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Summary record of the 106th meeting

Topic:
<multiple topics>

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120. Mr. ALFARO replied that the period would begin from the time the treaty was open for signature or from some other date. The essential point was that the beginning of the period should be the same for all signatories.

121. Mr. HUDSON said that supposing only one State among twenty signatories of a convention had submitted an objection. It had the right to do so, but it would be told that if it made an objection, it should give evidence of its good faith by ratifying. The important point was to lay down a rule which would provide a safeguard against abuse of the right to make objections. If in the course of the specified period ratification by the State which had tendered the objection were not forthcoming, the reservation would become effective in respect of the other States. If later the State which had tendered the objection decided to ratify, it would have to ratify on the basis of acceptance of the reservation.

122. Mr. FRANÇOIS pointed out that, under Mr. Hudson's system, a signatory State acting in bad faith got the advantage of an additional period of grace after it had already delayed ratification for three years.

123. Mr. HUDSON replied that in such circumstances the period of grace should be curtailed. In his opinion it was nonsense to speak of the right of veto in the matter.[13] A State acting in bad faith would abuse its right as a signatory by presenting and maintaining an objection. Hence the specified period must not be too long.

124. Mr. FRANÇOIS thought that as the two viewpoints had been clearly explained the Commission should make its choice.

125. The CHAIRMAN asked the Commission to decide as to when the prescribed period should begin. He himself thought the date of the objection should be adopted.

It was so decided by 6 votes.

126. The CHAIRMAN considered it would be better not to specify the actual period but to call it x months.

127. Mr. FRANÇOIS asked why the period should not be specified.

128. Mr. HUDSON thought the General Assembly might be told that twelve months would be a suitable period.

129. Mr. SPIROPOULOS thought the important point was to decide whether that question came within the scope of codification. If so, a definite period must be fixed.

130. Mr. HUDSON replied that it was being dealt with in connexion with codification. The Commission was not stating that that was the law, but that it was the best method of achieving results.

131. The CHAIRMAN pointed out that the question would be dealt with in a special report to the Assembly.

132. Mr. SPIROPOULOS said that the rules in question would be inserted in Mr. Brierly's report. There was no doubt on that point. The Assembly wished the Commission to give priority to that section of Mr. Brierly's report, but the section in question would come within the general framework of the draft on treaties. Hence a definite period must be fixed.

133. The CHAIRMAN thought it would be time enough to do so when the Commission examined the draft Convention on Treaties.

134. Mr. AMADO thought Mr. Spiropoulos was right. The Commission was reaching a conclusion which he considered scientific. The fact that the Commission was replying to a specific question put by the General Assembly did not make its reply any less significant.

135. The CHAIRMAN replied that it was too soon to embark on that question.

136. Mr. SPIROPOULOS said he would not press the point, though he thought that the same rules should apply in both cases.

137. Mr. HUDSON agreed that they should be consistent, though not necessarily identical.

It was decided that the period should be specified, and the duration should be 12 months.

The meeting rose at 6 p.m.

[13] See para. 93 above.

106th MEETING

Tuesday, 19 June 1951, at 9.45 a.m.

CONTENTS

Chairman: Mr. James L. BRIERLY

Rapporteur: Mr. Roberto CORDOVA

Present:

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

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

Law of treaties: General Assembly resolution 478 (V) of 16 November 1950: Reservations to multilateral conventions (item 4 (*b*) of the agenda) (A/CN.4/L.18) *(continued)*

DISCUSSION OF MR. BRIERLY'S DRAFT REPORT (A/CN.4/L.18)[1]

PARAGRAPH 19 (*paragraph 34 of the "Report"*) (continued)

Sub-paragraphs (1) and (2) (sub-paragraphs 4 and 5 of paragraph 34 of the "Report") (continued)

1. Mr. YEPES asked when the amendment he had proposed to paragraph 19, sub-paragraphs (1) and (2), would be discussed. It read as follows:

> "When, prior to or after the entry into force of a multilateral convention, a State signs, ratifies, accedes to or accepts a convention, *subject to one or more reservations*, that State may become a party to the convention if the *majority of the States*, which have, up to the time of notification of the reservation, signed, ratified, acceded to or accepted the convention, expressly or tacitly consent to the reservation. Consent shall not, however, be required from a signatory State which has not ratified or accepted the convention within three years from the date of signing it."

2. The CHAIRMAN replied that, should the Commission so desire, it could discuss Mr. Yepes' amendment forthwith. He pointed out, however, that it would not be easy to fit it into the report.

3. Mr. YEPES was sorry that his amendment had not yet been submitted to the Commission, but simply put on one side. The only reference to it had been Mr. Hudson's ungracious comment to the effect that it was absurd to speak of a right of veto in connexion with reservations.[2] His was a constructive proposal, put forward in a conciliatory spirit, and he was not prepared to see it treated in that way. That was why he asked that it be dealt with in accordance with the usual procedure.

4. He believed he was only doing his duty in asking the Commission to reconsider the question before entering upon so dangerous a course. The system which the Commission was about to adopt amounted to nothing less than the introduction of a right of veto in a field where it could neither be permitted nor tolerated. To make the rejection of a reservation dependent on the decision of a single State was tantamount to setting up a veto system. He had quoted the case of the Geneva Convention relative to the Protection of Civilian Persons in Time of War,[3] which was conclusive. The United Kingdom had made a secondary reservation to that convention, and the objection of a single State would suffice to exclude it from a convention, which it had been very largely instrumental in preparing, and of which it, in the main, approved. If that was not a right of veto, he did not know what was. If he could be shown otherwise, he was ready to follow the majority. His proposal would demonstrate that at least one member of the Commission was opposed to the introduction of the right of veto. He would repeat that discussion of the question of a right of veto, in connexion with reservations, was not an absurdity. Mr. Hudson's outburst was not an argument.

5. The Commission's lengthy discussions on the subject had led Mr. ALFARO to the conclusion that all systems had serious practical disadvantages, and he had been trying, all along, to find the least objectionable. Generally speaking, he had been in favour of the so-called "classical" or League of Nations system, rather than that of the Pan-American Union, which would result in the fragmentation of a convention.

