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Summary record of the 227th meeting

Topic:
Adoption of the report

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the end of its first session, held in New York in the spring of 1949.

“When the question of deciding the date and place of the third session came up in 1950 there was some discussion with regard to the place, and the opinion of the great majority of the members of the Commission was that the third session, or rather all sessions of the Commission, should be held in Geneva. The only reason taken into account for holding the meetings in New York was the information given by the Office of the Secretary-General that holding the meetings in Geneva caused an extra expenditure of some ten or twelve thousand dollars in transportation of personnel and material. In favour of Geneva it was maintained that the quiet atmosphere of the city was more propitious to the kind of work the members of the Commission have to perform; that the meetings were held far away from the disturbing agitation of political debates in the General Assembly and in the First Committee; that library facilities at the European Office of the United Nations, with material gathered and organized since the days of the League of Nations, had proved to be unsurpassed; that inasmuch as it was necessary to hold the meetings during the summer, consideration should be given to the fact that climatic conditions in New York at that time were exacting to the point of interfering with the health and working capacity of the members of the Commission, whereas climatic conditions in Geneva were quite healthy and agreeable; and finally, that any added expenditure caused by meeting in Geneva would be fully compensated by more fruitful labours and more satisfactory results.

“It could be seen during this discussion that no member of the Commission had any objection against holding the meetings in Geneva, while on the other hand some members did object to New York, in terms which showed that holding the meetings at Headquarters would certainly lead to absences which would seriously affect the work of the Commission. Two or three members stated that they would not object to the meetings being held in New York, but that they were satisfied if the majority decided to hold them in Geneva. Finally, at the fourth session, when the matter was first discussed two or three members abstained from voting one way or the other, but at the meeting at which the question was finally decided, they voted in favour of Geneva and no vote was cast in favour of New York. It may thus be averred that the unanimous view of the members of the Commission today is that all meetings of the Commission should be held in the city of Geneva.”

77. That statement had arrived in New York too late for presentation to the Committee, but the Secretary had previously submitted similar observations in response to a request by the Committee.

78. As, in the Commission's view, those reasons were still valid, the only question now was that of adjusting the date of the session so that it did not overlap with the Economic and Social Council.

79. Mr. SANDSTRÖM said that, although he realized that he might well not be re-elected, he felt it his duty to draw attention to the particular difficulty with which he was faced. He had to attend the meetings of the Board of Governors of the League of Red Cross Societies. In 1954 the meeting would take place in Oslo, and it had been suggested that it should be held in June. At his request, in order to avoid clashing with the start of the International Law Commission's session, the date of the Oslo meeting had been brought forward to the last ten days of May. If, after all, the session of the International Law Commission began in mid-May, and not at the beginning of June, he would therefore be unable to attend during the first fortnight.

80. Mr. SCALLE said that the Commission had a duty to consult the Secretary-General on the place of its sessions, but that it was for it itself to decide. The Commission had taken a decision to which the Secretary-General now raised objections. Some of those objections were perhaps valid, although the estimate of the additional financial implications of the Commission's decision was, to put it mildly, open to question. The Commission could, if it wished, change its decision, and from his point of view it would be more convenient if the session began at the end of May. The length of the session could perhaps be cut. Once taken, however, the new decision must stand.

81. Mr. KOZHEVNIKOV pointed out that the whole question was complicated by the fact that the Commission did not know who would be the members, or what would be their views, in a year's time. He personally was still in favour of sessions in Geneva, but at the same time he would not have any objections to meeting in New York if the Commission so decided.

82. Mr. AMADO wondered whether, in comparing the cost of sessions in Geneva and New York, Headquarters had taken into account the travel expenses of the Commission's members as well as those of its Secretariat.

83. Faris Bey el-KHOURI said that he understood the only objection to the Commission's session overlapping with that of the Economic and Social Council was that it necessitated the engagement of a few temporary staff. That was surely a small matter when viewed in the light of the Commission's clearly expressed opinion as to how it could most effectively perform the tasks for which it had been established.

