or of territory under an international regime.

8. Acts committed by the authorities of a State or by individuals with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such, including:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group.

9. Inhuman acts committed by the authorities of a State or by individuals against any civilian population, such as mass murder, or enslavement, or deportation, or persecutions on political, racial or religious grounds, when such acts are committed in execution of or in connection with the offences defined in Nos. 1, 2, 5 and 7.

10. Acts committed in violation of the laws or customs of war.

11. Acts which constitute:

the views expressed in the Commission, but it was customary for the work of a sub-commission to be submitted to the parent Commission.

11. Mr. SPIROPOULOS said that the Drafting Committee had considered whether or not the Commission's conclusions should appear in the general report, but the same question also arose in the case of other reports. What was to happen in their case? The question clearly did not arise in the cases of his own first report and the reports of Mr. Alfaro and Mr. Sandström, which dealt with items on the agenda that the Commission had finished discussing. But the Commission had not yet decided how to deal in the general report with the subjects upon which final conclusions had not yet been reached.

12. The CHAIRMAN gave it as his personal view that the results obtained ought to be mentioned in the general report. The Assembly should be kept informed of the progress of the Commission's work.

13. Mr. KERNO (Assistant Secretary-General) suggested that the Commission might follow the procedure it had adopted the previous year. On certain questions it had reached a final decision, whereas on others it had only done preparatory work, and its report to the General Assembly dealt with both; there had been a final report on the rights and duties of States and an interim report on other matters. By means of the in-

- (a) conspiracy to commit any of the offences defined in Nos. 1-10;
- (b) direct incitement to commit any of the offences defined in Nos. 1-10;
- (c) attempts to commit any of the offences defined in Nos. 1-10;
- (d) complicity in the commission of any of the offences defined in Nos. 1-10.

Article II

The fact that a person acted as Head of State or as responsible Government official does not relieve him from responsibility for committing a crime under international law.

Article III

The fact that a person acted under the orders of a Government or a superior does not relieve him from responsibility for committing a crime under international law, provided a moral choice was in fact possible to him; but this fact may be considered in mitigation of punishment.

Article IV

Pending the establishment of a competent international criminal court, the States adopting this Code undertake to enact the necessary legislation for the trial and punishment of persons accused of committing any of the crimes under international law as defined in the Code.

Article V

The States adopting this Code undertake to refrain from denying extradition for the crimes under international law as defined in the Code on the ground that they are political crimes.

Article VI

Disputes between the States adopting this Code relating to the interpretation or application of the provisions of the Code may be brought before the International Court of Justice by an application by any party to the dispute.

terim report the Assembly had been informed of what the Commission had done without a text being submitted to it.

14. The CHAIRMAN said that if he were given a task and was asked for a report, and he replied that he had studied the matter, the reply would probably not be found very satisfactory.

15. Mr. HUDSON thought that if the Commission included the text in its report to the General Assembly it would be discussed at length by the Sixth Committee. But the text would only be one indicating work in progress. What was the use of telling the General Assembly that the Commission had given such and such directives to its rapporteur? It would be sufficient to mention that it had examined Mr. Spiropoulos' report. The text of the report and the records of the proceedings were at the disposal of the members of the Assembly. It was unnecessary to involve the Sixth Committee in a lengthy discussion before the report was finally adopted. The Commission was not required to inform the General Assembly in detail of what it had done. To give the members of the Assembly to understand that the text submitted constituted the Commission's final conclusion would produce a bad impression; the members of the Assembly ought moreover to know that the Commission's task was a lengthy one. Since the texts were not final ones, the Commission ought not to submit them to the Assembly.

16. The CHAIRMAN said that the Commission must certainly draw attention to the fact that the texts were only of a provisional nature. He thought that it would be helpful to know the Assembly's reaction to the results of the Commission's work.

17. Mr. HUDSON thought on the contrary that it would disturb the Commission's work. If the Commission sent the General Assembly an interim report stating such and such and then in 1951 submitted a final report, the members of the Assembly would wish to know the reason for the changes made.

18. Mr. SANDSTRÖM reminded the Commission that the previous year when the Nürnberg Principles were under discussion the Commission had reached certain preliminary conclusions but had not included them in the general report. He felt that procedure should be repeated. The Commission was not in general bound to give an account of every stage of its work. The discussion to which the draft would give rise would be a premature one.

19. Mr. YEPES did not see any reason why the Commission should not submit to the General Assembly a detailed report on its work during the current session. The resulting discussion in the Sixth Committee would, moreover, be very helpful to the Commission. If the Sixth Committee failed to approve what the Commission had done, the latter might perhaps modify its conclusions.

20. Mr. AMADO observed that a special report was a scientific work whereas a general report was a compilation of facts informing the General Assembly of what had occurred in the Commission. The previous year the Commission had devoted a passage of its report

to each of the items upon which its opinion had been divided. Paragraph 27 of that report, for example, read as follows:

"The Commission also considered the question whether, in formulating the principles of international law recognized in the Charter and judgment of the Tribunal, it should also formulate the general principles of international law which underlie the Charter and judgment. Mr. Georges Scelle advocated the latter course and in furtherance thereof presented a set of draft principles. The majority of the Commission, however, took the contrary view and were therefore unable to accept certain of the principles enunciated by Mr. Scelle which, in their opinion, went beyond the scope of the task of the Commission."⁴

20 a. That was the right course to pursue. Mention should be made of the views expressed on each item. The report should say what stage had been reached in the Commission's discussions and what opinions had been expressed. In his opinion the Assembly should be sent a report similar to that of the previous year, but he regretted that he could not agree to the Assembly being informed of all the details of the discussions.

21. Mr. SPIROPOULOS thought that the members of the Commission would be able to agree upon a single solution. The General Assembly should be provided with an account of the Commission's work. He did not agree with Mr. Hudson that a bad impression might be produced if the Commission gave the Assembly an account of what it had done and then altered its opinion the following year. To give an account of certain principles provisionally adopted could not have harmful consequences; he was not nervous of a discussion in the General Assembly. Such a discussion might even be helpful.

21 a. If reference was made to the general discussion in the General Assembly on questions other than the draft declaration on rights and duties of States appearing in the previous year's report, it would be seen that it had enabled some delegations to express their views, and those views had been useful to him in drafting his report. He had wondered whether he ought to include the Nürnberg Principles in his report without interpretation or appraisal. Some delegations had said that an appreciation was required. Discussion in the General Assembly could thus be helpful. A report containing only the Nürnberg Principles and the creation of an international tribunal would be too meagre. For psychological reasons the report should be more substantial.

22. The CHAIRMAN thought that Mr. Amado's proposal, which was an intermediate one, would still give the Rapporteur General a great deal of work since he would have to describe the trends of opinion that had appeared in the Commission.

23. Mr. AMADO pointed out that Professor Koretsky had not sat on the Commission during the present

⁴ Official records of the General Assembly, Fourth Session, Supplement No. 10 (A/925).

session, and differences of opinion had not been so acute.

24. Mr. ALFARO had listened carefully to the arguments put forward and thought that those of both Mr. Hudson and the Chairman had considerable weight. To take Mr. Hudson's argument first: If the document in question were submitted to the Assembly after inclusion in the general report, the General Assembly would naturally tend to regard it as a finished work even when told that it was merely preparatory. It would examine not only the substance of the text but its wording. The Sixth Committee would take decisions upon it. The following year the decisions of the General Assembly or the Sixth Committee could be taken into account, but those decisions could not be other than provisional. The Commission would therefore set about drafting a new text of the code. The Code would then go back again to the General Assembly, which might contain different representatives, apart from the possibility of governments changing their views, and in that case the decisions taken might be different from those of the year before. Like Mr. Hudson, he felt that such a situation should be avoided. The document ought not to be included in the general report.

24 a. The Chairman was right too: The General Assembly should be informed of the results of the Commission's work. The Assembly should realise that the Commission was engaged in very delicate work and that it was impossible for it to complete its task in so short a time. The Assembly should be informed that the Commission had studied a draft code and that a drafting committee had prepared a text. He felt that to include in the report the individual views of each member on each item would be a lengthy and almost impossible task. It would be better to adopt the intermediate solution and submit an interim report which only mentioned the broad lines upon which the Commission was agreed.

25. The CHAIRMAN said that the Commission could inform the General Assembly that it had decided substantially that certain crimes should be included in the code and only a very general discussion of principle could take place in that connexion. In that way the Commission would show the Assembly that it had worked and arrived at conclusions. The provisional conclusions adopted made it possible for a full report on the subject to be submitted to the Assembly.

26. Mr. LIANG (Secretary to the Commission) said that the Statute made no provision for an interim report. Whether the Commission were engaged in work on the progressive development of law or in work on the codification of law, all that the Assembly expected was the final report on that particular subject. It was true that the Commission had seen fit to submit an interim report to the Secretary-General the previous year.

26 a. During the present year the Commission had completed its examination of three questions: the Nürnberg Principles, the desirability and possibility of establishing an international criminal jurisdiction, and ways and means for making the evidence of customary international law more readily available. The General Assembly would probably devote much time to dis-

cussing those questions. For the remaining items on the agenda of the present session a summary report would suffice, and it would not be necessary to summarize the records, which was always a delicate matter. The summary of the records would have to be approved by the Commission, which would mean additional meetings after 29 July, the date scheduled for the end of the current session.

26 b. With regard to the draft code of offences against the peace and security of mankind, the report would contain an account of what had taken place and give the numbers of the documents adopted. Any member of the Sixth Committee could ask for the documents and study them, but it was not necessary to submit the text of a provisional document to the Sixth Committee. Simply to submit the text of the articles without any statement of precedents or any comments would, moreover, not be in keeping with the Statute. Furthermore many members of the Commission would not be present at the General Assembly, and the members who were present would find it embarrassing to state the Commission's views in the name of the Commission.

26 c. He supported Mr. Alfaro's suggestion. The Commission should submit a very brief account of the conclusions it had reached. In the case of questions it had finished studying, it could submit a full report. If in the general report the Commission dealt with the substance of matters it had not finished studying, the Sixth Committee might waste much time discussing questions upon which the International Law Commission had only given a provisional opinion.

27. Mr. AMADO had never suggested that the individual opinions of members of the Commission ought to be included in the report. What he had said was that in the case of certain questions the Commission might inform the General Assembly that its discussions had reached such and such a point. The question of the draft code of offences was more advanced than the question of treaties. That should be indicated in the report. The previous year Professor Koretsky had asked for individual views to be mentioned because at that time opinion had been much divided. During the present year the Commission had been divided on the question of exchanges of notes—for example, in the report on the law of treaties—and it was possible that when the general report came to be discussed some members might wish it to be mentioned that they had not accepted Mr. Brierly's views.

28. Mr. HSU thought that it would be desirable to submit to the General Assembly an interim report on the Commission's work. The draft code of offences against the peace and security of mankind ought to be included in the report, with a note stating that it was a provisional text. The Assembly was aware that the Commission had done much work on the subject. It should be emphasized that the text was a preliminary one. The Assembly should be asked for its opinion in order that the views of its members might be known.

28. Mr. SPIROPOULOS felt that the members of the Commission were of the same opinion. He himself had said a month previously what had just been said by Mr.

Liang. The Commission was not obliged to submit a report, but since it had submitted one the previous year it was advisable that it should do so again. As regards the draft code of offences against the peace and security of mankind, the Commission could say, for example, that it had adopted the principle of individual responsibility and that it was desirable to have a code incorporated in a convention. In that way the General Assembly would be shown the work that had been done, but only general principles would be mentioned, which would perhaps be wiser than enumerating all the offences.

30. The CHAIRMAN felt that the members of the Commission were in general agreed that a substantial account of the trend of their work should be provided, but that they did not think it desirable to include provisional texts in the general report. That did not advance matters very far. The Commission would have to discuss the general rapporteur's report which would be a very delicate matter. It was fortunate in having as general rapporteur a man well versed in the law and accustomed to presenting views expressed in a body like the Commission, in which political opinions had some importance. He would like discussion of the report to begin as soon as possible, at least on that item. He regretted that the draft report, discussion on which might be lengthy, had not come before the Commission earlier, particularly in view of the fact that Mr. Spiropoulos had announced his departure in the near future. Mr. Spiropoulos remarked that discussion of the report would be simple, since the Commission had decided to include the Nürnberg Principles in it and to state that it would prefer the code of offences to be incorporated in a convention. On that point there was no disagreement.

31. Mr. HUDSON pointed out that of the seven questions the Committee had to deal with at the present session, three had been the subject of a report the final text of which could be submitted to the Assembly, viz: ways and means for making the evidence of customary international law more readily available, the document on which was already complete and would be submitted to the General Assembly; the Nürnberg Principles, each of which had been formulated with a carefully considered commentary; and the question of an international criminal jurisdiction. The questions upon which the Commission could only make an interim report were the code of offences against the peace and security of mankind, the regime of the high seas, the law of treaties and arbitral procedure. He hoped that the interim report would not be too detailed.

32. The CHAIRMAN recalled that the Commission had reached conclusions of some importance on certain items in Mr. François' report, and that the report on the draft code of offences against peace and security had reached a fairly advanced stage. The same by no means applied to the other questions. The law of treaties had been studied only in part and arbitral procedure even less. He appreciated very much the reports of Mr. François and Mr. Spiropoulos, which would make a great impression on the Sixth Committee and on public

opinion. Much work had gone into those reports and the general rapporteur could not deal with them simply in a few lines.

32 a. There remained the second question, and Mr. Sandström had been right in saying that the first question was a preliminary one. What did the Commission wish to do with the text prepared by the Drafting Committee, which reflected the principles advocated by the Commission? Did it wish it to be merely a working paper for the Rapporteur, or did it desire to make certain that it was a true reflection of those principles?

33. Mr. ALFARO felt that at the moment all that could be done was to pigeon-hole the document until the third session. If the Commission embarked on a discussion of the various articles it would use up the whole of its time till the end of the session. The Drafting Committee had undoubtedly endeavoured to take into account in its draft all the views expressed during the discussion. He thought, however, that in many cases members would wish to propose alterations. The alterations could be proposed when the Commission was examining the general report as a whole. There had been differences of opinion in the Drafting Committee, for example on the question whether the articles should be drafted in the form of a convention or in the form of a code. Finally the convention form had been chosen, without the word "convention" being mentioned. The words "the States adopting this Code" had been substituted for the words "parties to the Code". There had also been the question whether or not provision for penalties should be made in the code. But all that ought to be gone into later. He proposed, therefore, that the document should not be examined at present, in order to save the Commission's time.

34. Mr. BRIERLY supported Mr. Alfaro's proposal. He added to Mr. Alfaro's arguments that if the Commission discussed the document in detail at once, it could hardly tell the General Assembly that the document was not yet in its final form. The Commission could inform the General Assembly that the text contained principles of a provisional nature to guide the Rapporteur for his report the following year.

35. The CHAIRMAN thought the proposal a wise one. The document should be regarded as a strategic reserve that had not yet been brought into action.

36. Mr. LIANG (Secretary to the Commission) agreed with the solution proposed by Mr. Alfaro and supported by Mr. Brierly. He felt it was particularly desirable to postpone study of the document because the Commission could not know at present how it would be referred to by the Rapporteur in his general report. Study of it should therefore be deferred until discussion of the general report. He further suggested that in drawing up his general report Mr. Alfaro might find it helpful to collaborate with the various special rapporteurs. The Secretariat would naturally be at the disposal of Mr. Alfaro and the special rapporteurs. He suggested that the Commission invite the special rapporteurs to collaborate with the general rapporteur.

37. The CHAIRMAN accepted Mr. Liang's suggestion.

38. Mr. HUDSON noted that the French translation of the document did not invariably tally with the English text, which appeared to him more accurate. The French text needed a number of corrections and improvements. In addition he thought a few alterations were necessary in the English text, to reflect precisely the ideas expressed by the Commission and the conclusions it had reached.

39. Mr. el-KHOURY remarked that he had found no provision in the Statute of the Commission requiring the Commission to submit interim reports. Article 17 directed the Commission to submit final reports on questions which it had finished examining. It might also, if it deemed it desirable, submit interim reports, but this was quite optional. The General Assembly therefore did not expect the Commission to submit to it interim reports on all the items it had considered but not finished. In the present year it had finished its examination of three questions on which it would have to submit final reports. In the case of other questions it might follow its procedure of the previous year and inform the General Assembly of the stage its work had reached.

40-42. The CHAIRMAN believed the Commission was in agreement with Mr. el-Khoury.

Mr. Sandström took the Chair.

43. Mr. HSU pointed out that the discussion on the examination of the document submitted to the Commission at the present meeting had not been finished. He had asked to make a statement on the question.

44. The CHAIRMAN called upon Mr. Hsu to make his statement.

45. Mr. HSU felt that the document did not fully reflect the views expressed during discussion of the report on offences against the peace and security of mankind. One important question was not mentioned in it at all, namely, the question of subversive activities. The omission seemed to him particularly unfortunate since, apart from the importance of that question, it related to a completely new practice. When he submitted a draft text on the subject⁵ the Commission had referred it to the Drafting Committee in order that the latter might incorporate its main features. Nothing connected with it, however, appeared in document A/CN.6/R.6. He asked whether the Drafting Committee had examined his draft text.

45 a. A discussion ensued between the CHAIRMAN, Mr. SCELLE and Mr. HSU as to whether Mr. Hsu was entitled to ask that question after the Commission had passed on to another item of the agenda.

46. Mr. ALFARO remarked that in his view Mr. Hsu was entitled to make the observation. He agreed with him that the idea of subversion was a new one. When the matter was discussed in the Drafting Committee, that Committee had held that subversion was included in some of the offences it had formulated. He felt, however, that the matter ought to be taken up again the following year. He therefore proposed that the question

of subversion be mentioned in the report submitted to the Commission the following year, together with certain other questions left outstanding, such as penalties, aiding the aggressor and failure to assist the United Nations. All those questions would be dealt with in the report of the following year.

47. Mr. HSU thanked Mr. Alfaro for his remarks. He had merely wished to reserve the right to raise the question again the following year. Subversion was a method of recourse to force. It was a new one, which the Commission could not pass over in silence. The following year he would make concrete proposals, since he considered the offence of subversion not to be fully covered by the offences formulated by the Commission. The best example of the need for a thorough examination of the question of that offence was provided by events in Korea. If the Commission did not formulate a new offence to cover subversion it would be failing to keep abreast of the times. He had wished to make his statement in order that it might appear in the records.

48. The CHAIRMAN stated that Mr. Hsu's reservation would be included in the records.

Arbitral procedure: Report by Mr. Scelle (item 6 of the agenda) (A/CN.4/18) (resumed from the 70th meeting)

49. The CHAIRMAN called upon the Commission to resume examination of Mr. Scelle's report.

PARAGRAPH III OF THE PROPOSED DRAFT TEXT

50. Mr. SCELLE reminded the Commission that in paragraph II of the proposed preliminary draft text appearing in his report, he had dealt with the constitution of an arbitral tribunal. The following paragraphs were based on the assumption that the tribunal had been set up by agreement between the parties to a dispute or by a decision of the International Court of Justice. What was needed was to invest the tribunal, once constituted, with the power to lay down the law. As far as the parties to the dispute were concerned, they were obliged to regard the tribunal as being as formally and regularly constituted as the International Court of Justice. Once established the tribunal was independent of the two parties.

50 a. That being understood, he had said in the first sub-paragraph of paragraph III: "Once the arbitral tribunal has been set up by agreement between the parties or by the subsidiary procedures indicated above, it shall not be open to any of the contending Governments to alter its composition". That clearly laid down that no tribunal and none of the parties might attempt to alter the tribunal's composition. As regards the method of appointing arbitrators, he first of all examined the question of vacancies. He had said in his report: "If a vacancy occurs, the arbitrator shall be replaced by the method laid down for appointments." His formula followed the practice observed since the 1899 Hague Convention, which he did not think could give rise to discussion.

⁵ 60th Meeting, paras. 108 et seq.; 61st Meeting, paras. 4 et seq.

50 b. In the next sub-paragraph of his text he had dealt with replacement of a single arbitrator. There again he had observed the practice followed since 1899. Next he had dealt with suspicion: "An arbitrator may not participate in the judgment of a case with which he has previously had to deal in any capacity. Any doubts in this connexion shall be decided by the tribunal." He had been very careful to specify that it was for the tribunal to decide in case of doubt. There he had adopted the procedure laid down in the Statute of the International Court of Justice.

51. Mr. AMADO wondered whether the wording used by the Rapporteur was not somewhat wide. He thought the expression "in any capacity" lacked precision.

52. Mr. SCELLE did not agree that the definition was too wide; cases occurred, for example, in which a judge had already been consulted by one of the parties to a dispute. It was for the tribunal to decide whether in such a case the arbitrator might or might not participate in the judgment of the case.

53. The CHAIRMAN asked Mr. Scelle what he meant by the words "with which he has... had to deal" (*dont il aurait connu*). Were they used in the legal sense?

54. Mr. SCELLE replied that they were not. In his opinion the words also included the fact of having been consulted.

55. Mr. AMADO felt that the Commission ought to make the wording clearer; it was too vague. Not only the actual dispute but cases connected with it ought to be taken into account.

56. Mr. SCELLE said that he had used the wording of Articles 17 and 24 of the Statute of the International Court of Justice. He agreed that the problem might be looked into more closely, but he did not feel that the Commission would achieve anything very satisfactory by doing so. He was well aware that there might be cases connected with a dispute submitted to the Court, but he thought it would be very difficult to state precisely what those cases were. In any case, it would be for the tribunal to decide.

57. Mr. AMADO asked the Commission to consider the hypothetical case of a question of maritime law coming before the tribunal. One of the parties to the dispute proposed Mr. François as arbitrator; Mr. François was a specialist on maritime law and consequently it might be said that he had already dealt with the subject, so that he could not act as arbitrator. What was to be done in such a case?

58. Mr. SCELLE replied that he intended it to be left to the tribunal to decide.

59. Mr. HUDSON gave another example. Suppose the tribunal was composed of three members and had to deal with a dispute between States A and B. Each of those States appointed one of their nationals a member of the tribunal. The two members agreed upon the appointment of the third member. He failed to see how in that case State A could oppose the appointment of the national arbitrator of State B. If in the case of a tribunal of three or five members the Netherlands were

party to a dispute and appointed Mr. François as arbitrator, could the tribunal disallow the appointment? He did not think it could.

60. Mr. SCELLE replied that the Commission was not at present concerned with the question of objection, which he dealt with in the next sub-paragraph of paragraph III. It was concerned with cases in which the arbitrator himself might have scruples about participating in a case submitted to the tribunal. That arbitrator might quite possibly ask his colleagues if they felt that he could participate in the judgment of the case because he had dealt with the matter in dispute in scientific works or had already been consulted in similar and therefore related cases. It was that kind of scruple he had had in mind when drafting the passage in question. He recalled the case of Louis Renault, who had had a great reputation as a jurist and was frequently called upon to act as arbitrator. Louis Renault had never written anything except a few short articles, which were now prized as basic texts of the greatest value. He (Mr. Scelle) had taken part in the 1907 Hague Conference and been struck by the fact that no article of the Convention there drawn up had been accepted by the Conference unless it had previously been submitted to Louis Renault.

60 a. If one of the arbitrators had scruples of that kind, it would be for the other arbitrators to reply and to take a decision. In the event of the tribunal being composed of three members the umpire would decide. He realized, however, that in the case of a *non liquet* the tribunal would frequently not be in a position to give a decision. But he wondered who else than the Court could take a decision in case of doubt as to a judge's right to sit. The case presented no difficulties when the Court was composed of a certain number of judges, like the International Court of Justice, for example, which consisted of fifteen members.

61. Mr. HUDSON remarked that there were cases in which there was no umpire.

62. Mr. CORDOVA said that in some countries, such as Mexico, there were very few people with experience in international law and international affairs. But a government would always try to appoint an arbitrator who possessed that experience, and it would naturally consider first one of its own nationals. In many cases, however, it had been found that national arbitrators appointed by their governments acted on the tribunal simply as agents of their countries. He thought that the Commission ought either to sanction that practice, or categorically forbid States to nominate their own nationals as arbitrators on an arbitrary tribunal. The procedure recommended by Mr. Scelle did not seem to him acceptable.

63. Mr. KERN (Assistant Secretary-General) noted that Mr. Scelle said in his report that if doubt arose as to whether an arbitrator might participate in the judgment of a case with which he had previously had to deal, the tribunal would decide. He asked whether the judge under suspicion would himself take part in the decision.

64. Mr. SCELLE replied that he would, but that he

would find himself in the minority. Replying to Mr. Córdova he stated that where there were national arbitrators, the umpire would always have the casting vote after the national arbitrators had stated their views.

65. Mr. YEPES thought that the wording proposed by Mr. Scelle was too wide. The alteration of a few words would make it clear and explicit. In his opinion the words "in which he has previously taken part" should be substituted for the words "with which he had previously had to deal"; or use might even be made of the wording of Article 17 of the Statute of the International Court of Justice, according to which no member of the Court "may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity". Such wording would obviate all difficulties in connexion with that passage of Mr. Scelle's text.

66. Mr. SCELLE said that his intention had been to leave the tribunal completely free to decide in case of doubt. The Commission was not at the moment dealing with the question of objection, which was dealt with later in the text. What was in question was scruples which might be felt within the tribunal itself.

67. Mr. HUDSON remarked that Mr. Scelle's text rather narrowed the field for countries wishing to appoint one of their own nationals as arbitrators.

68. Mr. SPIROPOULOS thought that Mr. Scelle was on the wrong track. What he proposed was contrary to practice. A tribunal was a tribunal. The objections that might be made ought to be limited to instances in which a judge had already taken part in the case in question. To give the umpire the right to decide was likewise going too far. If a tribunal were composed of three members, two of whom belonged to the nations parties to the dispute, those two members would clearly tend to pronounce in favour of their own countries. Had the umpire the right to remove them? If he had, it would nearly always be impossible for governments to appoint their own jurists as judges or arbitrators. In most cases the members of the International Court of Justice were jurists appointed by their own governments. They participated in the judgment on all cases except the ones in which they had already pleaded on behalf of their countries, etc. As far as the Statute of the Court was concerned, there was nothing to prevent governments from appointing their jurists members of the Court.

69. Mr. SCELLE said he found Mr. Spiropoulos' objection difficult to answer. Mr. Spiropoulos had said that his proposal was contrary to practice. He had not written his report to conform with practice but to fill in the gaps in existing practice. Mr. Spiropoulos had spoken of jurists. In his own experience such persons cast off the old Adam when they came to judge a dispute. They adopted the point of view of the law. Mr. Weiss, jurist to the French Government, had voted in the Permanent Court of International Justice against his own government. A Belgian judge had done the same. The members of the International Court of Justice forgot their capacity as legal advisers to their govern-

ments and their nationality. The Commission was not, however, concerned with the International Court of Justice but with the arbitral tribunal.

69 a. Article 17 of the Statute moreover forbade members of the Court to participate in the decision of a case in which they had previously taken part as agent . . . "or in any other capacity". Mr. Yepes had quoted Article 17 of the same Statute and proposed that the words "in which he has previously taken part" should be substituted for the words "with which he has previously had to deal" in the report. He accepted the proposal, but would be sorry to see the whole passage deleted, since its object was to improve customary procedure. Governments must not be prevented from appointing their own nationals, but arbitrators appointed by them were like *ad hoc* judges in the International Court of Justice. There were strong objections to such judges.

69 b. He reminded the Commission that Judge Loder, the first President of the Permanent Court of International Justice, had given a lecture to the International Law Academy in 1922 on the difference between international arbitration and international justice. In connexion with an article in the draft Statute of the Court drawn up by the delegates of the Scandinavian, Swiss and Netherlands Governments, to the effect that a judge who was a national of a Power party to the dispute was to be debarred, Mr. Loder had remarked that to doubt such a judge's impartiality and to wish to debar him was "to allow for human frailty".

70. Mr. HUDSON did not oppose Mr. Scelle's views, but wished to propose a different form of words, such as the following:

"Neither party should name as national arbitrator a person who has previously taken an active part in dealing with the particular dispute to be arbitrated."

71. Mr. YEPES withdrew his amendment in favour of Mr. Hudson's proposal.

72. Mr. SCELLE accepted Mr. Hudson's text. It was the third occasion during the last few days on which Mr. Hudson had proposed a better text than his own. He had only one reservation to make—namely, that the last sentence of his own text did not appear in the text proposed by Mr. Hudson. Was the omission necessary?

73. Mr. HUDSON replied that it was.

74. Mr. SCELLE said that in that case he no longer agreed, since it meant a return to the old error of leaving a gap.

75. Mr. HUDSON said he had frequently observed that States regarded nationals appointed by them as representatives of their countries, and that national arbitrators regarded themselves as their governments' agents. He did not see how that could be avoided. In the International Court of Justice the situation was quite different. The judges there were quite independent of their governments.

76. Mr. el-KHOURY felt that the idea on which Mr. Scelle's text was based could only apply to an international tribunal; it was not applicable to private or national arbitration. In the case of private or national

arbitration, the parties must be entirely free to appoint their arbitrators. Those arbitrators, in their turn, would appoint the umpire. In that kind of arbitration, neutrality of the judges could not be insisted on. In the case of international arbitration, however, neutrality was indispensable. There were gaps in the text proposed by Mr. Scelle. It made no mention, for example, of the quorum required for a decision by the tribunal. He thought that an addition should be made to the text to cover that point.

77. Mr. CORDOVA drew attention to Article 31 of the Statute of the International Court of Justice dealing with the nationality of judges, which made provision for States parties to a dispute being represented in the Court by judges of the parties' nationality. If the Commission accepted that principle, there could be no question of its imposing restrictions on a judge on account of his past activities. It was recognized that Governments on the whole believed, when they appointed one of their nationals, that he would take their point of view. But it was the judge's duty to judge objectively. The text proposed by Mr. Hudson was drafted in too general terms. Mr. Hudson used the words "active part". What did he mean by the word "active"? Did he mean that a person who had acted as advisor to his government in a dispute submitted to arbitration, or who had participated in a judgment in connexion with that dispute, had thereby taken an "active part"? The Commission must decide whether it meant to allow States parties to a dispute to appoint arbitrators of their own nationality, or to forbid such appointments.

78. Mr. YEPES thought that *ad hoc* judges were always open to challenge. In article 17, paragraph 2 and article 31, paragraph 6, the Statute of the International Court of Justice allowed the Court to object to *ad hoc* judges.

79. Mr. SCELLE pointed out that the question of objection was dealt with later in his text.

80. Mr. SPIROPOULOS felt that the Commission was faced with a difficult situation which had no simple solution. He thought that the formula proposed by Mr. Hudson was the only one which the Commission could accept. The most that could be expected of governments was that they should not appoint persons who had already actively participated in investigating or settling the dispute submitted to arbitration. It was a very delicate matter to limit the rights of States. It was necessary in the present case, but care should be taken not to go too far. He did not think that the Commission could fill in the gaps to which Mr. Scelle had referred. He asked the Commission to adopt Mr. Hudson's formula which, as he had already said, appeared to him to represent the maximum that could be provided for.

81. Mr. SCELLE accepted Mr. Hudson's formula. The question of the nationality of judges would come up again when the Commission came to consider the next point in his report, which dealt with objection. The question before the Commission at the moment, however, was one which should be settled within the tribunal itself. In his view the arbitrators constituting the tribunal ought to decide any doubt, and whether or not

an arbitrator should participate in the judgment of the case. If the doubt was serious, one of the other arbitrators would certainly propose disqualification. That, however, was a matter to be considered later.

82. The CHAIRMAN felt he was right in saying that the members of the Commission accepted Mr. Hudson's formula.

83. Mr. HUDSON said that his formula was a direction to the Rapporteur, and that it was not necessary for it to be put to the vote.

The meeting rose at 1.5 p.m.

73rd MEETING

Friday, 21 July 1950, at 10 a.m.

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Chairman: Mr. A. E. F. SANDSTRÖM.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. Roberto CORDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris el-KHOURY, 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).

Arbitral procedure: Report by Mr. Scelle (item 6 of the agenda) (A/CN.4/18) (*continued*)

PARAGRAPH III OF THE PROPOSED DRAFT TEXT (*continued*)

1. Mr. SCELLE said that on the previous day the Commission had rejected the fourth sub-paragraph, under which the tribunal would decide in case of doubt whether an arbitrator could participate in the judgment of a case. He explained that the tribunal, or in some cases a third-power arbitrator, might be called on to give an opinion as to the qualifications of an arbitrator to sit on the tribunal. The question was taken up again in connexion with objections. Once a tribunal was set up, it was an organ of a particular international body; hence, its composition could no longer be changed. National arbitrators could not be interfered with. They were nominated by the two parties; the tribunal was above the parties and had no further connexion with

them, even where the arbitrators were national judges. The object of the report was to correct questionable procedure in the past. The tribunal must be safeguarded from diplomatic bargaining. It must be a genuine tribunal, making its awards on the basis of respect for law, as stated in article 37 of The Hague Convention of 1907.

1 a. The chief point in the report was the constitution of the tribunal. The tribunal must be set up prior to the *compromis*. The entire report was based on that notion. The procedure to be aimed at was that if the parties did not agree on the drafting of the *compromis*, the tribunal would draft it. The notion was to be found as far back as the 1907 Convention (article 53). The tribunal was now in charge of the issue, not the parties.

2. Mr. HUDSON asked whether article 53 had ever been invoked. He personally had never found that the article had the slightest effect, and he had come to the conclusion that it was illusory.