6. It appeared to him, however, that Mr. Yepes' objection to the unanimity rule was very serious. That rule, sometimes called the "veto system", had given rise to objections in the United Nations. It had been pointed out that if, for instance, forty States were prepared to accept a secondary reservation which did not affect the main purpose of the convention, it would be lamentable if one State were permitted to obstruct the wishes of those forty States. He was therefore in favour of the majority rule proposed by Mr. Yepes, provided that the majority be one of at least four-fifths.

7. Mr. YEPES accepted that amendment to his proposal.

8. Mr. CORDOVA understood the meaning of the proposal to be that, in accepting the reservation, the majority of the States could impose its will on the minority, and that the State, formulating the reservation, would become a party to the convention, in spite of the objections raised to the said reservation. He could not accept such a rule.

9. Mr. YEPES replied that that was indeed the case when the majority of the States in question were parties to the convention. The Convention relative to the Protection of Civil Persons in Time of War, for instance, had been signed by sixty States. Supposing there were fourty-eight acceptances of the reservation formulated by the United Kingdom, that State could be a party to the convention, and if any State did not accept the United Kingdom reservation, its objection would hold good in regard to its relations with that country.

10. Mr. AMADO wondered how it was that Sir Hartley Shawcross, United Kingdom Attorney-General, and Mr. Fitzmaurice, Second Legal Counsellor at the Foreign Office, had advocated, before the International Court of Justice, a system opposed to that proposed by Mr. YEPES, and had elected for the traditional system.

11. Mr. YEPES replied that he was not called upon to explain the thought processes of the United Kingdom Government. He had stated facts, to wit, that there was a United Kingdom reservation, and that if a single State were to oppose that reservation, the United Kingdom would be excluded from the convention.

12. Mr. SANDSTRÖM did not believe that the matter could be regarded from the point of view of the veto. The question was whether a majority could deprive a minority of a right to which it was entitled.

13. Mr. SCELLE said that the Commission was only concerned with cases where no provision was made for

[1] See summary record of the 101st meeting, footnote 1.

[2] See summary record of the 105th meeting, para. 123.

[3] See summary record of the 103rd meeting, para. 19.

reservations in the convention. The States were free agents when concluding the convention, but once that had been done the convention had the force of law. It was in the same position as a law passed by a parliament. He did not see how one could speak of a veto in such a case. A group of States could not impose its will on other States by accepting a reservation to which they were opposed. The wording of the convention was final.

14. Mr. Yepes' proposal reversed the order of importance of the factors involved.

15. Mr. EL KHOURY put the case of a convention, concluded by sixty United Nations Member States, one of which attached a reservation. Fifty States accepted the reservation and ten rejected it. If those ten States insisted on the rejection of the reservation, failing which they would not be bound by the convention, should they be excluded because they objected to a reservation by a State that had not necessarily taken part in the negotiations? Should those ten States be left to withdraw from the convention, because there was a majority in favour of accepting the reservation? It was not a matter of majorities or minorities. That rule was only applicable in the case of a conference.

16. As Mr. Hudson had said, a reservation amounted to a new agreement, and a new agreement should be discussed and adopted by all the framers of the convention. He could not accept Mr. Yepes' proposal.

17. Mr. SPIROPOULOS had intended making the same observations as Mr. el Khoury. He did not understand the bearing of Mr. Yepes' proposal. Before taking a decision, the Commission must know what its effect would be. In the case of the Convention on Genocide, the Soviet Union had formulated a reservation in regard to compulsory appeal to the International Court of Justice, under article IX. Supposing that three States were to declare that they did not accept that reservation, what would be the effect of their objection? Would they cease to be bound by the convention?

18. Mr. YEPES assumed that forty States had accepted the Soviet Union's reservation. Would it be right to allow two or three States to stand in the way of the wishes of those forty States? States accepting the reservation would be bound by the convention in their mutual relations, and also in their relations with the Soviet Union subject to observance of the reservation. States that did not accept the reservation would still be bound by the convention, except that the part of the convention to which the reservation had reference would not be applicable in their relations with the Soviet Union.

19. Mr. HUDSON remarked that Mr. Yepes was again proposing the Pan-American system.

20. Mr. CORDOVA observed that the Pan-American system resulted in the fragmentation of conventions. Under that system, if, out of ten States, one formulated a reservation, it would be bound in regard to the States accepting its reservation. Insofar as they were concerned, it would be a party to the convention. Under the unanimity system, which was that of the League of Nations and of the Secretary-General of the United Nations, the objection of one State could prevent the reserving State from becoming a party to the convention. Mr. Yepes and Mr. Alfaro were proposing a compromise solution. If the majority of the States accepted the reservation, the reserving State could become a party to the convention, insofar as its relations with the majority were concerned. The other States, that was to say those that did not accept the reservation, would not be bound in their relations with the reserving State but would be bound in regard to the other States. The difference between that proposal and the Pan-American system was that a majority was necessary. The proposal was therefore less extreme.

21. In the view of the CHAIRMAN, such a system was just as conducive to the fragmentation of conventions, as the Pan-American practice.

22. Mr. ALFARO said that, under the Pan-American system, there might be a convention, comprising ten articles, and signed by twenty-one republics, where ten groups of two States each made a reservation to a different article. There would then be two States for which the whole convention was in force except for article 1, two others for which it was in force except for article 2, etc. Mr. Yepes' proposal reduced the drawbacks of the Pan-American system to a minimum and would have the effect of preventing a state of mind in the Assembly such as had resulted in talk of vetoes. The representative of Uruguay's remarks in that connexion would not have been forgotten.[4] The unanimity rule gave any State the right of veto and thereby enabled it to prevent another State from becoming a party to the convention, by reason of the fact that the latter had made a reservation which had been accepted by 59 States out of 60.

23. Naturally there were disadvantages attached to Mr. Yepes' proposal, but they were not so great as in the case of the other systems.

