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Summary record of the 125th meeting

Topic:
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125th MEETING

Monday, 16 July 1951, at 3 p.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. 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.

Co-operation with other bodies (item 9 of the agenda) *(resumed from the 124th meeting)* [1]

1. The CHAIRMAN read out the following paragraph submitted by Mr. Hudson:

> "The Commission again gave consideration to the co-operation with other bodies which is envisaged in articles 25 and 26 of its Statute (item 9 of the agenda). It was highly gratified by the willingness expressed by many international and national organizations specially interested in international law to co-operate with the Commission in its work. Indeed, such co-operation has already been of great aid to the Commission; reports and studies supplied to the Commission by a number of such organizations have been immensely valuable in the course of the Commission's endeavours, particularly in its work on the régime of the high seas. It has become apparent that in the future the Commission will probably need to rely to an even greater extent on the contributions which are being made by unofficial groups."

2. Mr. AMADO questioned the desirability of referring to such organizations without naming them. He also thought that the word "immensely" was too strong.

It was decided to delete the word "immensely" and to adopt the text as thus amended.

[1] Paras. 56–61.

Régime of the high seas: report by Mr. François (item 6 of the agenda) (A/CN.4/42) *(resumed from the 124th meeting)*

CHAPTER 6: SUBMARINE TELEGRAPH CABLES

3. Mr. FRANÇOIS recalled that at the end of the previous meeting the Commission had been discussing the question, raised by Mr. Spiropoulos, as to whether it should undertake a general codification of the law of the high seas or merely select subjects which appeared ripe for codification.[2] He himself had supported the latter alternative and a perusal of the report of the Commission covering its second session (A/1316) showed that the Commission had taken the same view. According to paragraph 183 of that report the Commission "was of the opinion that it could not undertake a codification of maritime law in all its aspects and that it would be necessary to select the subjects the study of which could be begun by the Commission as a first phase of its work on the topic". That text answered the question asked by Mr. Spiropoulos. No systematic codification of maritime law could be contemplated, and Mr. Spiropoulos' objection that the Commission could not begin with the continental shelf or with some other subject was not a serious one if the task of the Commission was deemed to be that expressed in paragraph 183 of the above report.

4. The CHAIRMAN said that certain members had thought that the Commission should begin with an introduction on the régime of the high seas and thereafter deal with the various subjects, emphasizing that the Commission's proposals followed from the principles applicable to the high seas.

5. Mr. SCELLE, supporting that view, said that the Commission's choice of an initial subject was of no immediate importance. A full and systematic account of the régime of the high seas was unnecessary. When the Commission submitted a final report, it would have to state basic principles, such as the principle of the freedom of the high seas and the principle that the high seas were common property. If the Commission subsequently undertook more complete codification, it would then have to go into details.

6. Mr. FRANÇOIS fully agreed with Mr. Scelle's view. The immediate concern was something other than systematic codification. The Commission had passed over many subjects which it did not consider ripe for codification. For example, it had dealt with the question of collisions only in its penal aspects and only in so far as concerned the jurisdiction of States. Should the Commission codify all the laws of the high seas, the question of collisions would have to be fully examined.

7. The CHAIRMAN asked whether the Commission wished to deal at length with the question of submarine telegraph cables, as proposed in his report by Mr. François, or to devote a shorter text to the subject. He himself favoured the latter procedure.

8. Mr. YEPES thought that, as in the case of other topics, the Commission should merely state general principles

[2] *Ibid.*, paras. 106–108.

and leave detailed regulations to be covered by conventions. The Commission could not at that stage aim at a complete codification of the régime of the high seas.

9. Mr. FRANÇOIS agreed that it was perhaps unnecessary to go into great detail, since that had not been done for other topics.

10. Mr. YEPES proposed that the Commission retain only article 1 of the provisions proposed by the Rapporteur (p. 34, mimeographed English text; para. 76 printed French text), which stated the general principle.

11. Mr. SANDSTRÖM proposed the retention of articles 1 and 2.

12. Mr. FRANÇOIS asked whether article 3 was not equally essential.

13. Mr. SANDSTRÖM replied that, although article 3 was clearly important, the basic principle was stated in article 2 and later articles merely concerned the effects of the principle.

14. The CHAIRMAN asked whether the Commission thought it enough to say:

" The breaking or injury of a submarine cable shall be a punishable offence ".

15. If the Commission went beyond the provisions of article 1 it would be going into detail. He himself was prepared to accept Mr. Yepes' proposal that only article 1 should be retained.

16. Mr. HUDSON pointed out that the Commission had already decided to add to article 1 the words " on the sea-bed of the high seas ".

17. Mr. FRANÇOIS, stressing the extreme importance of article 7, said that the Commission had directed him not only to formulate the principle of that first phase of the régime, namely, that all States were entitled to lay cables, but also to study measures for the protection of cables. If the Commission adopted only article 1, there would be no provision for protective measures.