3. Mr. SCELLE did not think the Commission had been convened to record government practice where such practice was faulty. At the same time, governments were not obliged to accept the Commission's pronouncements. As article 37 stated, disputes should be settled "on the basis of respect for law", and not on the basis of law half-undermined. If the Commission felt that the only possible course was to continue as before, the report under discussion was pointless.

4. Mr. el-KHOURY remarked that Mr. Scelle had not said whether the nomination of a national arbitrator was subject to acceptance by the other party. With regard to the quorum, he would like to know whether the whole arbitration tribunal must sit, or whether a majority of the members was sufficient.

5. Mr. SCELLE, answering the earlier question, said he regarded arbitrators as the arbitrators for both parties, and a tribunal as only constituted when both parties had accepted all the arbitrators. A State had no right to change its arbitrators, and an arbitrator had no right to resign, any more than a judge. He could do so only with the consent of both parties; otherwise he was no longer a judge. Surely a judge was only at liberty to resign where a government had accepted his resignation. A tribunal was an institution above either party. A judge fulfilled a public function and no one had a right to abandon such a function once it had been accepted. As to the quorum, when a judge withdrew, it was more often than not at the bidding of his government, which was anxious to wreck the arbitration proceedings—an inadmissible situation. As his report showed, he was concerned first of all with the constitution of the tribunal, and only considered the *compromis* in the second place.

6. Mr. HUDSON pointed out that generally speaking, the *compromis* itself set up the tribunal.

7. Mr. SCELLE agreed that that was generally true, but that it was one of the major defects of the current procedure. Parties were free to proceed in that way, but if they did not agree, the first thing to be done was to set up a tribunal which would then establish the *compromis*. The procedure was the same as in domestic

law. If two parties appeared before a court and the case was not ready for hearing, the court might say — get your case ready or we shall decide it on the facts available.

8. Mr. AMADO said that the essential point in arbitration was not the fact that the tribunal was chosen by the parties. The linch-pin of the whole system of the arbitration was the *compromis*. Mr. Scelle appeared to call for two *compromis*: one to set up the tribunal, and then the *compromis* proper. Such a procedure was to much of an innovation that it would be well to consider whether it was feasible. The *compromis* was the basis on which the arbitration structure was erected; Mr. Scelle appeared to wish to divide it up, and to make it two-storeyed.

9. Mr. SCELLE thought a distinction was called for. The basis of arbitration was not the *compromis*, but the undertaking to submit issues to arbitrators. States must be brought to do so. He agreed that the Commission should urge States to draw up a *compromis* if they could agree; and if not, to endeavour to set up a tribunal which in turn would draw up the *compromis*. If they did not set up such a tribunal, it would be set up in conformity with article 23 of the General Act. Thus States had full latitude, where they agreed. Otherwise the tribunal established the *compromis*.

10. Mr. AMADO did not see how arbitrators could negotiate a *compromis*. Such negotiations were political operations.

11. Mr. SCELLE pointed out that there was nothing new involved. The obligatory *compromis* had been contemplated at The Hague Conferences of 1899 and 1907. Thirty years ago it had been decided that the tribunal should establish the *compromis*. If two States undertook to appear before arbitrators, from the legal point of view they must no longer be left a loophole. The Commission was trying to find out how States could be made to respect their obligations.

12. Mr. HUDSON asked the Rapporteur to mention a case in which article 53 of the Hague Convention had been applied and the *compromis* had been established by the tribunal.

13. Mr. SCELLE could not think of an example off hand. All writers who had studied the question of arbitration procedure, including J. C. Witenberg, had considered that the 1907 Convention should be applied.

14. Mr. el-KHOURY observed that in civil procedure, the arbitrator chosen by the parties established the *compromis*. But he did not think that was the case in international arbitration.

15. Mr. SCELLE said he had followed treaties published over a long period, and the procedure adopted by various States. If the Commission was to confine itself to the practice of chanceries, there was no point in convening experts on law to study the problem; it would be better to convene members of the chanceries.

16. Mr. SPIROPOULOS thought that the point on which Mr. Scelle and the other Members of the Commission differed was that the latter appreciated more fully the position of States which desired to retain a

certain freedom of action and to be in a position either not to appoint an arbitrator, or having done so, to withdraw him or to find some other way of avoiding arbitration. It was a normal practice for States to have a certain option not to have recourse to arbitration. In the case of a court whose compulsory jurisdiction had been accepted, there was no way of escaping that jurisdiction. Mr. Scelle would make arbitration compulsory as in the case of the International Court. He wanted all cases to be able to be brought before a tribunal for award. It was a proposal worth considering by the Commission. The question would then arise whether, in view of the desire of governments for a certain freedom of action, the Commission could urge that. It was a matter that called for reflection.

17. Mr. SCELLE was ready to grant full liberty to governments so long as they acted in good faith; but the moment they ceased to act in good faith, there must be some organ to prevent them from evading their obligations. Legally speaking, they could no longer evade arbitration.

18. Mr. AMADO was afraid that if the Commission aimed too high it might lose the little it had gained so far in arousing the interest of the various countries in arbitration.

19. Mr. SCELLE pointed out that States were not obliged to sign the Convention, but by drafting it the Commission would be formulating the law. Parties to a dispute invariably tried to defeat the law. Litigants were never honest. In a lawsuit, all that concerned them was their own interest.

20. Mr. AMADO recalled that a great many States had refused to accept the compulsory jurisdiction of The Hague Court in its entirety. He could speak with some confidence, since Brazil was a pioneer in the matter. He fully agreed with Mr. Scelle, but he could not see how to change the situation in practice. States were only States, and must be taken for what they were worth. He did not see how the problem of the *compromis* could be split up.

21. Mr. SCELLE argued that arbitration was intended for parties not wishing to appear before the International Court. If they acted in good faith, they could proceed freely; but if they refused to set up the tribunal, it must still be set up. The previous day, the Commission had voted in favour of article 23 of the General Act of Arbitration. He had felt that the question was settled, though he had not been sure. Certain writers had stated that a tribunal could waive the *compromis*. The tribunal and not the parties governed the suit. If there were to be justice, the tribunal representing the international community must take charge. Authors like Lauterpacht and Fischer Williams shared his opinion.

21 a. The question on which his own view differed from that of some of the members of the Commission at present was that of sovereignty. To say that States could evade justice was a poor interpretation of sovereignty. The question was whether sovereignty implied the right for a State to apply its regular jurisdiction, or whether it implied the right to take arbitrary action.

Some members of the Commission were championing arbitrary action.

22. Mr. ALFARO said he had always been greatly interested in the question of international arbitration. He knew by experience that, generally speaking, a State which had done an injury to another State tried to avoid arbitration. He had been rapporteur on the question of the pacific settlement of international disputes during the Pan-American Conference at Havana in 1928. In his report, he had advocated a system of pacific settlement by which, once a dispute had arisen, the parties could not avoid arbitration. The Conference had not accepted his proposal, but it had been persuaded to advocate the obligatory principle—which had brought about the 1928 - 1929 conventions on conciliation and arbitration. There were obligatory arbitration treaties in force between some of the Latin American republics. In principle—like Mr. Scelle—he favoured any system making arbitration compulsory. Once a State had agreed to submit a dispute to arbitration, it should not be able to avoid doing so.

22 a. With regard to the setting up of the tribunal, whether the *compromis* should always precede the establishment of the tribunal was a matter of practical expediency. It must be allowed that, before agreeing to arbitration, a State should be permitted to go into the matter; but where it had accepted a general clause requiring it to submit to arbitration, there could be no way out of arbitration, once a tribunal had been set up. Hence the logical conclusion was to entrust the drafting of the *compromis* to the tribunal. Failing a general arbitration clause, States which occasionally had recourse to that method of settling disputes drafted the *compromis* before setting up the tribunal; but States could agree beforehand on the composition of the tribunal. That would mean a double *compromis*, which appeared to worry Mr. Amado. But if the provisions in the report were adopted, States would take great care to draft the *compromis* at the same time as they set up the tribunal. States must be deprived of the possibility of evading arbitration once they had undertaken to submit their disputes to arbitration. He would vote on those lines.

23. Mr. YEPES found himself somewhat perplexed. Some speakers had discussed the right of withdrawing a national judge, and the right to challenge an arbitrator, others had discussed the *compromis*. He would like to know what exactly was the subject of the discussion.

24. Mr. SCELLE agreed that the discussion had strayed from its course; the Commission should have again taken up the discussion where it had left off the previous day—namely, on the question of objection to one of the arbitrators. He had gained the impression that when decisions had been taken, some members of the Commission did not like the arguments in his report so lucidly outlined by Mr. Alfaro. Once the principle of arbitration was admitted, there should be no possibility for a party to escape from it. It could happen that parties acted in good faith. In the Franco-German case of the Casablanca deserters,¹ neither party had

attempted to evade arbitration. It was a perfect example of what arbitration should be.

25. Mr. YEPES said he would like to speak on the question whether an arbitrator appointed by a State and losing its confidence could be withdrawn by that State.

26. Mr. SCELLE considered that a State had no right to withdraw its arbitrator. If it did so, the tribunal should continue to examine the case, as had happened with the Franco-Mexican Commission.² The tribunal still stood, and made its awards without the participation of the arbitrator who had been withdrawn. Members were aware of the case of the Hungarian optants, and the way in which the Council of the League of Nations had proposed a solution contrary to common legal honesty. It was an example of the way in which a political organ could pronounce a decision in defiance of its obligations. The Council of the League of Nations had declared that it was bound to appoint arbitrators, but had intimated that if the parties fell in with its wishes, it would not do so. It was a scandalous example of the introduction of politics into law.

27. Mr. YEPES said that the great weakness of arbitration lay in its actual definition. An award was made by arbitrators appointed by the interested States. He was in favour of compulsory arbitration, but he was also in favour of renouncing it and recommending instead the compulsory jurisdiction of a court of law. According to the principle of arbitration, if an arbitrator were chosen by one of the parties and lost the confidence of that party, the latter was no longer bound by the award.

28. Mr. SCELLE contended that Mr. Yepes' view was not in keeping with legal doctrine.

29. Mr. YEPES upheld the principle of arbitration. If compulsory jurisdiction were called for, all disputes should be brought before the International Court of Justice. A national judge on an arbitration tribunal might be compared to the *ad hoc* judge of the International Court, who could always be withdrawn at a State's request. The basic fact must be recognized that arbitration was an imperfect way of settling disputes. In 1948, at the ninth Pan-American Conference in Bogotá, it had been decided to put arbitration into the background in favour of giving full jurisdiction to the International Court of Justice. In codifying arbitration, the Commission should start out from the principle that it was an imperfect type of jurisdiction where a State was at once judge and litigant.

30. Mr. SPIROPOULOS pointed out that the Commission was discussing several questions at once. A few moments ago, it had been discussing Mr. Scelle's proposal—a very important innovation. He would like to know what the Commission proposed to examine next. The main question was whether the *compromis* could be established by the arbitrators.

31. Mr. SCELLE said the Commission was discussing the question of objection to arbitrators.

32. The CHAIRMAN thought it would be better to continue examining the binding force of arbitration conventions, and he asked Mr. Scelle if it would not be advisable to give some pointers as to whether the arbitration Convention was binding, and whether an arbitrator could be withdrawn.

33. Mr. SCELLE replied that the withdrawal of a judge was a separate question. When a State undertook of its own accord to appear before an arbitrator, should it be allowed the option of failing in its undertaking? That was the question.

34. Mr. AMADO read out the following passage from Mr. Scelle's report: "A 'national' arbitrator may not withdraw or be withdrawn by the government which has appointed him. Should this occur, the tribunal is authorized to continue the proceedings and to render an award which shall be binding. If the withdrawal prevents the continuation of the proceedings, the tribunal may request that the absent arbitrator be replaced and, if the procedure employed for his appointment fails, may request the President of the International Court of Justice to replace him." (para. III, last sub-paragraph) That was the main question.

35. The CHAIRMAN said that the Commission was engaged in a general discussion on that particular point in the draft.

36. Mr. SPIROPOULOS thought that States should be prevented from making arbitration impossible by their behaviour. The provisions of the proposed Convention would, after all, only be binding on States signing it. If a State undertook to accept arbitration and had not signed the Convention, it could continue to follow the diplomatic method. Hence, there was no risk for States which had not signed: but States signing the Convention would be opting for the procedure under which they could not evade their obligations. It would be a useful innovation to establish a procedure which added something to the structure of international law.

36 a. His experience with arbitration had been unfortunate. Most States endeavoured to avoid arbitration. Where they accepted it, it was frequently in order to obtain some advantage in other negotiations. The idea of laying down conditions which made evasion of arbitration impossible was most judicious. As he had said, there was no risk involved in adopting those conditions, since States not wishing to bind themselves had merely to refrain from signing the Convention.

37. Mr. CORDOVA saw nothing new in Mr. Scelle's text. It involved no more than the application of the principle that parties to an undertaking must carry out that undertaking in good faith. If they did not wish to do so, they put themselves outside the law. In a dispute between the United States of America and Mexico,³ the American judge had not been willing to sign the award rendered by Mr. Alfaro, as third arbitrator, and the Mexican judge; and he had withdrawn, as of course

¹ Arbitration of 24 November 1908; Award of 2 May 1909 (*American Journal of International Law*, 1909, 766).

² A. H. Feller, *The Mexican Claims Commissions*, pp. 69 - 76.

³ A.H. Feller, "The International Fisheries Case" (1931), *The Mexican Claims Commissions* (1935), p. 193.

was his right. The important point was that the tribunal had the power to settle the issue. The tribunal must not lose its jurisdictional authority because a national judge withdrew. Discussions had been carried on for many years at the diplomatic level, and in the end the United States to its credit had accepted the decision. The principles of international law were sufficient to warrant the statement that a State could not evade an undertaking to which it had given its word. That was no innovation; it was merely a question of codification.

38. Mr. SCELLE agreed with Mr. Córdova. The articles he had proposed left the parties the option of appointing another arbitrator; "If the withdrawal prevents the continuation of the proceedings..." The situation might well arise. It could happen that only one arbitrator was left, or that the remaining national arbitrator and the third arbitrator could not reach agreement. He continued to read out the passage: "...the tribunal may request that the absent arbitrator be replaced and, if the procedure employed for his appointment fails, may request the President of the International Court of Justice to replace him." That provision had been inserted to prevent a tribunal being made impotent to render an award.

39. Mr. CORDOVA observed that the situation was hardly likely to arise, since the arbitrators were three in number.

40. Mr. SCELLE replied that it arose frequently. A judge withdrew. Two judges remained, and it was quite possible that they might not agree. The Commission's concern was that the situation should be regularized so as to settle the issues involved.

41. Mr. CORDOVA took an example where there were three arbitrators, none of whom withdrew, and all holding different opinions. In such circumstances, they would be unable to render an award.

42. The CHAIRMAN pointed out that such a case could only arise if it had not been stipulated that the chairman or umpire would have the casting vote.

43. Mr. CORDOVA could not accept the solution suggested. If an arbitrator withdrew and were not replaced, the International Court of Justice would intervene. It was as if the parties had accepted its compulsory jurisdiction. But by opting for arbitration, they showed that they did not wish to submit their dispute to the International Court. Where an arbitrator withdrew, the remaining arbitrators could render the arbitration award on their own.

44. Mr. el-KHOURY thought the general discussion of the problem of arbitration would enable the special rapporteur to take cognizance of the Commission's opinion and to make the necessary alterations to his report. It would be well for the point concerning compulsory arbitration to be embodied in the Commission's work on the development of international law; but it should be in a form acceptable to States signing the Convention. A number of States had notoriously not yet accepted as compulsory the jurisdiction of the International Court of Justice as laid down in article 36, paragraph 2 of its Statute. How could they be expected to submit to compulsory arbitration? In any case, they

were aware that the appointment of an arbitrator and the drafting of the *compromis* did not bind them so long as they had not accepted the Convention.

44 a. He would prefer States to accept the principle of compulsory arbitration in a general treaty providing that disputes should be submitted to arbitration. In the absence of a prior agreement, if States concluded a private agreement, they must observe it. Certain conventions called on the parties to a dispute to set up a tribunal. If they did not succeed in doing so, that was one difficulty. If they did not succeed in drafting the *compromis* either, that was another. Where a State accepted the constitution of an arbitration tribunal, but refused to draft the *compromis*, the case would be referred to the International Court, which would itself judge the dispute in its entirety. Hence, States could be asked to accept the principle that if they did not succeed in reaching agreement on the *compromis* and the constitution of the tribunal, the Court would intervene and take the case over. On that basis, States would probably be prepared to accept the Convention. If they were deprived of the right to draft the *compromis* and to set up the tribunal, they would refuse out of hand to accede to the Convention.

44 b. If a judge withdrew, the party which had nominated him would replace him, naturally with the consent of the other party. If that proved impossible, the case would be brought before the International Court of Justice. If it accepted the principle of obligation proposed by Mr. Scelle, the Commission would be making the tribunal an international organ—in fact, a court of justice. The Commission should either draw up a Convention or allow full liberty to the contending parties.

45. Mr. KERN (Assistant Secretary-General) was not surprised that today's discussion had taken a high-flown and somewhat heated turn. The question at issue warranted it. On one cardinal point, there seemed to be unanimity in the Commission—namely, that parties were free not to bind themselves to appear before an arbitrator, but once they had bound themselves to do so, they must carry out their obligations in good faith. To have settled that as a starting point was a decided achievement. Although arbitration raised great difficulties, they must be surmounted in spite of breach of faith on either side. Some members of the Commission had been rather alarmed that the report should stress what the arbitrator could and could not do. If the accent were put rather on what the tribunal could or could not do, many of their fears would be allayed.

46. Mr. HUDSON was surprised that the words "compulsory" and "binding" should be mentioned so often in the discussion of arbitration. If the obligation to arbitrate existed but there was no arbitration tribunal when the obligation was undertaken, a distinction must be made between (1) the constitution of the tribunal, and (2) the competence of the tribunal set up. The general question was how far the two points could be left to be settled by the parties, or how far the solution of the difficulties which arose could be enforced on the parties by conventional law. In Mr. Scelle's report, those two questions—the composition of the tribunal and the

fixing of its competence—would be settled consecutively. He felt that the two points were inter-connected. In his experience, they invariably went together. He hoped that the way in which he proposed to formulate the problem would simplify the discussion. He suggested that the Commission give its opinion on the following points: (1) how far could the two questions be left to the parties? and (2) how far could the settlement of the two questions be enforced on the parties by conventional law on arbitration procedure?

46 a. He was concerned about the wide scope of the measures which the Rapporteur would like to introduce. So categorical a manner of drafting the text would probably reduce the number of countries prepared to accept the arbitration procedure which the Commission was attempting to establish; and recourse to arbitration would certainly be far less frequent in those circumstances. It was out of the question not to allow parties a good deal of latitude in the constitution and competence of the tribunal.

46 b. The next question which would arise was the functioning of the arbitration tribunal. Apropos of that, the first sentence of the final sub-paragraph of paragraph III of the proposed text stated: "A 'national' arbitrator may not withdraw or be withdrawn by the government which has appointed him." There were numerous reasons why an arbitrator might withdraw or be withdrawn. He might withdraw on grounds of illness, or for other reasons of *force majeure*. The report did not appear to admit of such reasons. The second sentence of the same paragraph struck him as being in contradiction to the sentence he had just quoted. It read: "Should this occur, the tribunal is authorised to continue the proceedings and to render an award which shall be binding." Thus, it recognized that withdrawal of an arbitrator could occur. Did the principle in the second sentence actually exist in current law? He did not think so, though it ought to exist. A well drafted *compromis* would cover the case. The only case in point he knew of was that of the *Lena Goldfields Co. Ltd. Arbitration*.⁴ The other three instances he could recall involving the withdrawal of an arbitrator were: first, the well known case of the Hungarian optants, a not very edifying episode. Arbitration had not been possible because of the withdrawal of one of the arbitrators; second, the Franco-Mexican Arbitration.⁵ During that hearing, the Mexican member of the Commission had withdrawn, or had not attended the meetings. In spite of that, the French member of the Commission and the chairman had rendered their award. Mexico had lodged a protest against the award, declaring that it was invalid. Agreement had finally been reached between the parties, but without deciding the question of principle regarding the replacement of an arbitrator who withdrew or was withdrawn; third, the final award rendered by the mixed German and Ame-

rican Commission in the *Black Tom Explosion Case*.⁶ The circumstances of that case were rather unusual. The Commission consisted of two American members and one German. The latter had withdrawn, and the Commission had rendered a limited award merely asking that certain funds already in United States hands should be paid over to the United States.

46 c. If it were now maintained that the report reflected the present state of the law, he could not agree. He was quite prepared to admit that the law should be in conformity with the principles formulated by the rapporteur. But since that was not the case, he would rather the question of replacement of an arbitrator who withdrew or was withdrawn were stipulated in the *compromis* or arbitration treaty between the parties. He requested the Rapporteur to look into the question as one which should be settled between the parties by means of an agreement.

47. Mr. SCELLE agreed that what he was advocating was not a universally recognized principle of international law. But there were precedents. He accepted Mr. Hudson's notion, provided the question of replacement of an arbitrator were stipulated in the *compromis*. But he could not accept it if it were not laid down in the *compromis*. His concern was to establish a principle. He would like to go further than the existing law, since he considered that the Commission was not called upon merely to record the positive law on the subject.

48 - 51. Mr. HUDSON, reverting to the Rapporteur's statement that The Hague Convention of 1907 called for revision, said he too felt that revision was desirable. In particular, he would like to see article 52 altered by a supplementary clause stipulating that the *compromis* should set forth the measures to be applied in the event of withdrawal of an arbitrator. If the Rapporteur's draft also stipulated that the question should be settled in the *compromis* itself, he would have no further objection to the paragraph in question. At all events the provisions of article 53 of the 1907 Convention ought not to be incorporated. They went much too far and had the further drawback of being unduly complicated.

Mr. el-KHOURY took the chair.

52. The CHAIRMAN requested Members of the Commission not to repeat in their speeches all the arguments already put forward during the discussions.

63. Mr. ALFARO said he had a comment to make on the final sentence of the last sub-paragraph of paragraph III of the proposed text. It would appear to indicate that, in the event of an arbitrator withdrawing or being withdrawn the tribunal could ask for the absent arbitrator to be replaced by the government in question. If the government did not replace him, the tribunal could ask the President of the International Court of Justice to replace him. Article 45 of The Hague Convention of 1907 was based on a similar notion.

⁴ *Lena Goldfields Co. Ltd. v. USSR*, Arbitration award of 2 September 1930, in Lauterpacht, *Annual Digest of public international law cases*, 1929/30, p. 426.

⁵ See footnote 2.

⁶ *Lehigh Valley Railroad Co. Agency of Canadian Car and Foundry Co. Ltd. etc.* (United States v. Germany), Second Arbitration Award of 30 October 1939 (Hackworth, *Digest of International Law*, vol. VI, pp. 90-97; 130-136).

54. Mr. SCELLE said that the only reason why he had inserted the paragraph in his report was that he wanted to avoid approaching a political authority for the replacement of an absent arbitrator. He wanted a judicial authority to be approached.

55. Mr. BRIERLY asked whether the Commission could not pass on from the paragraph in question. It would be easy enough if Mr. Scelle were prepared to delete the first sentence of the paragraph.

56. Mr. SCELLE was reluctant to agree to deleting the sentence. The principle involved in the sentence was precisely what he wanted to establish. At the same time, if the Commission were opposed to it, he would study the entire problem afresh, and possibly a year hence could return with another formula which might be less categorical. But he felt he must refer to the far too frequent fact that governments resorted to withdrawal of their arbitrators so as to sabotage arbitration. That had happened during the case of the Hungarian optants. Withdrawal in that manner should be regarded as fraudulent and inadmissible. But there were instances where there was no question of fraud — illness of the arbitrator, or his inability to attend the arbitration proceedings for reasons of *force majeure*. The sentence in question did not apply to such cases.

57. Mr. YEPES said that an arbitrator might withdraw or be withdrawn on the grounds that he had lost the confidence of his government.

58. Mr. SCELLE replied that that was precisely what he wanted to avoid. His basic concept was that once a tribunal had been set up, the arbitrators were the arbitrators for both parties. If there was only a single arbitrator, he was the arbitrator for both parties; if there were three of them, the situation was exactly the same. The arbitrators were in all cases arbitrators for both parties. He thought the Commission was unanimous on that principle, and he was sure too that it accepted his contention that the Commission's function was not merely to formulate the law or to enlarge upon it; it had also to point out to the various States that they should aspire to justice. He was not prepared to admit that a party had the right to sabotage arbitration by the simple expedient of withdrawing the arbitrator it had appointed.

59. The CHAIRMAN thanked Mr. Scelle for his statement. Mr. Scelle was evidently willing to go into the whole problem again and to draft the final sub-paragraph of paragraph III less categorically, so that the Commission would be able to reach agreement on it the following year.

60. Mr. HUDSON suggested the omission of the final sentence of the paragraph as not being in keeping with the sentence that preceded it.

61. Mr. SCELLE said he had added the sentence to allow greater latitude in the event of the replacement of an absent arbitrator, and to give the whole paragraph a less peremptory character. At all events, a provision of that nature was called for. A case might arise, for example, where, following the withdrawal of an arbitrator, the two remaining arbitrators might wonder

whether they should not bring in a finding of *non-liquet*. He thought it desirable to prevent that.

62. Mr. FRANÇOIS said Mr. Scelle had stated that once the undertaking to arbitrate had been accepted by the parties, the latter could not evade the obligation to arbitrate. But the point was, what was the undertaking that the parties had accepted. The undertaking was to have recourse to arbitration—namely, to a procedure for the settlement of disputes which left the parties a certain amount of latitude either to agree or to decline to submit any particular issue to arbitration. That latitude allowed to States was what distinguished arbitration from judicial proceedings. The 1899 Hague Convention had been very rough and ready. It had been revised in 1907 with the object of perfecting it. Mr. Scelle wanted still more; he wanted absolute perfection. He personally greatly admired perfection, but he also regarded it with apprehension. A scheme as perfect as the one Mr. Scelle proposed establishing ran the risk of remaining a dead letter. In practice, the less you strove for the more you got. It was better to leave well alone. Theoretically, Mr. Scelle's point of view was entirely justified, but in practice it might prove risky. Hence, he wished Mr. Scelle had been less ambitious, and he hoped he would be prepared to review the proposals he had put before the Commission, and to return a year hence with a text which might be more easily accepted by the various States.

63. Mr. SCELLE found Mr. François' reasoning decidedly convincing. There was much truth in it. As to his objection that compulsory arbitration should not be decisive merely because the parties were prepared to accept arbitration procedure, he could not admit it off-hand. In his draft, he had wished to establish precisely that absolute obligation. As he had pointed out, what he advocated in his report had already been contemplated in 1907.

64. Mr. HUDSON regarded the undertaking to arbitrate as the undertaking to reach agreement in due course. The rapporteur would force the parties to dispense with agreement in due course and to accept his method of solving any difficulties which might arise.

65. Mr. SCELLE replied that the undertaking which Mr. Hudson had referred to was no more than an expression of goodwill.

66. The CHAIRMAN thought Mr. Scelle had in mind unconditional acceptance. But there was no doubt that States would lay down conditions. He asked Mr. Scelle in his next report to bear in mind the objections revealed in the Commission. In his opinion, no party should be deprived of the right to raise objections or to lay down conditions.

67. Mr. SCELLE replied that in his report, States were not deprived of that option. What he wanted to avoid was that any party be resorting to obstructionism could hamper the ordinary course of the proceedings—e.g., by withdrawing the arbitrator it had itself appointed. To obviate that possibility his draft laid down certain rules of procedures as in the case of domestic legislation. Bad faith could be found at all stages, and there must be machinery for overcoming it at all stages.

68. Mr. CORDOVA felt that the Commission had discussed all aspects of the principle, and could rely on the Rapporteur to submit a text the following year which would take account of the opinions voiced during the debate.

69. Mr. HSU was prepared to accept the final subparagraph of paragraph III. The principle it laid down was a sound one. If a country was not willing to accept the arbitration procedure contemplated by the Rapporteur, there were other means and procedures it could apply. But once it submitted to the arbitration procedure, it should not be given the chance of evading it. The principle laid down was excellent. All Mr. Scelle need do was to re-examine it in the light of the present discussion and to re-cast it the next year for further examination and acceptance by the Commission. If States did not ratify it, they could always follow the procedure laid down in The Hague Convention and the General Act.

70. Mr. LIANG (Secretary to the Commission) recalled that Mr. Hudson had referred to the *Lena Goldfields Co. Ltd.* arbitration case. The *compromis* was reproduced in section IV of the "Memorandum on the Soviet doctrine and practice with respect to arbitral procedure", submitted to the Commission by the Secretariat (A/CN.4/36).

71. Mr. SCELLE pointed out that the Commission had not yet examined the fifth subparagraph of paragraph III of his proposed text, referring to the disqualification of an arbitrator. That was the next point to be examined. The question it raised was whether a party could object to one of the arbitrators only on account of a fact arising subsequent to the constitution of the tribunal, unless it could reasonably be supposed to have been unaware of the fact or to have been the victim of fraud. It was a question which arose constantly in domestic law, where an objection was only admitted subject to a great many restrictions. Objections were not admitted in domestic law before the tribunal was constituted. In practice, a party could not in such circumstances object to its own arbitrator or the arbitrator of the other party. The moment a party discovered after the tribunal had been set up that it had been the victim of a fraud, it could lodge an objection. For example, it might happen that the arbitrator had already appeared as judge on the issue, or had already been consulted on the point of contention. Objection could be made to the arbitrator of the party in question or to the arbitrator appointed by the other party. Domestic law granted the right of objection in the case of all arbitrators, including the umpire. That was the principle he had felt should be inserted in his draft text.

72. Mr. HUDSON thought it was a mistake to introduce the principles of domestic law into international law. The only case he knew of where there had been fraud was that of an arbitration case between the United States of America and Mexico.⁷ After the arbitration proceedings, Mexico had paid heavy compensation to

the United States under the award. But the United States had refunded the money once it discovered that fraud had been committed.

73. Mr. SCELLE pointed out that there was no domestic court of justice or arbitration which had not the right of challenge, which was an elementary principle.

74. Mr. CORDOVA said that in domestic law the right of challenge existed because the parties to the issue did not take part in the setting up of the tribunal. He could not see how an international arbitration procedure could give one State the right to disqualify the other State's arbitrator.

75. Mr. SCELLE replied that his draft did not grant such a right absolutely. It granted it only where fresh evidence came to light after the tribunal had been set up. The measure he contemplated was the same as that in force in domestic law on the question of re-hearing, which was admissible only where fresh evidence was forthcoming. To give a very simple example, suppose an arbitrator was nominated, and it was subsequently found that he was mad; would it not be legitimate to disqualify him? Or suppose it was discovered that an arbitrator had received money from the other party. There could be any number of reasons justifying disqualification; hence, he could not possibly admit that there should be no right of objection.

76. Mr. CORDOVA suggested that the cases where objection was permissible should be listed.

77. Mr. SCELLE thought it was unnecessary. The procedure he advocated in the last two sentences of the paragraph in question was sufficient.

78. Mr. SPIROPOULOS thought Mr. Scelle's proposals were truisms, and raised no problem. It might be true that no instances of objection had so far arisen in international arbitration. But they might well arise in the future. In a constructive document such as Mr. Scelle was endeavouring to compile, every possibility must be foreseen. He could not understand why the Commission should hesitate to follow Mr. Scelle's lead and make provision for the possibility of objection. Mr. Scelle's proposal was perfectly well founded. Every safeguard must be provided, not only in the interests of arbitration, but in the interests of governments.

79. The CHAIRMAN pointed out that, if there was a single arbitrator and he was challenged, the International Court of Justice would decide. But who would do so where there were three arbitrators? Would the other two?

80. Mr. SCELLE said that where there were three arbitrators, all three, including the arbitrator challenged, would make the decision. In domestic law, a challenged arbitrator remained in his place. He was present while his own case was being discussed, and took part in the decision. Actually, that was a minor matter which could be gone into at a later stage. The essential fundamental question was whether the Commission admitted the challenge or not.

81. The CHAIRMAN thought the question was of the utmost importance, and merited more thorough discussion. He pointed out too that the question of quorum

⁷ Claims by Mr. Weil and the La Abia Silvia Mining Co. (Moore, *Digest*, vol. VII, pp. 63-68).

arose. The tribunal must be complete before it could pronounce a decision. He did not favour the view that the arbitration tribunal itself could decide in the event of an objection. He would prefer that in such cases it should invariably be left to the International Court of Justice.

82. Mr. HUDSON hoped that the following week the Commission would have time to discuss so important a question again, so as to help the Rapporteur to summarize the members' views when he drew up his report a year hence. There were also all the other paragraphs of Mr. Scelle's draft report to be examined.

83. The CHAIRMAN ruled that the Commission begin discussion on Mr. Alfaro's general report on the following Monday morning, and continue if necessary into its Monday afternoon meeting. He hoped the discussion would not be unduly prolonged.

The meeting rose at 1.5 p.m.

74th MEETING

Monday, 24 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 CORDOVA, 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).

Commission's draft report covering the work of its second session

PART I: GENERAL (A/CN.4/R.7/ADD.1) ¹

1. The CHAIRMAN said the Commission now had several parts of the report before it. Part I was a mere

¹ Mimeographed document only. Parts of the document that differ from the "Report" are reproduced in footnotes to the summary records. For other parts, see the "Report" in vol. II of the present publication.

factual summary. It began with Mr. Koretsky's speech, which was fully reported in paragraphs 4, 5, 6 and 7.