24. Mr. KERNO (Assistant Secretary-General) observed that Mr. Yepes' proposal would result in the fragmentation of conventions, but to a lesser extent than the Pan-American system.

25. Mr. CORDOVA felt obliged to put a number of questions. In speaking of the system proposed by Mr. Yepes, mention had hitherto been made only of a single reservation, but it might happen that fifteen States would each make a different reservation. What would be the effect of all those different reservations? It would really be tantamount to splitting up the convention into, possibly, fifteen separate conventions. He could not support Mr. Yepes' proposal, as he was opposed to the fragmentation of conventions.

26. Mr. YEPES replied that the system of reservations was bad in itself. It had, however, to be accepted. The solution he proposed was the least harmful. Fragmentation would not be so extensive.

27. Mr. HSU felt that the above modification of the Pan-American system was very satisfactory and hoped that Mr. Yepes would advocate it within the Pan-American Union, but he did not believe that it could be

[4] See *Official Records of the General Assembly, Fifth Session, Sixth Committee*, 217th meeting, para. 61.

applied to the system adopted by the Commission without destroying it. There was, obviously, an analogy between the unanimity rule and the veto, but it should not be pressed too far. It was not possible to speak of a veto in the case of a reservation to a text which had already been promulgated.

28. Mr. AMADO wished to draw attention to the case of States that had made concessions in order to accept the convention, and were, then, faced with a demand from a single State that they agree to some particular point.

29. Mr. EL KHOURY considered that a State which formulated a reservation wished to be a privileged party to the convention and was not prepared to be on the same footing as the other States. In those circumstances, it might well be asked why it considered itself entitled to be in a more favoured position than the other parties. A new situation would have arisen in regard to which there should be a new agreement. The object was not to prevent a reserving State from entering the circle of States bound by the convention, but to prevent it from being in a specially favoured position. A reserving State was welcome, provided it did not seek to be in a more advantageous position than the other parties. That was the point.

30. The CHAIRMAN asked the Commission to vote on Mr. Yepes' proposal, as amended by Mr. Alfaro.

31. In view of the course taken by the discussion, Mr. AMADO did not consider it necessary to take a vote. Mr. Yepes had proved himself a doughty fighter, and Mr. Alfaro had brought to his assistance his long experience as a defender of democratic ideas. Mr. Córdova had given proof of his exactness of mind. The masters had spoken and nothing remained but to proceed with the Commission's deliberations, while paying tribute to Mr. Yepes.

32. The CHAIRMAN asked Mr. Yepes whether he wished his proposal to be put to the vote.

33. Mr. YEPES replied that the proposal was no longer his alone, since Mr. Alfaro had associated himself with it.

34. Mr. ALFARO felt that the Commission had already voted and rejected the proposal.

It was so agreed.

NEW PARAGRAPH 18 (*paragraphs 29 and 30 of the "Report"*) (*resumed from the 105th meeting*)

35. The CHAIRMAN asked the Commission to examine the redraft of a new paragraph 18, prepared by Mr. Hudson, which ran as follows:

> "In so far as relations with the reserving State are concerned, a tender of a reservation constitutes, in substance, a proposal of a new agreement, the terms of which will differ from those of the agreement embodied in the text of the convention. Such a new agreement would require acceptance by all the States concerned. The question arises, however, as to which are such States. In the view of the Commission, a State which has signed but not ratified a convention which is subject to ratification, is not to be excluded from that category; for at the time the reservation is tendered such a State may be actively engaged in the study of the convention, or it may be in the process of completing the procedure necessary for its ratification, or for some reason, such as the assembling of its parliament, it may have been compelled to delay its ratification. Yet its concern should be taken into account. If an objection to a reservation offered by a State is to have the effect of preventing that State's becoming a party to a convention, it is necessary to determine which are the States competent to interpose such an objection. In this connexion, some commentators have drawn a distinction between reservations offered before, and those offered after the entry into force of the convention; but that distinction encounters difficulty when the entry into force is brought about as a result of the deposit of the ratifications of a very limited number of States. It seems neccssary to take account of the interests, not only of those States which become parties or which have deposited their ratifications, but also of States which are signatories but which have not completed the process of ratification.
>
> "It is not to be anticipated that a signatory State would advance an objection to a reservation from motives unrelated to its merits. In order, however, to guard against any possible abuse by a signatory State of its right to object to a reservation, and to forestall the possibility of the reserving State being indefinitely excluded from participation in a convention by a State which itself refrains from assuming the obligations of a party, the Commission deems it necessary, while allowing the objection by a mere signatory to a reservation to have the effect of excluding a reserving State, to prescribe a time limit within which the effect of such objection may endure. Taking into consideration the normal administrative and constitutional procedures of most governments in respect of ratification, the Commission believes that a period of twelve months would be a reasonable time within which an objecting State could proceed to effect its ratification or acceptance of the convention and thereby demonstrate its willingness to undertake the obligations of the convention. Accordingly, the Commission is of the opinion that, if after a period of twelve months from the time it makes an objection to a reservation, a signatory State has not proceeded to effect its ratification or acceptance of the convention, its objection should cease to have the effect of preventing the reserving State from becoming a party."

36. Mr. HUDSON explained that the above was a first draft and that it needed putting into shape. He had done no more than formulate some concepts that might be of use.

37. The CHAIRMAN proposed that the Commission discuss the draft sentence by sentence. He read out the first sentence:

> "In so far as relations with the reserving State are concerned, a tender of a reservation constitutes, in substance, a proposal of a new agreement, the terms of which will differ from those of the agreement embodied in the text of the convention."

38. He asked whether the sentence could not be shortened and begin with " A tender of a reservation constitutes . . .".

39. Mr. HUDSON felt it would be a mistake to do away with the first part of the sentence, which limited its scope. It was not a question of renewing the whole agreement.

40. Mr. CORDOVA observed that the tender of a reservation was equivalent to proposing an alteration in the original agreement.