18. Mr. EL KHOURY thought that articles 1, 2, 3 and 5 were necessary, but that articles 4, 6 and 7 were not.

19. Mr. KERNO (Assistant Secretary-General), while agreeing with Mr. el Khoury, thought that if the Rapporteur submitted a new formula the Commission should not go back on what was already established. International treaty law had existed on the subject since the Convention for the Protection of Submarine Cables of 14 March 1884.[3] The doctrine had been examined by the Institute of International Law as early as 1879. It should be explained in the comment that the Commission had no intention of limiting existing treaty law.

20. Mr. FRANÇOIS was still rather confused as to the Commission's intentions with regard to submarine cables. According to Mr. el Khoury's proposal, most of the articles would be retained. Again, as Mr. Kerno had said, the Commission should not be too timorous. If it stated a vague principle in a field in which a convention was much more explicit, the point of its work of codification would not be clear.

21. Mr. SCELLE agreed that the Commission could not go back on what was already established.

22. Mr. HUDSON questioned whether the points concerned were already established and asked how many States had ratified the Convention for the Protection of Submarine Cables.

23. The CHAIRMAN said that the names of the States which had ratified the Convention were given on page 31 (mimeographed English text; para. 63, printed French text) of the report by Mr. François.

24. Mr. SCELLE pointed out that the number of States was very high, especially if it was considered that there were many States which could not be expected to lay submarine cables. In fact, all States that were in a position to do so had ratified the Convention.

25. The CHAIRMAN said that he would deplore any decision by the Commission that put difficulties in the way of Mr. François.

26. Mr. FRANÇOIS said that he was not wholly satisfied with the guidance he had received. If the Commission stated clearly that it preferred one single general principle he would conform with its wishes, but for the moment he was without instructions, since the Commission told him, on the one hand, not to go into details and, on the other, not to restrict himself to one principle. Given such guidance, he might well return in the following year with a draft similar to the one which he had submitted that year.

27. The CHAIRMAN said that, if the Commission deemed it unnecessary to repeat the terms of the Convention, it need merely state the principle that the laying of cables was free and refer the reader for details to the Convention for the Protection of Submarine Cables of 1884.

28. Mr. FRANÇOIS thought that one of the very purposes of codification was to embody in the code the actual rules adopted by all States. If it were decided that such rules need not be inserted he failed to see what purpose codification would serve. The topics under consideration were ripe for codification. The question of principle must be settled. The Commission should decide whether it considered codification unnecessary where the subject was regulated by a convention. If the Commission held that view, he could comply with it although he did not share it.

29. Mr. SCELLE thought it desirable that the Commission should know what attitude to adopt with regard to a topic that had been the subject of a convention which had been found satisfactory, that was to say, whether to refer the reader to the convention or to include the latter in the text which it was drafting. He himself thought that it should adopt the latter procedure. When the Civil, Commercial and Forestry Codes were drafted in France customary law texts were included *in extenso*. That was part of the work of codification.

30. Mr. HUDSON noted that it was 65 years since the drafting of the Convention for the Protection of Submarine Cables and that there had been only two recent accessions to it, namely, those of Poland and Czechoslovakia. He thought that the Convention had

[3] See *British and Foreign State Papers*, vol. LXXV, p. 356.

perhaps become out-of-date. He could see no objection to an attempt to review the question.

31. Mr. AMADO thought that it should be laid down as a general principle that any State was entitled to lay cables on the bed of the high seas and that any cables so laid should be protected against breaking and injury, which would be preferable to stating that the breaking of a cable would entail the punishment of the offender. The Commission must avoid, as inadmissible, the textual reproduction of the articles of the Convention. If an article stated a principle the Commission should formulate that principle, if it was opposed to the adoption of an excessively general article like article 1.

32. Mr. FRANÇOIS said that he had endeavoured to do precisely what Mr. Amado proposed. He had not reproduced articles textually, but stated the principle on which the articles were based.

33. Mr. ALFARO thought that the special rapporteur should accordingly be at liberty to present the whole question on that basis. The aim should be to make it possible for any person seeking information on the application of international law to submarine telegraph cables to find a complete statement on the question in the text adopted by the Commission. He thought it preferable that the Commission should supply too much rather than too little information.

34. Mr. KERNO (Assistant Secretary-General) pointed out that the Commission was once more divided on the fundamental question of the precise meaning of codification. Jurists trained in Anglo-Saxon countries naturally took a different view from Continental European jurists, who regarded the purpose of codification as being not only to repair omissions, but to formulate all existing provisions — apart, of course, from minor provisions, which were set out in special regulations. The Commission could deal with the main points and refer the reader for details to already existing Conventions, such as the Convention of 1884.