Paragraph 12 ²

2. Mr. YEPES recalled that the previous year he had been instructed to draw up a working paper on the right of asylum, but he had thought it better not to submit it during the current session on the grounds that a case involving the question was pending before the International Court of Justice. The paper was actually ready, and he would like it to be mentioned in the report.

3. Mr. HUDSON suggested that the end of the first sentence "in view of the fact that a case involving the right of asylum was pending before the International Court of Justice" should be deleted, so as to avoid the conclusion being drawn that the International Law Commission considered that it was no longer competent to study a problem once the Court took up a case involving that problem. Surely the reason why the topic had been deferred was that the paper had not been submitted; there was no point in going into detail.

4. Mr. YEPES could not agree to the deletion of the words. The reason why his report had not been submitted was that after some correspondence with the Secretariat he had felt it better to hold it up for the reason already given.

5. The CHAIRMAN suggested the wording: "Mr. Yepes stated that his report was ready, but in view of the fact that a case was pending before The Hague Court he preferred not to have his paper submitted to the Commission." That would avoid creating any precedent, since it would involve only Mr. Yepes' preference, and not a decision on the part of the Commission.

6. Mr. ALFARO suggested that in that case it would be better to recast the first sentence of paragraph 12.

7. Mr. YEPES accepted that suggestion.

8. Mr. SANDSTRÖM wondered whether the final sentence of paragraph 12 was really necessary. In any case the sentence struck him as inaccurate, since the Commission had gone into the possibility of consulting technical bodies.

9. Mr. KERNO (Assistant Secretary-General) said he had already expressed the opinion that the interval between the second and third sessions should not be allowed to go by without consulting certain bodies. The agenda had been adopted; the report should therefore indicate why the Commission had not felt it necessary to discuss item 10.

10. Mr. SANDSTRÖM pointed out that the Commission had not felt it necessary to discuss the item separately, and it would be sufficient to insert the word "separately" in the sentence in question.

² Paragraph 12 read as follows:

12. The Commission decided to adopt the foregoing agenda with the exception that consideration of the topic of "the right of asylum" should be postponed, in view of the fact that a case involving the right of asylum was pending before the International Court of Justice. As no question arose in regard to "co-operation with other bodies", the Commission did not find it necessary to consider that item at the session under review.

11. Mr. HUDSON suggested leaving out the sentence, since it was evident from the report, particularly from paragraph 9, that the Commission had actually held consultations and intended to hold further consultations.

12. Mr. ALFARO said that the Assistant Secretary-General and he had felt that if the report stated that the agenda had been adopted, it was impossible not to mention item 10. The statement that no question had arisen meant that there was nothing in the Statute against such consultations, and that the Commission had decided that they should take place whenever necessary. There had been no disagreement on the subject.

13. Mr. KERNO (Assistant Secretary-General) felt that paragraph 19 of the report dealt with a question which had come before the Commission under article 17 of the Statute, and not with the consultations referred to in articles 25 and 26.

14. Mr. CORDOVA observed that item 10 referred to co-operation, and that paragraph 19 also dealt with it—co-operation with the Economic and Social Council. Unless it were stated that item 10 applied to co-operation with other bodies, the layman would have the impression that there was some connexion between item 10 and paragraph 19.

15. Mr. KERNO (Assistant Secretary-General) recalled that item 10 had been taken over from the first agenda. He enumerated the measures for implementing chapter III of the Statute. In regard to the co-operation mentioned in article 17 of the Statute and paragraph 19 of the report, the initiative rested with the Members of the United Nations and others, whereas for the consultations referred to in articles 25 and 26, the initiative rested with the International Law Commission. The matter was of some importance, since it often happened that organizations approached the Secretariat to have their names placed on a list of organizations with a sort of advisory status with the Commission; but the Commission had no urgent reason to examine it.

16. Mr. HUDSON suggested that it be left to the Rapporteur to draft the paragraph.

17. The CHAIRMAN asked the Commission whether it felt that the sentence should be deleted, or that the example of the previous year's report, which contained a sixth chapter devoted to co-operation with other bodies, should be followed.

18. Mr. ALFARO said he thought the issue before the Commission was Mr. Hudson's proposal that the task of amending the paragraph be left to the Rapporteur.

Mr. Hudson's proposal was adopted.

Paragraphs 13 and 14:

"Items for the consideration of the General Assembly"

19. Mr. HUDSON suggested that the word "items" was unsuitable. The items were reports.

20. The CHAIRMAN also felt that it would be better to say "reports submitted . . . etc." They were the findings arising from the Commission's deliberations.

21. Mr. ALFARO explained that the word "items" meant "items of the agenda".

22. Mr. HUDSON pointed out that the General Assembly was not going to discuss the Commission's agenda. He suggested the phrase "Special reports to the General Assembly". With regard to the final sentence³ of paragraph 14, the Commission was not submitting its conclusions to the General Assembly "for such action as it may deem fit to take". It was submitting them in compliance with its request. He thought the Commission should say "in accordance with resolutions . . ." mentioning the resolutions in question.

23. Mr. BRIERLY pointed out that there was no General Assembly resolution on the question mentioned under paragraph 13 (1).

24. Mr. HUDSON concurred; actually the first of the reports had been submitted in accordance with article 24 of the Statute.

25. Mr. el-KHOURY thought it was unnecessary to say "for such action as it may deem fit to take". It would be sufficient to say, "These are submitted to the General Assembly" without giving the reason.

26. Mr. BRIERLY thought that the whole of the second sentence of paragraph 14 was unnecessary, since all the Commission's reports were submitted to the General Assembly.

27. Mr. ALFARO agreed to the deletion of the sentence.

It was so decided.

Paragraph 15: "Items on which the Commission will continue its study"

28. The CHAIRMAN thought the word "Items" could be kept in the heading.

Paragraph 20

29. Mr. FRANÇOIS felt that the last sentence, "It was understood that the foregoing decision would not preclude the Commission from initiating work on the subject at its session in 1951", was a truism. Of course, there was nothing to preclude it in the text adopted by the Commission. He therefore suggested the wording "The Commission will initiate its work on the subject at its session in 1951, if it be found possible to do so."

30. The CHAIRMAN agreed that it would be better to adopt a positive approach and to say "if it be found possible to do so". He was surprised to find the words "would not preclude".

31. Mr. ALFARO replied that he had decided on the negative form of words for reasons of caution, but he would be glad to modify his report on the lines suggested.

It was so decided.

³ Read as follows: "These are submitted to the General Assembly for such action as it may deem fit to take."

Paragraphs 21 and 22 ⁴

32. After an exchange of views, the Commission decided to insert in the report a paragraph on emoluments for members of the Commission.

PART II: WAYS AND MEANS FOR MAKING EVIDENCE OF
CUSTOMARY INTERNATIONAL LAW MORE READILY
AVAILABLE (A/CN.4/R.7)

33. The CHAIRMAN asked the Commission to turn to part II of the Commission's draft report, dealing with ways and means for making the evidence of customary international law more readily available. The Commission had already discussed Mr. Hudson's working paper (A/CN.4/16 and Add.1). The report submitted to the Commission contained the text of the working paper as revised by the Rapporteur in the light of the opinions expressed during the debates. To simplify and shorten the discussion he suggested that the Commission should merely make suggestions on specific points.

34. Mr. HUDSON said that the Rapporteur-General and he had re-examined the question and had recast as a report by the Commission the working paper which he himself had drawn up. For example, they had omitted the bibliography given in paragraph 10 of the working paper. He wished to draw the Commission's attention to the text of paragraph 9 of the report as modified in deference to Mr. Amado's observations. The Commission should give some considerable attention to that paragraph. The other paragraphs of the report contained nothing new, except for paragraphs 63 and 64, which were entirely new.

Paragraph 6 (Paragraph 29 of the "Report")

35. Mr. YEPES said he was sorry that he had found no mention in the report of one source of customary law, namely the multilateral conventions which had been signed but not ratified or brought into force. He had suggested the inclusion of that source.

36. Mr. HUDSON said he had no objection to the insertion in the paragraph of a sentence to the effect that "even multipartite conventions signed, but not brought into force, are frequently regarded as having value as indications of State practice".

37. Mr. YEPES agreed to Mr. Hudson's proposal.

⁴ These paragraphs read as follows:

21. At the seventy-first meeting of the Commission on 19 July 1950, reference was made to the action taken by the General Assembly at its fourth session in respect of the question of emoluments for members of the Commission. The view was reiterated by the Chairman and several other members that present emoluments are hardly sufficient to meet living expenses, and that new efforts should be made to have the matter reconsidered and adjusted in terms that will make service in the Commission less onerous financially.

22. The Commission decided to draw again the attention of the General Assembly to the inadequacy of the *per diem* allowances provided by article 13 of its Statute. The assimilation of its members to members of commission of experts of the Economic and Social Council fails to take account of the position of the International Law Commission which is endowed with a formal Statute. The assimilation is invidious, moreover, by reason of the larger allowances provided for members of the Administrative Tribunal of the United Nations.

Paragraphs 8 and 9 ⁵

38. Mr. AMADO said that paragraph 9 did not state quite accurately what he himself had said during the discussion in the Commission on 6 June. He had requested that the report should be slightly recast to bring it into line with the concept of customary law as constituting the rule. He disliked the expression "conception by the States engaged that the practice is not forbidden by prevailing international law". Custom must not necessarily be in harmony with pre-existing international law. He suggested replacing the words by "recognition of custom by State practice".

39. Mr. BRIERLY wondered whether it was desirable for the Commission to embark on a question of doctrine. He felt it would be difficult to find a formula on which all members of the Commission could agree. In place of a text going into a certain amount of detail, he would have preferred to formulate merely a very general statement. He also wondered whether the whole problem was of any concern to the General Assembly. Nothing stated in the report was dependent on the Commission's opinions as to what constituted customary international law. He therefore suggested that paragraphs 8 and 9 simply be deleted.

40. Mr. ALFARO said that when he had drafted paragraphs 8 and 9 his intention had been merely to give a very brief outline of the discussions and the views put forward by the various members of the Commission. He would have liked to suggest that, in view of the objections raised, the Commission should discuss those paragraphs sentence by sentence so as to crystallize them where necessary. Customary law was constantly developing, at a rate which today seemed to be getting faster and faster. He quoted the example of the law in relation to air navigation; that too had evolved at a rapid rate. Since Mr. Brierly had suggested the deletion of paragraphs 8 and 9, the first thing for the Commission to do was to decide whether the two paragraphs ought to be omitted.

41. Mr. HUDSON said that he had modified the text of paragraph 9 in deference to Mr. Amado's suggestions. Thus he had used the expressions "a... rule of customary international law is generally thought to require presence of the following elements" and "practice...".

⁵ These paragraphs read as follows:

8. Before listing the various types of materials which serve as evidence of customary international law, the Commission deemed it appropriate to consider the elements which should be present before a principle or rule of customary international law can be said to have become established. A good measure of agreement seems to exist among authors of treatises as to what these elements are.

9. As a guide for determining the character of the evidence of customary international law which should be made more readily available, the Commission concluded that the emergence of a principle or rule of customary international law is generally thought to require presence of the following elements: concordant practice by a number of States with reference to a situation falling within the domain of international relations; continuation or repetition of the practice over some period of time; conception by the States engaged that the practice is not forbidden by prevailing international law; and general acquiescence in the practice by States other than those engaged.

not forbidden by prevailing international law". He thought paragraph 9 would arouse considerable interest in the scientific world. However, he had no objection to paragraphs 8 and 9 being deleted.

42. Mr. CORDOVA thought that a definition of the term "customary law" would be useful. But he agreed that such definition would be difficult. The Commission was in the same position as when it had had to examine the draft Declaration on rights and duties of States.

43. Mr. YEPES thought that all the reasons just raised in favour of deleting the two paragraphs should have been put forward at the beginning of the discussion. The report after all should be a reflection of the discussions. Since the Commission had adopted a general criterion, it could not now ignore that fact. It would be a serious omission if the Commission did not stipulate what it regarded as the elements of customary international law.

44. The CHAIRMAN said that when he had read paragraph 9, he had felt that Mr. Amado, whose opinion he shared, would be satisfied with the new version. The definition in paragraph 9 was correct, and he saw no objection to retaining it. He recognized, nevertheless, that it did not come under the agenda item.

45. Mr. KERNO (Assistant Secretary-General) thought that anyone studying or applying customary international law—e.g., the Legal Department of the United Nations Secretariat—would be glad to find guiding principles and data in the Commission's report. He was therefore in favour of retaining the two paragraphs.

46. Mr. BRIERLY thought it would have been useful, if it had been feasible, to state in the report what conclusions the Commission had reached in regard to customary law; paragraphs 8 and 9 merely gave a few of the opinions held in scientific circles. In the circumstances, he saw no object in retaining the two paragraphs.

47. The CHAIRMAN put to the vote the question of deleting paragraphs 8 and 9.

Paragraphs 8 and 9 were deleted, seven votes being cast for their deletion, and three for their retention.

48. Mr. YEPES said that his reason for voting for the retention of the paragraphs was that he felt that to delete them was contrary to the decision taken by the Commission at an earlier meeting.

49. Mr. CORDOVA and Mr. BRIERLY pointed out that no decision had been taken on that subject.

Paragraph 12 (Paragraph 33 of the "Report")

50. Mr. AMADO said that paragraph 12 spoke of "two admirable collections". He felt that the epithet was perhaps unduly subjective and unsuitable for use by a Commission whose duty it was to produce an objective study. He proposed therefore that the word "important" should be substituted for "admirable".

51. Mr. HUDSON replied that the two collections in question deserved the qualification of "admirable". When a compilation as thorough and scientific had gone

on for over one hundred and fifty years, it could not be described otherwise than as admirable.

52. Mr. ALFARO pointed out that in paragraph 27 (paragraph 48 of the "Report") other collections were spoken of as "notable efforts". The same description might be used in paragraph 12.

53. Mr. SPIROPOULOS did not agree with Mr. Hudson. He did not dispute the fact that the achievement of the two publications in question was an admirable one; but the Commission should adopt a more concrete and more objective attitude. He therefore wanted to see the word "admirable" replaced by some other word.

54. Mr. KERNO (Assistant Secretary-General) thought that the modification which Mr. Amado had proposed represented a compromise which Mr. Hudson might be willing to accept. He therefore seconded the proposal and called for the replacing of the word "admirable" by "important".

55. Mr. HUDSON agreed to the amendment.

*Paragraphs 63 and 64
(Paragraphs 84 and 85 of the "Report")*

56. The CHAIRMAN asked the Commission to examine paragraphs 63 and 64.

The paragraphs were accepted without comment.

Paragraph 68 (Paragraph 89 of the "Report")

57. Mr. BRIERLY observed that paragraph 68 listed a number of international law yearbooks.⁶ Yet apart from those yearbooks, there were international bulletins and reviews which were quite as important. In any case, the list of countries mentioned should certainly include Spain, Denmark and the United Kingdom.

58. Mr. YEPES thought it would be better not to mention the countries by name, but to state that such yearbooks were published in a number of countries. There was the danger of a list being incomplete, and even if additions were made, some countries might be left out.

59. The CHAIRMAN asked Mr. HUDSON whether he was agreeable to the names of the countries being deleted.

60. Mr. HUDSON thought it would be of interest to mention them.

61. Mr. LIANG (Secretary to the Commission) pointed out to Mr. Hudson that Germany was not mentioned.

62. The CHAIRMAN thought that either the list should be comprehensive, or else countries should not be mentioned by name. It would therefore be better to delete the list and to say merely "in a number of countries".

It was so decided.

⁶ "... notably in Czechoslovakia, Israel, Italy, Switzerland and Yugoslavia."

*Section V: "Specific ways and means
suggested by the Commission"*

63. Mr. KERNO (Assistant Secretary-General) wondered whether there was any point in mentioning in paragraph 1 of the section (paragraph 90 of the "Report") that the Commission attached special importance to the continuance of the multilingual system of the United Nations Treaty Series. He recalled the budgetary objections apt to be raised in regard to United Nations publications. It would be well to delete the word "multilingual" and to give an account of the system followed at present.

64. Another point should be made clear: The same paragraph stated that the Commission expressed the *voeu* "that the texts of international instruments registered or filed and recorded with the Secretariat, should be published with greater promptness". At the outset, there had been a delay of over a year between the date of issue of the texts and the date of their reproduction by the Secretariat. The delay had already been reduced; but it would be helpful if still greater promptness could be achieved. He therefore proposed that the words "as promptly as possible" should be substituted for "with greater promptness". Incidentally, General Assembly resolution 364 (IV) had made a similar recommendation.

65. Mr. HUDSON accepted Mr. Keruo's two suggestions, and went on to urge the Commission to read paragraph 2 (a) of the section (paragraph 91 (a) of the "Report") very carefully, as it contained a novel suggestion. It would be most useful if a publication in the form of a juridical yearbook as described in the paragraph in question could be prepared and published in the not too distant future. The same applied to paragraph 2 (b). A legislative series of the type mentioned would likewise be a most valuable publication.

66. Mr. LIANG (Secretary to the Commission) explained that the Secretariat was at present engaged on compiling works of that kind; publication had been authorized by the General Assembly. It was, for example, already collecting for publication legislative texts referring to the high seas; and some of them would be published.

67. Mr. HUDSON was most anxious that such compilations should be published.

68. Mr. KERNO (Assistant Secretary-General), referring to paragraph 2 (f), said that the Secretariat had in hand the publication of occasional index volumes of the United Nations Treaty Series.

69. Mr. LIANG (Secretary to the Commission) pointed out that the English text of paragraph 2 (g) should read, not "United Nations Organization", but merely "United Nations", the Organization's official title.

70. Mr. ALFARO said the official title was indeed "United Nations", though it was neither logical nor grammatical; but the Commission should keep to official titles and designations.

71. Mr. HUDSON said he would have preferred in English "Organization of the United Nations".

72. Mr. ALFARO accepted the suggestion provided that "organization" were written with a small letter.

73. Mr. KERNO (Assistant Secretary-General) said that the United States delegation had proposed at San Francisco that the term "United Nations" be adopted in memory of President Roosevelt who had introduced it and always used it.

The meeting rose at 12.55 p.m.

75th MEETING

Monday, 24 July 1950, at 3.30 p.m.

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Chairman: Mr. Georges SCALLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

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

Commission's draft report covering the work of its second session (*continued*)

PART V: PREPARATION OF A DRAFT CODE OF OFFENCES (A/CN.4/R.7/ADD.2)¹ AGAINST THE PEACE AND SECURITY OF MANKIND

1. The CHAIRMAN reminded the Commission that it had received a request from the United Nations Educational, Scientific and Cultural Organization to include the destruction of monuments and works of art in its list of international crimes, but that it had not yet replied to that request. In order not to appear to neglect relations with other bodies, it would be desirable for the Commission to inform UNESCO that the Commission would reply to its request next year when it

¹ Mimeographed document only. Parts of that document that differ from the "Report" are reproduced in footnotes to the summary records. For other parts, see the "Report" in vol. II of the present publication.

resumed study of the draft code of offences against the peace and security of mankind.

Paragraph 1 (Paragraph 146 of the "Report")

2. Mr. BRIERLY said that in English the city was called "Nuremberg", and not "Nürnberg".

3. Mr. LIANG (Secretary to the Commission) said that General Assembly resolution 177 (II) had employed the German form.

Paragraph 2 (Paragraph 149 of the "Report")²

4. Mr. AMADO pointed out that the expression "conflicts de lois" was used in French only in connexion with private international law. The same was true of the English expression, "conflicts of laws". He noted that the English text of paragraph 2 spoke of "conflicts of legislations".

5. The CHAIRMAN suggested that the expression "conflits de législations" should be used in the French text.

6. Mr. YEPES drew attention to the fact that the text made it clear that the conflicts of laws in question were in connexion with international criminal matters.

7. Mr. AMADO maintained that the sense of the expression in technical legal language was the one he had just indicated. It gave the impression that private international law was being referred to.

8. Mr. SANDSTRÖM considered that the question had nothing to do with offences against the peace and security of mankind, and that it was accordingly unnecessary to refer to it.

9. Mr. CORDOVA thought that there was no need for the Commission to examine cases in which municipal law was applicable.

10. Mr. SPIROPOULOS recalled that in paragraph 36 of his report (A/CN.4/25),³ he had stated: "From the same declarations, discussions, etc., follows *negatively* that the draft code to be elaborated by the International Law Commission cannot have as its purpose questions concerning conflicts of legislation and jurisdiction in international criminal matters."

11. Mr. AMADO considered that the words "political nature" in the second sentence of the paragraph should be changed.

² Paragraph 2 read as follows:

2. The Commission first considered the meaning of the phrase "offences against the peace and security of mankind", contained in resolution 177 (II). The view of the Commission was that the main characteristic of these offences lies in their political nature. They are offences which are likely to endanger the maintenance of international peace and security. The Commission was therefore of the opinion that the draft code should not deal with questions concerning conflicts of legislation and jurisdiction in international criminal matters. Nor should such topics as piracy (*delicta juris gentium*), suppression of traffic in dangerous drugs or of traffic in women and children, suppression of slavery, of counterfeiting currency, protection of submarine cables, etc., be considered as falling within the scope of the draft code.

³ Para. 5, p. 16 of the mimeographed French text.

12. Mr. BRIERLY noted that the second sentence of the paragraph said that "the main characteristic of these offences lies in their political nature".⁴ That was not, however, their distinctive characteristic. A murder, for instance, could be a political crime. The main characteristic of such offences was that they might endanger the peace and security of mankind. He would like to have the second sentence deleted.

13. The CHAIRMAN observed that the third sentence repeated the second one. He proposed the following wording: "The Commission's view was that the main characteristic of these offences is that they are likely to endanger the maintenance of international peace and security." The essential character of such offences should perhaps be sought in their aims and effects.

14. Mr. AMADO read the third sentence of the paragraph: "They are offences which are likely to endanger the maintenance of international peace and security" and asked whether it would not be more correct to say: "They are offences which endanger..."

15. Mr. ALFARO proposed saying: "which actually endanger..."

16. Mr. AMADO remarked that it was for the judges to decide whether offences against peace and security were involved.

17. Mr. LIANG (Secretary to the Commission) reminded the Commission that the phrase: "which is likely to endanger the maintenance of international peace and security" was to be found in Article 33 of the Charter, but was not used there to define a crime. If it was desired to describe such acts as crimes a more energetic term should be employed. He would suggest saying "which endanger".

18. Mr. HUDSON remarked that Mr. Briery proposed saying: "They are offences such as to endanger..."

19. Mr. ALFARO then read the text resulting from the different amendments: "The main characteristic of these offences is that they are such as to endanger the maintenance of international peace and security."

20. The CHAIRMAN considered that the French text: "La Commission estime que le caractère essentiel de ces crimes est qu'ils sont de nature, etc..." was a satisfactory one.

21. Mr. KERNO (Assistant Secretary-General) suggested that it was in Article 99 of the Charter rather than in Article 33 that a suitable formula should be sought. Article 99 ran: "a matter which in his opinion may threaten the maintenance of international peace and security".

22. Mr. SPIROPOULOS explained that, when drafting his report, he had sought to discover what distinguished such acts from other acts. If the report referred simply to offences of a political nature, it would cover acts, such as revolutionary ones, for instance, which were not offences under the Code. In order to be considered as an international crime, such offences must

⁴ *Ibid.*

possess three characteristics. First, they must be committed or tolerated by the State; secondly, they must be of a political nature; and thirdly, they must be such as to endanger peace and security. The combination of all three elements was required. Such offences were always acts involving the international responsibility of the State.

23. Mr. CORDOVA thought that it was necessary to retain the idea of violation of international law. There might be many situations endangering peace which could be solved pacifically and which had nothing to do with criminal law. The act referred to should already constitute a breach of international law and not solely a threat to peace.

24. The CHAIRMAN said that if an act was contrary to the Code, it was certainly a violation of international law. The characteristics of an international crime must be indicated. There was no doubt that the latter was contrary to international law and, once the Code was drawn up, it would state that fact.

25. Mr. SPIROPOULOS said that the Code would state what was an offence and not what was contrary to international law. Reference had already been made to the political nature of the offence, but the international element must also be mentioned.

26. Mr. AMADO remarked that a code referred to acts. Yet, in the last sentence of paragraph 2, it was said: "nor should such topics as piracy etc. . . be considered as falling within the scope of the draft Code". He would like to draw the Rapporteur's attention to that point. Approximations were dangerous.

27. Mr. ALFARO proposed saying: "The Commission first considered the meaning of the phrase 'offences against the peace and security of mankind', contained in resolution 177 (II). The Commission's view was that it could only be concerned with crimes which endanger the maintenance of international peace and security. It was therefore of the opinion . . ."

28. Mr. BRIERLY thought that the sole purpose of paragraph 2 was to explain why the Commission attached a restricted meaning to the expression "offence against the peace and security of mankind". The second of the two sentences did no more than repeat the first one.

29. Mr. HSU thought that by omitting the words "the meaning of" in the first line of paragraph 2 and simply saying: "The Commission first considered the phrase . . ." the problem could be solved.

30. Mr. SPIROPOULOS thought that an expression could not be defined by using the same terms as the expression itself. What should be said was that offences were involved if a State provoked or tolerated them and if they endangered the peace of the world.

31. Mr. CORDOVA suggested saying: "The Commission confined its study to offences which endanger peace and security." That would exclude piracy, which did not endanger international peace and security.

32. Mr. el-KHOURY asked why any definition should be given at all in the part of the report dealing with the progress of work on the draft Code. Why should the

Commission submit to the General Assembly something which it was not obliged to produce? The fifth part of the report answered no need. Its submission was purely optional on the part of the Commission. There was no reason for it to bind itself by giving definitions. He thought paragraph 8 (paragraph 157 of the "Report") alone would be quite enough.

33. Mr. SANDSTRÖM approved Mr. Córdova's idea, but thought the expression "in violation of international law" too vague. The criterion should be the fact that such offences endangered peace and at the same time constituted a violation of the rules which should govern relationships between States.

34. Mr. SPIROPOULOS recalled that he had said that it was not necessary to speak of a violation of international law, but that it was sufficient to emphasize the international nature of the offence.

35. The CHAIRMAN proposed combining the proposals of Mr. Sandström and Mr. Spiropoulos and saying: "The Commission adopted the definition of offences against the peace and security of mankind as being violations of international law likely to endanger the maintenance of international peace and security."

36. Mr. ALFARO said that the question was to discover the meaning of the phrase "offences against the peace and security of mankind", occurring in the Commission's terms of reference. The answer should be that the Commission would be concerned only with offences endangering peace and security and would not deal with other crimes.

37. Mr. CORDOVA said that the Commission could not assert that piracy did not endanger the security of mankind. In order to exclude such an offence from the draft Code, the latter would have to cover only crimes for political ends.

38. Mr. SPIROPOULOS also considered that the political nature of the offences in question was important. It was necessary to rule out piracy, the suppression of traffic in dangerous drugs, etc., but the actual words used did not constitute a definition.

39. The CHAIRMAN was of the opinion that the Commission should indicate what it had sought to do, which was to omit crimes which were not of a political nature.

40. Mr. BRIERLY proposed keeping the first sentence in the paragraph and then saying: "The Commission considered that this phrase should be limited to offences which contain a political element and which endanger or disturb the maintenance of international peace and security, and that the draft Code therefore should not deal with . . ."

41. Mr. SPIROPOULOS approved of the proposal since it emphasized the political nature of the crimes under consideration.

The Commission accepted the proposal.

42. Mr. AMADO pointed out that it would be necessary to say "*delictum*" and not "*delicta*" since only a single crime was referred to.

43. Mr. ALFARO thought the phrase "*delicta juris gentium*" might be deleted and that the word "acts" could be used instead of "topics".

It was so decided.

Paragraph 3 (paragraph 150 of the "Report")

44. Mr. HUDSON proposed deleting the third sentence, "The Commission would be reluctant to exclude principles which had been recognized as principles of international law in the Charter and judgment of the Nürnberg Tribunal."

45. The CHAIRMAN found the wording of the paragraph insufficiently direct.

46. Mr. HUDSON thought it would become so if the words "on the other hand" were deleted from the beginning of the last sentence.⁵

47. The CHAIRMAN pointed out that the Commission reserved the right to include only some of the Nürnberg Principles.

48. Mr. SPIROPOULOS recalled the fact that he had spoken in his report of "evaluation" of the Nürnberg Principles.

49. Mr. AMADO thought both the English and the French texts obscure. He read the second sentence of the paragraph and said that he understood it to mean that the Commission considered that place should be found for those principles in the draft Code but that it was free not to insert all of them. The last two sentences of the paragraph were difficult to follow.

50. Mr. KERNO (Assistant Secretary-General) said that the Commission had discussed the question a few weeks ago. The adoption of Mr. Hudson's proposal would mean that it interpreted the phrase: "indicating clearly the place to be accorded to the principles" as permitting it to indicate no place at all for those principles. The General Assembly had considered that the Nürnberg Principles constituted an important stage in the evolution of international law and that they should be confirmed. What had been established should not be lightly cast aside. The existing text of the report did at least say, in the sentence which it was proposed to delete, that the Commission, while reserving the right to leave out certain principles, would do so only for very serious reasons. While it had been the desire of the Assembly that a place be accorded to those principles, the Commission could clearly, upon reflection, arrive at the conclusion that there was no place for those principles in the draft Code.

51. Mr. HUDSON said that the text he proposed exactly embodied the decision taken the other day.

52. Mr. ALFARO pointed out that the text, as amended by Mr. Hudson, might seem to imply that the Commission intended to introduce great changes in the Nürnberg Principles, whereas that was not so. If the third sentence of the paragraph was struck out, some-

thing would have to be done to counteract the impression that the Commission attached scant importance to the Nürnberg Principles. In point of fact, it had made very few changes in those principles and then only for very sound reasons, for example, by introducing the element of the possibility of moral choice in the face of superior orders.

53. The CHAIRMAN drew attention to the fact that by saying "in their entirety" the Commission showed that it would subtract nothing from those principles but might change their order and manner of exposition. What was chiefly expected of the Commission was that it should indicate its conception of how those principles might be included. The phrase "in their entirety" was perhaps somewhat narrow. The Commission envisaged the possibility of adapting those principles, and of giving them a somewhat different technique.

54. Mr. CÓRDOVA considered Mr. Hudson's text excellent. The Commission was a body which should form its own estimate of its responsibilities. It could not confine itself simply to inserting provisions in a code. It must exercise its judgment. In other words, Mr. Hudson's proposal was clear and summed up the situation.

55. Mr. el-KHOURY thought it would be desirable to indicate the reasons for which certain principles were not included in the draft Code. The report could say, in that connexion: "Certain of the Nürnberg Principles not in accord with international law should not be incorporated..."

56. Mr. HUDSON thought that the first sentence of the paragraph might be retained and that the report might then say: "The sense of the Commission was that the phrase should be interpreted as leaving to the Commission freedom to appreciate the Nürnberg Principles and their formulation in view of their incorporation in the draft code."

57. Mr. ALFARO would prefer another rendering, since it was quite true to say that the Commission wished to include as much as possible in the draft Code. Practically speaking, it was incorporating all the principles. The Commission had omitted the enumerations contained in some of the principles and had improved the wording of certain principles but had kept the substance. The Nürnberg Principles were incorporated in the Code, and it was possible to put one's finger on the place they occupied. If it were asked where was the principle relating to forced labour, the Commission could reply that it came under Crime No. IX. But, when the Commission was able to improve those principles, as in the case of the possibility of moral choice, it should do so. Such questions should be very carefully considered, as the Nürnberg Principles, since their reaffirmation by the General Assembly, possessed a great significance which the Commission could not ignore.

58. Mr. BRIERLY thought that the Commission should indicate in the report that, on the one hand, it had made some changes in the Nürnberg Principles, and on the other had left out certain parts of those principles. He proposed keeping the first and second

⁵ That sentence read as follows: "On the other hand, should the Commission be convinced that any of the Nürnberg Principles ought not to be incorporated in the draft code or that any of them should be modified, it should be free to act accordingly."

sentences of paragraph 3 and replacing the third sentence by the following words:

"The Commission felt that the phrase did not preclude it from suggesting modifications or developments of those principles with a view to their incorporation in the draft Code."

59. The CHAIRMAN pointed out that Mr. Hudson's proposal said exactly the same thing as Mr. Brierly's.

60. Mr. SPIROPOULOS found Mr. Brierly's proposal very interesting, but preferred Mr. Hudson's. The General Assembly had long discussed the question of the formulation and appreciation of the Nürnberg Principles. It had used the English term "evaluation". He thought that Mr. Hudson's proposal was nearer to the decisions taken by the General Assembly.

61. The CHAIRMAN remarked that the French equivalent of the word "evaluation" used by the General Assembly was "appréciation" and it was the latter term that should be used in the French version of Mr. Hudson's proposal.

62. Mr. AMADO thought that a statement by the Commission on the modifications or omissions it had decided upon with regard to the Nürnberg Principles was the more necessary since the Commission had, for example, excluded from its consideration the criminal responsibility of States or organizations and had confined itself to the criminal responsibility of individuals. The report should therefore inform the General Assembly that, in accordance with the terms of reference it had been given, the Commission had not only formulated the Nürnberg Principles but had evaluated them.