41. Mr. HUDSON pointed out that such an alteration would only apply to the reserving State. The text proposed by Mr. Brierly read: " The Commission believes that, in substance, the tender of a reservation constitutes a proposal of a new agreement. " He felt that was putting the matter too strongly.

42. Mr. EL KHOURY felt that Mr. Brierly had stated the position very accurately.

43. Mr. HUDSON replied that what Mr. Brierly had said was certainly correct, but only as regards the reserving State.

44. The CHAIRMAN undertook to add a few words to that effect.

The first sentence was approved.

45. The CHAIRMAN read out the second and third sentences:

" Such a new agreement would require acceptance by all the States concerned. The question arises, however, as to which are such States."

The second and third sentences were approved.

46. The CHAIRMAN read out the fourth sentence:

" In the view of the Commission, a State, which has signed but not ratified a convention which is subject to ratification, is not to be excluded from that category; for at the time the reservation is tendered such a State may be actively engaged in the study of the convention, or it may be in the process of completing the procedure necessary for its ratification, or for some reason, such as the assembling of its parliament, it may have been compelled to delay its ratification."

47. Mr. KERNO (Assistant Secretary-General) observed that, after raising the question as to which States were concerned, the draft only mentioned signatories.

48. Mr. HUDSON said that his draft was only intended to refer to signatories.

49. Mr. KERNO (Assistant Secretary-General) considered that the text should be more precise so that readers who had not attended the Commission's discussions should be under no misapprehension as to what was intended.

50. The CHAIRMAN suggested the wording " in the view of the Commission, not only the States which have ratified but also those which have signed . . .".

51. Mr. SCELLE remarked that a State which had taken part in drawing up a treaty was one of its framers.

52. Mr. HUDSON said that, if a convention could be acceded to by States which had not taken part in its preparation, the latter could sign it and would then be on exactly the same level as the original signatories.

53. Mr. SCELLE did not see any objection to that interpretation though it was wider than the one he had had in mind originally.

The fourth sentence was approved.

54. The CHAIRMAN read out the fifth and sixth sentences:

" Yet its concern should be taken into account. If an objection to a reservation offered by a State is to have the effect of preventing that State's becoming a party to a convention, it is necessary to determine which are the States competent to interpose such an objection."

55. Mr. HUDSON said that the sixth sentence should be deleted as it was only a repetition of what had been said before.

The fifth sentence was approved and the sixth deleted.

56. The CHAIRMAN read out the seventh sentence:

" In this connexion, some commentators have drawn a distinction between reservations offered before, and those offered after the entry into force of the convention; but that distinction encounters difficulty when the entry into force is brought about as a result of the deposit of the ratifications of a very limited number of States."

57. Mr. HUDSON said that the sentence referred to the 1949 Geneva Conventions. It might be as well to mention them specifically.

The seventh sentence was approved on the above terms.

58. The CHAIRMAN read out the eighth sentence:

" It seems necessary to take account of the interests, not only of those States which become parties or which have deposited their ratifications, but also of States which are signatories but which have not completed the process of ratification."

59. Mr. HUDSON said that the sentence was superfluous and should be deleted.

The eighth sentence was deleted.

60. The CHAIRMAN read out the ninth and tenth sentences:

" It is not to be anticipated that a signatory State would advance an objection to a reservation from motives unrelated to its merits. In order, however, to guard against any possible abuse by a signatory State of its right to object to a reservation, and to forestall the possibility of the reserving State being indefinitely excluded from participation in a convention by a State which itself refrains from assuming the obligations of a party, the Commission deems it necessary, while allowing the objection by a mere signatory to a reservation to have the effect of excluding a reserving State to prescribe a time limit within which the effect of such objection may endure."

61. Mr. YEPES asked whether it were wise to assume that reservations by States were always inspired by worthy motives. There might be cases where the object of the reservation was to impede the proper functioning of the convention.

62. The CHAIRMAN considered that there were reasons why the draft should be so worded.

63. Mr. KERNO (Assistant Secretary-General) was entirely of Mr. Yepes' opinion, but it was one of the rules of the game that the good faith of States was taken for granted.

64. Mr. LIANG (Secretary to the Commission) agreed with Mr. Yepes. He proposed the wording: " for reasons not relevant to the substance of the convention".

65. Mr. HUDSON recalled that Mr. Brierly's text read: " It is therefore conceivable that a single signatory State, having itself no intention of becoming a party, might object to a tendered reservation from motives unrelated to its merits. " He thought that Mr. Liang was being too subtle.

66. Mr. YEPES said that he would not pursue the matter further.

The ninth and tenth sentences were approved.

67. The CHAIRMAN read out the eleventh sentence:

" Taking into consideration the normal administrative and constitutional procedures of most governments in respect of ratification, the Commission believes that a period of twelve months would be a reasonable time within which an objecting State could proceed to effect its ratification or acceptance of the convention and thereby demonstrate its willingness to undertake the obligations of the convention."

68. Mr. HUDSON proposed the deletion of the last part of the sentence starting with "... and thereby demonstrate ...".

The eleventh sentence was approved as thus amended.

69. The CHAIRMAN read out the twelfth and last sentence:

" Accordingly, the Commission is of the opinion that, if after a period of twelve months from the time it makes an objection to a reservation, a signatory State has not proceeded to effect its ratification or acceptance of the convention, its objection should cease to have the effect of preventing the reserving State from becoming a party."

70. Mr. EL KHOURY asked, with reference to the words " has not proceeded to effect its ratification ...", if it would be sufficient for the State to reply that the question had been discussed by the Council of Ministers or had been submitted to Parliament. In his opinion, it would be sufficient if the formalities had, at least, begun; it might take one or two years to complete them. He preferred that wording.

71. Mr. HUDSON said that he did not interpret the draft in that way. " Proceed to effect its ratification " meant " effect its ratification ".

72. Mr. FRANÇOIS observed that the text was very ambiguous.

73. In order to meet that objection Mr. HUDSON proposed that wording: " a signatory State has not effected its ratification or acceptance".

The twelfth and last sentence was approved as amended.