35. The CHAIRMAN trusted that Mr. François would receive any further guidance which he might require.

36. Mr. FRANÇOIS said that he now felt better equipped to proceed with his study of the question.

CHAPTER 8: RIGHT OF PURSUIT

37. Mr. FRANÇOIS said that the right of pursuit was the last topic of his report due to be examined by the Commission. Although he had proposed an article (pp. 43–44, mimeographed English text; para. 102, printed French text) embodying principles which were not disputed in international law, he thought that his proposal should perhaps be discussed on the basis of the debatable points which he had enumerated.

(a) *At what moment can the pursuit be deemed to have begun?*

38. Mr. FRANÇOIS said that neither that point nor point 2 had been settled by the Codification Conference held at The Hague in 1930.

39. Mr. ALFARO favoured the rule contained in the second paragraph of the article proposed by the rapporteur. He considered that the pursuit had begun when the pursuing vessel had given the signal to stop.

40. The CHAIRMAN explained that the signal in question should be visible or audible, but that it could not take the form of a wireless message. He was prepared to accept the text proposed.

The Rapporteur's text was adopted.

(b) *Must the patrol vessel giving the order also be within the territorial sea?*

41. The CHAIRMAN agreed with the Rapporteur's statement that " It is not necessary that, when the foreign vessel receives the order to stop, the vessel giving the order should be within the waters indicated in the first paragraph ".

The Rapporteur's text was adopted.

(c) *Can the pursuit be commenced when the vessel is already in the " adjacent zone" ?*

42. Mr. FRANÇOIS pointed out that the *I'm Alone* had been in the contiguous zone, but that the arbiters had expressed no opinion on the point. In his view, the recognition of the existence of a special contiguous zone for the purposes of Customs, revenue and public health regulations entailed certain consequences, such as the extension of the right of pursuit when the vessel was in those waters.

43. Mr. KERNO (Assistant Secretary-General) asked whether, since the contiguous zone was established solely for the purposes of Customs, revenue and public health regulations, any pursuit beginning in that zone must arise out of an infringement of such regulations.

44. Mr. FRANÇOIS replied that such was normally the case, but that it would be splitting hairs to draw any distinction.

45. Mr. SCELLE nevertheless thought that Mr. Kerno's question was entirely to the point. The contiguous zone was established in order to specify certain interests, as was also the right of pursuit. It was inadmissible that the right of pursuit should begin at the furthest limit of the contiguous zone in connexion with an offence committed in territorial waters. There must be a link between the reason for the establishment of the contiguous zone and the grounds for the pursuit.

46. Mr. FRANÇOIS said he was prepared to consider the practicability of drawing such a distinction.

47. Mr. HUDSON thought that pursuit begun in an area where the vessel could be seized was hot pursuit.

48. The CHAIRMAN said that, summarized, Mr. Scelle's observation meant that, where pursuit concerned an offence unconnected with the reason for the establishment of the contiguous zone, it was illogical to allow it to begin in that zone.

49. He agreed with the Rapporteur as to the practical difficulty of drawing such a distinction. It would perhaps be an excessive refinement to stipulate that the right of pursuit began in territorial waters for certain offences, but could begin in the contiguous zone for other offences.

50. Mr. SCELLE agreed that the complication existed, but said that it would be for the judge to decide whether

pursuit had begun where it could legally begin. The Commission could adopt a decision to that effect.

51. The CHAIRMAN asked whether the Commission should state the zone in which pursuit could begin, and point out that the Commission had adopted a 12-mile limit for the contiguous zone.

52. Mr. SCELLE considered that the contiguous zone was an easement on the high seas in favour of the coastal State, and one that varied with the particular interests involved. He thought that the concept of contiguous zones should replace that of territorial waters.

53. Mr. FRANÇOIS pointed out that the Commission had decided that the only interests to be safeguarded in the contiguous zone were Customs, revenue and public health interests, for which it had adopted a twelve-mile limit.

54. Mr. SCELLE was afraid that, in consequence, his own remark and that of Mr. Kerno became pointless.

55. Mr. KERNO (Assistant Secretary-General) pointed out that his observation had been based on strict logic. It was perhaps illogical to permit the right of pursuit to begin in the contiguous zone for reasons other than those for which that zone had been established.

56. Mr. CORDOVA thought that, where a vessel had been fishing in but had left territorial waters, pursuit could begin in the contiguous zone.

57. Mr. KERNO (Assistant Secretary-General) disagreed. In his view, pursuit should begin in territorial waters.

58. The CHAIRMAN said that Mr. Córdova's argument was logical but impracticable.

59. Mr. SCELLE pointed out that a decision would remain difficult so long as the Commission had not considered the régime of territorial waters.

(d) *Can the pursuit be commenced in the case of the constructive presence of a vessel in territorial waters?*

60. Mr. FRANÇOIS thought that, to justify pursuit, the boats used in committing the offences must be the boats of the offending vessel itself. As to the other cases, he had rejected the concept of constructive presence. He had stated in his report that he felt " that this opinion has not received enough support to entitle it to appear in the text to be adopted by the Commission " (p. 43, mimeographed English text; para. 99, printed French text).