63. Mr. BRIERLY was prepared to accept the text proposed by Mr. Hudson.

64. Mr. ALFARO was afraid that the Commission might run into difficulties if it said that it had evaluated the Nürnberg Principles, whereas formerly it had always spoken of only having formulated those principles. The Commission had adopted the principles, although with certain modifications, but it should think of the impression it would make by adding at that stage that it had also evaluated them. It should avoid giving rise to the impression that it had treated them lightly.

65. Mr. CORDOVA thought that the report might say that the Commission had formulated the principles, but that it had later evaluated them when it came to incorporating them in the draft Code. That fact was clearly brought out by Mr. Hudson's text.

66. The CHAIRMAN noted that the formulation of the principles by the Commission was almost the same thing as their adoption.

67. Mr. SPIROPOULOS thought that the Commission might leave it to the rapporteur to analyse the two closely related proposals and produce a single combined text for inclusion in the general report.

It was so decided.

Paragraph 4 (paragraph 151 of the "Report")

68. Mr. HUDSON thought that the first sentence was better worded in English than in French. The question

was not one of "facts" involving criminal responsibility, but of persons who might be held criminally responsible.

69. Mr. AMADO noted that in the second sentence of the paragraph there was a difference between the French text and the English one. The phrase in the latter, "it would only deal with" seemed to him far preferable to "il vaut mieux traiter". However, even the English text gave the impression that the Commission accepted the notion of the criminal responsibility of States.

70. Mr. el-KHOURY proposed deleting the words "for the time being" from the second sentence, after the words "was that".

71. Mr. ALFARO explained that he had included those words in order to show that the decision was a tentative one.

72. The CHAIRMAN said that he was also in favour of deleting the words "for the time being" which did not seem to him accurately to reflect the sense of the Commission's decision.

73. Mr. CORDOVA proposed deleting the whole of the second sentence and leaving only the first.

74. Mr. ALFARO said he was prepared to accept Mr. Córdova's proposal.

75. The CHAIRMAN felt that the Commission could not leave the matter there. The first sentence merely recorded the fact that the Commission had studied the question and gave no indication of the decision, provisional it was true, which the Commission had reached. The General Assembly must, however, be given some such indication.

76. Mr. HUDSON proposed the following wording for the second sentence:

"The sense of the Commission was that it should only deal with the criminal responsibility of individuals."

In other words, he had omitted the phrases "for the moment" and "and not of States or of organizations".

The proposal was accepted.

Paragraph 5 (paragraph 152 of the "Report")⁶

77. Mr. HUDSON did not think that the words "in this respect" could be used since they had no meaning in the context. It was, in any case, necessary to indicate the nature of the tentative decisions taken by the Commission.

78. Mr. AMADO found paragraph 1 quite inadequate. It did not say all that should be said. The Commission had discussed at length the various offences which it wished to include in its draft Code and the report should give a picture of the discussions and conclusions.

79. Mr. HUDSON said that paragraph 8 (paragraph 157 of the "Report") was complementary to para-

⁶ Paragraph 5 read as follows:

5. Several meetings were devoted to a discussion of the particular offences to be included in the draft code and tentative decisions were taken by the Commission in this respect.

graph 5. It seemed to him, therefore, that the information contained in paragraph 8 could be transferred to paragraph 5.

80. Mr. LIANG (Secretary to the Commission) thought Mr. Hudson's proposal a good one.

81. Mr. KERNO (Assistant Secretary-General) considered that paragraphs 5 and 8 could be linked together by re-drafting paragraph 5 roughly as follows:

"Several meetings were devoted to discussion of the particular offences to be included in the draft Code; tentative decisions were taken by the Commission on the matter and referred to the drafting sub-committee, mentioned in paragraph 8 below."

82. Mr. ALFARO found Mr. Kern's suggestion an excellent one. The Commission should not forget that a press release issued on 6 July had mentioned the draft Code that the Commission was in the course of elaborating. If the wording suggested by Mr. Kern for paragraph 5 were adopted, the Commission would avoid causing any difficulties in connexion with the press release.

83. Mr. HUDSON also supported Mr. Kern's suggestion.

The suggestion was adopted.

Paragraph 6 (paragraphs 154 and 155 of the "Report")¹

84. Mr. SANDSTRÖM noted that the paragraph dealt both with the responsibility of Heads of States and high officials and with that of a person acting under superior orders. He thought that the question of the responsibility of Heads of States would give rise to a big discussion in the General Assembly. As regards the responsibility of a person acting under superior orders, the Commission, when formulating Principle IV, had stated that such a person could not be considered as free from responsibility if a moral choice had been possible to him. He regretted that no mention was made of that conclusion in the text of paragraph 6.

85. The CHAIRMAN thought that the omission could be repaired by including a reference to Principle IV.

86. Mr. AMADO thought that the word "tentatively" in the third line of the paragraph was superfluous, and should be deleted. There had been agreement in the Commission on the point.

87. Mr. HUDSON said that the remark made by Mr. Sandström had raised some doubt in his mind. As a matter of fact, the Commission had formally decided that there could be no freedom from responsibility if the author of a crime had had the possibility of a moral choice. He considered that that part of the Commission's decision should be reflected in paragraph 6.

88. Mr. YEPES observed that, on that point, the

Commission had departed from the Nürnberg Principles. He thought it indispensable that explicit mention of that fact should be made in paragraph 6.

89. Mr. ALFARO replied that the Commission had departed from the Charter, but not from the judgment of the Tribunal.

90. Mr. BRIERLY pointed out that the Commission had therefore not departed from the Nürnberg Principles, since under its terms of reference it was called upon to examine the Charter *and* the judgment.

91. The CHAIRMAN noted that, according to the text of paragraph 6, the Commission had decided that "the relevant Nürnberg Principles as formulated by the Commission should be applicable." He would like to point out in the first place that the word "relevant" should be replaced by the word "corresponding". He also found the expression "as formulated" insufficiently precise. The Commission had altered the definition of certain principles and the fact should be clearly stated.

92. Mr. HUDSON suggested saying that the Commission had decided to apply the Nürnberg Principles "with certain variations".

93. Mr. CÓRDOVA recalled that the Commission had been unanimous in modifying Principle IV. That decision should be maintained, and clear mention of it made in paragraph 6.

94. The CHAIRMAN thought that the report might say that the Commission had decided that the Nürnberg Principles should be applicable with one important modification.

95. Mr. HUDSON said that, having re-read the text of the principles, he would like to propose the following wording for paragraph 6:

"The Commission considered at some length the responsibility of a person acting as Head of State or as responsible Government official and that of a person acting under superior orders. The tentative decision taken on this matter follows the relevant principle of the Nürnberg Charter and judgment as formulated by the Commission."

96. Mr. YEPES moved that the paragraph should be divided into two parts, the first dealing with Heads of States and government officials, the second applying to persons acting under superior orders.

97. Mr. KERNO (Assistant Secretary-General) thought that there was much to be said for giving satisfaction to the members of the General Assembly by referring, as Mr. Hudson's text did, not only to the Charter of the Nürnberg Tribunal, but also to the judgment pronounced by the Tribunal.

98. Mr. AMADO thought that when the Nürnberg Principles were mentioned, people usually thought only of the Charter of the Nürnberg Tribunal, and they would be astonished on reading the report to find that certain of the principles formulated by the Commission were not in entire conformity with those to be found in the Charter. Accordingly, it was necessary to state that the Commission had not only had recourse to the Charter, but had also based itself on the judgment in

¹ Paragraph 6 read as follows:

6. With respect to the responsibility of a person acting as Head of State or as responsible government official and the responsibility of a person acting under superior orders, the Commission tentatively decided that the relevant Nürnberg Principles as formulated by the Commission should be applicable.

formulating the principle relating to persons acting under superior orders.

99. The CHAIRMAN thought the discussion which had just taken place could be summed up by saying that the members of the Commission were unanimous in affirming that the Commission had made modifications in the Nürnberg Principles, and that the fact should be indicated in the report. At the same time, he felt that the Rapporteur had received sufficient guidance to be able to produce in the final draft of his report a formula which would give satisfaction to everybody. He also noted that the Commission was in favour of dividing the paragraph into two distinct parts as proposed by Mr. Yepes.

Paragraph 7 (paragraph 156 of the "Report")

100. Mr. HUDSON proposed deleting the words "under the draft Code" from the last line of the paragraph.

101. Mr. KERNO (Assistant Secretary-General) observed that the French translation of that part of the report required revision. The word "application" should be replaced by the words "mise en oeuvre" in that paragraph.

These proposals were adopted.

Paragraph 8 (paragraph 157 of the "Report")

102. Mr. ALFARO thought that a few words should be added to the paragraph to the effect that Mr. Spiropoulos, in his capacity as special rapporteur, had been requested to continue his work and submit a new report to the Commission at its next session. He suggested the following text:

"The draft was referred by the Commission to the special rapporteur, Mr. Spiropoulos, who was requested to continue work on the subject and to submit a further report to the Commission at its third session."

It was so decided.

The meeting rose at 6.10 p.m.

76th MEETING

Tuesday, 25 July 1950, at 3 p.m.

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Chairman: Mr. Georges SCILLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. Roberto CORDOVA, Mr. J. P. A. FRANÇOIS,

Mr. Shuhsi Hsu, Mr. Manley O. HUDSON, Mr. Faris el-KHOURY, Mr. A. E. F. SANDSTRÖM, 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).

Commission's draft report covering the work of its second session (*continued*)

PART III: FORMULATION OF THE NÜRNBERG PRINCIPLE A/CN.4/R.7/ADD.3)¹

1. Mr. HUDSON wished to know whether what was taking place was the first reading of the draft report, to be followed later by a second reading of the final text which would then be adopted officially. If the members of the Commission wished to have their individual opinions recorded in the report the time to express them would be at the second reading.

2. The CHAIRMAN replied that a second reading would certainly be required but that it would only be a partial one. Members of the Commission who had observations to make would make them at the second reading. In principle, apart from certain recommendations to the general rapporteur, the Commission had adopted what had been read.

3. Mr. HUDSON assumed that the report would be put to the vote at the second reading, in the first place section by section and then as a whole. He repeated that some members of the Commission might wish to express their personal opinions then, for inclusion in the report.

4. Mr. LIANG (Secretary of the Commission) asked whether the Commission contemplated a third reading. As a rule, if a member wished his observations to be included in the report he made them before the second reading.

5. Mr. HUDSON reminded the Commission that the previous year it had approved, during the second reading, memoranda setting out the opinions of certain of its members. He thought that procedure a good one.

6. Mr. LIANG (Secretary of the Commission) seemed to remember that the observations in question had been made at the first reading.

7. The CHAIRMAN thought it better for individual observations to be made at the first meeting.

8. Mr. HUDSON was not in favour of that procedure: he would like to have the revised text to be voted upon in front of him before giving his personal opinions.

9. The CHAIRMAN made the objection that that would involve a third reading, unless it were left to the Rapporteur to incorporate such observations in his report.

¹ Mimeographed document only. Parts of that document that differ from the "Report" are reproduced in footnote to the summary records. For other parts, see the "Report" in vol. II of the present publication.

10. Mr. CÓRDOVA asked whether every member of the Commission would be able to have his opinions included in the report.

11. Mr. HUDSON thought not. It would be a question of explaining why a member had voted as he did.

12. Mr. ALFARO said that explanations of that kind had been included in the case of Mr. Koretsky during the first session.

13. Mr. HUDSON remarked that the same thing applied to Mr. Scelle and himself.

14. The CHAIRMAN stated that the observations in question had been made when the Commission adopted the report as a whole. He thought that it would be possible for the Commission to accept observations made during the second reading, but that either the task of incorporating them in the report must be left to the Rapporteur or the Secretariat, or they must appear in the report in the form in which they were made.

15. Mr. ALFARO read out Part III of the report.

*Paragraphs 1 and 2
(paragraphs 95 and 96 of the "Report")*

16. Mr. HUDSON thought that the first sentence of paragraph 2: "In pursuance of this resolution of the General Assembly, the Commission undertook a preliminary consideration of the subject at its first session in 1949", might be followed by the first two sentences of the last paragraph of Part III,² and the paragraph might end with the words "This conclusion was set forth in the report which was approved by the General Assembly at its session of 1949."

17. Mr. ALFARO had felt that the part of the draft report under consideration ought to end by pointing out to the reader what the formulation of the Nürnberg Principles meant, and saying: "That is what the Tribunal thought, and that is what the Commission did." He had therefore thought it best to place the passage mentioned by Mr. Hudson at the end of Part III.

18. Mr. HUDSON, Mr. SANDSTRÖM and Mr. CÓRDOVA felt that it would be more logical for the explanation of the manner in which the Commission had interpreted its task to be given at the beginning of Part III.

The Commission decided to insert the first two sentences of paragraph 2 on page 13 after the first sentence of the second paragraph on page 2.

The Commission decided to add after those three sentences the words: "This conclusion was set forth in the report which was approved by the General Assembly at its session of 1949."

19. Mr. FRANÇOIS pointed out that the Commission

had taken a much wider view of its task in connexion with paragraph (b) of resolution 177 (II). In preparing the draft code it had rejected the view that its task "was not to express any appreciation of these principles". It had expressed an appreciation of those principles in Part II of the report. It should be made clear that it was only paragraph (a) of the resolution which applied to Part III. Drafted as it was at present the passage would be rather confusing for the public, which would be surprised to find in Part V of the report that the Commission had expressed an appreciation of the Nürnberg Principles.

20. Mr. KERN (Assistant Secretary-General) suggested that the second sentence of paragraph 2 on page 13 might be amended to read: "the task entrusted to the Commission by paragraph (a) of resolution 177 (II) was not to express any appreciation...".

It was so decided.

Paragraph 3 (paragraph 97 of the "Report")³

Paragraph 3 was adopted without comment.

A. THE PRINCIPLES

Principle 1

21. Mr. HUDSON proposed that the words "of course" in the second sentence of paragraph 1 (*paragraph 98 of the "Report"*) be deleted.

22. Mr. ALFARO thought that those words meant that the Commission could not enunciate principles applicable only to persons in Axis countries. That was obvious, but needed emphasizing. To say "but Principle I is now enunciated in general terms" would imply that its being so enunciated was something out of the ordinary.

23. Mr. HUDSON asked whether the Rapporteur would accept the word "formulated" instead of "enunciated".

24. Mr. ALFARO saw no objection to the substitution.

25. The CHAIRMAN failed to understand the meaning of the words "in theory" in the second sentence of paragraph 2 (*paragraph 99 of the "Report"*). Did it imply a reservation? He would like the words deleted.

26. Mr. ALFARO said that the same idea had occurred to him and he had thought of saying "This conception involves...", but had preferred to keep to Mr. Spiropoulos' text. He believed Mr. Spiropoulos had meant: "from a theoretical standpoint".

27. Mr. CÓRDOVA thought that what Mr. Spiropoulos had meant was that for the first time individuals

² These sentences read as follows:

"In the first session of the Commission the question arose as to whether or not the Commission should ascertain to what extent the principles contained in the Charter and judgment constituted principles of international law. The conclusion of the Commission was that since the Nürnberg Principles had been affirmed by the General Assembly the task of the Commission was not to express any appreciation of these principles as principles of international law but merely to formulate them."

³ In the "Report" the last sentence of paragraph 3 replaced the three following sentences of the draft report:

"This formulation consists of two sections: The first section contains the general principles laid down in the Charter and in the judgment of the Nürnberg Tribunal. The second section is devoted to definitions of the crimes under the said Charter and judgment. The formulation of the Commission is set out in the following paragraphs."

were recognized as having international personality, since they were declared punishable under international law, and that the doctrine previously applied to them had been abandoned.

28. Mr. HUDSON proposed the deletion of the explanatory sentence in question, which did not show why the Commission had formulated the principle.

29. The CHAIRMAN pointed out that it was a statement made by the Tribunal.

30. Mr. HUDSON felt that in that case the text ought to say so.

31. The CHAIRMAN said that the Commission was going over once again the discussion of the previous year. He had believed it to have taken a final step, but he perceived now that all members of the Commission had not done so. He repeated that he failed to understand the meaning of the words "in theory", since the Nürnberg criminals had been hanged "in practice".

32. Mr. CORDOVA pointed out that they had been hanged in pursuance of a legal theory.

33. Mr. HUDSON observed that the task of the Commission was to formulate principles, not to state what that formulation involved. It would be for doctrine to do that.

34. The CHAIRMAN reminded the Commission that Mr. Hudson had proposed deletion of the sentence; if it were deleted, however, it might be necessary to delete the remainder of the paragraph.

35. Mr. HUDSON and Mr. ALFARO thought that would not be necessary.

36. The CHAIRMAN failed to understand the objection to acknowledging that rules of international law applied directly to individuals. He wondered what grounds there could be for not accepting the expression "the 'international personality' of individuals". To state that an individual had or had not legal capacity was to state implicitly that he was or was not a person for purposes of international law.

37. Mr. BRIERLY considered that that might be going rather far. There were subjects of law who were obliged to obey and who did not possess international personality in the full sense of the term. International personality had both a passive and an active aspect. The Nürnberg Principles had recognized the individual's passive international personality by making him punishable under international criminal law. But the individual did not possess active international personality; he had not for example the right to plead before an international tribunal.

38. The CHAIRMAN understood that they were dealing with persons for the purposes of international law and the legal capacity they were regarded as having.

39. Mr. AMADO felt that it was not the Commission's task to draw theoretical conclusions from the principles formulated. He saw no purpose in saying "The general rule underlying Principle I is that international law may impose duties on the individuals directly without any interposition of internal law". The principle having been laid down, why give the reader and the General Assembly a lesson about it? And why

mention the consequences of the principle's interpretation? He did not approve of the word "involving". It was very proper, however, to repeat the Tribunal's conclusions.

40. The CHAIRMAN observed that the general rapporteur had a difficult task. He had included the Commission's conclusions in his report, a decision had been taken, and now it was called in question again.

41. Mr. YEPES pointed out that what was stated was not a conclusion but a fact.

42. Mr. el-KHOURY thought that if it accepted the first principle and declared that international law might impose duties on the individuals directly, the Commission would be expected to give reasons for its conception. The conception had become its own, and the reasons for it must be shown if it was to be incorporated in international law.

43. The CHAIRMAN asked the Commission whether it agreed to deletion of the second sentence that read: "This conception, in theory, is considered as involving the 'international personality' of individuals."

The Commission decided, by 6 votes to 4, to delete the second sentence of the paragraph.

44. Mr. KERN (Assistant Secretary-General) wished to remark that he was sure the vote ought not to be interpreted as a rejection of the content of the sentence, since the members of the Commission had had different reasons for voting against it. Mr. Briery, for example, approved of the sentence in part. The vote meant that some members had thought it better for the question of the individual's international personality not to be mentioned, because it was not the proper place for it.

45. Mr. HUDSON agreed. The Commission was not taking any stand on the matter.

46. Mr. YEPES considered that the passage after the sentence which the Commission had just decided to delete continued the sequence of ideas. The whole paragraph ought therefore to be deleted.

47. Mr. ALFARO held however that the principle, reinforced by the quotation from the judgment, appeared in the first sentence of the paragraph. The reference to the international personality of individuals might be deleted, but he felt that deletion of the remainder of the paragraph would weaken the statement.

*Principle II*⁴

48. Mr. HUDSON had advanced an argument during the discussion which he believed had been accepted by the Commission. No trace of it, however, appeared in document A/CN.4/R.7/Add.3. He had pointed out that it was not acts which were punished, but persons for an act. Principle III spoke of "a person who committed an act . . ."; in Principle II it would be better to say: "The fact that domestic law does not make punishable the act which . . .".

⁴ Principle II read as follows:

"The fact that domestic law does not punish an act which constitutes a crime under international law does not free the person who committed the act from responsibility under international law."

49. Mr. ALFARO remarked that the word "punishable" ought not to refer to the word "act" if it was persons that were to be punished.

50. Mr. HUDSON proposed that in that case the principle might read: "make a person punishable for an act . . .".

51. Mr. YEPES felt it would be better to say: "does not punish a person for an act".

52. Mr. HUDSON suggested the words: "The fact that domestic law does not make a person punishable for an act does not free that person from responsibility . . .".

53. The CHAIRMAN remarked that it was a matter of English phraseology.

54. Mr. BRIERLY proposed the words: "The fact that domestic law does not impose any penalty for an act which . . .".

55. The CHAIRMAN pointed out that in French the expression would be: "*ne punit pas un acte*" ("does not punish an act").

56. Mr. HUDSON thought Mr. Brierly's the better text.

57. Mr. BRIERLY and Mr. HUDSON would prefer the word "internal" to be substituted for the word "domestic".

58. Mr. HUDSON proposed that in the English text the word "relieve" be substituted for the word "free".

59. Mr. ALFARO pointed out that the Charter used the word "freeing".

60. Mr. CORDOVA replied that the Commission was improving on the text of the Charter.

61. Mr. ALFARO stated that in the second paragraph of the commentary the word "domestic" must be retained in the English text since the passage was a quotation from the judgment.

62. Mr. FRANÇOIS failed to understand the meaning of the phrase "and only as far as the local law is concerned". He thought it redundant.

63. The CHAIRMAN had likewise failed to understand the meaning of that phrase.

64. Mr. ALFARO reminded the Commission that sub-paragraph (c) of article 6 of the Charter of the International Military Tribunal read: "whether or not [committed] in violation of the domestic law of the country where perpetrated", and that no objection had been made to that passage. The phrase in question must therefore be retained. Should the Commission so desire it might substitute the word "internal" for the word "local" in the English text.

65. Mr. FRANÇOIS and Mr. HUDSON were in favour of deleting the phrase.

66. Mr. KERNO (Assistant Secretary-General) felt that it was of little consequence whether the phrase was deleted or retained, but he thought the text more correct in its present form because the Charter only referred to "the domestic law of the country where perpetrated", whereas here the text was referring in a more general manner to the country's legislation.

67. Mr. BRIERLY considered the text highly ambiguous. The "local law" did not unequivocally mean the internal law of the country where the act had been perpetrated. Nothing would be lost if the words were deleted.

68. Mr. HUDSON felt that there was no need to say anything since sub-paragraph (c) of Article 6 of the Charter of the Tribunal was quoted.

69. Mr. ALFARO agreed to the first sentence of paragraph 2 (paragraph 101 of the "Report") ending at the word "humanity".⁵

70. Mr. HUDSON wished to know why there was a footnote giving the source of the particular quotation from the Statute, when similar footnotes did not appear in all other cases. He was in favour of footnote (3) being deleted.

71. Mr. ALFARO remarked that in the present case the quotation had been taken from the text of the judgment.

72. Mr. BRIERLY proposed that footnotes be given only in the case of quotations from the judgment.

73. Mr. ALFARO had no objection to make.

74. Mr. HUDSON proposed the deletion of the last phrase of the paragraph: "in order to remove any doubt concerning the applicability of this principle to all international crimes after the words 'general terms'". That phrase did not come within the Commission's terms of reference: its task was to formulate the Nürnberg Principles.

75. Mr. ALFARO stated that the purpose of the phrase was to explain the difference between the text of Principle II and the corresponding text in the Charter. The words "in order to remove any doubt etc. . . ." might be deleted, but the matter must not be left in doubt; mention must be made of the fact that the Commission was expressing the principle in general terms. The international criminal code would over-ride the law of all countries.

76. Mr. HUDSON asked what doubt could arise.

77. Mr. ALFARO replied that the phrase had been quoted from the Special Rapporteur's report.

78. The CHAIRMAN pointed out that the Commission had already pronounced on the matter, but if the Commission wished to reconsider it it could do so.

79. Mr. CORDOVA thought that the Commission had not pronounced on the matter.

80. The CHAIRMAN stated that the Commission had decided that international law was superior to national law, but some members of the Commission were dissatisfied with the decision.

81. Mr. CORDOVA agreed that the Commission had accepted the principle; it had not however made up its mind whether that was the right place to mention it.

The Commission decided, by 4 votes to 3 with 4 abstentions, to delete the words: "in order to remove any doubt concerning the applicability of this principle to all international crimes".

⁵ Thus leaving out the words "and only as far as the local law is concerned".

82. Mr. HUDSON did not like the tone of the last paragraph (paragraph 102 of the "Report") of the commentary on Principle II; he desired to know who considered that international law could be binding. The Commission was reproducing the findings of the Tribunal: it ought to say: "The Tribunal considered . . .".

83. Mr. ALFARO pointed out that the text in question, proposed by the Special Rapporteur, had been adopted by the Commission and incorporated in the final report.⁶

84. Mr. YEPES agreed that the Commission had already given its final consent and the general rapporteur had merely reproduced what had been approved.

85. Mr. AMADO wished to know the meaning of the sentence: "It is considered that international law can bind individuals even if national law does not direct them to observe the rules of international law."

86. Mr. SANDSTRÖM proposed the deletion of the opening words: "It is considered that".

87. Mr. ALFARO remarked that that would make the sentence more categorical.

88. Mr. CORDOVA repeated the objection that the text had been adopted by the Commission. He added that when adopting Mr. Spiropoulos' report the Commission had not thought of the difficulty. It had now to consider its position vis-à-vis the General Assembly. It was necessary to make it clear whether the sentence was a conclusion arrived at by the Commission or whether it was merely a matter of formulating principles contained in the Charter and the judgment.

89. Mr. BRIERLY proposed that the opening words of the sentence read: "The Tribunal considered that . . ."

It was so decided.

Principle III

90. Mr. HUDSON proposed, in the first place, the substitution of the word "relieve" for the word "free" in the English text.

91. Mr. ALFARO accepted the amendment.

92. Mr. BRIERLY thought that the first part of the second sentence of the commentary (paragraph 103 of the "Report"), namely the words "In cases of acts constituting international crimes", should be deleted. It added nothing to the clarity of the text.

Mr. Brierly's proposal was adopted.

93. Mr. HUDSON then asked why, in the second sentence of the commentary on that principle, the Rapporteur had used the words "in an official capacity" instead of repeating the words he had used in the principle itself, namely "acted as Head of State or responsible Government official".

94. Mr. ALFARO replied that Mr. Spiropoulos' reason for not using the same words had been that he wished to give a paraphrase which appeared to him to show the sense in which the expression "responsible Government official" could be understood.

95. Mr. AMADO laid that he did not like paraphrases. He thought them unnecessary, particularly in a case of that kind.

96. Mr. CORDOVA remarked that the expression "acted in an official capacity" could include much wider categories of persons than the expression "acted as Head of State or responsible Government official".

97. The CHAIRMAN thought it would be advisable for Mr. Alfaro to employ the same words as those used in the principle itself.

98. Mr. KERN (Assistant Secretary-General) thought that the reason Mr. Alfaro had acted as he had was that he had adopted Mr. Spiropoulos' view, which had always been that it was not enough simply to state principles but that they must be accompanied by commentaries. It was his own opinion that a paraphrase was sometimes very helpful. It enabled public opinion, which was not exclusively the opinion of jurists or experts, to form a more correct view of the meaning of certain terms. He pointed out that the Commission had agreed to retain the commentaries on Principles I and II, which were likewise paraphrases, and he saw no reason why the Commission should decide differently in the case of Principle III.

99. Mr. SANDSTRÖM considered that the second sentence of the commentary, containing the words "acted in an official capacity", led up to the following sentence which was a quotation from the judgment of the Nürnberg Tribunal; it was helpful and should be retained.

100. Mr. CORDOVA agreed, provided that the words "acted in an official capacity" were substituted for the words "acted as Head of State or responsible Government official".

101. Mr. FRANÇOIS pointed out that the last sentence of the commentary (paragraph 104 of the "Report") on Principle III conflicted with the last sentence of Principle IV: if the mitigation of punishment was a matter for the competent Court to decide, the same must apply in Principle IV.

102. Mr. ALFARO stated that the last sentence of the commentary on Principle III bore reference to article 7 of the Charter of the Nürnberg Tribunal. He reminded the Commission that the question of mitigating punishment, explicitly referred to in article 7, had been discussed at length by the Commission when considering Principle III appearing in Mr. Spiropoulos' report on formulation of the Nürnberg Principles. He felt he should read out the passage of the Summary Record of the 46th meeting dealing with the matter (paras. 73 - 77). He stated that it was that discussion and the decision taken which had caused him to include the sentence in question in his report.

103. Mr. HUDSON proposed the deletion of the last sentence of the second paragraph of the commentary; if the Commission retained it, it would have to delete the second sentence of Principle IV.

104. Mr. ALFARO observed that the Commission must be consistent. Its views on one day must not conflict with those of the day before.

⁶ See 46th meeting, paras. 58 - 69.

105. Mr. FRANÇOIS and Mr. BRIERLY said that the decisions taken by the Commission on Principle III and Principle IV must be consistent.

106 - 107. Mr. ALFARO added that the Commission had deleted a large part of article 7 of the Charter where it formulated the Nürnberg Principles. It must provide an explanation of the reasons which had caused it to do so and state explicitly that it had thought the question of mitigating punishment ought to be left to the decision of the Court.

The Commission decided to retain the last sentence of the commentary on Principle III.

Mr. SANDSTRÖM took the chair.

Principle IV

108. Mr. HUDSON proposed that the word "relieve" be substituted for the word "free" in the English text.

109. Mr. ALFARO accepted the amendment.

110. The CHAIRMAN asked whether the Commission agreed that the last sentence of the Principle be deleted, as had been suggested earlier (see para. 103, *supra*).⁷

111. Mr. AMADO stated that he would vote for deletion of the sentence. If it were retained it would make any acquittal impossible since it only provided for mitigation of punishment. Acquittal, however, must be possible, according to the terms of the preceding sentence, in the event of its being morally impossible for the person who committed a crime to have refused to carry it out when ordered to do so.

112. Mr. YEPES was also in favour of deleting the sentence; the Principle would state precisely the same thing without it, whereas retention would weaken the Principle.

113. Mr. FRANÇOIS declared that the sentence should be omitted entirely in order that the decision now being taken by the Commission on Principle IV should tally with the decision it had just taken on Principle III. An addition should, however, be made to the commentary to the effect that the sentence in question, the gist of which occurred in article 7 of the Charter of the Nürnberg Tribunal, had not been retained by the Commission for the same reason as the words "or mitigating punishment" had already been omitted from Principle III.

114. Mr. CORDOVA and Mr. el-KHOURY were in favour of deleting the sentence. Mr. el-KHOURY added that, with the sentence deleted, the Court would retain the power to mitigate punishment.

The Commission decided to delete the sentence.

115. In reply to a question by Mr. YEPES, Mr. ALFARO stated that in the commentary on each Principle he had made reference to the corresponding article of the Charter of the Tribunal to show the source of the Principle.

116. Mr. YEPES urged that when the Commission departed from the principles laid down in the Charter,

more special mention should be made of the fact that it had done so.

117. Mr. HUDSON proposed that the following sentence in the commentary (paragraph 105 of the "Report"), forming part of a quotation from the judgment of the Nürnberg Tribunal, be deleted: "though, as the Charter here provides, the order may be urged in mitigation of the punishment". He felt that the first sentence of the commentary was the most important.

118. Mr. ALFARO was not in favour of the sentence quoted being deleted. He wished it to be retained because it formed part of the preamble to the Nürnberg judgment.

119. Mr. CORDOVA thought that if the Commission decided to retain the sentence it would be running counter to decisions it had taken previously. According to article 8 of the Charter it was never possible to plead in defence the order of a superior. The Commission, however, had accepted the modification made to that article of the Charter by the Nürnberg Tribunal when it provided that the carrying out of such an order might be pleaded as grounds for acquittal, when the person receiving the order was not morally free to refuse to obey it and had no choice.

120. Mr. BRIERLY felt that it was not correct to say that the Nürnberg Tribunal had modified the provisions of the Charter. The Tribunal had merely extracted from the provisions of the Charter conclusions universally accepted in criminal law. The Nürnberg Tribunal had applied the principle recognized by all systems of criminal law and by all courts that the perpetrator of an act was not responsible for it and should be acquitted if he did not possess moral freedom not to perpetrate it, that was to say, if he had no choice. Many circumstances might deprive a person of moral freedom or choice. The person might be mad, might act under compulsion, or in pursuance of an order which he could not disobey. In many cases the order of a superior completely deprived the person of moral freedom. The Tribunal had merely stated recognized law on that point. It had observed an elementary principle which had not been formulated by the Charter because there had been no need for the Charter to formulate it.

121. The CHAIRMAN felt that an explanation along the lines of Mr. Briery's statement should be added at the end of the commentary.

122. Mr. HUDSON thought that there was no need to add anything on the subject since the commentary itself provided the necessary explanation. The meaning of the paragraph became quite clear if one read in its original form the text of the passage out of the judgment of the Nürnberg Tribunal, which the Rapporteur had split up into several sentences:

"The provisions of this article (article 8) are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defence to such acts or brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most

⁷ The last sentence read as follows: "It may, however, be considered in mitigation of punishment, if justice so requires."

nations, is not the existence of the order, but whether moral choice was in fact possible.”

122 a. He proposed that the passage of the judgment which he had read out should be quoted in the commentary as a continuous whole.⁸ He also supported Mr. François’ proposal to the effect that a statement be included in the commentary to the effect that the second sentence of Principle IV had not been retained by the Commission for the same reason as a similar provision had been omitted from Principle III.⁹

123. Mr. ALFARO accepted Mr. Hudson’s suggestion.

124. Mr. YEPES desired it to be made clear in the commentary that the Commission had departed from the exact terms of article 8 of the Charter of the Nürnberg Tribunal.

125. Mr. BRIERLY proposed, in order to give effect to Mr. Yepes’ suggestion, that in the first sentence of the commentary on Principle IV the words “as interpreted in the judgment of the Nürnberg Tribunal” should be added after the words “contained in article 8 of the Charter”.