The meeting rose at 1.5 p.m.

227th MEETING

Thursday, 30 July 1953, at 9.30 a.m.

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Chairman: Mr. J. P. A. FRANÇOIS.

Rapporteur: Mr. H. LAUTERPACHT.

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Roberto CORDOVA, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

Secretariat: Mr. Yuen-li LIANG, Director of the Division for the Development and Codification of International Law, and Secretary to the Commission.

Date and place of next session (*continued*)

1. The CHAIRMAN invited the Commission to continue its discussion on the date and place of its next session.
2. Mr. LAUTERPACHT explained his personal position. The University term at Cambridge did not finish until about 10 June, and if he was re-elected to the Commission he would therefore be unable to come to Geneva before 1 June at the very earliest. As the question affected him personally, he had refrained from speaking at the previous meeting. However, so long as he was a member of the Commission, he had a share in the work of the Commission as a whole and a measure of responsibility for it. It was indefensible to deprive any member of the Commission of the opportunity to participate fully in the work of the Commission. He was not the only member of the Commission who would be unable to attend earlier than 1 June, and it was clearly most undesirable, from the Commission's point of view, that some of its members should not arrive until the work was under way. It was equally undesirable to fix a date which, if followed generally, would make it impossible for members actively engaged in the teaching of international law to attend all the meetings of the Commission.
3. The objections to the Commission meeting between the beginning of June and the end of August were of a financial and administrative character, and he did not think that decisive importance could or should be attached to them. The General Assembly had elected the members of the Commission to fulfil an important duty in conformity with the United Nations Charter, and it must be left to them to decide the manner in which they could most efficiently discharge it, subject only to compelling and obvious reasons of economy. It would be improper for the Commission to abdicate its responsibilities in that respect.
4. The message received from United Nations Head-

quarters referred to an eight-weeks' session. In his view, that would be quite inadequate. The Commission was already seriously in arrears; it had only touched the fringes of the report on the régime of the high seas, which had been before it for two years; the question of the régime of the territorial sea it had dealt with only sketchily; the fact that it might complete its work on statelessness did not mean that it had exhausted the whole subject of nationality; and the law of treaties was sufficient in itself to provide work for two or three sessions of eight weeks' duration. In addition, it had only considered four of the fourteen subjects which it had selected at its first session for codification. He therefore considered it imperative that sessions should last eleven weeks, like the present one. It was only because the present session had lasted eleven weeks that the Commission had been able to produce results which would show the General Assembly its potentialities.

5. Mr. SANDSTRÖM agreed that the fact that the members of the Commission had been invited, in their capacity as experts in international law, to render the United Nations certain assistance did not make them employees of the United Nations. Every effort should therefore be made to meet their wishes so far as possible. He did not, of course, claim that the Commission should have priority over all other United Nations organs, but it should at least be considered as of equal standing with the Economic and Social Council.

6. He supported the suggestion that an attempt should be made to persuade the Council to postpone its session by a week or two.

7. Mr. YEPES agreed with Mr. Lauterpacht that the Commission should not show undue concern for financial considerations. He also agreed that a short session would not suffice for its work. Indeed, having proposed that it should be in permanent session, it could hardly now agree to the length of its sessions being reduced.

8. Mr. SCELLE agreed that the Commission would be going back on its former attitude if it now tamely accepted what had been called "rump" sessions. He also agreed that the responsibility for deciding the date and place of its next session could rest with no one but the Commission itself. He could see no valid objections to the Commission and the Council sitting concurrently, as indeed they were doing at the present. Neither interfered with the other's work, and the temporary staff who had been engaged were perfectly satisfactory.

9. Mr. SPIROPOULOS agreed that in theory it would be desirable for the Commission to meet for so long as Mr. Lauterpacht had suggested, but in the circumstances he felt that, unless it wished to go to New York, it had no choice but to reduce the length of its sessions. The present session had been abnormally long. If the length of the Commission's session were reduced and the opening date of the Economic and Social Council's session postponed, even by a week, as he still thought might be possible, the overlapping would be slight and the additional expenditure incurred would be much less than the 25,000 dollars suggested by the Secretariat.