61. The CHAIRMAN noted that Mr. FRANÇOIS rejected the view of certain authorities that " even if the vessel uses not its own but other boats to commit offences in foreign waters, its guilt is nevertheless established " (*ibid.*). In his own view, a vessel selling liquor on the high seas to boats which then proceeded to the mainland was committing no offence. It was for the coastal State to control its own boats.

62. Mr. HUDSON pointed out that the adoption of such a principle might give rise to considerable difficulty. For example, off the coast of California vessels fitted out as gaming-houses catered for gamblers less than twelve miles from the mainland. It was very difficult to find any legal provision under which such a case could be dealt with.

63. The CHAIRMAN thought that if such vessels were in the contiguous zone the coastal State could deal with their activities; but if they were more than twelve miles from the coast, they could hardly be said to be committing an offence.

64. Mr. KERNO (Assistant Secretary-General) said that gambling had nothing to do with the contiguous zone, since it did not concern revenue, Customs or public health.

65. Mr. HUDSON asked whether it might not concern revenue.

66. Mr. SANDSTRÖM thought that the best example was to be found in the liquor laws. Boats came from the shore to vessels standing outside the contiguous zone, so that such vessels were aiding and abetting an offence in territorial waters.

67. The CHAIRMAN thought that such an activity was merely a commercial transaction on the high seas.

68. Mr. HUDSON asked whether it was not a fact that British courts had declared it illegal for any British vessel to cause a violation of the laws of another country. He seemed to remember a finding of some twenty-five years ago which recognized the existence of a principle of international law under which any such operation by a vessel flying the British flag was prohibited.

69. The CHAIRMAN pointed out that the decision in question concerned the fitting out of vessels to break the American Anti-Liquor Laws. He did not think that point was a matter for the Commission.

The principle proposed by the Rapporteur was adopted.

70. Mr. FRANÇOIS then referred to the very debatable case of the *Martin Behrman* (*ibid.*).

71. The CHAIRMAN failed to understand why a captured vessel should be set at liberty if, after being arrested in waters subject to the jurisdiction of a captor State, it had to cross a portion of the high seas in order to be taken to another port of that State.

72. Mr. HUDSON agreed that in such circumstances a vessel could be taken across the high seas. The case was very exceptional, but the principle formulated by the Rapporteur in the last paragraph of the section of his report concerning the right of pursuit was in line with the provisions of extradition treaties covering similar cases.

73. Mr. FRANÇOIS added that there had been no court decision in the case of the *Martin Behrman*. The United Kingdom Government had reserved its future position, but the United States Government had agreed with the Netherlands Government.

74. The CHAIRMAN said that he was not familiar with the case and asked how it came to concern the United Kingdom Government when the vessel involved was a United States vessel.

75. Mr. FRANÇOIS explained that the United Kingdom Government had made a general observation on that subject.

76. The CHAIRMAN said that he agreed with the text proposed by the Rapporteur, which read as follows:

"A vessel arrested within the jurisdiction of a State and escorted to a port of that State for delivery to the competent authorities shall not be set at liberty solely on the grounds that a portion of the high seas was crossed in the course of that voyage."

The Rapporteur's text was adopted.

The preceding paragraph, which read as follows, was also adopted.

"The right of pursuit ceases as soon as the vessel which is pursued enters the territorial sea of its own country or of a third State."

77. The CHAIRMAN pointed out that the Commission had completed consideration of the report by Mr. François (A/CN.4/42).

78. Mr. KERNO (Assistant Secretary-General) referring to the desirability of having the reports for submission to the Commission at its next session drafted more or less on the same model, said that such reports should consist of articles, each followed by a comment, like the report by Mr. Spiropoulos on the Draft Code of Offences against the Peace and Security of Mankind, so that they would be ready for submission to Governments or to the General Assembly.

79. He thought that all members of the Commission were agreed that the Commission could not prepare an absolutely complete code on the régime of the high seas; but he hoped that the text submitted in the following year would be an integral whole. The Commission might then proceed to deal with one or two topics which it had not yet considered.

80. Mr. SCELLE, agreeing with Mr. Kerno's suggestion, said that his own report had been submitted in that form, except that the comments preceded the articles; but the order could easily be changed.

81. He would like to ask Mr. François whether it might be possible to deal with the question of territorial waters in the following year. In his view, the question of the high seas could hardly be discussed without mentioning territorial waters. He himself could find no material distinction between territorial waters and the high seas.

82. Mr. CORDOVA, agreeing with Mr. Scelle, thought that the limit of territorial waters should be stated in relation to the high seas and vice versa. He might add that the General Assembly had specially stressed the question of territorial waters and he did not see how the Commission could abstain from considering the question.

83. The CHAIRMAN pointed out that the subject was a wide one to entrust to Mr. François before it had been examined by the Commission.

84. Mr. FRANÇOIS said that he had understood that the Commission intended to direct another special rapporteur to study the question.