126. Mr. ALFARO accepted the addition. He added that owing to the amendments which the Commission had made to Principle IV it was necessary also to delete the last phrase of the second sentence of the commentary, namely the words: “but that it might be considered in mitigation of punishment”.

Principle V

127. Mr. HUDSON proposed that sub-paragraphs (a), (b), (c), (d) and (e), of the commentary (paragraph 107 of the “Report”), which were a word-for-word quotation of sub-paragraphs (a), (b), (c), (d) and (e) of article 16 of the Charter of the Nürnberg Tribunal, be deleted in their entirety.

128. Mr. ALFARO was against the proposal. The question of fair trial had been discussed at length by the Commission.¹⁰ At the commencement of the discussion Mr. Hudson had asked what a “fair trial” was, which meant that Mr. Hudson had been in some doubt on the matter. The vast majority of people would certainly wonder what was meant by “fair trial”. The Commission must explain it *expressis verbis*. There was another reason for retaining the sub-paragraphs. The expression “fair trial” was a typically Anglo-Saxon one and was only employed in the legislation of Anglo-Saxon countries. It did not exist in other countries. He felt that retention of the quotation was therefore essential.

129. Mr. YEPES and Mr. el-KHOURY supported Mr. Alfaro.

130. Mr. HUDSON withdrew his proposal.

⁸ It reads as follows in the draft report: “The Tribunal declared the provision of article 8 to be in conformity with the law of all nations. ‘That a soldier’, the Tribunal said, ‘was ordered to kill . . .’”.

⁹ That statement became para. 106 of the “Report”.

¹⁰ 47th meeting, paras. 54 - 67.

131. The CHAIRMAN declared that in that case the quotation would be retained. He wished however to draw attention to a point of detail. The commentary on Principle V referred to “the Charter of Nürnberg”, whereas the correct term was “the Charter of the Nürnberg Tribunal”; he felt it would be desirable to use the official title.

132. Mr. HUDSON asked whether the last paragraph of the commentary meant that an accused person could on all occasions demand the fulfilment of all the conditions laid down in sub-paragraphs (a) to (c).

133. Mr. ALFARO and Mr. BRIERLY thought that it did.

B. THE CRIMES

134. The CHAIRMAN stated that the Commission had finished examining the Principles and invited the Commission to pass on to section B, “The Crimes”.

135. Mr. HUDSON wished to raise a point of detail. On page 2 of the document under consideration the list of principles bore the general title: “A. The Principles”. The second section of the document, with which the Commission was now about to deal, was entitled: “B. The Crimes”. Different phraseology was thus used for A and B. He felt that it ought to be made uniform.

136. Mr. ALFARO stated that the General Assembly had directed the Commission to formulate the principles laid down in the Charter and judgment of the Nürnberg Tribunal, but the Commission had also to define the crimes referred to in the Charter and the judgment. The General Assembly had certainly not intended definition of the crimes not to be included in the formulation of the principles.

137. Mr. HUDSON said that if the Commission agreed with Mr. Alfaro an explanation to that effect ought to be included in the report.

138. Mr. KERNO (Assistant Secretary-General) stated that the matter had already been discussed at length. The gist of the discussion was indicated on page 2 of the report, but he agreed with Mr. Hudson that some additional explanation was desirable.

139. Mr. HUDSON proposed that section A be entitled “General Principles” and section B “Definition of Individual Crimes”.

140. The CHAIRMAN thought it would be better to make reference to the introductory paragraphs of the present part of the report (paragraphs 95 - 97 of the “Report”).

141. Mr. LIANG (Secretary of the Commission) felt that Mr. Hudson’s proposal was a good one, but it ought to be made clear that the two sections of the Commission’s report concerned the formulation of principles. Otherwise the objection might be raised that section B was not concerned with principles. He therefore proposed that section A be entitled “General Principles” and section B “Principles for the Defining

of Crimes". He thought that the defining of certain acts as crimes against peace etc. was a principle.

142. Mr. YEPES proposed that the terminology used on page 2 be employed: A. General Principles; B. Definitions of the Crimes.¹¹

143. Mr. AMADO observed that a distinction was made in Mr. Spiropoulos' report between principles "*Stricto Sensu*" and the principles in the broad sense of the word. Both categories of principles, however, were actually principles. He thought it would be desirable therefore to leave I to V as they stood and from that point to continue the same numbering, thus: Principle VI: Crimes against Peace, Principle VII: War Crimes, etc., instead changing to B. The Crimes (a) Crimes against peace, etc.

144. The CHAIRMAN stated that in his view crimes were also principles. However, the Commission ought to use simple headings, and therefore he supported Mr. Yepes' proposal.

145. Mr. HUDSON also disliked the change of numbering from Principles I, II, III, IV, V to Crimes (a), (b), (c) etc. He accepted Mr. Amado's proposal to continue the series: Principle VI: Crimes against Peace, etc. For the general title to section B he proposed: "Principles stating crimes", or "Principles regarding categories of crimes".

146. Mr. ALFARO reminded the Commission that it had decided to divide the subject into two sections: 1. The Principles, and 2. The Crimes.¹² To amend its decision it could state in the introduction to its report that crimes against peace, war crimes, crimes against humanity etc. were also principles. He was willing to ponder the matter and would take into consideration the views just expressed.

147. Mr. CORDOVA thought it desirable to add a paragraph to the introduction mentioning the difficulties the Commission had had over that point owing to the drafting of General Assembly resolution 177 (II).

148. Mr. el-KHOURY felt that both sections of the report, section A dealing with principles and section B dealing with crimes, concerned principles. The simplest solution would be to call crimes "principles" likewise.

149. Mr. KERNO (Assistant Secretary-General) thought that the Rapporteur would be able to draw the appropriate conclusions from the discussion that had just taken place, which showed the Commission to be agreed that the titles needed to be made uniform and that the two sections should be numbered in a single sequence throughout.

The meeting rose at 6 p.m.

77th MEETING

Wednesday, 26 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 CORDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi Hsu, Mr. Manley O. HUDSON, Mr. Faris el-KHOURY, Mr. A. E. F. SANDSTRÖM, 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).

Commission's draft report covering the work of its second session (*continued*)

PART III: FORMULATION OF THE NÜRNBERG PRINCIPLES (A/CN.4/R.7/ADD.3)¹ (*continued*)

B. THE CRIMES (*continued*)

1. Mr. ALFARO suggested that the choice of titles for the two parts of the formulation of the Nürnberg Principles should be deferred to a later date.

(a) *Crimes against peace*

2. Mr. HUDSON pointed out that the exact title of the Briand-Kellogg Pact, mentioned on page 7 (paragraph 111 of the "Report"), was "General Treaty for Renunciation of War". So far as the Pan-American Conference, mentioned on page 8 (paragraph 112 of the "Report"), was concerned it would also be preferable to give it its official title of "International Conference of American States".

3. Mr. KERNO (Assistant Secretary-General) observed that the Pact was known to the public as the "Briand-Kellogg Pact" and suggested that the official title of the Treaty should be given with "Briand-Kellogg Pact" in brackets.

4. Mr. YEPES moved that the same procedure be adopted with regard to the International Conference of American States, which was known to the public as the "Pan-American Conference".

5. The CHAIRMAN suggested that the introduction of these changes should be left to the Rapporteur.

¹ Mimeographed document only. Parts of that document that differ from the "Report" are reproduced in footnote to the summary records. For other parts, see the "Report" in vol. II of the present publication.

¹¹ See footnote 3, *supra*.

¹² See 45th meeting, paras. 9-36.

6. Mr. HUDSON, referring to the last paragraph on page 8 (paragraph 115 of the "Report"),² said that "assurances" were not necessarily a "unilateral undertaking" and proposed that the word "meaning" should be replaced by the word "including".

7. Mr. ALFARO explained that the word "unilateral" was designed to convey that the undertakings concerned were undertakings subscribed to by one or more States representing the same interests, and not synallagmatic undertakings.

8. The CHAIRMAN thought the word might prove ambiguous, since "unilateral" generally meant "isolated", whereas parallel undertakings were also included.

9. Mr. BRIERLY also preferred "including" to "meaning" and proposed that the expression "unilateral undertaking" should be used without inverted commas.

10. Mr. ALFARO proposed the substitution of the phrase "as meaning an undertaking made unilaterally by a State or a group of States, etc."

11. Mr. AMADO pointed out that, if the State which received the assurance acted as if it had accepted the latter, the undertaking would cease to be a unilateral undertaking. He proposed that the word "unilateral" should be deleted because it limited the scope of the undertakings referred to, and that was not the Commission's intention.

12. Mr. KERNO (Assistant Secretary-General) recalled that the Commission had discussed this question at length in relation to the three terms "treaties", "agreements" and "assurances", and had found that the distinction between assurances on the one hand and treaties or agreements on the other was that the former were unilateral.

13. Mr. SANDSTRÖM added that the Commission had recalled certain activities of Hitler who had given assurances even when the protected State had not accepted them.

14. The CHAIRMAN remarked that it was a difficult point. In civil law, for example, there was some discussion as to whether a deed of gift was a contract or not.

15. Mr. el-KHOURY observed that a unilateral undertaking was an undertaking given by one party; it ceased to be an obligation if the other party did not accept it. He therefore thought it preferable to delete the word "unilateral".

16. Mr. ALFARO, referring to Mr. Sandström's observation, said it was highly probable that those who drafted the Charter had had in mind the unilateral assurances given by Hitler, which had not required acceptance because the States concerned were anxious to live in peace. Such assurances had been purely unilateral assurances.

17. The CHAIRMAN suggested the word "spontaneous".

18. Mr. CORDOVA proposed the phrase "as including spontaneous promises made by a State . . ." since it would provide an explanation while avoiding a definition.

19. Mr. el-KHOURY thought that the meaning suggested by Mr. Alfaro would be preserved by deleting the word "unilateral".

20. Mr. AMADO said he preferred the English to the French text.³

21. The CHAIRMAN and Mr. SANDSTRÖM objected to the word "contractée" which was unsatisfactory as applied to a unilateral undertaking and, in addition, said they preferred "engagement" to "obligation".

22. Mr. BRIERLY proposed the following text: "as including any pledge or guarantee of peace even if given unilaterally".

The above text was adopted.

23. Mr. ALFARO, referring to the second paragraph on page 9 (paragraph 117 of the "Report"), said that he had regarded the discussion in the Commission as a general debate, but it concerned "every man in uniform who fights a war".

24. Mr. HUDSON considered that the war in question must be an aggressive war.

25. Mr. CORDOVA proposed the substitution of the words "who fights such a war" for "who fights a war".

26. Mr. ALFARO accepted this amendment.

27. Mr. HUDSON proposed the deletion of the words "The Commission agreed on the understanding that" at the beginning of the last sentence in the paragraph. He recalled that Mr. Spiropoulos had said that it was the Tribunal which had agreed on that understanding.

28. Mr. CORDOVA said he believed Mr. Spiropoulos had said that the judgment referred only to high-ranking military personnel and had concluded from the fact that junior officers had not been brought to trial that only high-ranking military personnel could be prosecuted.

29. The CHAIRMAN pointed out that, if the judgment applied only to high-ranking military personnel, it was because the Tribunal was not competent to try junior officers and soldiers; consequently it could not be known what it would have done if it had had to do so.

30. Mr. CORDOVA stated that soldiers were nevertheless responsible even if they had acted on orders from a superior.

31. Mr. SANDSTRÖM read out the following passage from The Charter and judgment of the Nürnberg Tribunal:

"Although the waging of aggressive war may involve activities in different fields, military, administrative and economic, only persons in the highest positions seem to have been, in the opinion of the Court, capable of committing this crime. Thus, the

² It read as follows: "The term 'assurances', is understood by the Commission as meaning any 'unilateral undertaking' made by a State as a pledge or guarantee of peace."

³ The French text read as follows: "Le terme 'garanties' est pris par la Commission comme signifiant toute 'obligation unilatérale' contractée par un Etat en faveur de la paix."

Court did not adopt the extreme theory that every act of warfare committed in the prosecution of a criminal war is an international crime. To be a crime against peace such an act must be such as to qualify it as *waging* war. It may be said that the Court, partly because it was concerned only with the major war criminals, did not make the compass of the notion of "waging" absolutely clear, but there seems to be no doubt about the principle that only acts of warfare constituting a *waging* of criminal war are crimes against peace. If an act committed in the course of or in relation to an aggressive war does not amount to waging such war, it is an international crime only if it can be characterized as a war crime in the strict sense of that term or as a crime against humanity."⁴

32. Mr. BRIERLY said that the passage quoted by Mr. Sandström was an excellent summary of the earlier quotations.

33. Mr. ALFARO said he would incorporate the passage in his report.

34. Mr. BRIERLY proposed that the last sentence of the second paragraph on page 9 should be worded as follows: "The Commission understood the phrase to refer only to high-ranking officers or officials and believed that was also the opinion of the Tribunal."

35. The CHAIRMAN pointed out that the Tribunal had not been concerned with the question, since it had merely to try the major war criminals brought before it.

36. Mr. HUDSON proposed the wording: "The Commission understood the phrase to refer only to such high-ranking military personnel and high State officials as were prosecuted."

37. Mr. BRIERLY said that phrase did not correspond with the facts since some of the persons prosecuted were not accused of war crimes.

38. Mr. HUDSON then suggested the deletion of the words "as were prosecuted".

39. Mr. CORDOVA suggested the substitution of the words "as were found guilty".

40. Mr. BRIERLY thought the views of the Tribunal could be deduced from its findings.

41. Mr. CORDOVA considered that the Tribunal had not tried other persons because it had not been competent to do so. It would be wrong to draw conclusions from the Tribunal's finding. If it had been competent to try soldiers, the latter might have been found guilty.

42. Mr. HUDSON moved that the wording of the phrase be left to the general rapporteur.

It was so agreed.

43. The CHAIRMAN observed that if the phrase "waging of a war" were translated by "conduire" or "mener une guerre" the paragraph would be pointless, because junior officers and soldiers did not "conduct" a war.

44. Mr. BRIERLY said the same applied to the expression "waging of a war".

45. Mr. SANDSTRÖM thought it might be assumed

that the Tribunal's view was that the persons referred to were holders of high rank. Otherwise, its findings would have been different.

46. Mr. HUDSON recalled that the Tribunal had said of Dönitz that he had not been a mere army or divisional commander.

47. Mr. ALFARO thought it was desirable to retain the paragraph, but he would redraft it.

(b) *War crimes*

48. Mr. HSU, referring to the killing of hostages, asked whether a note could not be added in the following terms: "the Commission took note of the fact that the Geneva Conventions of 1949 had outlawed the taking of hostages in addition to the killing of hostages."

49. Mr. ALFARO pointed out that the note would be inserted in a paragraph which he proposed to add, and which read as follows:

"When the Commission discussed the definition of war crimes some members considered that not only the killing of hostages but also the taking of hostages should be included in the list of such crimes. A proposal to that effect was, however, rejected by 5 votes to 5 with 1 abstention. The Commission intends to reconsider the question in connection with the preparation of a draft Code of offences against the peace and security of mankind."

50. Mr. HUDSON thought that such a paragraph was out of place in the document, because it was absolutely unconnected with the formulation of the Nürnberg Principles, and that its proper place was in a draft code.

51. Mr. ALFARO recalled that the Commission had decided at its 49th meeting to incorporate a passage to that effect.⁵

52. Mr. HSU observed that while the Commission had adopted that decision when the draft Code had been discussed, it had agreed not to include any list. The paragraph proposed by the Rapporteur was therefore no longer appropriate. But he suggested that the text which Mr. Alfaro had just read out had its value, because the reader would find it strange that there was no mention of the Geneva Conventions.

53. Mr. YEPES entirely agreed with Mr. Hsu. It should be mentioned that the Commission had wished to go further than the Nürnberg Principles, since it had proposed to state that the taking of hostages was a war crime.

54. The CHAIRMAN wondered whether the proper place for the note was at that point in the report, or in the section dealing with the draft Code of offences against the peace and security of mankind.

55. Mr. CORDOVA agreed with Mr. Hsu that the Commission should avoid giving the impression that it was unaware that the taking of hostages had been outlawed in 1949, although it was not a crime in 1939. If the note in question was inserted, it would be clear to everyone that the Commission had been restricted by its terms of reference.

⁴ United Nations publication, Sales No. 1949.V.7.

⁵ See 49th meeting, paras. 27 - 30.

56. Mr. el-KHOURY thought that it should also be pointed out that the Government of Pakistan had called attention to the question of the taking of hostages (A/CN.4/19/Add.2). But he agreed with Mr. Hudson that the question should be mentioned in connexion with the draft Code.

57. Mr. ALFARO proposed saying: "The Commission noted this fact during the discussion concerning the Nürnberg Principles."

58. Mr. CORDOVA said that everyone would read this document without referring to the draft Code. Hence, he would repeat that it was preferable to state that the Commission was familiar with the Geneva Conventions.

The Commission decided, by 8 votes to 1 with 2 abstentions, to include the note proposed by Mr. Hsu.

59. Mr. HUDSON thought that if, as had been decided, the Commission incorporated Mr. Hsu's note in the report, it would be logical also to state that the Geneva Conventions of 1949 dealt only with serious violations of the laws and customs of war. He had always had misgivings concerning the looseness of the phrase "violations of the laws and customs of war". Some passage which would restrict the phrase to serious violations should be sought in the judgment of the Nürnberg Tribunal.

60. Mr. ALFARO thought that the sense of this expression from the Charter was brought out in the list of the most serious crimes which was to be found in the same paragraph. The only reason for saying that "such violations shall include, but not be limited to..." was that it was deemed desirable to avoid the possible impression that other serious violations had been ignored.

61. Mr. HUDSON thought that the gravity of the violations listed might be noted in the first paragraph of the commentary in the report.

62. Mr. ALFARO said that he would certainly examine the question.

63. Mr. AMADO observed that the words "destruction sans motif" in the French text did not accurately render the English words "wanton destruction". Members of the Commission proposed that the phrase "sans motif" should be replaced by one of the following expressions: "non justifiée", "abusive", "perverse" or "arbitraire".

The Commission decided to substitute the word "perverse" for the phrase "sans motif".

64. The CHAIRMAN moved that it be stated that the Commission had clearly understood that the destruction of cultural equipment came under its definition of war crimes. The Commission would thereby avoid seeming to have neglected this question to which UNESCO attached much importance. It would be courteous to indicate that the Commission took account of UNESCO's wishes. The note might be included after the words "not justified by military necessity".

65. Mr. HUDSON observed that the Nürnberg judgment had not dealt with this question, and that it would be preferable to include the note in the draft Code.

66. The CHAIRMAN replied that the Commission

had decided, when discussing the draft Code, to disregard this question. It would clearly be preferable, from a logical point of view, to include it in the draft Code.

67. Mr. LIANG (Secretary to the Commission) explained that it was impossible to include a note in the draft Code because the latter contained no list, and the text which had been provisionally adopted would not be annexed to the report.

68. The CHAIRMAN trusted that there would be a statement in the part of the report devoted to the draft Code to the effect that the question had been considered.

69. Mr. YEPES thought that the question of monuments, etc. should be mentioned in the general report.

70. The CHAIRMAN moved that it be left to the general rapporteur to decide at what point this note should appear.

(c) *Crimes against humanity*

71. Mr. HUDSON said he would prefer the phrase "only when committed" to the phrase "only inasmuch as they have been committed" in the first paragraph of the commentary (paragraph 120 of the "Report"). The value of the following phrase—namely, "in execution of or in connexion with any crimes within the jurisdiction of the Tribunal"—was reduced by its being taken out of its context. It was far from clear, because crimes against humanity also fell within the jurisdiction of the Tribunal. He proposed that the sentence at line 8 of the first paragraph should begin with the words: "Crimes referred to as falling within the jurisdiction..."

72. Mr. ALFARO supported this amendment.

73. Mr. HUDSON suggested that the quotation marks at the end of the second paragraph should begin before the word "declared" and that the words "to the effect" in the English text should be deleted.⁶ He asked why the phrase "the 1939 war" was not used instead of the phrase "the Second World War" in the fourth paragraph of the commentary.

74. Mr. BRIERLY thought that the words "in a general definition of crimes against humanity" at the end of the second sentence in the fourth paragraph (paragraph 123 of the "Report") should be replaced by the words "in this formulation of crimes against humanity".⁷

75. The CHAIRMAN asked the Commission whether it was afraid of compromising itself by establishing a relationship between crimes against humanity and wars.

76. Mr. BRIERLY recalled that the Commission had omitted the expression "before or during the war", which was contained in article 6 (c) of the Charter of the Nürnberg Tribunal, because it considered that these

⁶ The sentence read as follows: "For this reason the Tribunal declared itself unable to make a general declaration to the effect that acts before 1939 'were crimes against humanity within the meaning of the Charter'."

⁷ The sentence read as follows: "This phrase refers to a particular war, the Second World War, and, in the view of the Commission, should not be included in a general definition of crimes against humanity."

words should not be included in the general principle in the form in which the Commission had had to formulate it, in the light of the rules which had been applied to criminals in a particular war. It was for the Commission to extract the substance of the principles from the Charter.

77. The CHAIRMAN said that the crimes listed in article 6 (c) were crimes against humanity, even if committed by rulers against the population of their own country.

78. Mr. HUDSON said that the first two sentences of the fourth paragraph of the commentary should be combined to read as follows:

"In its definition of crimes against humanity the Commission has omitted the phrase 'before or during the war' contained in article 6 (c) of the Charter of the Nürnberg Tribunal, since it refers to a particular war, the World War of 1939."

79. Mr. ALFARO accepted this proposal.

80. Referring to the last paragraph of the commentary (paragraph 124 of the "Report"), Mr. HUDSON noted that Mr. Alfaro used the words "against 'any' civilian population", whereas, in the definition of crimes against humanity, he used the phrase "done against a civilian population". This distinction was also made in the Charter, where article 6 (b) ("War Crimes") referred to civilian populations in occupied territories, whereas article 6 (c) ("Crimes against Humanity"), referred to acts committed against any civilian population. The Charter had thereby distinguished between war crimes and crimes against humanity in relation to the populations concerned in each case. In his view, the definition of crimes against humanity contained in the report should also use the phrase "any civilian populations" instead of "a civilian population".

81. The CHAIRMAN thought the Commission had no objection to the amendments proposed by Mr. Hudson.

It was so agreed.

82. Mr. BRIERLY raised once more the question of the last paragraph of the commentary on "Crimes against Humanity", and asked that the words "are crimes" contained in the second sentence of the said paragraph be replaced by the words "may be crimes".

83. Mr. CORDOVA observed that, in the words of the report, such crimes might be "committed by the aggressor against his own population". He considered this use of the expression "aggressor" incorrect.

84. Mr. ALFARO accepted the amendment proposed by Mr. Brierly and, replying to Mr. Córdova's observation, suggested that the word "aggressor" might be replaced by the words "their perpetrator".

It was so agreed.

(d) *Complicity in the commission of a crime against peace, a war crime, or a crime against humanity, as set forth in (a), (b) and (c)*

85. Mr. HUDSON proposed that the first paragraph⁸ of the commentary be deleted on the ground that it was

superfluous, since it merely repeated in different words the provisions under Crime (d). The statement in the paragraph that accomplices were "liable to punishment" was redundant, which was one more reason for deleting it. The complicity referred to in this section was a crime. It was therefore unnecessary to state that persons who committed the crime were liable to punishment. It was tantamount to stating that accomplices were accomplices in complicity.

86. Messrs. BRIERLY and SANDSTRÖM also regarded this paragraph as supererogatory.

87. Mr. ALFARO, supporting the retention of the paragraph, said that the Commission was doing no harm in stating that it regarded accomplices as being liable to punishment.

88. The CHAIRMAN observed that in certain legal codes complicity was not set down as a special crime. Murder was a crime and anyone participating in it, directly or indirectly, should be punished. Once the Commission had decided that complicity in the crimes here referred to was a special crime, the paragraph under discussion was no longer necessary. At the same time, he disagreed with complicity being treated as a special crime.

89. Mr. AMADO was surprised that the crime of complicity should again be specified here. He would have preferred the practice adopted in national penal codes of including complicity in the general section. The Commission, having enumerated principles and crimes and having included complicity among the latter, it was now proposed that a further specific reference to complicity should be included. In his view, that was really quite superfluous.

90. The CHAIRMAN said that the Commission seemed to be agreed on the deletion of the first paragraph of the commentary, which was also acceptable to Mr. Alfaro.

It was agreed to delete the first paragraph.

91. Mr. HUDSON thought that the second paragraph of the commentary (paragraph 125 of the "Report") was somewhat unsatisfactory. He did not share the Rapporteur's view that the rule concerning Crime (b) went further than the Charter. Where there was complicity, there was conspiracy. The text should be reworded in the light of the fact that the Charter had clearly referred to complicity. Mr. Spiropoulos had stated the contrary in his report, but had agreed to the deletion of the passage concerned.

92. The CHAIRMAN pointed out that there was no distinction in French law between complicity and conspiracy.

93. Mr. SANDSTRÖM said that in Swedish law conspiracy was a serious form of complicity.

94. Mr. ALFARO recalled that the Commission had approved Crime (a), paragraph (ii) of which referred to

⁸ It read as follows: "The foregoing paragraph declares liable to punishment the accomplices in the commission of the crimes mentioned therein."

participation in a common plan or conspiracy. In his view, the participants in a common plan or conspiracy were co-authors. On the other hand, complicity presupposed a certain gradation between the main perpetrator and the accomplices. The Commission had already made a distinction between "participation" in a crime and "complicity".

95. The CHAIRMAN was not very clear as to the distinction Mr. Alfaro wished to make. In his view, when a group of persons committed a crime, whether by active participation in it or as mere accomplices, they were always liable to punishment. For instance, a burglary might be committed by several persons. Two of them entered the house and burgled it, while a third kept watch. Under the laws of some countries the first two persons were the criminals while the one who watched and had taken no active part in the crime was an accomplice. If the mistress of one of the burglars diverted the owner's attention during the burglary, she also was an accomplice. However, in his view and under French law, these four persons had all participated in the crime and were therefore the perpetrators of the crime.

96. Mr. el-KHOURY asked whether an instigator who provided money or equipment for the carrying out of a conspiracy was an accomplice or not.

97. Mr. BRIERLY reiterated his view that the principle of Crime (d) did not go further than the Charter. It was based on article 6 of the Charter which the Tribunal had interpreted restrictively. In addition, he considered that the subtle distinction which had just been discussed was no concern of the Commission.

98. The CHAIRMAN thought that it would be sufficient merely to quote article 6 of the Charter and delete the rest of the paragraph.

99. Mr. BRIERLY said that there was no point in the last two sentences of the paragraph either.⁹

100. Mr. ALFARO considered that the paragraph was justified on the ground that the Charter had not referred to complicity as a special crime.

101. Mr. HUDSON thought that it was necessary to refer to the terms of the Nürnberg Judgment in order to see how the misunderstanding had arisen which had resulted in the drafting of the second and third paragraphs of the commentary. After quoting the terms of article 6 of the Charter, the judgment stated that:

"In the opinion of the Tribunal, these words do not add a new and separate crime to those already listed. The words are designed to establish the responsibility of persons participating in a common plan. The Tribunal will therefore disregard the charges in Count one that the defendants conspired to commit War Crimes and Crimes against Humanity, and will consider only the common plan to prepare, initiate and wage aggressive war."¹⁰

⁹ The last two sentences read as follows: "In fact, as worded, this paragraph does not concern all cases of complicity but is limited to the participation in a common plan or conspiracy. Complicity in individual crimes is not mentioned."

¹⁰ "The Charter and Judgment of the Nürnberg Tribunal", United Nations publication, Sales No. 1949.V.7, pp. 72-73.

The Tribunal had been wrong in making this statement. It should be stated that Crime (d) was based on the Charter, but that the Tribunal had applied the Charter in a restrictive manner. The whole of this paragraph of the report should be redrafted. It would be expedient to refer it back to the general rapporteur to enable him to find a clearer justification for the principle he had formulated concerning Crime (d). In his view, the Tribunal had not acted in accordance with its own findings.

102. Mr. CORDOVA urged that the Commission's report should contain an explicit reference to the divergence which it had noted between the Charter and the judgment.

103. Mr. BRIERLY disagreed, stating that the contradiction existed, not between the Charter and what the Tribunal had done, but between the Charter and what the Tribunal had stated in the judgment.

104. Mr. SANDSTRÖM said he agreed with Mr. Alfaro, since a careful reading of article 6 showed that it bore no reference to complicity.

105. Mr. KERNO (Assistant Secretary-General) thought that the second and third paragraphs of the commentary (paragraphs 125 and 126 of the "Report") as a whole should be redrafted. He also pointed out firstly, that it was true that the Charter did not refer to complicity and secondly, that in any case the last two sentences of the second paragraph of the commentary should be deleted, since they did not exactly correspond with the facts.

106. Mr. ALFARO asked the Chairman to put the first sentence of the second paragraph of his commentary to the vote. If the Commission decided to retain it, he would ask Mr. Hudson to assist him in redrafting it.

107. The CHAIRMAN put to the vote the question of the deletion of the first sentence of the second paragraph of the commentary, namely "*Prima facie* this rule seems to go further than the Charter."

The proposed deletion was rejected by 7 votes to 2.

108. Mr. BRIERLY proposed that the redrafting of the second and third paragraphs of the commentary as a whole should be left to the Rapporteur and Mr. Hudson.

It was so agreed.

111. Mr. ALFARO, referring to the last three paragraphs¹¹ of his report, observed that his intention had been to point out what the judgment of the Tribunal had to say with regard to the Charter and the principles which it contained and to state briefly the current significance of the Nürnberg Principles. Next, he had

¹¹ Paragraph 127 of the "Report" and the following two paragraphs read:

Referring to 'the law of the Charter', the Tribunal said in its judgment:

"The Charter is not an arbitrary exercise of power on the part of the victorious nations but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law."

"In the first session of the Commission the question arose as to whether or not the Commission should ascertain to what extent the principles contained in the Charter and judgment

wished to recall the decision adopted by the Commission at its previous session with regard to its programme of work—namely, that it was competent only to formulate, but not to evaluate, principles. In a word, he wished to indicate that the Commission had accomplished its task. Since the Commission had decided to include the second of these three paragraphs among the introductory paragraphs to this part of the report, he asked the Commission whether it intended to retain the reference to the statement of the Tribunal which he had reproduced in the first of these three paragraphs. The statement in question was of considerable value.

112. Mr. AMADO opposed the retention in the last paragraph of the words “the text of its formulation stands before the world”. In his view, the phrase was rather pompous.

113. Mr. HUDSON said that he himself would hesitate to make such a statement. Since the General Assembly might still modify or amend the Principles, it was wrong to state that the texts in question now stood before the world. In addition, he disagreed with the Tribunal’s statement that the Charter was the expression of international law existing at the time of its creation.

114. Mr. CORDOVA considered that the inclusion of the quotation from the judgment of the Nürnberg Tribunal was wrong. That judgment was in fact a judgment rendered by conquerors, and it was not for the Commission to concern itself with the justifications which the Tribunal had found for its action. The quotation should not be included. Nor should it be stated that the Commission’s formulation was final. All formulations might be modified by the General Assembly.

115. Mr. KERNO (Assistant Secretary-General) thought it was of value to have a conclusion to the report. Accordingly, the text of the second paragraph could be retained with the addition of the introductory words “As had already been stated at the beginning of this part of the report”, and of the first sentence of the last paragraph. The last sentence of the last paragraph should be remodelled to show that the text submitted was the one which had been drafted by the Commission.

116. The CHAIRMAN supported the retention of the quotations from the judgment, which he regarded as a necessary reminder of the findings of the Tribunal. One phrase in the statement that was true was that the Charter was the expression of international law existing at the time of its creation. From the point of view of general legal ethics, the Tribunal had the power to formulate a new law or a new rule. So soon as ever the Tribunal stated that such a law or rule was customary,

constituted principles of international law. The conclusion of the Commission was that since the Nürnberg Principles had been affirmed by the General Assembly the task of the Commission was not to express any appreciation of these principles as principles of international law but merely to formulate them. This task the Commission has accomplished. The text of its formulation stands before the world as a set of principles affirmed by the United Nations with regard to crimes against peace, war crimes and crimes against humanity, the responsibility of those persons who are guilty of such crimes and the manner in which the responsibility must be determined.”

it actually became so. He would have liked the general impression created by the report to be corrected. He did not consider that the report as drafted truly represented the findings of the Commission and thought that it minimized both the scope of the discussions and of the findings.

116 a. The Commission had now accepted its responsibility; but, as he had already stated, he could not unreservedly accept this report concerning the formulation of the Nürnberg Principles, and wished to make the following reservation:

“Mr. Scelle regretted that he was unable to accept this part of the report on the grounds which he had already stated the previous year—namely, that the report did not enunciate the general legal principles on which the provisions of the Charter and the decisions of the Tribunal were based, and also because the final form of the report appeared not to represent exactly the findings adopted by the Commission during its preliminary discussions and to minimize their scope.”

He requested the Rapporteur to include this reservation in his report.

117. Mr. ALFARO thought that Mr. Scelle’s reservation should be discussed, and proposed that the discussion take place at the following meeting. As for the quotation from the judgment of the Tribunal, he had regretfully to state that, if the Commission decided to delete it, he himself would be obliged to add a reservation to that just made by Mr. Scelle.

The meeting rose at 1.10 p.m.