TEXT PROPOSED BY MR. SANDSTRÖM

74. The CHAIRMAN invited the Commission to examine the text proposed by Mr. SANDSTRÖM for insertion in the Report, which read as follows:

" (*a*) The Commission first states, in conformity with the practice of States, the League of Nations and the United Nations and the opinions of most writers, that the standpoint of international law at present in force must be considered to be, in general terms, that no reservation is valid unless it is accepted by all " parties ". The advisory opinion given by the International Court of Justice on the reservations to the Convention on the Prevention and Punishment of the Crime of Genocide does not depart from this rule. The majority opinion stresses, it is true, the need for flexibility in the operation of multilateral conventions (p. 22), but declares that the concept on which the above rule is based and " which is directly inspired by the notion of contract, is of undisputed value as a principle ", and the majority founds its opinion on a variety of circumstances referring to the Genocide Convention, from which the conclusion is drawn that an understanding was reached within the General Assembly on the faculty to make reservations, within certain limits, to that convention and that States becoming parties to the convention gave their consent thereto (pp. 21–23).

" (*b*) The standpoint of present international law thus being determined, the problem facing the Commission is to examine whether, in view of the progressive development of international law, there are reasons to adopt some other rule. This question seems to require a special study in respect of the alternatives which are offered, on the one hand by the Pan-American Union system, and on the other by the system outlined in the majority opinion of the International Court of Justice conceived as a system for general application."

75. Mr. SANDSTRÖM recalled that he had already suggested the idea underlying his text at a previous meeting.[5] The Commission might be accused of being somewhat uncertain as to what the majority of the Court had wished to say, but he was, himself, unable to interpret the opinion of the Court otherwise than he had done in sub-paragraph (*a*). By interpreting the intentions of the parties the majority of the Court had completely altered the scope of the classic principle, but the rule of law was not changed. Interpretation of the parties' intentions had led to a different solution. The point of divergence between the Court and the Commission was that the Court had considered itself free to find such intention by interpreting the Convention, whereas the Commission demanded that the intention be clearly expressed by the terms of the Convention itself.

76. He did not claim that the wording of his text was satisfactory. He had done no more than put forward an idea.

77. The CHAIRMAN proposed the inclusion in Mr. Sandström's text of an extract from page 21 of the Court's opinion which read:

" It is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto. It is also a generally recognized principle that a multilateral con-

[5] See summary record of the 102nd meeting, para. 29.

vention is the result of an agreement freely concluded upon its clauses and that consequently none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and *raison d'être* of the convention. To this principle was linked the notion of the integrity of the convention as adopted, a notion which in its traditional concept involved the proposition that no reservation was valid unless it was accepted by all the contracting parties without exception, as would have been the case if it had been stated during the negotiations." [6]

78. That concept, which was directly inspired by the notion of contract, embodied a principle of undisputed value.

79. Mr. SANDSTRÖM was of the opinion that his text should be inserted immediately after the historical part of the report.

80. The CHAIRMAN took the opinion of the Commission on Mr. Sandström's proposal.

81. Mr. SPIROPOULOS considered that Mr. Sandström's point of view was entirely correct. The Court had confirmed the general principle on which the Commission had based its text. In his opinion the text proposed by Mr. Sandström was in entire conformity with what the Court had decided. It was necessary to accept that text, or it would be said that the Commission had put a false interpretation on the Court's advisory opinion.

82. Mr. HUDSON recalled that no objection had been formulated in the part of the document under consideration, which related to the Court's opinion. There was no reason why an explanation should not be given. He was not, however, sure whether the explanation given in sub-paragraph (*a*) of Mr. Sandström's text was correct. The Court had said that the General Assembly had, itself, contemplated the possibility that there would be reservations to the Convention on Genocide. It did not follow, however, that the Assembly had made provision for the manner in which such reservations should be treated. He was not at all in favour of giving that explanation. It was not germane to the question who should accept the reservation.

83. The CHAIRMAN considered that on page 21 the advisory opinion was dealing with the principle. The object of the passage was to show that the Commission did not depart from the Court's opinion on the point of law.

84. Mr. HUDSON remarked that the passages which followed that quoted by the Chairman showed that the Court had, in fact, departed from the traditional principle.

85. Mr. SPIROPOULOS considered that it was very important to stress that the Commission accepted that principle.

86. Mr. YEPES asked Mr. Sandström whether he considered that the first six lines of his text reflected the existing law.

87. Mr. SANDSTRÖM replied in the affirmative.

88. Mr. YEPES said that in that case he could not accept the text, as he did not believe that Mr. Sandström's contention was correct. His statement might perhaps apply as regards European regional law, but not as regards general international law, since twenty-one States, or a third of the United Nations, did not follow that rule. It could not, therefore, reflect general international law.

89. Mr. SANDSTRÖM remarked that the advisory opinion stated that the Pan-American system rested on the agreement of the parties.

90. Mr. YEPES saw in that proof that there was an international law other than that examined in the text. The Pan-American system had been accepted by other States.

91. Mr. SPIROPOULOS recalled that the majority and the minority of the Court were agreed on the question as to what was the existing law in the matter.

92. Mr. LIANG (Secretary to the Commission) had not found anything in Mr. Brierly's report on the question of whether the Commission intended to submit certain propositions, as constituting the existing law. General Assembly resolution 478 (V), dated 16 November 1950, did not oblige the Commission to do so. It might be held that the Commission had taken the same position as Mr. Sandström had done in his text.

93. Another point for consideration was whether the Commission intended to endorse the Court's pronouncement in regard to existing law. He did not, himself, think that was necessary and considered that the Commission would have completed its work when it presented the report, as prepared by Mr. Brierly, but a different course might be indicated when it came to the study of the draft convention on treaties.

94. He suggested the deletion of the last part of paragraph (a) of Mr. Sandström's text, following the words " is of undisputed value as a principle ". He did not consider that the Commission should run the risk of giving even such qualified approval, as contained in the last part of that paragraph, to the arguments on which the majority of the Court had based its opinion. It was doubtful whether the circumstances of the 1948 General Assembly afforded any grounds for the conclusion that the framers of the Convention on Genocide had visualized the possibility of reservations to that Convention or that at the time the States became parties to the Convention, they had given their assent to that condition. He himself could not recall any such circumstance. He thought the Commission ought to study the problem before approving that conclusion.