85. Mr. KERNO (Assistant Secretary-General) said that the majority of the members of the General Assembly regarded the high seas and territorial waters as related topics, which explained why the Assembly, on the proposal of Iceland,[4] had requested the Commission to give priority to the study of the régime of territorial waters. The original proposal had, of course, been whittled down so as not to compel the Commission to deal with the two questions simultaneously. But after the lapse of two years it would be in accordance with the spirit of the General Assembly resolution[5] to take up the study of the question of territorial waters in the interval between the present session and the following one. He hesitated to make such a suggestion; but in view of the close link between the two problems he thought it essential that the same Rapporteur should deal with both. The Rapporteur could rest assured that he would receive every possible assistance from the Secretariat.

86. Mr. EL KHOURY, recalling a suggestion at the last session that the study on territorial waters should be entrusted to Mr. François, said that the time was ripe for the decision which had not been taken then.

87. Mr. YEPES thought that the Commission should request Mr. François to agree to undertake the report on the régime of territorial waters, since the two subjects were so closely interwoven that they must on no account be treated from different points of view. Mr. François had already acted as Rapporteur on the régime of territorial waters at the Codification Conference held at the Hague in 1930.

88. The CHAIRMAN noted that the Commission was unanimous in requesting Mr. François to undertake the report.

89. Mr. FRANÇOIS replied that he would do his best.

Examination of the draft report of the Commission covering its third session

CHAPTER II: RESERVATIONS TO MULTILATERAL CONVENTIONS (A/CN,4/L.22)[6]

90. Opening the discussion on document A/CN.4/L.22, the CHAIRMAN said that the first five paragraphs should evoke little comment from members, since they stated facts and reproduced texts.

91. Mr. YEPES thought that chapter II of the draft report was merely a repetition of the decisions adopted by the Commission. Although it should be a true reflection of the Commission's proceedings, it did not report discussions. While no error was to be found in the document before the Commission, it dealt with only one aspect of the question. It did not contain the arguments in support of the procedure followed by the Pan-American Union, and a perusal of it would suggest that the Commission had regarded that procedure as absurd.

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[4] *Official records of the General Assembly, Fourth session, Sixth committee*, 163rd meeting, para. 19.

[5] General Assembly resolution 374 (IV) of 6 December 1949.

[6] Mimeographed document only, the text of which corresponds with drafting changes to chapter II 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 125th and 126th meetings.

91a. The Commission's report covering its previous session had reproduced the arguments in support of the various viewpoints, without naming the advocates of those viewpoints, which was as it should be. But the General Assembly would not be aware from chapter II of the present report that a discussion had taken place, but would gather that the Commission had unanimously agreed that the procedure followed by the Pan-American Union, although suited to the needs of countries maintaining close relations with each other, was not such as to secure universality. Yet the contrary view had been defended and it had also been held that the formula adopted by the Commission implied the introduction of the veto, although that argument had been described as ridiculous by other members.

92. In the previous year the Sixth Committee of the General Assembly had stated the opposing arguments and explained the attitudes of the various delegations in its report on the same subject (A/1494).[7] The text before the Commission seemed to suggest that there had been but one school of thought in the Commission; it was a truthful account but it did not state the whole truth.

93. Mr. CORDOVA, speaking as General Rapporteur, pointed out that the Commission had examined, amended and approved every paragraph of the draft report.[8] The final text had been given the form of a chapter for the Commission's general report.

94. Mr. HUDSON pointed out that the Commission's proceedings were recorded in detail in the summary records. In his view, the rapporteur should report only the conclusions reached by the Commission.

95. Mr. KERNO (Assistant Secretary-General) thought that a distinction should be drawn between the reports of the Commission and those of the Sixth Committee. Mr. Yepes' remarks were largely true of the reports of the Sixth Committee; but it should be emphasized that the reports of the International Law Commission had been differently arranged from the outset, a fact which, he might add, had at times led certain members of the Commission to submit individual comments for insertion as footnotes. For example, in Part III of the report of the Commission covering its second session devoted to the formulation of the Nürnberg Principles,[9] the particular views of Mr. Alfaro, Mr. Hudson and Mr. Scelle had been given in footnotes. Members who did not approve certain parts of the present report would be entitled to submit reservations in that way.

96. Mr. AMADO observed that, if certain personal views dissenting from the Commission's findings were given in the report, all members would doubtless feel compelled to request the insertion of additional passages explaining their own views in detail. The problem was different for the Committees of the General Assembly, whose members were representatives of States, which sometimes wished to clarify their respective viewpoints in order to obviate misunderstandings during subsequent negotiations. Moreover, delegations acting on instructions from their Governments expected the report to show that they had expressed views in accordance with their instructions.

97. The insertion in the report of the International Law Commission of any individual opinion, however interesting, would tend to introduce a note of ambiguity into what was an absolutely clear text. The report should only record the conclusions reached by the Commission in its corporate capacity. Other opinions were best given in the form of footnotes.