78th MEETING

Thursday, 27 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 CORDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris el-KHOURY, Mr. A. E. F. SANDSTRÖM, 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).

Commission's draft report covering the work of its second session (continued)

PART III: FORMULATION OF THE NÜRNBERG PRINCIPLES (A/CN.4/R.7/ADD.3)¹

B. THE CRIMES (concluded)

1. The CHAIRMAN reminded the Commission that it had to take a decision on the final wording of the last paragraphs² of part III. There was still a difference of opinion between members of the Commission regarding the penultimate paragraph.

2. Mr. SANDSTRÖM proposed that that paragraph should be inserted in the second paragraph of the comment on crimes against peace (paragraph 111 of the "Report") and begin with the following words: "Referring to the law of the Charter, the Tribunal concluded that the Charter..."

3. Mr. FRANÇOIS observed that that would be repeating what was already said. He proposed that the paragraph be deleted.

4. The CHAIRMAN pointed out that, in quoting those sentences, the Rapporteur-General had intended to state a general conclusion. He recalled that the first two sentences of the last paragraph of part III had been transferred to the beginning of that part of the report.³ He asked the Commission whether it wished to retain the words: "It is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law."

5. Mr. YEPES did not approve of that quotation. The Commission should not support a statement of the Tribunal that was contradicted by history. He was in favour of deleting the words: "The Charter is not an arbitrary exercise of power on the part of the victorious nations."

6. Mr. el-KHOURY observed that, in reproducing those passages in that manner, the Commission took no responsibility.

7. Mr. AMADO said that it must not be forgotten that the Tribunal had had to apply law which had not been formulated. It had examined international law for authority to try war criminals. It was to satisfy its conscience that it had spoken of existing international law. The Tribunal had wished to bring out the legitimacy of its attitude. In ordinary cases, a judge had no need to state that he was applying existing law, since the text of the law was available. Consequently, he remained opposed to the insertion of any such passage.

8. Mr. HUDSON understood Mr. Amado to be pro-

posing the deletion of the whole paragraph; he supported that proposal.

9. Mr. FRANÇOIS recalled that Mr. Sandström and he had also suggested deleting that passage, since it already appeared in the report.

10. Mr. SANDSTRÖM said that he had proposed, as a compromise, that the paragraph should be inserted in the comment on Crime (a). If it was to be retained, that was the appropriate place.

11. The CHAIRMAN observed that there were three proposals. First, that the paragraph should be retained—or at least, the first sentence quoted; secondly, that the whole paragraph should be deleted; and thirdly, that it should be transferred to the commentary to Crime (a).

12. Mr. ALFARO considered that the paragraph related to the whole formulation of the Nürnberg Principles. The Commission could recall that, in delivering its judgment, the Tribunal had made that statement, and could reproduce it for what it was worth. The Commission must at least state what the Tribunal had said at the time when the principles were formulated. He wished he could reconcile the opposing views. He was prepared to accept a compromise solution, namely, that of transferring the quotation to the comment to Crime (a) although that comment only concerned crimes against peace. He supported Mr. Sandström's proposal.

13. Mr. HUDSON read out the paragraph of the judgment from which the quotation had been taken: "The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world. The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal... it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law."⁴ It could be seen that the first and second sentences were completely contradictory. It followed from the first that the Charter had the force of law for the occupied countries. The second sentence stated that the Charter was not an arbitrary exercise of power. It would be a mistake to remove one of those two sentences from its context.

14. Mr. CORDOVA was opposed to the insertion of those quotations. The Tribunal had had its historic responsibility. If the Commission included in that part of the report the passage which justified the Tribunal's decision, it would in fact be adopting that passage and the reader would believe the Commission to be declaring that the state of international law had been as the Tribunal had formulated it, whether the passage was inserted at the end of Part III or in the commentary to Crime (a).

14 a. He believed that the Nürnberg Tribunal had created law, had established something that had been lacking, and that it was well that it had done so. But to state that the Nürnberg Principles represented the

¹ Mimeographed document only. Parts of that document that differ from the "Report" are reproduced in footnotes to the summary records. For other parts, see the "Report" in vol. II of the present publication.

² See 77th meeting, footnote 11.

³ See 76th meeting, paras. 16-18.

⁴ See "The Charter and Judgment of the Nürnberg Tribunal", *op cit.*, p. 38.

law as it existed at the time was an error that the Commission must avoid. He would be sorry if the Commission appeared to approve a legal contradiction.

14 b. There was one point on which he had always felt concern. Although war had been outlawed at the time, the law had made no provision for the punishment of heads of States who had carried on an aggressive war. That was why he was opposed to the Commission appearing to adopt the Tribunal's statement. Progress in international law had been achieved with the creation of the Tribunal, and it was real progress.

15. The CHAIRMAN recalled the words of Poincaré: "Speeches only serve to sustain supporters of the same idea." He thought that every member of the Commission already knew how he would vote.

16. Mr. el-KHOURY thought that the Tribunal's statement should be inserted at that point even if it contained a contradiction, as Mr. Hudson had said, and that the Commission's opinion should be included with it. It would be advisable to state that the Commission did not share the view expressed by the Tribunal.

17. Mr. ALFARO explained that it was for the precise reason given by Mr. Córdova and Mr. el-Khoury that, in the penultimate paragraph immediately after the quotation, he had recalled the Commission's conclusion of the previous year. The Tribunal had stated that the Charter was the expression of international law existing at the time of its creation, and in 1949 the Commission had said that its task was not to express any appreciation of that statement, but merely to formulate the Nürnberg Principles.

18. Mr. AMADO asked why, if international law on that point had already existed in 1939, the Commission had been instructed to formulate it.

19. The CHAIRMAN observed that the Commission was adopting what it found acceptable in the Nürnberg Principles, and rejecting what it found unacceptable. He thought that certain members of the Commission did not wish the Tribunal's opinion to be reported. He reminded the Commission that there were three proposals before it.

20. Mr. HUDSON pointed out that there was a fourth proposal—namely, to retain the quotation and add the first sentence of the passage he had read out, so that it should be reported in full.

21. Mr. ALFARO was willing for the whole passage read out by Mr. Hudson to be quoted.

22. Mr. HUDSON said that he would prefer the penultimate paragraph of part III to be deleted.

The Commission decided by 7 votes to 3, with one abstention, to delete the penultimate paragraph of part III.

23. Mr. KERNO (Assistant Secretary-General) thought that the discussion preceding the vote could be summed up as follows: Certain members of the Commission held that the Charter and judgment of the Nürnberg Tribunal only constituted a declaratory precedent, whereas others considered them an original precedent. But he believed that all members of the Commission agreed that, whatever their nature, the Charter

and judgment, after their re-affirmation by the United Nations General Assembly, formed a part of existing international law.

24. The CHAIRMAN observed that the whole Commission agreed to that interpretation, but that with regard to creation of the law, the majority represented countries in which the system of "judge-made law" did not obtain.

25. Mr. HSU explained that he had voted for the deletion of the paragraph in question because he had thought that, if it were retained, the Commission might appear to be approving the Tribunal's statement. It would be better not to express any opinion. He proposed that the words "as principle of international law" in the sixth line of the last paragraph of part III should be deleted. He thought there was unnecessary repetition.

26. Mr. HUDSON reminded Mr. Hsu that those words appeared in the Commission's report on its first session. Their deletion would not effect any improvement. The words "appreciation of these principles as principles of international law" would be more easily understandable to the reader.

27. Mr. HSU considered that, by deleting those words, the Commission would not be committing itself so far.

28. Mr. ALFARO supported Mr. Hsu's proposal, since after the deletion of the preceding paragraph, there was no reason to include the words in question.

Mr. Hsu's proposal was rejected by 7 votes to 4.

29. The CHAIRMAN announced that the paragraph would remain unamended.

30. Mr. HUDSON reminded the Commission that it still had to take a decision on the titles to be given to Sections A and B of that part of the report.

31. Mr. ALFARO proposed two amendments to remove the inconsistency of the titles. First, to insert the wording used by the General Assembly: "The principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal." Secondly, to make no separate heading for the crimes, but to insert them as Principle VI, reading: "The crimes hereinafter set out are punishable as crimes under international law". An enumeration of the crimes would follow. A seventh principle would be included to cover complicity.

32. Mr. CÓRDOVA asked why the word "acts" was not used rather than "crimes".

33. Mr. ALFARO replied that he had wished to retain the terms of the formulation.

34. Mr. AMADO asked whether an enumeration of acts was a principle.

35. Mr. ALFARO explained that the principle was that those acts were crimes.

36. The PRESIDENT explained that Principle VI stated that the acts thereafter set out were crimes; it was certainly a principle, applying to the enumeration that followed.

The Commission adopted the wording proposed by Mr. Alfaro.

37. Mr. KERNO (Assistant Secretary-General) pointed

out that the Commission had decided at its 76th meeting to transfer to paragraph 2 of part III the first two sentences of the last paragraph of part III, and to delete the remainder of that paragraph.⁵

38. The CHAIRMAN announced that he considered that part of the report to have been adopted by the Commission as amended.

39. Mr. HUDSON pointed out that it was adopted subject to a second reading.

40. The CHAIRMAN observed that the decisions had been taken. He asked the Commission not to go back on them although, of course—as Mr. Hudson had very properly pointed out—all members had the right to make reservations. He personally wished to make a reservation regarding the third part of the report, of which he could accept neither the viewpoint nor the conclusion. He asked the Rapporteur to indicate in a note or otherwise that he had made the following reservation:

“Mr. Georges Scelle said that he regretted that he could not accept the view taken by the Commission of its task in this part of the report, for the same reasons as those which he had stated the previous year. The report did not enunciate the general principles of law on which the provisions of the Charter and the decisions of the Tribunal were based, but merely summarized some of them, whereas the Tribunal itself had stated that the principles it had adopted were already a part of positive international law at the time when it was established. Moreover, he considered that the final text of the report did not seem to reflect accurately the conclusions reached by the Commission during its preliminary discussions, and restricted their scope.”

That was his view, and he wished it to be inserted in the general report.

41. Mr. HUDSON understood that the Chairman was explaining the negative vote he intended to cast.

42. The CHAIRMAN explained that it was an opposing vote, not an abstention. It was exactly what the Commission had done the previous year with regard to explanations of votes.

PART VI: PROGRESS OF WORK ON TOPICS SELECTED FOR CODIFICATION (A/CN.4/R.7/ADD.4)⁶

Paragraph 1 (paragraph 158 of the “Report”)

43. Mr. HUDSON wished to add to paragraph 1 the following sentence taken partly from paragraph 3: “The Commission, at its second session, considered reports on these three subjects and reached certain tentative decisions which were not intended to have a definite and binding character, but to serve for the guidance of the special rapporteurs in their future work.” The sentence would thus apply to all reports by special rapporteurs, and not only to the report on treaties.

44. The CHAIRMAN supported Mr. Hudson’s proposal.

45. Mr. ALFARO indicated that that statement applied to all the reports.

46. Mr. HUDSON thought it would be preferable to insert the sentence at the beginning of part VI.

47. The CHAIRMAN proposed that it should be inserted before chapter I, and that paragraph 3 should be deleted.

48. Mr. ALFARO accepted that proposal.

The Commission decided to insert the sentence proposed by Mr. Hudson after paragraph 1.

CHAPTER I: LAW OF TREATIES

49. Mr. YEPES stated that when all the reports had been considered, it had been agreed that the discussion should be reopened to permit members of the Commission to state their views. He had intended to submit an important proposal regarding the law of treaties, and wished to indicate its nature.

49 a. The discussion that had taken place had been limited to the purely formal aspects of the matter. The Commission had considered the following problems: written form, capacity, signature and ratification; that was the framework of treaties. The validity of treaties depended on their subject matter. The Commission had forgotten to say that States were not entitled to conclude treaties on every subject. It had forgotten the purpose of treaties. It was essential that treaties should have a lawful purpose, and that must be expressly stated. He was well aware that his was like the voice of one crying in the wilderness, but he belonged to a school of thought that did not accept the will of the State as a source of law and he considered that the State was subject to law and must respect it. Moral law was above the State. In diplomatic history, there were many examples of treaties with unlawful purposes—for example, the partitions of Poland which had been the subject of treaties accepted by all States, the Clayton-Bulwer treaty by which the United States and Great Britain had disposed of the rights of a small State without even informing it of the fact, the treaties for the partition of China, the declarations of Yalta, Teheran, Moscow and Potsdam, by which the fate of countries had been decided without consulting them.

49 b. Article 2, paragraph 2 of the Charter had made good faith the supreme rule of international life. The Commission must have the courage to draw all the possible conclusions from that principle. Good faith clearly required that treaties should have a lawful purpose. If they had not, they could not be valid. One difficulty might arise: Who was to say that a treaty had an unlawful purpose? In his opinion, it should be the United Nations itself. In order to be valid, even a treaty should be registered. The Secretary-General of the United Nations should be given powers to decide that a treaty was unlawful, and that consequently he would not register it. He might also be required to obtain an advisory opinion from the Court on that matter.

49 c. The article he had intended to propose would have been drafted as follows:

“In order to be valid, a treaty, as understood in

⁵ See 76th meeting, paras. 16-18.

⁶ See footnote 1.

this Convention, must have a lawful purpose according to international law. In case of any dispute regarding the lawfulness of a treaty, the International Court of Justice shall state its opinion on the matter at the request of any State directly or indirectly interested, or of the United Nations.

"A treaty with an unlawful object may not be registered with the Secretariat of the United Nations. Whenever the lawfulness of a treaty submitted for registration is in doubt, the Secretary-General of the United Nations shall ask the International Court of Justice for an advisory opinion."

50. The CHAIRMAN said that Mr. Yepes was probably aware that many members of the Commission were in agreement with his remarks, but that his proposal could not be included in the report, which was devoted to the questions that had been discussed. Nevertheless, he could request that the problem of the intrinsic validity of treaties should be discussed at the beginning of the next session.

51. Mr. YEPES asked that the Rapporteur-General should take the article into consideration.

52. Mr. BRIERLY said that the question raised by Mr. Yepes would not be omitted, but for the moment he did not claim that his report was complete.

Paragraphs 2 and 3 (paragraph 160 of the "Report")

53. Mr. BRIERLY thought that, since the second sentence to paragraph 3 had been transferred,⁷ the first sentence of that paragraph should be added to paragraph 2.

Paragraph 4 (paragraph 161 of the "Report")

54. Mr. HUDSON did not approve of the first sentence of paragraph 4.⁸ He proposed the following wording: "In discussing the scope of the term 'treaty', it was decided by a majority of the Commission that the draft should include exchange of notes. . . ."

⁷ See para. 43, *supra*. The second sentence read as follows:

"It was the understanding of the Commission that the decisions reached were not of a definitive and binding character, but would serve merely for the guidance of the Rapporteur, and would be considered again at the next session of the Commission."

⁸ Paragraph 4 read as follows:

4. In discussing the term "treaty" as used in the draft by the Rapporteur it was decided that the draft should include exchange of notes, but that this provisional decision should not prejudice the question whether an agreement reached by an exchange of notes could properly be covered by the term "treaty". A majority of the Commission were also in favour of including agreements to which an international organization is a party in their study. The Commission also discussed whether it was desirable, in explaining the use of the word "Treaty", to place the primary emphasis upon the idea of agreement or upon the formal instrument embodying the agreement. The majority of the Commission favoured the expression "formal instrument" over the expression "agreement recorded in writing". Mention was made by certain Members of the Commission of the desirability of emphasizing the obligatory character of the relation under international law established by a treaty, and of making it clear that a treaty not only establish a relation, but may modify, abrogate, or regulate it.

55. Mr. BRIERLY saw no objection to that proposal.

56. Mr. HUDSON thought that the Commission might delete the second part of the last sentence beginning with "... and of making it clear". Its subtlety would not be understood.

57. Mr. AMADO supported Mr. Hudson's proposal.

58. Mr. ALFARO recalled that he had drawn attention to the fact that, in the definition of treaties, it was only stated that they established relations, whereas treaties could modify, abrogate or regulate a relation; the latter definition was to be found in numerous works on international law. Since the time of Fiore and Bluntschli it had been recognized that treaties could modify, abrogate or regulate legal relations.

59. Mr. HUDSON was inclined to support Mr. Alfaro on that point, but thought it useless to insert such a subtlety in the general report.

60. There followed a discussion in which the CHAIRMAN, Mr. AMADO and Mr. SANDSTRÖM took part, regarding the value of the words "making it clear" in the sentence under consideration. They considered it perfectly obvious that a legal relation could not only be established but could also be modified, abrogated or regulated. To mention "the desirability of making it clear" that that was the case might suggest to the reader that there was some doubt on the matter.

61. Mr. ALFARO explained that that part of the report had been drafted by Mr. Brierly. He had found it excellent, and although he might not have drafted the passage in that way himself, as he had inserted it he must now support it. There were good reasons for retaining the passage. If it were deleted there might be criticism, since it would be pointed out that nothing was established by an abrogation.

62. Mr. BRIERLY agreed to the deletion of the words, which he considered to be of no great importance.

63. The CHAIRMAN suggested that the words "of the relation under international law established by a treaty" should be replaced by the words "of the situation established by a treaty".

64. Mr. HUDSON proposed the words "the binding character under international law of an obligation established by a treaty".

65. The CHAIRMAN thought that the last part of the sentence "and of making it clear" might be deleted.

It was so decided.

66. Mr. AMADO was glad to note that the third and fourth sentences of the paragraph were extremely clear. For the Commission, a treaty should be of a formal character. The discussions and conclusions of the Commission were very well rendered in that passage.

67. The CHAIRMAN thought that there was a contradiction between the Commission's decisions regarding exchange of notes and the importance of a formal instrument.

68. Mr. HUDSON agreed that that passage in the report was in conflict with the decision taken by the Commission regarding agreements concluded by exchange of notes.

69. Mr. AMADO and Mr. CORDOVA did not agree. The Commission had merely decided to consider the question of exchanges of notes when it examined the report to be submitted the following year by the special rapporteur.

70. The CHAIRMAN confirmed that the Commission had made a reservation and that its decision regarding exchanges of notes was entirely provisional.

71. Mr. BRIERLY considered that that was a serious matter. The report accurately recorded the conclusions reached by the Commission after a long discussion. But it might perhaps be difficult to explain the exact position to the General Assembly.

72. Mr. AMADO thought that the importance of the question lay in the necessity to prevent every exchange of notes being considered as a treaty requiring formal ratification procedure.

73. The CHAIRMAN said that, in spite of the explanations given, he did not find the passage very clear. He thought that after the words "The majority of the Commission favoured the expression 'formal instrument' over the expression 'agreement recorded in writing'", it would be advisable to add some such phrase as the following: "but mention was made of the binding character of treaties".

74. Mr. ALFARO thought that a slight amendment to the beginning of paragraph 4 would make it sufficiently clear. He recalled that during the discussion the Chairman had called for a vote on whether the Commission wished to deal with exchanges of notes. The Commission had decided in favour of that proposal by 6 votes to 5.⁹ Subsequently, the Chairman had asked the Commission whether it preferred the definition advocated by Mr. Briery (agreement recorded in writing) or that formulated in the Harvard draft (formal instrument). The Commission had decided in favour of the Harvard draft by 6 votes to 4 with 1 abstention.¹⁰ It was in the light of those two votes that he had drafted his text. But as he had already said, he thought that the difficulty confronting the Commission could be overcome by a minor drafting amendment to the beginning of paragraph 4.

75. Mr. HUDSON submitted a new text for paragraph 4, which he thought would solve the difficulty. His text read as follows: "The Commission devoted some time to a consideration of the scope of the subject to be covered in its study. Though it took a provisional decision that exchanges of notes should be covered, it did not undertake to say what position should be given to them by the Rapporteur. A majority of the Commission favoured the explanation of the term treaty as a 'formal instrument' rather than as an 'agreement recorded in writing'. Mention was frequently made by members of the Commission of the desirability of emphasizing the binding character of the obligations under international law established by a treaty."

76. Mr. ALFARO agreed to the substance of Mr. Hudson's proposal. He said that he would insert it in

his report in place of the existing text of paragraph 4.

77. Mr. BRIERLY, as rapporteur on the law of treaties, also accepted Mr. Hudson's proposal, which simplified the issue.

Paragraph 5

*(paragraphs 162 and 163 of the "Report")*¹¹

78. Mr. HUDSON proposed that the words "The Commission briefly discussed the use of the term 'international organization'", at the beginning of paragraph 5, should be deleted and replaced by the following sentence taken from paragraph 4: "A majority of the Commission were also in favour of including in their study agreements to which an international organization is a party." He was surprised to see it stated in the second sentence of the paragraph that the Commission had also discussed the capacity of States to enter into treaties. He did not think that the Commission had done so, and in his opinion the words "States and" should be deleted.

79. Mr. FRANÇOIS and Mr. AMADO observed that no one had questioned the capacity of States to enter into treaties and that it was therefore incorrect to mention tentative agreement by the Commission on that subject.

80. Mr. LIANG also remarked that the Commission had not discussed the capacity of States to enter into treaties and that it was only the capacity of international organizations that was in doubt.

81. The CHAIRMAN observed that Mr. Hudson's proposal to amend the beginning of paragraph 5 by inserting the second sentence of paragraph 4 would undoubtedly improve the text. Moreover, he saw no reason why the whole of the second sentence of paragraph 5 should not be deleted. On the other hand, the last sentence of that paragraph should be retained.

82. Mr. HUDSON said that he would prefer the last sentence to form a separate paragraph 6. By that arrangement, all the material dealt with in the draft submitted by Mr. Alfaro would be grouped in a more logical manner. Paragraph 4 would relate to the question of treaties, paragraph 5 to international organizations having the capacity to conclude treaties, and paragraph 6 to constitutional provisions as to the exercise of capacity to make treaties.

83. Mr. KERNO (Assistant Secretary-General) approved of Mr. Hudson's proposal to regroup those two paragraphs. But he thought that under the new arrangement the question of international organizations might not be very clear to the reader. He thought that a slight drafting amendment was necessary to show that the Commission agreed that certain international organizations such as the United Nations had the capacity to

⁹ See 51st meeting, para. 38.

¹⁰ See 52nd meeting, para. 17.

¹¹ The first two sentences of paragraph 5 read as follows: 5. The Commission briefly discussed the use of the term "international organization" and there was general agreement that determination of the organizations which possess a capacity for making "treaties" would need further consideration. It also discussed and reached tentative agreement concerning the capacity of States and international organizations to enter into treaties.

enter into treaties, and that there had been general agreement that it was the determination of what other organizations had that capacity which required fuller study.

84. The CHAIRMAN thought that the Commission could accept Mr. Kerno's proposal, though no mention should be made of the United Nations or of any specialized agency.

85. Mr. HUDSON read out the amended text of paragraph 5, which he thought should be drafted as follows:

"A majority of the Commission was also in favour of including in its study agreements to which international organizations are parties. There was general agreement that, while the treaty-making power of certain organizations is clear, the determination of the other organizations which possess capacity for making treaties would need further consideration."

86. Mr. ALFARO again read out the draft of paragraph 4 proposed by Mr. Hudson. He added that after that text would come the new text of paragraph 5 read by Mr. Hudson and then paragraph 6, which would consist of the last sentence of the former paragraph 5. He considered that the words "and no decision was reached" should be retained, because that had in fact been the case.

87. The CHAIRMAN thought that those words could be retained since they were in accordance with the facts.

88. Mr. AMADO said that he would not object, although he was averse to mentioning the negative aspects of a question.

89. Mr. HUDSON asked that the words "on this topic" be added after the words "general principles" in the second sentence of paragraph 6. He thought that in the same sentence the words "is part of the agreement between the parties and therefore" should be deleted. He pointed out that the Commission had considered the possibility that the parties must also consent to reservations. Speaking frankly, he would prefer that the whole of the second part of the second sentence should be deleted, since it gave the impression that the Commission had not been in agreement on certain points. Though that was a fact, he was averse to mentioning points on which there had not been agreement.

90. Mr. KERNO (Assistant Secretary-General) thought he must remind the Commission that, during the discussion on certain points in Mr. Brierly's report, all members had agreed that in the case of a treaty already in force a reservation was only effective if all the parties consented to it. But there had been no such agreement in the Commission regarding the entry into force of a reservation to a treaty that was not yet in force, nor regarding the question whether a reservation to a treaty already in force required the consent of the States which had signed the treaty but not yet ratified it.¹² If Mr. Hudson's proposal to delete the last part of the second sentence were adopted, it was probable that

the General Assembly would wonder what significance to attach to the first part of that sentence which, taken without its complement, was somewhat cryptic. In order to facilitate his task in the General Assembly, something should be inserted to replace the words deleted. On the whole, he thought that the sentence should be retained.

91. Mr. YEPES said that the report accurately summarized the discussion on that subject and that the words to which Mr. Hudson was opposed should not be omitted.

92. Mr. HUDSON thought that if those words were retained, the reader would conclude that consent of the parties was sufficient. He would accept the proposal that the words "at least" should be inserted before the words "the consent of all parties", in order to prevent that conclusion from being drawn. He again urged that the words "is part of the agreement between the parties and therefore" should be deleted.

The Commission decided to adopt the wording of the last sentence of paragraph 5 for a new paragraph 6 (paragraph 163 of the "Report")

Paragraph 6 (paragraph 164 of the "Report")

The original paragraph 6 was adopted without discussion.

Paragraph 7

93. *Paragraph 7 (last sentence of paragraph 159 of the "Report") was adopted without discussion*, it being understood that it would be inserted immediately after paragraph 3 (which had itself been inserted after paragraph 1), and amended to apply to all special reports.

94. Mr. YEPES stated that he approved that chapter of the report in the hope that at its next session the Commission would give priority to what he considered the essential question of the subject matter of international treaties which, in his opinion, could not be valid or be registered unless they had a lawful purpose under international law.

CHAPTER III: REGIME OF THE HIGH SEAS

(A/CN.4/R.7/ADD.5)¹³

Paragraph 3 (paragraph 184 of the "Report")

95. Mr. HUDSON wished to make the following amendments to paragraph 3: In the first sentence he considered that the words "thought it necessary to" were too strong, and should be replaced by the words "thought that it could"; in the second sentence, the word "regulation" should be replaced by the word "study". The Commission had not, in fact, carried out any regulation, but had made a study. Finally, in the last sentence he would prefer that the word "dropped" should be replaced by the words "set aside".

¹² See 53rd meeting, paras. 86 *et seq.*

¹³ Mimeographed document only. See footnote 1.

96. Mr. LIANG (Secretary to the Commission) thought that a reference should be made in that paragraph to document A/CN.4/30, which had been submitted to the Commission by the Secretariat. He also asked that the words "other United Nations bodies" in the first sentence should be supplemented by the addition of the words "or by the specialized agencies".

Those proposals were adopted.

Paragraph 4 (paragraphs 185 and 186 of the "Report")

97. The CHAIRMAN proposed that in the first sentence the word "instructed" should be replaced by the word "invited" and that at the end of the second sentence the words "and can have one flag only" should be amended to read "and one flag only".

98. Mr. HUDSON proposed that the last sentence should be deleted. Contrary to what was stated, the Commission had reached a conclusion; that conclusion was stated in the preceding sentence.

99. The CHAIRMAN thought that the sentence could be retained. It would be sufficient to say "no other specific conclusions" instead of "no specific conclusions".

100. Mr. BRIERLY proposed the deletion of the small letters in the sub-headings preceding the various paragraphs after paragraph 3, and inserting the sub-headings between the paragraph number and the beginning of the text.

Those proposals were adopted.

Paragraph 5 (paragraph 187 of the "Report")

101. Mr. HUDSON thought that the Rapporteur had given that paragraph too wide a scope. The Commission had not wished to determine which court was competent in all cases of collision. It had confined itself to collisions involving questions of criminal law. Consequently, he thought that the first sentence should be amended to read "... which court is competent in criminal cases arising out of collision" instead of "competent in cases of collision". He also proposed that in the second sentence the passage "a positive principle which could supplement the negative opinion ordered by the Permanent Court of International Justice" should be deleted, and the words "a proposal" inserted after the word "submit".

102. Mr. BRIERLY suggested that the final sentence of paragraph 5 should be transferred to the beginning of that paragraph.

103. The CHAIRMAN said that in the French text the words "saurait demeurer silencieuse à ce sujet" at the end of the first sentence should be amended to read "pouvait passer ce sujet sous silence".

104. *Those amendments were adopted and the paragraph re-drafted.*

Paragraph 6 (paragraphs 188 and 189 of the "Report")

105. Mr. HUDSON thought that the first sentence of paragraph 6, as it stood, would only be understandable to persons well versed in maritime affairs. The passage relating to the adoption of the London Regulations of

1948 by all governments should be deleted. That passage went too far; the regulations of 1889 had been adopted by a large number of States and those of 1929 by a smaller number. It was by no means certain that there would be a large number of accessions to the revised text of 1948.

106. Mr. KERNO (Assistant Secretary-General) observed that the Commission intended to submit the report to the General Assembly for information only, and that a final report would be submitted later. The report stated that the Commission considered that the adoption of the 1948 regulations by all governments would represent a great step forward in that field. Did the Commission mean by those words that it invited the General Assembly to appeal to governments to adopt the 1948 regulations? He did not think that that was the Commission's intention and therefore believed that he could support Mr. Hudson's proposal to delete the passage in question.

107. Mr. FRANÇOIS agreed to the deletion but observed that he had inserted the passage to satisfy Mr. Hudson who had strongly urged, at the sixty-fourth meeting (para. 86), that all governments should ratify the revised text of 1948.

108. The CHAIRMAN said that in the second sentence of paragraph 6 the words "a principle" should be replaced by the word "principles".

Those proposals were adopted.

109. Mr. HUDSON proposed adding a few lines to the second sub-paragraph (paragraph 189 of the "Report")¹⁴ to explain the provisions of article 11 of the Brussels Convention of 1910 for the unification of certain rules relating to assistance and salvage at sea, and of article 8 of the Convention of the same date for the unification of certain rules relating to collision.

110. Mr. FRANÇOIS agreed to that proposal, in order to clarify the text for the reader.

*Paragraphs 7 and 8
(paragraphs 190 and 191 of the "Report")*

111. Mr. AMADO asked whether paragraph 8 was necessary, since the Commission had not considered the slave trade.

112. The CHAIRMAN proposed that the word "engaged" should be replaced by the words "which might engage".

Paragraphs 7 and 8 were adopted with the amendment proposed by the Chairman.

The meeting rose at 1 p.m.

¹⁴ That sub-paragraph read as follows:

It was the Commission's view that principles could be formulated on the basis of article 11 of the Brussels Convention of 23 September 1910 for the Unification of Certain Rules with respect to Assistance and Salvage at Sea, and of article 8 of the Convention for the Unifications of Certain Rules with respect to Collisions between Vessels, also dated 23 September 1910.

79th MEETING

Friday, 28 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 CORDOVA, Mr. J. P. A. FRANÇOIS, Mr. Manley O. HUDSON, Mr. Faris el-KHOURY, Mr. A. E. F. SANDSTRÖM, 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).

Commisison's draft report covering the work of its second session (*continued*)

PART VI: PROGRESS OF WORK ON TOPICS SELECTED FOR CODIFICATION

**CHAPTER III: REGIME OF THE HIGH SEAS
(A/CN.4/R.7/ADD.5)¹ (*concluded*)**

Paragraph 10 (paragraph 193 of the "Report")

1. Mr. HUDSON asked whether it was a good idea for the Commission to bind itself to consulting other organizations without knowing what organizations were referred to. He suggested the wording "... consultations may have to be held".²

2. Mr. FRANÇOIS agreed to the alteration.

3. The CHAIRMAN suggested "It was agreed that consultations may have to be held with other organizations, especially technical organizations which deal with ...".

It was so decided.

Paragraph 11 (paragraph 194 of the "Report")

4. Mr. HUDSON suggested deleting the word "and" before "with due regard".

¹ Mimeographed document only. Parts of that document that differ from the "Report" are reproduced in footnotes to the summary records. For other parts, see the "Report" in vol. II of the present publication.

² Instead of "It was agreed that consultations should be held with other organizations dealing with the question of the protection of resources of the sea".

*Paragraph 12
(paragraphs 195 and 196 of the "Report")*

5. Mr. HUDSON felt that the words "adopted the principle" in the first line of the paragraph were too categorical. He suggested "took the view".

6. Mr. FRANÇOIS agreed to the alteration.

7. Mr. HUDSON suggested "with regard to their contiguous zones" instead of "with regard to their rights over contiguous zones", in the second paragraph.

Paragraph 13 (paragraph 197 of the "Report")

It was decided to delete the word "preliminary" before the words "exchange of views".

Paragraph 14 (paragraphs 198-201 of the "Report")³

8. Mr. HUDSON said that the continental shelf was not a legal concept but a geological phenomenon. He suggested that the paragraph read: "The Commission recognized the great importance from the economic and social point of view, as well as juridical, of the exploitation of sea bed and subsoil of the continental shelf".³

9. Mr. FRANÇOIS had no objection to the alteration.

10. The CHAIRMAN thought it would be better to express it as follows: "The Commission recognized the great importance of the exploitation of sea bed and subsoil of the continental shelf, from the economic and social, as well as from the juridical point of view".

11. Mr. YEPES felt that the motion was not sufficiently well crystallized. It would be better to say "... the importance of the exploitation from the economic and social point of view, and the importance of establishing a juridical regime".