95. Mr. CORDOVA wished to lodge an objection to the first sentence. The principle adopted by the Court was that reservations should be accepted by the parties. If that were the existing law, there would be a contradiction in the Commission's speaking of the Pan-American practice as also constituting a legal system under international law which could be applied in cases where a convention did not contain any specific reference to the matter. If Mr. Sandström's text were adopted, no other procedure would be legal where a convention made no

[6] *I.C.J. Reports 1951*, p. 21.

mention of reservations. He considered that the text should be redrafted.

96. Mr. SPIROPOULOS held that, when nothing was said in the convention, the Commission's system would be applicable. Everyone was agreed on that point, and there was no necessity to re-open the question. The Pan-American system was only applicable when it was specifically so stated.

97. Mr. SANDSTRÖM was of the opinion that, in view of Mr. Yepes' and Mr. Córdova's objections, it was necessary to alter the wording of the text and expand his thesis. He had thought that priority should be accorded to the question as to what was the existing law. The General Assembly's resolution had, in fact, invited the International Law Commission " in the course of its work on the codification of the law of treaties, to study the qucstion of reservations to multilateral conventions, both from the point of view of codification and from that of the progressive development of international law ". He had considered that, in view of those terms of reference he had been under the necessity of considering what the existing international law actually was. As regards paragraph (b), he considered that, from the point of view of the development of international law, it was necessary to study other alternatives.

98. Mr. YEPES pointed out that the resolution also spoke of the progressive development of international law. He proposed the deletion of the words " at present in force " in the first sentence of Mr. Sandström's text.

99. Mr. HUDSON did not believe that the two paragraphs proposed by Mr. Sandström would serve any useful purpose.

100. Mr. SPIROPOULOS was favourably inclined towards the proposal, but did not believe it to be absolutely necessary. He proposed that the Commission vote on the matter forthwith.

101. In reply to a question by Mr. AMADO, Mr. SANDSTRÖM said that the two paragraphs proposed by him would be inserted immediately after paragraph 10, relating to the history of the question.

102. Mr. YEPES wondered whether the Commission could decide by means of a vote whether such and such constituted the existing law. He would like to know on what facts the Commission would base its opinion.

103. Mr. HUDSON remarked that the Commission was most definitely not called upon to decide whether such and such constituted the existing law.

Mr. Sandström's text was rejected by 8 votes to 3.

ANNEX.[7]

104. The CHAIRMAN said that the Commission had still to examine the annex to the draft report, containing draft articles relating to reservations. In his opinion, it would be difficult for the Commission to study the annex in plenary session, as the draft articles were of too technical a character and the Secretariat was best equipped to deal with the matter. He suggested that the Commission appoint one or two of its members to study the draft articles.

105. Mr. YEPES regretted that he could not agree to the Chairman's suggestion. The Commission could not divest itself of so great a responsibility.

106. The CHAIRMAN said that the study of the annex by the Commission in plenary session would take at least a week.

107. Mr. YEPES considered that it would be time well spent.

It was decided that a sub-committee composed of Mr. Brierly, Mr. Hudson and Mr. François be set up to study the annex to the report (A/CN.4/L.18).

Preparation of a draft code of offences against the peace and security of mankind: report by Mr. Spiropoulos (item 2 (*a*) of the agenda) (A/CN.4/L.15) [8] *(resumed from the 92nd meeting)*

108. Mr. SPIROPOULOS said that he had no comments of a general nature in regard to the revised text he had prepared on the basis of the Commission's decisions and of the discussions that had taken place on the subject. The text would be the same, whether the Commission decided to submit the draft code to governments or to the General Assembly.

INTRODUCTION

PARAGRAPHS 1, 2 AND 3 [9] (*paragraphs 54–56 of the " Report "*)

109. Paragraphs 1, 2 and 3 were *adopted* with the addition of the dates of the first and second sessions and the date of resolution 177 (II).[9a]

PARAGRAPH 4 [10] (*last sentence of paragraph 54 of the " Report "*)

110. Mr. HUDSON proposed the deletion of the word " any " in line 5 of the English text.

It was so decided.

Paragraph 4 was *adopted* as amended, and with the addition of the date of resolution 488 (V).

[7] The text of the Annex is reproduced in vol. II of the present publication.

[8] Mimeographed document only, the text of which corresponds with drafting changes to Chapter IV of the *Report of the International Law Commission covering the work of its third session.* (See vol. II of the present publication.) The drafting changes are indicated in the summary records of the 106th to 111th meetings.

[9] Paras. 1 and 2 read as follows:

" 1. By resolution 177 (II), paragraph (*b*), the General Assembly requested the International Law 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.

" 2. At its first session, the International Law Commission appointed one of its members, Mr. Jean Spiropoulos, Special Rapporteur on this subject, and invited him to prepare a working paper for submission to the Commission at its second session. The Commission also decided that a questionnaire should be circulated to Governments inquiring what offences, apart from those defined in the charter and judgment of the Nürnberg Tribunal, should, in their view, be comprehended in the draft code."

[9a] See however summary record of the 111th meeting, para. 171.

[10] Corresponds to the last part of paragraph 54 of the " Report " beginning with the words " By resolution 488 (V) . . .". See also summary record of the 111th meeting, para. 176.

PARAGRAPH 5 (*paragraph 57 of the " Report "*)

111. Mr. SPIROPOULOS pointed out that the French and Lebanese Governments had submitted their observations. Documents A/CN.4/45 Add.1 and Add. 2 should therefore be added to the list of documents mentioned in the report.

It was so decided.

112. Paragraph 5 was *adopted* as amended, and with the addition of the date of the third session of the International Law Commission.