98. Mr. SANDSTRÖM proposed that, in accordance with Mr. Kerno's suggestion, members who so desired should have their dissenting opinions included in the report as footnotes.

99. Mr. YEPES said that he would not care to have to adopt such an offensive procedure. He had no desire to dissociate himself from the decisions adopted, but merely requested that the Commission present both sides of the question. In its present form the draft report was a one-sided argument, a report by the majority of the Commission.

100. Mr. HUDSON pointed out that the report was, in fact, an apologia, but one in defence of the Commission's standpoint.

101. Mr. SCELLE, supported by Mr. CORDOVA and Mr. ALFARO, thought that those members who wished to submit amendments should do so progressively as the Commission proceeded with the reading of the draft report. At all events, the Rapporteur could not be asked at the outset to abandon the drafting method which he had used.

102. The CHAIRMAN proposed that the Commission proceed to a detailed study of the draft report, paragraph by paragraph.

Paragraphs 1 and 2 (paragraphs 12 and 13 of the "Report")

Paragraphs 1 and 2 were adopted without comment.

Paragraph 3 (paragraph 14 of the " Report ")

103. Mr. SANDSTRÖM questioned the point of the words " at least ", in paragraph 3, line 7.

104. Mr. SCELLE thought the expression was meaningless. To say " at least of all parties " was, in a way, tantamount to saying that the minimum requirement was the maximum.

105. Mr. HUDSON pointed out that, apart from States parties to a treaty, there were also the signatory States which had not ratified.

106. Mr. SANDSTRÖM was satisfied with Mr. Hudson's explanation.

Paragraph 3 was adopted.

Paragraph 4 (paragraph 15 of the " Report ")

Paragraph 4 was adopted without comment.

Paragraph 5 (paragraph 16 of the " Report ")

107. Mr. HUDSON proposed the deletion of the words " foregoing " before " advisory opinion ", " of four and one judge respectively ", of " all " and " great " in the

[7] *Official records of the General Assembly, fifth session, Annexes*, agenda item 56, pp. 24–29.

[8] From its 100th to 106th meetings.

[9] *Official records of the General Assembly, Fifth Session, Supplement No. 12* (A/1316).

phrase " all these opinions with great care " in the final sub-paragraph of paragraph 5.

108. The CHAIRMAN said that it was of value to state the number of dissenting judges.

109. Mr. HUDSON proposed, having regard to the Chairman's observation, that the words " of four and one judge respectively ", the deletion of which he had proposed, be retained with a slight amendment, namely, the insertion of the word " judges " after the word " four ".

Paragraph 5 was adopted as amended.

Paragraph 6 (paragraph 17 of the " Report ")

110. Mr. HUDSON requested that the reference to the advisory opinion of the International Court of Justice, following the two quotations be made more precise. In addition, he proposed the deletion of the word " naturally " in line 1 of the final sub-paragraph, and of the words " irrespective of " in line 6 of the same sub-paragraph.[10]

Paragraph 6 was adopted with the above amendments.

Paragraph 7 (paragraph 18 of the " Report ")

111. Mr. HUDSON proposed the deletion of the introductory words " It is to be noted that, . . .".

It was so agreed.

Paragraph 7 was adopted as amended.

Paragraph 8 (paragraph 19 of the " Report ")

112. Mr. YEPES proposed the addition of the following text to paragraph 8:

> " The view was expressed in the Commission that the practice followed by the United Nations — which is the same as that formerly followed by the League of Nations — implies the introduction of the veto in a sphere where it would be inadmissible, namely, the General Assembly. This view was not shared by the majority of the Commission."

113. Mr. KERNO (Assistant Secretary-General) pointed out that paragraph 8 was not a record of the discussions which had taken place in the Commission concerning the practice followed by the Secretary-General. Paragraph 8 did not concern the Commission's criticisms of or comments on that practice, so that the addition requested by Mr. Yepes would be out of place.

114. Mr. YEPES, while agreeing with Mr. Kerno's interpretation, reserved the right to request the insertion at a later stage of the text he had proposed.

115. Mr. SCELLE thought that before paragraph 9 was discussed, which concerned the practice followed by the Pan-American Union, mention should be made of the practice followed with regard to reservations to the Conventions included under the auspices of the International Labour Organisation, which had been the subject of a memorandum from the International Labour Office to the International Court of Justice.[11] It had been held that the said practice made no allowance for reservations. In his view, however, the introduction of " exceptions " into conventions enabled States to achieve the same results as if they had made reservations, but with the immense improvement that their reservations were approved by all the negotiators. The same situation arose where the text of a law contained saving clauses in favour of certain categories of persons. In accordance with the practice to which he had referred, it was the organ responsible for preparing the draft convention that judged whether or not the reservations were compatible with the object of the convention. The practice was, in some respects, an ideal one and might be recommended both to organs of the United Nations and to the specialized agencies, if the aim was to promote international legislation. Conventions concluded under the auspices of those international organizations frequently came into force after the second ratification. When that was so, the tender of reservations would disturb the whole economy of the convention. It was therefore preferable to provide for the right to include exceptions in the text of conventions rather than to permit the tender of reservations. That practice was so valuable that it was strange that the draft report made no mention of it.