12. The CHAIRMAN suggested "... the economic

³ Paragraph 14 read as follows:

14. The Commission recognized that the continental shelf is not only a legal concept, but is also highly important from the economic and social points of view. Methods now exist whereby submarine resources may be exploited for the benefit of mankind. Legal concepts likely to impede this development should be removed. One member of the Commission expressed the view that the exploitation of the products of the continental shelf should be an international responsibility. Others considered that there were insurmountable difficulties in the way of internationalization. The Commission adopted the principle that a riparian State might exercise control and jurisdiction over the subsoil and sea bed of submarine areas situated outside its territorial waters with a view to exploring and exploiting the natural resources to be found there. Such control and jurisdiction should not to any considerable extent affect the right to free navigation on the waters above such submarine areas or the right to fish freely in such waters. The area over which such a right of control and jurisdiction may be exercised must be delimited; but it need not necessarily depend on the existence of a continental shelf. The Commission considered that it would be unjust to countries having no continental shelf if the granting of the rights in question were made dependent on the existence of such a shelf, since certain countries which had none might also wish to exploit the sea bed and its subsoil.

It is perfectly clear that the extent of the region in question should be delimited. That delimitation—like the delimitation of the regions allocated to the different countries—should be decided later. It must not be possible for States to penetrate into the region attributable to another State for purposes of

and social importance of the exploitation, and the importance of its juridical regime”.

13. Mr. el-KHOURY pointed out that the juridical regime had still to be established.

14. Mr. YEPES suggested in the circumstances “... the juridical regime to which ... will be subject”.

15. Mr. AMADO wondered whether it was necessary to state in the second sentence “for the benefit of mankind”.

16. The CHAIRMAN thought it was. The continental shelf had an importance for mankind in general.

17. Mr. YEPES recalled that President Truman had expressly mentioned “long range world-wide need”.

18. Mr. FRANÇOIS thought it would be better not to mention any particular proclamation.

19. Mr. KERNO (Assistant Secretary-General) remarked that the French text had “*toute l'humanité*”; whereas the English text read “mankind” only.

20. The CHAIRMAN suggested “*au bénéfice de l'humanité*”.

21. Mr. HUDSON suggested that the third sentence read “Legal concepts should not impede its development”.

22. Mr. KERNO (Assistant Secretary-General) pointed out that the spirit of the text was “strictly legal concepts”.

23. Mr. YEPES asked why not use the expression “The juridical regime should facilitate its development”, thus giving the sentence an affirmative form.

24. Mr. HUDSON said that the idea was that “legal concepts should not impede...”. With that idea in mind, the Commission could adopt a constructive attitude. At the present time there were obstacles to be

control and jurisdiction. Moreover, care must be taken not to affect the concept of the high seas to a greater extent than is required by the interests concerned.

In the opinion of the Commission the sea bed and subsoil of submarine areas above referred to are not to be considered as either *res nullius* or *res communis*. The sea bed and subsoil are subject to the exercise, by the littoral States, of a right of control and jurisdiction for the purpose of their exploration and exploitation. That control and jurisdiction are equivalent to sovereignty. On the other hand, there can be no question of a right of sovereignty, or of rights of control and jurisdiction, over the waters covering those parts of the sea bed. Those waters remain under the regime of the high seas. Navigation and fishing rights may be impaired only in so far as is strictly necessary for the exploitation of the sea bed and subsoil. For works and installations established in the waters of the high seas for working the sea bed and subsoil, special security zones might be claimed, but they could not be classed as territorial waters. The Commission considers that protection of the resources of the sea should be subject to general regulations for all the high seas as provided in paragraph (g); it should thus be independent of the concept of the continental shelf.

The majority of the Commission was of the opinion that since the continental shelf is neither *res nullius* nor *res communis* it is subject *ipso jure* to the exercise of control and jurisdiction by the littoral State with a view to present and future exploration of its resources. The concept of a “notional” occupation, therefore, has no *raison d'être*.

The Commission requested the Rapporteur to include in his report to the next session certain concrete proposals based on the principles above set forth.

removed before any progress could be made with the problem.

25. The CHAIRMAN felt that the negative formula had its points. The Commission was delimiting the issue. The sentence might state that “There must be no juridical construction likely to impede this development”.

26. Mr. YEPES suggested the addition of “... rather, it should promote the development”.

27. The CHAIRMAN said that for once he favoured allowing greater latitude to governments. He read out the sentence “One member of the Commission expressed the view that the exploitation of the products of the continental shelf should be an international responsibility”.

28. Mr. HUDSON wondered whether Mr. Hsu, who had put forward that view, wished that wording to be kept.

29. Mr. FRANÇOIS observed that the same view had been expressed in Brussels in 1948 by the International Law Association. He had inserted the sentence as an indication that he had not lost sight of that viewpoint.

30. The CHAIRMAN pointed out that the text of the report referred to a member of the Commission. He thought it would be advisable to replace the word “should” by the word “might”.

31. Mr. FRANÇOIS and Mr. HUDSON were opposed to that. Mr. Hsu had expressed his feelings quite as definitely as that.

32. Mr. HUDSON thought it would be better to begin the sixth sentence with the words “The Commission took the view”.

33. Mr. ALFARO thought there was a principle involved and that the Commission had adopted it.

34. Mr. HUDSON thought it was merely a directive given to the Special Rapporteur.

35. The CHAIRMAN said that in the French text of the next sentence he would prefer “*dans une mesure notable*” rather than “*dans une mesure importante*”.

36. Mr. ALFARO agreed to the emendation.

37. Mr. BRIERLY thought the word “considerable” should be kept in the English text.

38. Mr. ALFARO suggested “do not ... affect”.

39. Mr. HUDSON preferred “should not to any considerable extent affect the exercise of the right...”.

40. Mr. YEPES submitted that it was actual navigation that was referred to.

41. The CHAIRMAN shared the opinion that it would be better to say “affect the exercise of the right”.

42. Mr. HUDSON was for deleting the end of the last sentence of the paragraph, from the words “since certain countries...” The notion was contained in the beginning of the sentence. Obviously it was impossible to exploit the resources of the ocean bed.

43. The CHAIRMAN remarked that it might eventually be possible.

44. Mr. HUDSON thought it would be time to go into the matter when it did become possible, and he suggested “A State having no continental shelf, but very

shallow waters, may exercise the same right". It was the only wording he thought acceptable. Any other would seem ridiculous to an expert.

45. Mr. AMADO said that the question was well reported in the summary records. Mr. Brierly had suggested the wording: "Control and jurisdiction do not depend on the presence of a continental shelf". There had been some discussion as to whether Mr. Córdova's proposal should be adopted. Mr. Brierly had felt that Mr. Córdova was misinformed (See 67th meeting, paras. 53 and 57). Mr. Hudson was right—it was like explaining something that was already perfectly obvious. If the Commission stood by its decision, less categorical formula might be found, or the passage could be deleted.

46. Mr. ALFARO appreciated Mr. Hudson's fears that the sentence would appear ridiculous to experts who were well aware that the ocean bed could not be exploited. Any fears would be allayed if the end of the phrase were eliminated; hence he suggested ending the paragraph after the words "existence of such a shelf".

47. Mr. HUDSON suggested in the previous phrase "must be limited" instead of "must be delimited"—a physical impossibility. The end of the sentence would then run: "but where the depth of the water permits exploitation it does not depend on the existence of a continental shelf".

The Commission approved.

48. Mr. ALFARO said that the idea expressed by Mr. François in the following paragraph referred to cases where two or more States had rights over one and the same continental shelf. It was therefore necessary to determine just how far a State could go.

49. The CHAIRMAN thought that in that paragraph the word "delimited" could be used.

50. Mr. HUDSON suggested deleting the paragraph and substituting Mr. Alfaro's proposal that States should agree on the delimitation of the continental shelf.

51. Mr. FRANÇOIS said he had inserted the paragraph to meet Mr. Alfaro's wishes.

52. Mr. CORDOVA said he would prefer the delimiting to be done by general regulation. He suggested leaving it to the Rapporteur to formulate a principle.

53. Mr. HUDSON felt it was impossible to make a general rule.

54. The CHAIRMAN said the same difficulty arose as in territorial waters, and that the hope of finding a general solution had not been given up.

55. Mr. HUDSON could not see how France, Great Britain, the Netherlands and Panama could control the way in which the United States and Mexico delimited the continental shelf in the Gulf of Mexico.

56. Mr. CORDOVA declared that if delimitation was international the smaller States would have a better sense of security.

57. The CHAIRMAN thought a reference to interstate conventions was called for; it should be indicated too that bilateral conventions were desirable so long as there was no general rule.

58. Mr. CORDOVA suggested that it be left to the Rapporteur to go into the question. Mention might be made of the fact that one member of the Commission would like to see the delimitation carried out by international agreement.

59. Mr. ALFARO said it was impossible to allow a State to penetrate into the region attributable to another State for purposes of control and jurisdiction. He suggested that the text be kept until another formula were found. Where the continental shelf could be occupied by several adjacent States, there should be some system preventing other States from penetrating into it.

60. Mr. CORDOVA pointed out that there were two possibilities—either to leave it to the States concerned to settle the matter, or to draw up international regulations. The exploitation of the subsoil was always an exception to the rule of freedom of the high seas.

61. Mr. HUDSON felt that was not so, since the freedom of the high seas continued to apply.

62. Mr. CORDOVA considered that it was nevertheless an exception; hence the community of nations would be well advised to delimit the rights of States which had a special interest in exploitation. Mankind must have its say. The report said as much at the beginning of paragraph 14 (paragraph 198 of the "Report").

63. Mr. HUDSON suggested "Where two or more neighbouring States are interested in the submarine area of the continental shelf, boundaries must be delimited."

64. Mr. el-KHOURY asked who was to do the delimiting.

65. Mr. CORDOVA replied that the Rapporteur might make suggestions.

66. Mr. FRANÇOIS and Mr. ALFARO accepted Mr. Hudson's proposal.

67. Mr. ALFARO said that the proposal arose out of a paragraph from the International Law Association's conclusions:

II. "Where two or more States border outside their territorial waters on the same continental shelf, control and jurisdiction over its sea-bed and subsoil can be vested in such States by proclamations to the exclusion of all other nations, and such States can by mutual agreement (to the exclusion of all other nations) divide between them such common part of the continental shelf."

That was what he had referred to when he said some system must be found.

68. Mr. KERN (Assistant Secretary-General) asked whether Mr. Hudson's formula was to replace the paragraph in its entirety. The final sentence was the only one which made any reference to the freedom of the high seas. In the rest of the paragraph it was only referred to by implication.

69. After an exchange of views in which the CHAIRMAN, Mr. ALFARO, Mr. CORDOVA, Mr. FRANÇOIS and Mr. HUDSON took part, it was decided that the paragraph in question would comprise Mr. Hud-

son's text followed by the third sentence of the paragraph as given in the draft report.

70. Mr. ALFARO suggested beginning with the words: "The Commission agreed that, where two or more States . . .".

71. The CHAIRMAN and Mr. HUDSON were not in favour of the third sentence in the third sub-paragraph of paragraph 14 ("That control and jurisdiction are equivalent to sovereignty").

72. Mr. HUDSON suggested: "the exercise of navigation and fishing rights" instead of "navigation and fishing rights". He also suggested that the sentence referring to the question earlier in paragraph 14 be deleted to avoid repetition.

73. Mr. SANDSTRÖM wondered whether what was now being said was not different from what had been said elsewhere. It was conceivable that navigation might be so heavy and fishing so important that priority should be given to those interests rather than to exploitation of the sea bed and subsoil.

74. Mr. FRANÇOIS pointed out that that question had not been discussed. Hence, it could not appear in the report.

75. Mr. HUDSON suggested deleting the final sentence of the antepenultimate paragraph, on the grounds that the point was already mentioned in paragraph 10 (paragraph 193 of the "Report").

76. Mr. FRANÇOIS felt that the sentence clinched the idea.

77. Mr. BRIERLY felt that it went too far. It was impossible to conceive of a general code of rules for the protection of the resources of the sea.

78. Mr. FRANÇOIS pointed out that, notwithstanding, proclamations by some of the South American countries spoke of sovereignty in the matter of protection of the resources of the sea in those regions. It might seem strange if the Commission made no mention of it. It would be a good thing to mention protection of the resources of the sea.

79. Mr. HUDSON pointed out that they had already been mentioned.

80. Mr. YEPES thought Mr. Francois was right; the report would be more lucid if the sentence were kept.

81. Mr. CORDOVA said the point had already been mentioned in paragraph 10 (paragraph 193 of the "Report").

82. Mr. FRANÇOIS suggested "Protection of the resources of the sea should be independent of the concept of the continental shelf".

83. Mr. ALFARO felt the sentence should be kept; but the words "as provided in paragraph (g)" might well be deleted.

84. Mr. HUDSON and Mr. BRIERLY accepted Mr. François' formula.

85. The CHAIRMAN did not see the use of the next to the last sub-paragraph.

86. Mr. FRANÇOIS said that Mr. Alfaro had inserted it.

87. Mr. ALFARO had thought the passage should be inserted on the grounds that Mr. Brierly had laid stress on the problem; indeed it had been the central point in the discussion concerning the continental shelf. The Commission had voted on four questions put by Mr. Hudson, based on Mr. Brierly's speech. It had first of all decided that the continental shelf was neither *res nullius* nor *res communis*. It had next voted in favour of the question which was a necessary consequence of its decision that the continental shelf was neither *res nullius* nor *res communis*. The sub-paragraph was important. With regard to the final sentence, surely it figured in Mr. Brierly's report.

88. Mr. HUDSON thought it was a good idea to say "the submarine area, sea bed and subsoil of the continental shelf is subject to the exercise . . .". If the expression *ipso jure* were used, it meant that the Commission regarded the area as belonging to the littoral State, even where that State did not exercise its control and jurisdiction. In such instances it was possible to speak of sovereignty, but there could be no question of exercise if there was none. He would delete the paragraph.

89. The CHAIRMAN recalled that the Commission had already admitted control and jurisdiction. It might perhaps be useful to add that control and jurisdiction were independent of occupation.

90. Mr. FRANÇOIS recalled that the Commission had accepted the proposal by a very slender majority.

91. Mr. HUDSON said that the text voted on at the time was different from the one now before the Commission.

92. Mr. KERN (Assistant Secretary-General) said that the report now before the Commission was a technical report. But the wording of the passage in question called for modification, since the reader would find it incomprehensible. The Rapporteur had inserted the passage on the grounds that the Commission had voted separately on the four points put forward by Mr. Hudson. But the report already referred in the preceding paragraph to the question of *res nullius* and *res communis*. It was surely unnecessary to repeat it once again. The only point on which explanation seemed necessary was that in the Commission's opinion the exercise of control and jurisdiction was independent of occupation. But all that should be said more simply. The next to the last sub-paragraph might be deleted entirely, and a phrase added after the second sentence of the preceding sub-paragraph, to indicate that the exercise of control and jurisdiction was independent of occupation.

93. Mr. CORDOVA, Mr. YEPES, Mr. BRIERLY and Mr. FRANÇOIS agreed.

94. Mr. HUDSON suggested the insertion of the sentence "The exercise of such control and jurisdiction is independent of the notion of occupation".

95. The CHAIRMAN pointed out that if that were done the next to the last sub-paragraph would fall out automatically.

The suggestions were accepted.

96. Mr. HUDSON suggested that in the English text of the final paragraph the word "certain" be deleted,

and that in both English and French versions the word "principles" be replaced by the word "conclusions".
It was so decided.

PART IV: QUESTION OF INTERNATIONAL CRIMINAL JURISDICTION (A/CN.4/R.7/ADD.7)⁴

97. The CHAIRMAN invited the Commission to turn to Part IV of the report, concerning the establishment of an international criminal organ for the trial of persons charged with genocide or other crimes.

Paragraph 4 (paragraph 131 of the "Report")

98. Mr. HUDSON suggested deleting the words stating that Mr. Sandström's opinion was negative.

99. Mr. ALFARO explained that he had drafted the report in deference to the Chairman, who had felt when the Commission discussed the reports submitted by Mr. Sandström and Mr. Alfaro himself, that Mr. Sandström's report should be discussed first as representing the more negative view of the question.

100. The CHAIRMAN replied that the word "negative" did not interpret him properly; and he suggested altering the first sentence of paragraph 4 to stop after the words "of Mr. Sandström", and to replace the word "opinion" by the word "report".

It was so decided.

101. Mr. HUDSON proposed the deletion of the words "or not" in the third line of the English text.

102. The CHAIRMAN suggested that at the end of the last sentence in the English text, "in the first case" should be replaced by "in that case".

It was so decided.

Paragraph 5 (paragraph 132 of the "Report")⁵

103. Mr. HUDSON suggested that in the first and second lines "the... court" should read "a... court", and that in the English text the word "a"

⁴ See footnote 1.

⁵ Paragraph 4 read as follows:

"4. It was decided to consider first the report of Mr. Sandström. At the opening of his exposition, Mr. Sandström raised the question whether the judicial organ mentioned in the resolution was to be created necessarily as an organ of the United Nations, as in that case an amendment of the Charter of the United Nations would be required."

⁶ Paragraph 5 read as follows:

"5. Several members of the Commission held the view that the international criminal court could be created by means of a convention open to the signature of States, members and non-members of the United Nations; that, therefore, such court was not necessarily envisaged as an organ of the United Nations; that Article 7 of the Charter contains a mere enumeration of the principal organs of the United Nations created by the Charter itself; that said article does not amount to a limitation on the possibility of creating new subsidiary organs and that, therefore, the creation of the international judicial organ contemplated by the resolution does not require an amendment of the Charter. It was pointed out, furthermore, that the substantial question before the Commission was whether it was desirable and possible to create an international criminal jurisdiction, and that the problem with which the General Assembly was concerned would be the same whether a judicial organ were set up within the framework of the United Nations or outside the organization."

should be added after the word "such". In lines 6 and 7 he suggested "does not limit" instead of "does not amount to a limitation on"; in line 9, "would", instead of "does" and in line 10, "essential" instead of "substantial".

104. Mr. LIANG (Secretary to the Commission) thought that in the French text (same paragraph) the words "*de fond*" should be replaced by the word "*essentielle*".

It was so decided.

Paragraph (paragraph 133 of the "Report")⁷

105. The CHAIRMAN, Mr. BRIERLY and Mr. HUDSON found the sense of the paragraph obscure.

106. Mr. ALFARO explained that he had tried to render as faithfully as possible Mr. Sandström's argument that he could not conceive how a court could function effectively; that he foresaw too many obstacles in the way of its functioning; and therefore concluded that it was neither possible nor desirable to establish it.

107. Mr. SANDSTRÖM thought the words "concerning the meaning of the two terms" in lines 2 and 3 could be deleted, and that the wording of the paragraph altered accordingly.

108. The CHAIRMAN thought the paragraph might be simplified if the following wording were adopted "On the question of desirability and possibility of establishing an international criminal tribunal, Mr. Sandström stated that he could only consider the problem in a concrete and not an abstract manner; that in his judgment it was impossible to consider separately the questions of desirability and possibility". In the French text he suggested substituting the word "*désirabilité*" for "*opportunité*" and "*souhaitable*" for "*opportun*".

109. Mr. LIANG (Secretary to the Commission) pointed out that General Assembly resolution 260 B (III) used the expression "*s'il est souhaitable*".

The CHAIRMAN's proposals were accepted.

Paragraph 7 (paragraph 134 of the "Report")⁸

110. Mr. BRIERLY suggested replacing "will have"

⁷ Paragraph 6 read as follows:

"6. On the question of desirability and possibility of establishing an international criminal tribunal, Mr. Sandström stated that, concerning the meaning of the two terms, the desirability could only be considered in relation to the judicial organ as it could be envisaged in function; that consequently he could only consider the problem in a concrete, and not in an abstract manner; that in his judgment, it was appreciation of the judicial organ in this light that really mattered, and that it was impossible under such conditions to consider separately the questions of desirability and possibility."

⁸ Paragraph 7 read as follows:

"7. He also stated that the judicial organ envisaged by the General Assembly, whether it be established within or without the framework of the United Nations, would have, especially in the case of important international crimes, the defects he had pointed out in his report. In such cases the judicial organ would be ineffective. According to Mr. Sandström, a judicial organ of such nature as had been envisaged was not desirable unless it was efficient. For these reasons, Mr. Sandström concluded that the establishment of the judicial organ was not desirable."

by "would have" while the CHAIRMAN suggested that the words "either incompetent or" be deleted.

It was so decided.

111. After an exchange of view, the Commission decided to replace the words "In his view" by the words "In such cases". It also decided to delete the end of the third sentence of the paragraph "and it was not possible to establish an efficient organ"; and at the beginning of the final sentence, instead of "Under these conditions" to say "For this reason".

Paragraph 8 (paragraph 135 of the "Report")⁹

112. Mr. HUDSON suggested deleting the first part of the second sentence of the paragraph up to and including "General Assembly".

The proposal was rejected.

113. The CHAIRMAN suggested that the beginning of the second sentence of the paragraph should read "After referring to the three questions...".

The proposal was accepted.

114. Mr. BRIERLY proposed the wording "who disturb international public order" instead of "who disturbed the international public order". He also suggested deleting in the English text the words "as responsible" after "William of Hohenzollern".

It was so decided.

115. Mr. HUDSON said that the word "universal" in the sentence beginning with "Mr. Alfaro adverted to the universal mobilization of public opinion in behalf of an international criminal jurisdiction" on page 4, line 1, was too strong, and might be deleted. In the final sentence of the English text he suggested "were" instead of "was".

It was so decided.

Paragraph 9 (paragraph 136 of the "Report")

116. Mr. CORDOVA felt he should state that the whole of the paragraph was a summary of the views of the special rapporteurs rather than a report by the Commission. It would not be essential to retain the paragraph.

117. Mr. AMADO was also of this opinion. The report was not there to advise the Rapporteur, but to state what decisions had been taken by the Commission.

118. Mr. ALFARO explained that on that particular topic there were two rapporteurs with divergent views. He had felt he should give the points of view of both. The conclusions reached by the Commission were given later on in the report.

119. The CHAIRMAN commended the way in which

⁹ The beginning of paragraph 8 read as follows:

"8. Discussion of the report presented by Mr. Alfaro began at the forty-second meeting. After referring to the three questions put to the Commission by the General Assembly, he took up first the point of desirability and stated that if desirable means useful and necessary the creation of an international criminal jurisdiction vested with power to try and punish those persons who disturb international public order was desirable as an effective contribution to the peace and security of the world. In the community of States,..."

Mr. ALFARO had dealt with that part of the report.

120. Mr. HUDSON thought Mr. Alfaro had been wise in explaining the position as he had done. He had given a very clear picture of the discussion. There was no reason why that section of the report should be altered. He would merely like to point out that the last lines of the paragraph were not very clear. He did not think that draft statutes for criminal bodies had been adopted by the League of Nations or United Nations; they had merely been proposed. Hence the last lines might read as follows: "and that seven different draft statutes for international criminal organs had been formulated (A/CN.4/7/Rev.1, pp. 47-147) or submitted to the League of Nations, the United Nations and law associations".¹⁰

121. Mr. ALFARO said that he would redraft the sentence more precisely, bearing in mind the observations just made.

112. Mr. HUDSON would have liked the phrase in the second sentence to read "that the Geneva Convention of 1937 signed by... nations agreed to create an international judicial organ...".

123. Mr. ALFARO asked that the text of the report should not be altered at that point. It was important to state that the nations had agreed to create an international judicial organ. He had not known when drafting his report how many nations had signed the Convention, but the number should be inserted in the final version of the report which would be completed by the Secretariat.

124. The CHAIRMAN suggested deleting the word "international" preceding "terrorism".

It was so decided.

Paragraph 10 (paragraph 137 of the "Report")

125. Mr. BRIERLY suggested that the words "that a tribunal would be unable" be substituted for the words "that it would be unable"; and that the word "only" be inserted before the word "because". He further proposed altering the end of the English text of the paragraph to read "that punishment of aggressors would depend on their being on the losing side, and that no illusory ideas should be encouraged as to the possibility of setting up the organ in question", with corresponding alterations to the French text.

It was so decided.

Paragraph 11 (paragraph 138 of the "Report")

126. Mr. HUDSON suggested deleting the words "and as a matter of fact provision is made in the Charter of the United Nations for coercive action by means of armed force" at the end of the paragraph; and the words "including Mr. Alfaro" after "of the Commission" at the beginning of the paragraph.

¹⁰ In document A/CN.4/R.7/Add.7, that sentence read as follows: "...had been formulated (A/CN.4/7/Rev.1, pages 47 to 147), presented to or adopted by the League of Nations, by the United Nations and by law associations."

¹¹ It read as follows: "That punishment of aggressors depends on the alternative that they be on the losing or the winning side, and that no illusory ideas should be entertained as to the possibility..."

Paragraph 11 was accepted with the alterations suggested by Mr. Hudson.

Paragraph 12 (paragraph 139 of the "Report")

127. Mr. HUDSON felt that paragraph 12 was out of place, as it gave Mr. Alfaro's opinion.

128. Mr. ALFARO replied that the paragraph expressed not only his own views but those of other members of the Commission. Hence he suggested keeping the paragraph, and altering the beginning to read "It was pointed out by some members . . ." instead of "by Mr. Alfaro". The words "Finally Mr. Alfaro stated his view that" in line 4 would be deleted, the sentence to begin "Even if it were found that . . .".

The paragraph was accepted with the above alterations.

Paragraph 13 (paragraph 140 of the "Report")

129. Mr. BRIERLY suggested that the word "thorough" at the beginning of the English text of the paragraph be replaced by the word "extended".

It was so decided.

*Paragraphs 14 - 17
(paragraphs 141 - 144 of the "Report")*

130. *Paragraph 14 was accepted with a slight alteration to the English text, the word "it" in the first line being deleted.*

131. *Paragraph 15 was accepted with a slight alteration to the English text, the word "necessitated" to read "would necessitate".*

*Paragraphs 16 and 17 were accepted without modification.*¹²

*Paragraph 18 (paragraph 145 of the "Report")*¹³

132. Mr. HUDSON pointed out that the decision quoted in the paragraph had been taken to cater for the opinions expressed during the discussion, but it was not advisable to reproduce the text in the report. The paragraph might read: "After an exchange of opinions on the problem, the Commission decided that the establishment of a Criminal Chamber of the International Court of Justice was possible by amendment of the Court's Statute, but it did not recommend it."

¹² However, the text read as follows:

"16. Mr. Alfaro stated in his report that with this proviso the creation of such a Criminal Chamber was possible. At the opening of the discussion of this part of his report he stated that such a view did not mean that he favoured the creation of a Criminal Chamber of the International Court of Justice.
"17. Mr. Sandström stated his agreement with views expressed by some members of the Commission against the creation of a Criminal Chamber of the International Court of Justice."

¹³ Paragraph 18 read as follows:

"18. After an exchange of opinions on different aspects of the problem the following decision was taken:

"In making the foregoing answers to the question which the Commission was invited to study, the Commission has paid attention to the possibility of establishing a Criminal Chamber of the International Court of Justice. That course is possible by amendment of the Court's Statute, but the Commission does not recommend it."

133. Mr. ALFARO accepted the text as an improvement on his own. But it must be remembered that the Commission had been invited to study the question. Hence the text of the paragraph should surely state that it had taken the decision in compliance with the request. He would try to combine Mr. Hudson's proposal and his own for the final report.

Mr. Alfaro's proposal was accepted.

The meeting rose at 1 p.m.

80th MEETING

Friday, 28 July 1950, at 3.30 p.m.

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Chairman: Mr. Georges SCALLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. Roberto CORDOVA, Mr. J. P. A. FRANÇOIS, Mr. Manley O. HUDSON, Mr. Faris el-KHOURY, Mr. A. E. F. SANDSTRÖM, 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).

Commission's draft report covering the work of its second session (*continued*)

PART VI: PROGRESS OF WORK ON TOPICS SELECTED FOR CODIFICATION (*concluded*)

CHAPTER II: ARBITRAL PROCEDURE

(A/CN.4/R.7/ADD.6)¹

Paragraph 1 (paragraphs 165 - 166 of the "Report")

1. Mr. HUDSON wondered whether it was necessary in the first paragraph to say "a discussion of the first three of these paragraphs".

¹ Mimeographed document only. Parts of that document that differ from the "Report" are reproduced in footnotes to the summary records. For other parts, see the "Report" in vol. II of the present publication.

2. The CHAIRMAN thought the statement could be deleted, since it was repeated in paragraph 4. Clearly, Mr. Hudson did not wish to advertise the fact that the Commission's work had been so restricted.

3. Mr. el-KHOURY pointed out that the report discussed only three paragraphs out of sixteen. Hence, it was clear that the Commission's work had been confined to the three paragraphs.

4. The CHAIRMAN thought it should be stated that the Commission had examined only the three paragraphs in question.

Paragraph 3 (paragraph 168 of the "Report")

5. The CHAIRMAN felt that the first line of the paragraph should read "the Rapporteur's thesis was as follows".

6. Mr. BRIERLY pointed out that the League of Nations had had nothing to do with the 1949 revision of the General Act. The reference was to the General Act of 1928, revised in 1949.

7. The CHAIRMAN suggested "... (General Act of 1928, revised by the General Assembly of the United Nations in 1949)."

8. Mr. HUDSON questioned whether the first sentence of the third sub-paragraph was not too categorical. It would be better to say "it sometimes happens" instead of "it often happens"; it was, after all, exceptional.

9. The CHAIRMAN agreed to the change.

10. Mr. BRIERLY submitted that the English text should read "close those loopholes" instead of "eliminate those loopholes".

11. Mr. AMADO wondered whether it was not going too far to speak of "loopholes".

12. The CHAIRMAN did not think so.

13. Mr. HUDSON did not think the International Court of Justice could intervene to appoint national arbitrators.

14. The CHAIRMAN recalled that the 1907 Convention stated that the tribunal could draw up the *compromis*: this would allow the International Court to intervene. Admittedly, his sentence was ambiguous. The words "In the absence of agreement, provision has to be made for intervention by an international authority whose decisions will be binding on the parties" were intended to cover every kind of omission. The international authority would intervene to lay down procedure, or to grant time for the production of documents. In some cases, that authority would be the tribunal, in others the International Court of Justice. The Commission had adopted article 23 of the General Act of Arbitration, where it was stated that the International Court of Justice would appoint the arbitrators. Hence, the two authorities which could intervene to fill the gaps were either the arbitral tribunal, or the Court; but that merely expressed the fundamental idea behind his report. The idea was not attributed to the Commission.

14 a. He suggested, "In some cases that authority would be the arbitral Tribunal itself, and, in other cases, the International Court of Justice." If the parties agreed, they would set up a tribunal; if they did not agree, the tribunal would be set up in accordance with article 23 of the General Act of Arbitration. He mentioned that his report was based on the 1907 Convention and the General Act of Arbitration.

15. Mr. AMADO observed that the General Act of Arbitration had received only a very small number of accessions.

16. The CHAIRMAN said that twenty-two States were parties to the General Act; that was the important point, not the fact that the Act had not been ratified. Even the 1907 Convention provided that the tribunal should set up the *compromis*.

Paragraph 4 (paragraph 169 of the "Report")²

17. Mr. el-KHOURY thought that the reason why the Commission had confined itself to a study of the first three paragraphs of Mr. Scelle's report only—namely, lack of time—should be stated.

18. Mr. HUDSON suggested that paragraph 4 be deleted, so as not to repeat what was already mentioned in paragraph 1.

19. Mr. LIANG (Secretary to the Commission) asked whether it was advisable to state that lack of time had prevented the Commission from making more progress; it had not exhausted the period set aside for the session. The same might be said of the reports by Mr. Brierly and Mr. François.

20. The CHAIRMAN suggested deleting the mention of the first three paragraphs.

21. Mr. HUDSON again suggested that paragraph 4 be deleted, and that paragraph 1 should read "This report concluded with a draft which was considered by the Commission in its...".

22. Mr. KERO (Assistant Secretary-General) pointed out that the Commission had not examined the entire report, and he suggested, "The Commission devoted its 70th, 71st, 72nd and 73rd meetings to a general discussion of the report and a detailed discussion of the first three paragraphs of the draft."

23. The CHAIRMAN suggested for paragraph 4 the wording, "The Commission examined in detail the following paragraphs."

Paragraph 5 (paragraphs 170 - 173 of the "Report")³

24. Mr. HUDSON did not think it necessary to re-

² Paragraph 4 read as follows: "As stated in paragraph 1 the Commission confined itself to a study of the first three paragraphs." (See Summary Records A/CN.4/SR.70, 72, 73.)

³ The Commentary to paragraph 1 of the draft read as follows:

The Rapporteur stated his view that the essential task is to prevent States which have undertaken to resort to arbitration from evading their obligation through the lack of a procedure for solving the difficulties that may arise in the course of arbitration.

In the first place, in the event of dispute as to whether an issue exists or as to whether or not it falls within the terms

produce paragraph 1 of Mr. Scelle's report. It would be better to continue with an outline of the general principle. Actually, the text provisionally adopted by the Commission was different from the text of paragraph 1 proposed by the special rapporteur. There was no point in stressing the differences.

25. Mr. AMADO wondered why the Rapporteur's opinion should be reproduced at that point, whereas on other matters the provisional conclusions reached by the Commission had not been given in full. The Commission's provisional conclusions were given in the special report, but it had been decided not to transmit provisional decisions to the General Assembly.

26. The CHAIRMAN said that the text of paragraph 1 of his report had been inserted in the general report for greater clarity; and he feared that if it were decided to delete it, a summary would have to be given.