PARAGRAPH 6 (*paragraph 58 of the " Report "*)

Sub-paragraph (a)

113. Mr. SCELLE asked whether it would not be possible to combine under one general heading the matters listed in the third sentence of sub-paragraph (*a*), and which the Commission had decided to exclude from the draft code. In his opinion it would be desirable to furnish some explanation and state the reasons why those matters had been excluded.

114. Mr. SPIROPOULOS pointed out that the crimes listed in the sentence in question were not of a political character.

115. Mr. SCELLE thought that a juridical reason for such exclusion should, nevertheless, be given. He pointed out that counterfeiting currency and damage to submarine cables, for instance, could be of a political character and endanger peace.

116. Mr. AMADO observed that the offences in question were in existence before the Nürnberg trials and could not, therefore, be included amongst the crimes covered by the proposed Convention.

117. In order to meet Mr. Scelle's views, Mr. ALFARO proposed that the sentence start with the words " For reasons stated before ".

118. Mr. SANDSTRÖM proposed the substitution of the word " therefore " for the word " nor ". (The English text would then read " Therefore, such matters . . . should not be considered as falling within the scope of the draft code ".)

119. Mr. KERNO (Assistant Secretary-General) considered Mr. Scelle's objection well-founded. He proposed that it be stated in the second sentence of sub-paragraph (*a*) that the phrase " offences against the peace and the security of mankind " only related to crimes whose predominant feature was that they contained a political element.

120. Mr. SANDSTRÖM considered that there should be a full stop after the words " the maintenance of international peace and security ", and that the words " and that " should be deleted. " The draft code therefore . . ." would then start a new sentence.

121. Mr. HUDSON proposed to say " for these reasons ".

122. The CHAIRMAN remarked that such a solution would not meet Mr. Scelle's objection.

123. Mr. SPIROPOULOS pointed out that, generally speaking, the offences listed in the last sentence of paragraph (*a*) were the acts of private individuals and not of States.

124. Mr. SCELLE proposed the addition at the end of the last sentence of the words " except where the culpability of the State is in question ".

125. Mr. SPIROPOULOS said that he would prefer the commentary to be worded differently. Many offences which, under certain conditions, might disturb the peace and security of mankind were not included. He thought that Mr. Kerno's formula was satisfactory.

126. Mr. AMADO would like to delete the whole of the last part of the paragraph after " international . . . security ".

127. Mr. SPIROPOULOS thought there was something to be said for Mr. Amado's views but, generally speaking, the public was under the impression that the matters in question would also be dealt with in the code. The United States, for instance, had mentioned piracy [11] in their reply. For that reason it was necessary to explain why the Commission had left them out. He added that the text of the paragraph had been taken from the Commission's last report to the General Assembly.

128. Mr. EL KHOURY asked Mr. Spiropoulos whether he would agree to the following text: " nor should such matters of a non-political character as . . .".

129. Mr. SPIROPOULOS was prepared to abide by the Commission's decision.

130. Mr. SCELLE said that he was not proposing to delete the last part of the paragraph. It would, however, in his opinion be as well to explain why such matters were excluded from the draft code. He proposed the addition at the end of the last sentence of the words " unless they are of a political character . . .".

131. Mr. ALFARO was of the opinion that the second sentence should end with: " the maintenance of international peace and security ". It would then be possible to go on to say " For these reasons the draft code does not deal with questions concerning conflicts of legislation and jurisdiction in international criminal matters and does not include such matters as . . .".[12]

132. Mr. SPIROPOULOS and Mr. SCELLE approved Mr. Alfaro's suggestion.

133. Mr. AMADO said that the Commission was engaged on a new classification of international offences, and that it would be easy to draw a distinction between offences already considered as crimes under international law before Nürnberg and those falling within the scope of national criminal law.

134. He was therefore in favour of either deleting the last part of paragraph (*a*), or adopting the formula proposed by Mr. Alfaro, which he considered acceptable.

Mr. Alfaro's proposal was adopted.

Sub-paragraph (b)

135. Mr. HUDSON wondered whether it would not be possible to do away with the division of sub-paragraph (*b*)

[11] See document A/CN. 4/19, Part II.

[12] The original text read: " . . . peace and security, and that the draft code, therefore should not deal . . ."

into two parts. He would also be in favour of deleting the second sentence of part (i).[13]

136. Mr. ALFARO and Mr. CORDOVA stressed the usefulness of the sentence in question, as showing the manner in which the Commission had interpreted its task.

It was decided by 5 votes to 3 to retain the second sentence of part (i).

137. Mr. AMADO proposed the deletion of the words " more or less " before the word " general " in part (ii).

It was so decided.

Mr. Hudson's suggestion to eliminate the division of sub-paragraph (b) *into two parts was accepted and the sub-paragraph was adopted as thus amended.*

Sub-paragraph (c)[14]

138. Mr. HUDSON was afraid that the phrase " on the question of the subjects of criminal responsibility under the draft code " was not very comprehensible. He thought it would be better to start sub-paragraph (*c*) at " The Commission decided . . .".

139. There followed an exchange of views as to whether the Commission wished to retain the reference to the charter of the Nürnberg Tribunal, which again did not refer to the criminal responsibility of States, and, if so, how the reference was to be worded.

It was decided by a majority of 6 to delete the beginning and end of sub-paragraph (c).

Sub-paragraph (*c*) then read: " The Commission decided to deal only with criminal responsibility of individuals ". (See also the summary record of the 129th meeting, paras. 12–13.)

Sub-paragraph (d)[15]

140. Mr. HUDSON proposed that the second and third sentences of sub-paragraph (*d*) be replaced by the following: " it was felt that in the absence of a competent international judicial organ the implementation by national courts would be the only practicable procedure ".

141. Mr. ALFARO, Mr. CORDOVA and Mr. YEPES preferred the text proposed by the Special Rapporteur.

142. Mr. SCELLE was also in favour of retaining the text proposed by the Special Rapporteur. In fact, if it went, hope went also. At its second session, the Commission had expressed the opinion that the establishment of an international criminal judicial organ was desirable and possible.

It was decided to substitute the phrase " a competent international criminal jurisdiction " for " an international judicial organ ".