116. The draft report recommended, and very rightly, that in the specialized agencies any signatories to a Convention should if possible agree beforehand as to reservations. That would be following in the footsteps of the International Labour Organisation. It should therefore be stated in the report that the practice adopted by the latter had been carefully examined by the Commission.

117. Mr. KERNO (Assistant Secretary-General) thought that the best place for a reference to the practice followed by the International Labour Organisation with regard to reservations might perhaps be in paragraph 15, sub-paragraph 1, which concerned a similar procedure. The reference could be included by means of a mere drafting change.

118. Mr. SCELLE said that he favoured the insertion of the reference concerned at that point in the report, the more so since the Commission would thereby be compelled to express a valuable opinion on the practice in question and to state that it was an ideal system which seemed to be gaining ground and resulted in the promotion of legislation that was equal for all parties.

119. Mr. HUDSON, supported by Mr. AMADO, requested Mr. Scelle to submit to the Commission a draft text amending paragraph 15.

Paragraph 8 was adopted.

Paragraph 9 (paragraph 21 of the " Report ")

120. Mr. HUDSON requested the deletion of the word " best " in " as best described " in the first sub-paragraph,

[10] The last sub-paragraph of paragraph 6 read as follows:

" In the second place, the Court naturally gave its advisory opinion on the basis of its interpretation of the existing law. The Commission, on the other hand, has been asked to study the question ' both from the point of view of codification and from that of the progressive development of international law '. The Commission therefore feels that it is at liberty to suggest the rules which it considers the most convenient for States to adopt for the future, irrespective of whether or not such rules represent rules of law existing today."

[11] *I.C.J.* Distr. 51/10, pp. 212–278.

and of the word " only " in " may only delay " in the third sub-paragraph. He also proposed the insertion, after the words " the proposed reservation " in the third sub-paragraph of the phrase:

" . . . and until the reserving State has an opportunity to consider any observations made by other States."

121. The addition he proposed was designed to complete the commentary accompanying the preceding quotation. When the reserving State had considered the objections submitted, it might be inclined to withdraw its reservation.

After some discussion, the three amendments proposed by Mr. Hudson were adopted.

122. Mr. YEPES, having drawn the Commission's attention to the sentence beginning "Thus the tender of a reservation . . .", in the third sub-paragraph, pointed out that the aim of the system followed by the Pan-American Union was not merely to delay the deposit of the instrument of ratification, but also to induce the reserving State to consider the advisability of withdrawing its reservations.

123. Mr. HUDSON said that the phrase added by the Commission allowed for that eventuality.

124. Mr. LIANG (Secretary to the Commission) pointed out that the word "become" after "and thereby" in the third sub-paragraph should read " becoming ".

Paragraph 9 was adopted as amended.

Paragraph 10 (paragraph 22 of the " Report ")

125. Mr. SCELLE pointed out that the second sentence of paragraph 10 gave the impression that the practice followed by the American State was the opposite to what it should be. In view of the close bonds existing between those States they should, apparently, be able to refrain from making reservations. In that respect the report expressed what would appear to be an illogical idea. He thought that the second sentence of the paragraph should be abbreviated to read as follows:

" The States of the Pan-American Union have adopted the procedure which they regard as suited to their needs."

126. The CHAIRMAN suggested that Mr. Scelle's requirements could be met by a mere change of punctuation, namely, the substitution of a comma for the full stop after the phrase " a special position ", and the substitution of a full stop for the comma after the phrase " the general body of States ".

127. Mr. SCELLE, although doubtful as to the effect of those changes, accepted the Chairman's proposal.

It was so agreed.

128. As a result of an observation by Mr. LIANG (Secretary to the Commission) *it was decided* to substitute the phrase " to ensure the greatest possible number of ratifications " for the phrase " to increase the number of ratifications ", in the third sentence.

129. Mr. YEPES proposed the following amendment:

" The view was expressed in the Commission that if the system followed by the Pan-American Union was practicable for a community of States such as the Organisation of American States, the bonds between which were very close, it might *a fortiori* be applied to a wider and more loose-knit community such as the United Nations. It had also been held that the system followed by the Pan-American Union might be deemed to represent the existing law on the subject since it is accepted by the majority of the States Members of the United Nations. This view was not shared by the majority of the Commission."

130. Mr. SCELLE thought that it would be dangerous to present the system followed by the Pan-American Union as the only existing system in international law.

131. Mr. HUDSON, pointing out that Mr. Yepes merely requested a reference to the fact that such an opinion had been expressed, hoped that Mr. Yepes would be prepared to withdraw his proposal. He himself did not consider it necessary that all the opinions expressed should be mentioned in the report. The reader could obtain all the information he required from the summary records.