27. Mr. HUDSON thought a commentary would be sufficient.

28. The CHAIRMAN was prepared to let a commentary suffice, if the Commission agreed. The first sub-paragraph of the commentary could be deleted, as it had been introduced to link up the draft article which it had been decided to suppress, and the commentary. In the second sub-paragraph of the commentary, the parenthesis "(article 29 of the Statute)" might be omitted.

29. Mr. HUDSON preferred "the issue should be" to "the issue must be".

30. The CHAIRMAN disagreed. The expression "must be" should be kept. The Commission had discussed the question and he had been under the impression that a decision had been taken. He read out the passage quoted at the end of paragraph 5, adding that it would be better to say "... failing agreement the issue must ...".

31. Mr. HUDSON preferred the form: "These questions ought ... to be brought before, etc." There were, after all, two questions. In the same passage he suggested inserting the words "by any party" after the words "be brought", and eliminating the words "proposed by Mr. Manley Hudson" (in paragraph 173) after the words "accepted the following text". It was not a proposal he had made himself, but a text he had drafted to express the opinions of the other members.

32. The CHAIRMAN agreed.

33. Mr. BRIERLY pointed out that, in the English

of the obligation to arbitrate, the issue must be referred to a judicial authority for final decision. That authority could be the International Court of Justice pronouncing judgment in a chamber of summary procedure (article 29 of the Statute).

The Rapporteur proposed in the second place that the Court should be able to issue *interim measures* of protection in accordance with article 41 of its Statute, a proposal which gave rise to debate. It was pointed out, on the one hand, that, if called upon to pass judgment, the Court would apply its Statute as a whole, including article 41, without any need to refer to that article, and, on the other hand, that the application of the interim measures of protection should not cease when the Court pronounced its verdict, but should remain in force until the arbitral award was given.

The Commission, in agreement with the Rapporteur, accepted the following text proposed by Mr. Manley Hudson. (See text in the "report".

text, the word "verdict" (in paragraph 172) would not do. Only a jury could pronounce a verdict. He felt that the passage could not be understood if it were not read along with the summary record.

34. Mr. SANDSTRÖM recalled that Mr. Córdova had advocated mentioning that the measures of protection would apply equally after the judgment had been proclaimed.

35. Mr. BRIERLY considered that article 41 of the Statute of the International Court of Justice was insufficient.

36. Mr. HUDSON said that the Court could not take a decision such as Mr. Cordova advocated.

37. Mr. CORDOVA thought the provisions of article 41 should be extended by means of a convention.

38. Mr. LIANG (Secretary to the Commission) thought there should be some connexion between the third sub-paragraph of the commentary and the preceding one. It might be worded: "the Rapporteur proposed that in order to implement the decision an agreement should be reached whereby the Court ...".

39. Mr. CORDOVA thought that such measures of protection should remain in force until the arbitral award was given, but this should be stated explicitly in the convention.

40. The CHAIRMAN agreed to alter the third sub-paragraph of the commentary.

41. Mr. HUDSON suggested adding at the end of the first sentence: "and that such measures should continue to be applied after ...". It was important to make it clear, first of all, that the Court should be able to issue interim measures; and secondly, that such measures should continue to be applied after the judgment on the arbitrability of the dispute. In the present state of the Statute, the interim measures would cease to apply once the Court had pronounced judgment.

42. Mr. KERNO (Assistant Secretary-General) thought Mr. Hudson's text was satisfactory, but did not go far enough. It had been recognized that the question how such measures could remain in force after the judgment on the arbitrability of the dispute should be further examined by the Rapporteur.

43. The CHAIRMAN suggested stipulating in the sub-paragraph in question that the measures of protection under article 41 would cease to apply as soon as the Court had passed judgment, but would apply until the arbitration award was made.

44. The final sub-paragraph of paragraph 5 was deleted, Mr. HUDSON pointing out that it was self-evident.⁴

After an exchange of views on the question whether the deletion of the paragraphs of Mr. Scelle's preliminary report would not make that part of the report incomprehensible, it was decided not to delete them. Some members expressed regret that chapter II of part VI of the report was presented so very differently from the

⁴ It read as follows: "It was further agreed that the Rapporteur would take into consideration in his report for next year the suggestions made during discussion."

other topic on which discussion was not yet completed.

Paragraph 6 (paragraphs 174 and 175 of the "Report")

46. The CHAIRMAN read out the commentary (paragraph 175 of the Report) on paragraph II of his report. The French text of the second sub-paragraph should read "...l'expression 'délai raisonnable'..." He then read the first sentence of the third sub-paragraph, and said the sub-paragraph should stop there. It was an actual text. He had kept the reference to articles 22 and 23 of the General Act of Arbitration as clothing his idea perfectly; but admittedly his wording was defective. The Commission had voted in accordance with paragraph 3 of article 23, and had agreed to the insertion of articles 22 and 23.

47. Mr. HUDSON said he had the text of the summary record in front of him, and noted that he had raised an objection to the insertion of those articles.

48. The CHAIRMAN pointed out that articles 22 and 23 were already mentioned in the second sub-paragraph of paragraph II.

49. Mr. HUDSON did not see why the most diligent party should be mentioned, since article 22 had the words "by common agreement..." How could that procedure be instituted unless there was agreement? It would be better not to mention article 22. He read out the third sub-paragraph of paragraph II, where only paragraph 3 of article 23 was referred to.

50. Mr. YEPES mentioned, apropos of the fifth sub-paragraph (para. 175, fifth sentence)⁵ of the commentary on paragraph II, that during the discussion on arbitration procedure he had drawn the Commission's attention to the fact that it seemed advisable not to allow heads of States to be arbitrators in a suit. Heads of States frequently based their decisions on political considerations; and that was precisely what should be avoided in arbitration.

51. Mr. KERNO (Assistant Secretary-General) said that the sub-paragraph in question merely reproduced the opinions expressed during the discussion. He would have liked the Rapporteur to deduce some conclusion from them.

52. The CHAIRMAN suggested altering the sub-paragraph in view of Mr. Yepes' remark. It might read as follows:

"With regard to the *fourth and fifth sub-paragraphs*, some members of the Commission said that it was unnecessary to elaborate the qualifications required of the arbitrators, and that arbitration by heads of States should not be excluded. On this latter point other members of the Commission were of a different opinion, observing that the intervention of heads of State was likely to introduce political factors into the

arbitration. Moreover, some members of the Commission observed that it would not be necessary to have an arbitral tribunal composed of five members except in the case of important international disputes."

It was so decided.

53. The CHAIRMAN read out the sixth sub-paragraph (last sentence of para. 175) of the commentary on paragraph II.

54. Mr. HUDSON pointed out that it was incorrect to say at the beginning of the sub-paragraph, "The Commission decided to delete". The Commission had not taken a vote on the text. He proposed, instead, "It was suggested that... should be deleted".

It was so decided.

Paragraph 7 (paragraphs 176-180 of the "Report")

55. The CHAIRMAN read out the commentaries on paragraph III, and suggested that the second sentence of the second sub-paragraph should read:

"They pointed out that the character of the arbitrators appointed by the parties was to a certain extent special⁶ and that, in accordance with established practice, governments should be given wide latitude⁷ in the choice of such arbitrators and allowed, if need be,⁸ to appoint legal experts in their service."

It was so decided.

56. Mr. HUDSON asked whether the word "disqualification" used in the English text of the fourth sub-paragraph (para. 179, first sentence) of the commentary corresponded exactly to the French word "*récusation*".

57. Mr. ALFARO suggested "challenge" instead of "disqualification".

58. Mr. BRIERLY thought the word "disqualification" should be kept in the English text, as the same word was used in other parts of the report and in Mr. Scelle's original report. At the same time, he thought it well to point out that the English word "disqualification" was not entirely appropriate. A footnote might be added to the effect that the French word "*recusation*" would be better rendered in English by "challenge" than by "disqualification".

It was so decided.

59. The CHAIRMAN said he would like to make some changes in the wording of the sixth sub-paragraph (para. 179, fourth sentence), making it read:

"The Rapporteur said that disqualification is possible only where a new fact,⁹ such as the insanity or venality of a judge, has come to light after the appointment of the tribunal."

It was so decided.

60. After a short discussion, the CHAIRMAN suggested the following wording for the eleventh sub-paragraph (para. 180, fifth to seventh sentences).

⁶ Instead of "was somewhat special".

⁷ Instead of "fairly wide latitude".

⁸ Instead of "allowed to appoint".

⁹ Instead of "must be possible where a new fact".

⁵ The fifth sub-paragraph read as follows:

With regard to the *fourth and fifth sub-paragraphs*, members of the Commission said that it was unnecessary to enlarge on the qualifications required of the judges, that allowance should be made for arbitration by heads of States, and that an arbitral tribunal composed of five members would be unnecessary, except in the case of important international disputes.

"Some members of the Commission thought this proposal went too far, since arbitration differed from judicial settlement of disputes in that its procedure was more flexible; consequently, various questions must be left to the agreement between the parties. It would discourage governments to impose unduly strict rules on them."¹⁰

61. Mr. HUDSON referred to the English text of the next to the last sub-paragraph, which read "... that the new convention proposed should prevent..." He thought the word "proposed" was incorrect, and should be replaced by the word "envisaged",¹¹ which incidentally would correspond to the French text. He also thought that the word "convention" should be replaced in both languages by the word "code".

It was so decided.

62. The CHAIRMAN said he would put before the Commission the second drafts of the various parts of the general report; and he asked the Commission to try not to dwell on points of detail.

63. Mr. HUDSON pointed out that the members of the Commission had not had the time to read their documents; but he suggested passing them page by page.

It was so decided.

SECOND READING

PART I: GENERAL (A/CN.4/R.7/ADD.1/REV.1)¹²

64. Mr. HUDSON was surprised at the wording of paragraph 3. It was not correct to state at that point that Mr. Koretsky had been absent from the second session. All mention of Mr. Koretsky should be omitted; in any case, paragraphs 4 - 7 referred to him.

65. Mr. KERNO (Assistant Secretary-General) thought it might merely be said that Sir Benegal Narsing Rau and Mr. Jaroslav Zourek had not taken part in the session.

66. After a short discussion, in which Mr. Brierly, Mr. Alfaro and Mr. Yepes took part, Mr. CORDOVA suggested that paragraph 3 should read:

"3. Sir Benegal Narsing Rau and Mr. Jaroslav Zourek did not attend the session. Mr. Vladimir M. Koretsky withdrew at the opening meeting."¹³

It was so decided.

67. Mr. HUDSON proposed that at the end of the third sentence of paragraph 7 the words "and has since absented himself from the meetings of the Commission" be deleted.

It was so decided.

68. Mr. HUDSON suggested fusing the two sub-paragraphs of paragraph 12 into one.

¹⁰ Instead of "was more flexible, so that various questions must be settled by agreement between the parties. It would be offensive to Governments to attempt to impose unduly strict rules on them."

¹¹ Later changed to "essential".

¹² Mimeographed document only. See footnote 1.

¹³ Later redrafted for the printed text of the "Report".

69. Mr. YEPES suggested the insertion of the words, "which was ready" after "his working paper" in paragraph 12.

It was so decided.

70. Mr. BRIERLY suggested that the heading "Time and Place of the Third Session" given in the French text should be added in the English version before paragraph 22.

It was so decided.

*Part I was adopted.*¹⁴

PART II: WAYS AND MEANS FOR MAKING THE EVIDENCE OF CUSTOMARY INTERNATIONAL LAW MORE READILY AVAILABLE (A/CN.4/R.7/REV.1)¹⁵

71. Mr. YEPES said he would like to propose just one slight modification to paragraph 29. In line 8, "evidence of customary law" should be substituted for "indications of state practice".

It was so decided.

Part II was adopted.

PART VI: PROGRESS OF WORK ON TOPICS SELECTED FOR CODIFICATION

CHAPTER I: THE LAW OF TREATIES

(A/CN.4/R.7/ADD.4/REV.1)¹⁶

72. Mr. BRIERLY suggested that the words "and the Rapporteur was asked to revise his draft" at the end of paragraph 7 (paragraph 164 of the "Report") be omitted.

It was so decided.

Part VI, Chapter I, was adopted.

The meeting rose at 6 p.m.

81st MEETING

Saturday, 29 July 1950, at 9.30 a.m.

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¹⁴ See 81st meeting, paras. 76-78.

¹⁵ Mimeographed document only. See footnote 1.

¹⁶ *Ibid.*

Chairman: Mr. Georges SCELLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. J. P. A. FRANÇOIS, Mr. Manley O. HUDSON, Mr. Faris el-KHOURY, 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).

Commission's draft report covering the work of its second session (concluded)

SECOND READING

PART III: FORMULATION OF THE NÜRNBERG PRINCIPLES (A/CN.4/R.7/ADD.3/REV.1) ¹

1. Mr. ALFARO recalled that Mr. HUDSON had made a reservation.

2. The CHAIRMAN added that he had made one also.

3. Mr. HUDSON read out the following reservation:

"In abstaining from the vote on this part of the report, Mr. Hudson stated that some confusion had existed as to the precise nature of the task entrusted to the Commission. In the report of the Commission covering its first session, which was approved by the General Assembly, the view was put forward that 'the task of the Commission was not to express any appreciation of these principles (namely the Nürnberg Principles) as principles of international law, but merely to formulate them'. In his opinion, however, the Commission had not altogether adhered to that view in its later work, with the result that doubt subsisted as to the juridical character of the formulation adopted. Moreover, the formulation had not sufficiently taken into account the special character of the Charter and judgment of the International Military Tribunal and the *ad hoc* purpose which they served."

He asked his colleagues to be so good as to state their comments.

4. The CHAIRMAN did not think that members of the Commission were entitled to criticise a reservation.

5. Mr. AMADO, on the contrary, considered that the wording of the reservation should be examined.

6. The CHAIRMAN explained that he had meant that there was no question of adopting the reservation.

7. Mr. HUDSON thought that reservations should be examined by members of the Commission in the same way as dissenting opinions of judges of the Permanent Court of International Justice had been examined by

the other judges. He considered that although a member of the Commission could issue a dissentient opinion, he must nevertheless submit it to the Commission so that his colleagues could state their views. He would take the suggestions put forward into account.

8. Mr. ALFARO did not wish to ask Mr. Hudson to amend the text of his reservation, but he wished to know what confusion he was referring to when he said that "in abstaining from the vote on this part of the report Mr. Hudson stated that some confusion had existed as to the precise nature of the task entrusted to the Commission". He believed that if there had perhaps been some confusion at the first session, it had been removed by the decision taken the previous year to state that the Commission should merely formulate the Nürnberg Principles.

9. Mr. HUDSON considered that the confusion had not been removed and that no decision had been taken. The various members of the Commission had referred to existing international law on that point. Doubts subsisted as to the juridical character of the formulation adopted. He did not think that he was injuring the Commission's prestige by submitting that text.

10. Mr. AMADO suggested that it might be better to say "some doubt" rather than "some confusion".

11. Mr. HUDSON observed that he used the word "doubt" later on, but that he was prepared to say "uncertainty".

12. The CHAIRMAN agreed with Mr. Hudson that members of the Commission held conflicting views and that in any case they were not unanimous.

13. Mr. AMADO observed that Mr. Hudson's reservation was in conflict with that of the Chairman.

14. The CHAIRMAN said that in his reservation he was indeed expressing a contrary view. He considered that the Nürnberg Principles constituted positive international law and even that they had done so before the judgment.

14 a. He read out his reservation, which was as follows:

"Mr. Georges Scelle said that he regretted that he could not accept the view taken by the Commission of its task in this part of the report, for the same reasons as those which he had stated the previous year. The report did not enunciate the general principles of law on which the provisions of the Charter and the decisions of the Tribunal were based, but merely summarized some of them, whereas the Tribunal itself had stated that the principles it had adopted were already a part of positive international law at the time when it was established. Moreover, he considered that the final text of the report did not seem to reflect accurately the conclusions reached by the Commission during its preliminary discussions, and restricted their scope."

14 b. He might have added that the General Assembly had itself adopted those principles, but he was uncertain whether it had done so because they were principles of international law or merely because it accepted them. He had added the words "Moreover, he con-

¹ Mimeographed document only. Parts of that document that differ from the "Report" are reproduced in footnotes to the summary records. For other parts, see the "Report" in vol. II of the present publication.

sidered that the final text of the report did not seem to reflect accurately . . ." because it was his impression that during its discussions the Commission had adopted a more positive attitude than was reflected in the report.

15. Mr. HUDSON observed that each of the two reservations made the other clearer.

16. The CHAIRMAN thought that that should help to remove what Mr. Hudson had described as confusion; there was no confusion, but rather opposition.

17. Mr. AMADO asked how the Rapporteur was going to insert the reservations. Would he include in the report a paragraph similar to paragraph 27 of the previous year's report?

18. Mr. HUDSON thought that his statement could appear as a footnote to the second sentence of paragraph 97 of the report.

19. The CHAIRMAN agreed; the statement he had made the previous year had appeared in the body of the report and also in a footnote.

20. Mr. ALFARO also had a short reservation for inclusion as a footnote. His reservation was as follows:

"Mr. Ricardo J. Alfaro declared that he voted in favour of Part III of the report with a reservation as to paragraph 96, because he believed that the reference therein contained regarding the task of formulating the Nürnberg Principles should have been inserted in the report together with a quotation of the passage in the judgment of the Nürnberg Tribunal in which the Tribunal asserted that the Charter 'is the expression of international law existing at the time of its creation and to that extent is itself a contribution to international law.'"

20 a. He thought that the two opinions should be included and the choice left to the reader. He did not propose that the Commission should approve the Tribunal's opinion, but that it should say what the Tribunal had stated. He did not think it fair to the Tribunal to include only that part of the decision which cast doubt on its juridical basis and did not show that the Tribunal believed that those principles were a part of international law. He did not approve of paragraph 96.

21. Mr. HUDSON pointed out that Mr. Alfaro was only objecting to a small part of paragraph 96. His reservation merely applied to the fact that the Commission was recalling its conclusions of the previous year in that part of the report.

22. Mr. ALFARO explained that he objected to a restatement of those conclusions in any part of the report.

23. Mr. HUDSON proposed that in that case the Commission should recall its decision without stating the opinion of the Tribunal.

24. Mr. ALFARO considered that the Commission was called upon to formulate what it considered to be international law. That was why he found it unjust to delete the whole paragraph, but thought it advisable to delete that part which cast doubt on the legal validity of the Tribunal's opinion. He would not have made any reservation if the Commission had not decided to omit the Tribunal's opinion.

25. Mr. HUDSON thought that Mr. Alfaro was right in making that reservation. The three reservations should appear in the form of a footnote, but he asked to what passage it should refer. He proposed that it should refer to the title of Part III.

25 a. He suggested that at the beginning of paragraph 98 the words "The above principle" should be replaced by the words "This principle". In footnote 16, referring to paragraph 119, he asked that the word "taking" should be underlined.² He thought that the reference to the Geneva Convention contained in that footnote was not sufficiently clear since the provision was included in the four Conventions of 1949. He proposed the following wording: "took note of the fact that the four Geneva Conventions interdict . . ."³ He said that in the English text he would prefer the word "interdict" to the word "prohibit".

26. Mr. ALFARO accepted that amendment. He explained that Mr. Hsu preferred that article 34 of the Convention Relative to the Protection of Civilian Persons in Time of War should be referred to, since that was the most appropriate reference for the question of hostages. He proposed the following wording: "Took note of the fact that the Geneva Conventions of 1949, and more specifically Article 34 of the Convention etc."

It was so decided.

PART IV: QUESTION OF INTERNATIONAL CRIMINAL JURISDICTION (A/CN.4/R.7/ADD.7/REV.1)⁴

27. Mr. HUDSON thought that paragraph 18 (paragraph 145 of the "Report") had been somewhat unduly truncated. The Commission did not state the reason why it did not recommend the establishment of a Criminal Chamber of the International Court of Justice. He would prefer the words "does not recommend it because of its possible prejudicial effect on the Court's discharge of its function of judging disputes between States". There was no doubt that several members of the Commission had taken that view. He thought the General Assembly would be glad to know the reason why the Commission did not recommend that the Statute of the Court should be amended.

28. Mr. KERNO (Assistant Secretary-General) had the same impression, but he did not think that the text proposed by Mr. Hudson should include the word "prejudicial".

29. Mr. HUDSON withdrew that word.

30. Mr. BRIERLY proposed the words "its functions under the present Statute". The new duties assigned to the Court would be very different.

31. Mr. KERNO (Assistant Secretary-General) thought that the most serious objection to the establishment of a Criminal Chamber was that its functions would be so different from those of the Court under the

² Footnote 19 of the "Report".

³ Instead of "the fact that Article 34 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 prohibits . . ."

⁴ Mimeographed document only. See footnote 1.

present Statute that the same judges would not be able to perform them.

32. Mr. HUDSON agreed to the words "the possible effect on the Court's discharge of its functions under the present Statute".

33. The CHAIRMAN had no objection to Mr. Hudson's revised text, which he found most judicious.

34. Mr. ALFARO did not think the Commission could consider the question at that stage, since it had decided by a very small majority to delete the words "for practical reasons as well as reasons of principle".⁵ Those reasons had been that the prestige of the Court would suffer, that a Convention would not be sufficient, that the members of the Court could not become criminal lawyers overnight, and that amendment of the Statute might be vetoed etc. The words "for practical reasons as well as reasons of principle" had been proposed. Without taking a vote, the Commission had adopted the words "for practical reasons"; it had then decided, by 6 votes to 5, to delete the words "as well as reasons of principle". Finally, voting on the whole proposal, the Commission had decided, by 6 votes to 4, to delete the words "for practical reasons". The Commission could not take a decision that day, since four of its members who had taken part in those votes were absent.

35. The CHAIRMAN asked whether the Commission wished to retain those words in view of the fact that there had been a formal decision. He thought it preferable not to go back on the vote.

36. Mr. el-KHOURY thought that the words "the majority of the Commission decided" might be added.

37. Mr. YEPES thought it would be more objective to state that the Commission "does not recommend it for practical reasons".

38. The CHAIRMAN pointed out that it was precisely those words which the Commission had decided to delete, and that since some members were absent it could not go back on its decisions.

39. Mr. HUDSON accepted that ruling. He added that the word "third" before "question" in the first line of paragraph 18 was unnecessary.

40. Mr. ALFARO explained that he had inserted it for the sake of clarity. The Commission had first considered the desirability and then the possibility of establishing an international judicial organ and had finally arrived at the third question, namely, the possibility of establishing a Criminal Chamber of the International Court of Justice.

41. Mr. HUDSON observed that it was not referred to as the "third" question in paragraphs 14, 15, 16 and 17. If it were to be so called, it should be so in those paragraphs also.

42. Mr. KERNO (Assistant Secretary-General) pointed out that in paragraph 13 it was stated that "The Chairman put the two points discussed to the vote"; hence the "third" question in paragraph 18.

43. Mr. HUDSON suggested that in that case the

wording should be "this third question". He proposed saying "the possibility of establishing a Criminal Chamber of the International Court of Justice and that, though it is possible to do so by amendment of the Court's Statute...".

44. Mr. YEPES remarked, from another point of view, that the report did not mention that a member of the Commission had suggested studying the Statute of the Court to see whether criminal cases could be brought before it through the intermediary of States, arguing from analogy with the *Mavrommatis Case*. He admitted that the comparison was rather forced, but thought that the Commission might consider the possibility of interpreting the Statute in that manner.

45. Mr. ALFARO recalled that at the time he had stated that the Commission had not been instructed to decide whether there was any possible means of giving the Court criminal jurisdiction, but only to examine the possibility of establishing a Criminal Chamber.

46. The CHAIRMAN pointed out that Mr. Yepes' proposal appeared in the summary record.

47. Mr. ALFARO agreed to the deletion of the word "third" in the first line of paragraph 18.

PART V: PREPARATION OF A DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND (A/CN.4/R.7/ADD.2/REV.1)⁶

48. Mr. HUDSON proposed that the beginning of the last sentence of paragraph 4 (paragraph 149 of the "Report") should be amended to read "Nor should offences connected with piracy etc. be considered as falling within the scope of the draft Code".⁷ Otherwise, the Commission would appear to be stating that those were international crimes, which he very much doubted.

49. Mr. AMADO recalled that it was owing to his intervention that the report had been amended. The report had originally read: "Such topics as...". He thought that the words "connected with" had a very precise meaning in criminal law. The reference to the offences themselves should be retained. He could not accept Mr. Hudson's text.

50. The CHAIRMAN considered that the French text was perfectly adequate.

51. Mr. HUDSON thought it impossible to affirm, for instance, that slavery was a crime under international law. He would accept the text if it were amended to read: "such matters as...".

52. The CHAIRMAN recalled that the Commission had decided to delete the word "questions" in the French text.

53. Mr. AMADO suggested that another word be found.

54. Mr. ALFARO said that traffic in women was a crime.

55. Mr. HUDSON did not agree. Traffic in women was not a crime under international law. He added that

⁵ See 44th meeting, paras. 61-63.

⁶ Mimeographed document only. See footnote 1.

⁷ Instead of "Nor should such offences as piracy...".

consideration of the other offences would show that piracy was the only one which constituted a crime under international law.

56. The CHAIRMAN considered that both traffic in women and counterfeiting currency were crimes.

57. Mr. HUDSON maintained that they were not crimes under international law.

58. Mr. FRANÇOIS proposed substituting the word "*matières*" (matters) for the word "*crimes*" (offences).

It was so decided.

59. Mr. BRIERLY proposed the inclusion of a footnote to paragraph 9 (paragraph 154 of the "Report") indicating the pages of the Summary Record on which the discussion was reported.

60. Mr. HUDSON recalled that Mr. Brierly had proposed that the English text of paragraph 10 (paragraph 155 of the "Report") be amended to read "under superior orders" instead of "under a superior order"; it would be better to say "under the orders of a superior".

61. Mr. ALFARO proposed the words "under the orders of a superior or of his Government".

62. Mr. HUDSON did not think it necessary to be too precise.

63. The CHAIRMAN proposed the words "under the orders of a superior".

64. Mr. ALFARO remarked that the Spanish translation would be much easier if the words "under superior orders" were adopted.

PART VI: PROGRESS OF WORK ON TOPICS SELECTED FOR CODIFICATION

CHAPTER II: ARBITRAL PROCEDURE

(A/CN.4/R.7/ADD.6/REV.1)

65. Mr. HUDSON asked whether it would not be advisable for the general rapporteur to revise the numbering of paragraph 6 and the following paragraphs, which contained a considerable number of sub-paragraphs, and were consequently difficult to refer to.

66. The CHAIRMAN accepted that proposal and said that the Secretariat would put it into effect.

67. Mr. YEPES pointed out that paragraph 4 of page 3 repeated the text of the second sub-paragraph of paragraph 1. He thought that the Commission had decided the previous day to delete paragraph 4.

68. The CHAIRMAN confirmed that that had been decided.

69. Mr. HUDSON drew attention to the heading "Paragraph I", in paragraph 5, page 3. The reader would wonder what it referred to. It should be made clear that the reference was to the report of the Special Rapporteur.

70. Mr. AMADO thought it would be preferable to retain the text quoted, but not to mention Paragraph I.

71. Mr. HUDSON considered that the origin of the

text quoted should be indicated. He proposed the words "Paragraph I of the report read as follows".

72. The CHAIRMAN observed that a difficulty arose from the fact that each paragraph of his report dealt with a different question. Nevertheless, he would be quite satisfied to add the words "Paragraph I of the report read as follows".

CHAPTER III: REGIME OF THE HIGH SEAS

(A/CN.4/R.7/ADD.5/REV.1)

73. Mr. HUDSON thought that a semi-colon should be substituted for the full stop at the end of the fourth sentence of paragraph 17 (paragraph 198 of the "Report"). He asked that the word "littoral" should be substituted for the word "riparian" since the latter applied to States bordering on a river.

74. Mr. FRANÇOIS accepted those amendments.

75. The CHAIRMAN observed that the word "*riverain*" must be left in the French text.

PART I (RESUMED FROM THE PREVIOUS MEETING)

76. Mr. HUDSON apologized for asking the Commission to revert to Part I. He found that the heading "Reports for the consideration of the General Assembly" was unsuitable, since it did not correspond to the heading regarding the Commission's future studies. Moreover, it seemed to imply that the general Report was not submitted for the consideration of the General Assembly. He proposed the words "definitive action by the Commission".

77. Mr. LIANG (Secretary of the Commission) proposed the words "Items on which the Commission has completed its study".

78. The CHAIRMAN proposed that the French title should read "*Points sur lesquels la Commission a terminé ses travaux*".

It was so decided.

Closure of the session.

79. The CHAIRMAN observed that the Commission had now reviewed the whole of its work for that year.

80. Mr. KERNO (Assistant Secretary-General) assumed that the Commission would allow the Secretariat to edit the report without, of course, making any change of substance.

81. Mr. HUDSON considered that most necessary.

82. Mr. KERNO (Assistant Secretary-General) said that there had been several suggestions that the summary records of the Commission should be made more easily accessible to those concerned with international law and that it might perhaps be possible to have them printed. It was for the Commission to decide whether it was advisable to make such a recommendation. The financial aspect of the question should also be considered; printing was expensive and no credits had been allocated for that purpose.

83. Mr. HUDSON was satisfied that the records should not be printed, since if they were, they would acquire a permanent value which he did not consider desirable.

84. Mr. ALFARO said that before the session closed, he wished to express the Commission's thanks to the Chairman for the success of its work. On behalf of his colleagues, he also wished to thank the Secretariat staff for the help they had given.

85. The CHAIRMAN fully endorsed Mr. Alfaro's remarks regarding the help given by the Secretariat. With regard to the thanks addressed to him by the general rapporteur, he felt that, on the contrary, it was for him to thank his colleagues both for the honour of his election and for the willingness with which they had accepted the guidance he had endeavoured to give the Commission. He was sorry for any mistakes he might have made. It was certainly difficult to be a perfect chairman, and he had often been an imperfect one. It was not easy to preside over a Commission which worked on a basis of equality and in which the office of chairman was only an occasional one. The previous year, the Commission had had an admirable chairman in Mr. Hudson, and it had worked hard; but the volume of its work had been smaller because it had been necessary first to establish a technique. The chairman of a body like the International Law Commission was torn between the difficulties of the democratic system and the spectre of dictatorship. It was difficult to steer a middle course.

85 a. The Commission was going to submit to the General Assembly three items that had been definitely disposed of; it had made a thorough study of another item—namely, the draft Code of Offences against the Peace and Security of Mankind. The other three questions had only been touched upon. Next year, when a new chairman would be directing the Commission's work, he believed that it would be advisable not to pass from one item to another. It would be preferable to study one question thoroughly; the Commission would decide that point.

85 b. He had sometimes been in opposition to the majority of the Commission. That was due to divergent views on what constituted a rule of law. The Commission had been asked to prepare a code, but the actual codification was not of course its function, since it was not a legislative body. Governments were the legislators, but they could not legislate unless their task was prepared for them. The Commission's task was to study how rules of law appeared in international society. They

emerged slowly from the conscience of the international community and at certain times assumed the form of what sociologists referred to as "ethics", which was the consciousness of what should become a rule of international law. For an ethical principle to become a rule of international law, the intervention of authority was required.

85 c. It must be recognized that in international law, international tribunals played a special part in that connexion. Although he adhered to the Latin concept of law, he had always maintained that there was judge-made law even in France, and he would go so far as to say that that was how the law came into being. In any kind of society, before the legislator there was the judge; that had been so in France. Judges had determined the rule of custom before the legislators had intervened. In international society too, the judge often acted before the legislator. That was the reason for his own attitude regarding the Nürnberg Principles. He thought that it was in conformity with the scientific facts. He owed his colleagues that explanation; he thought that the Nürnberg judges had made positive law of what had only been ethics. The Charter of the Tribunal had been drawn up by the international public authorities. That was his view.

85 d. He thanked the Commission for the work they had done together; they must never lose heart. Even if the Commission's work did not lead to positive results, it was an element in the general organization of mankind. He regretted that in the United Nations there did not seem to be a sufficient realization of the moral force which the Organization could exert. He deplored the fact because he had always maintained that without that force federalism could never be achieved. He had confidence in the conscience of the peoples and in ethical principles. On the other hand he had no confidence whatever in the power that always resisted ethical principles, but was always defeated in the end.

85 e. He admired the Secretary-General of the United Nations who, like another Noah, had remained confident in the most dramatic circumstances. Like the Commission, he had built a ship which had finally arrived in port. He had sent out several doves of peace, some of which had returned to the ark; but that did not mean that the flood was over. It was on the dove which returned with an olive branch that hopes must be fixed.

85 f. He thanked his colleagues for the friendship they had shown him and bade them farewell till the following year.

The meeting rose at 11.10 a.m.

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ABBREVIATIONS

- Art., Article.
Conf., Conference.
Conv., Convention.
Cttee., Committee.
Draft code of offences, Draft code of offences against the peace and security of mankind.
Dr. Dec., Draft Declaration on the Rights and Duties of States.
GA, General Assembly.
ICJ, International Court of Justice.
ILC, International Law Commission.
- Int., International.
Int. judicial organ, International judicial organ for the trial of persons, charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions.
Nürn. prin., Nürnberg principles, formulation of.
Prin., principle.
Res., resolution.
Ways and means, Ways and means of making the evidence of customary international law more readily available.

Note. — The numbers in roman type refer to the pages of this volume. The numbers in italics refer to the paragraphs of the report of the International Law Commission to the General Assembly covering its second session, which is in Volume II.

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