It was decided by a majority of 7 to retain sub-paragraph (d), *as thus amended.*[15a] (See also the summary record of the 129th meeting, paras. 12–13.)

TEXT OF THE DRAFT CODE

ARTICLE 1

On Mr. Hudson's proposal, it was decided to delete the word " the " before the word " offences " in article 1 of the draft code.[16]

Comment

143. Mr. HUDSON proposed that the second sentence be redrafted to read: ". . . and in the Commission's formulation of the Nürnberg principle, it was stated . . ." instead of " and has been formulated by the Commission as follows: ".

It was so agreed.

ARTICLE 2

Paragraph (*1*)

144. Mr. HUDSON wondered whether the words " or any of them " after " The following acts " in the first sentence of article 2 were absolutely necessary. In his opinion they did not make sense.

145. Mr. SPIROPOULOS said that the words appeared in the charter of the Nürnberg Tribunal, but they were, in effect, entirely useless.

It was decided to delete the words " or any of them ".

146. Mr. SCELLE drew the attention of the members of the Commission to the fact that paragraphs 1, 3 and 4 and, perhaps even, paragraph 5 of article 2 were concerned with definite cases of aggression. The Commission had decided not to define aggression, but it was defined by implication in the above paragraphs.

147. He asked whether a passage could not be inserted in the commentary to the effect that the Commission had defined aggression in such and such an article of the draft code; always provided that the Commission did not prefer to go back on its decision not to define aggression.

148. In his opinion the Commission, in refusing to define aggression, had not shown much courage. It was not very difficult. That was the reason why he asked the Commission to reverse its decision.

149. Mr. YEPES strongly supported Mr. Scelle's statement. He was in favour of inserting a passage in the commentary to the effect that a definition of aggression was given in such and such an article.

150. In reply to the Chairman, Mr. SCELLE said that he would have a proposal to make concerning the definition of aggression. Actually the Commission had defined many aspects of aggression. It only remained to formulate a composite definition.

[13] Sub-paragraph (*b*) was originally split into two parts as follows: " The sense of the Commission was: (i) that the above phrase should not be interpreted . . . (ii) that it was not necessary to indicate . . .".

[14] Sub-paragraph (*c*) read as follows: " (*c*) On the question of the subjects of criminal responsibility under the draft code, the Commission decided to deal only with the criminal responsibility of individuals, following the example of the charter of the Nürnberg Tribunal."

[15] Sub-paragraph (*d*) read as follows: " (*d*) Considerable thought was given by the Commission to the question of the implementation of the code. It was felt that only the establishment of an international judicial organ could ensure adequate implementation. Pending the establishment of such an organ, the implementation by national courts would be the only practicable procedure."

[15a] See however summary record of the 111th meeting, paras. 22–28 and 69–85.

[16] The original text used the expression " the present Code ".

151. The CHAIRMAN pointed out that the acts listed in the various paragraphs of article 2 of the draft code constituted to some extent examples of offences against the peace and security of mankind. Those paragraphs, however, did not contain a definition.

152. Mr. AMADO considered that the addition proposed by Mr. Scelle would be more appropriately discussed in connexion with the Commission's report on the definition of aggression.

153. Mr. SCELLE supported that point of view and said that he was not proposing to offer an amendment to the text of the draft code. He could submit his definition of aggression at the next meeting.

Paragraph (1) of article 2 was adopted without amendment.[17]

First paragraph of the comment[18]

154. Mr. YEPES pointed out that in using the words " armed force " in article 2, paragraph 1, as well as in the comment in that paragraph, the Commission was restricting the scope of the article, seeing that Article 2, paragraph 2, of the Charter of the United Nations simply spoke of the use of " force ". He therefore proposed the deletion of the word " armed ", so as to bring the paragraph into line with the United Nations Charter.

155. The CHAIRMAN pointed out that the Commission had already discussed that point at length.

156. Mr. ALFARO said that that discussion had taken place in connexion with the definition of aggression. He saw some reason for using the term " armed force ", but he was, in principle, always in favour of using the terms of the United Nations Charter. It would do no harm to delete the word " armed ".

It was decided by 8 votes to 4 to retain the term " armed force ".

157. Taking up a suggestion by Mr. SPIROPOULOS, the CHAIRMAN proposed the substitution in article 2, paragraph 1 of the wording: " It is to be noted that Article 2, paragraph 4, of the United Nations Charter binds all members . . ." for " this is in conformity with Article 2, paragraph 4 of the Charter of the United Nations . . ."

It was so decided.

158. Mr. YEPES stressed the importance of the draft code which the Commission was preparing and earnestly requested that, whenever the latter departed from the text of the Charter, it should state its reasons for so doing. He considered that it was advisable to say " this provision is not in conformity with the Charter ".

159. Mr. AMADO pointed out that the Charter was concerned with the acts of States, so no confusion was possible. Further, it could not be maintained that the violation of every obligation laid down in the Charter constituted an offence under international law, involving criminal responsibility.

160. Mr. YEPES asked that the Commission vote on this suggestion.

Mr. Yepes' suggestion was rejected by 6 votes to 3.

The meeting rose at 1 p.m.

[17] The original text of paragraph (1) opened with the following phrase: " (1) The employment, or threat of employment, by the authorities of a State, . . .". See also, summary record of the 108th meeting, paras. 115–155.

[18] The first paragraph read as follows: " In prohibiting the employment of armed force (except under certain specified conditions), this paragraph incorporates in substance that part of Article 6, paragraph (*a*), of the charter of the Nürnberg Tribunal, which defines as ' crimes against peace ' *inter alia* the ' initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances . . .'. In addition, the present paragraph includes the threat of employment of armed force as an offence. This is in conformity with Article 2, paragraph 4, of the Charter of the United Nations which binds all Members to ' 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 '."

107th MEETING

Wednesday, 20 June 1951, at 9.45 a.m.

CONTENTS

Chairman: Mr. James L. BRIERLY

Rapporteur: Mr. Roberto CORDOVA

Present:

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

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