132. Mr. YEPES requested that his opinion be included in the report in a footnote.

133. Mr. HUDSON pointed out that Mr. Yepes' request for such a footnote would suggest that he was opposed to chapter II of the report as a whole.

134. The CHAIRMAN thought it was only after reading the whole report that members could decide, in full knowledge, what footnotes they wished to add.

135. Mr. YEPES said that he did not request a vote on his amendment.

136. Mr. HUDSON proposed the substitution of the phrase " are more important considerations " for the phrase " is a more important consideration " in the sixth sentence.

It was so agreed.

137. Mr. SCELLE proposed the substitution, for the fifth and sixth sentences of the following: " There are cases where the integrity of the convention is a more important consideration and others where its universality is more important ". The importance of the integrity and the universality of a convention varied, not with the type or subject of the convention, but with circumstances. Political considerations were sometimes responsible for the desire for universality gaining the day over the desire for uniformity.

138. Mr. HUDSON and the CHAIRMAN emphasized that the substance of the convention itself and external circumstances were alternately responsible for considerations of universality gaining the day over considerations of uniformity. The text proposed excluded neither of those possibilities.

139. Mr. SCELLE did not press his point.

140. Supported by Mr. YEPES, he requested the deletion of the word " often " in the phrase " These conventions are often . . .", in the seventh sentence. In his view, conventions prepared under the auspices of the United Nations were always of a law-making type. He had formed that opinion, which was a purely personal one, as a result of his investigations. He would ask those members who disagreed with him when such conventions

were not of a law-making type, and, in that case, of what type they then were.

141. After some discussion, in which Mr. LIANG (Secretary to the Commission) and Mr. KERNO (Assistant Secretary-General) took part, Mr. SCELLE requested a vote on the deletion of the word " often ".

It was decided, by 5 votes to 3, to delete the word "often".

142. Mr. YEPES requested the deletion of the last two sentences in paragraph 10, which he regarded as a criticism of the practice followed by the Pan-American Union in the matter of reservations.

143. Mr. CORDOVA, speaking as General Rapporteur, observed that the sentences in question explained the grounds for the Commission's rejection of the Pan-American Union practice.

The proposal for the deletion of the last two sentences in paragraph 10 was rejected.

144. Mr. YEPES requested the Commission to add to the end of the paragraph the text concerning the practice of the veto, which he had previously read out.[12] Other members of the Commission had also supported the same idea.

Mr. Yepes' proposal was rejected by 4 votes to 2.

Paragraph 10 was adopted with the various amendments above-mentioned.

The meeting rose at 6.15 p.m.

126th MEETING

Tuesday, 17 July 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.

[12] See para. 112 above.

Examination of the draft report of the Commission covering its third session *(continued)*

CHAPTER II: RESERVATIONS TO MULTILATERAL CONVENTIONS (A/CN.4/L.22) [1] *(continued)*

Paragraph 11 (paragraph 23 of the " Report ")

1. Mr. HUDSON suggested deleting the word " Moreover " in the third sentence, and that the sentence run: " It was left to each State party to the convention to apply the criterion of compatibility" instead of "Moreover, it was for each State . . .". He also suggested deleting the word " indeed " in the last sentence, after the phrase " In its answer to question II, the Court . . .".

The above amendments were adopted without comment.

Paragraph 12 (paragraph 24 of the " Report ")

First sentence.

2. Mr. HUDSON suggested the wording: " The Commission believes that the criterion . . . is not suitable . . ." instead of " The Commission does not believe that the criterion . . . is suitable ".

3. Mr. SCELLE thought the words " applied by the International Court of Justice to the Convention on Genocide " should be deleted. He saw no reason why that should be repeated.

4. Mr. KERNO (Assistant Secretary-General) agreed that the proposed change made the sentence less ponderous, but he thought it might be a good idea to reiterate that the Court had given an opinion on an actual case.

5. Mr. SCELLE thought that the Commission would hardly wish to run counter to the Court's Opinion so obviously.

Second sentence

6. Mr. HUDSON did not think the latter part of the sentence was very convincing. A convention might have protocol clauses which could not be regarded as contributing to effect its object and purpose. In his opinion, the sentence should stop after the words " from part of its object and purpose ".

7. The CHAIRMAN proposed that the first part of the sentence, as far as the words " and those which do not form part of its object and purpose ", be fused with the third sentence to be introduced by the word " but ".

It was decided to delete the second part of the second sentence [2]; the Chairman's proposal was not adopted.

Third and fourth sentences

8. Mr. HUDSON suggested that the word " however " after " even ", at the beginning of the fourth sentence, be deleted.

It was so decided.

9. Mr. SCELLE said he did not like the words " and those which do not " in the third sentence. It had after all just been stated that it was quite unusual for the

[1] See summary record of the 125th meeting, footnote 6.

[2] The second part read as follows: " and the Commission finds some difficulty in understanding why the parties should include in a convention provisions which they do not regard as contributing to effect its object and purpose."