10. Mr. LIANG (Secretary to the Commission) pointed out that it was the Commission itself which had decided tentatively that its next session should last for approximately eight weeks, possibly because it had not wished to overlap too long with the General Assembly. From his own experience, he feared that eight weeks might not be sufficient.

11. He agreed that the Commission was an independent body to the extent that its consideration of questions of substance was concerned. However, from the place which it occupied in the United Nations hierarchy, it was clear that it was subject to the General Assembly in questions of administration and finance, just as on the national level any body of experts was subject in questions of administration and finance to the body which had established it. Nor could it be denied that the General Assembly had so far been generous to the Commission in administrative and financial matters; it might have insisted that the Commission meet at Headquarters, in accordance with article 12 of its Statute; if it had not done so, it was probably because it realized that the only time when the Commission could conveniently meet was in the summer, and because it accepted the Commission's argument that conditions in New York in the summer were not conducive to maximum efficiency.

12. If, as seemed to be the case, the Commission still wished to meet in Geneva, he suggested that it could only convene at a time well ahead of 1 June in order that any overlapping with the Economic and Social Council might be avoided. It had been argued that certain members would be unable to attend before 1 June; but in 1951 the Commission had met in May, and, however much absences were to be regretted, they were sometimes unavoidable; for example, one member of the Commission had been unable to attend the closing weeks of the present session. He hoped, however, that the Commission would see its way to holding its next session in New York.

13. Mr. HSU felt that it was very undesirable to shorten the session further, and equally undesirable to fix its date in such a way that either university professors or members of delegations to the General Assembly would be unable to attend the whole of it. The only objection to holding the session in Geneva from the beginning of June to the middle of August was that it would run concurrently with the Economic and Social Council, and thereby entail additional expenditure. That objection could easily be overcome, however, if a few influential governments could be persuaded that the extra money would be well spent. Alternatively, the Commission might consider the possibility of dividing its annual session into two, sitting for six weeks in Geneva during the summer and for four to six weeks in New York after the close of the General Assembly.

14. Mr. CORDOVA said that, in the circumstances, the wisest course would perhaps be to meet in mid-May as the Secretary had suggested, and devote the first fortnight to discussing some question for which the absence of those members who were detained elsewhere, how-

ever regrettable, would not be an insuperable obstacle, for example, the régime of the high seas.

15. Mr. ZOUREK said that although he had no objections in principle to the Commission's sessions being held in New York, he agreed that working conditions made Geneva preferable in summer. With regard to the date, he felt that the Commission should put personal considerations aside and be guided solely by objective considerations, particularly in view of the fact that its membership in 1954 would be different. He also thought that it should try so far as possible to fit in with the programme which had been approved for other United Nations bodies.

16. Mr. LAUTERPACHT said that he was just as interested in the régime of the high seas as in the law of treaties, and that he had the same general responsibility for one subject as for any other. Some absences were unavoidable, but it seemed quite unreasonable to decide that the session should begin at a date when it was already known that at least three members would be unable to attend. For he understood that besides himself and Mr. Sandström, Mr. Pal would also be unable to come to Geneva before the beginning of June. He (Mr. Lauterpacht) would support any proposal to the effect that the Commission should meet in Geneva for ten to eleven weeks, starting at the beginning of June, and that it should be left to the Chairman to work out the necessary arrangements with the Secretariat.

17. Mr. SPIROPOULOS pointed out that such a decision would flatly contradict the terms of General Assembly resolution 694 (VII). In the event of conflict between the Commission and the General Assembly, it was possible that the General Assembly might yield, but it was much more likely that it would not, in which case it would have no choice but to fix the date of the Commission's session with no further reference to the wishes of its members.

18. Mr. LIANG (Secretary to the Commission) pointed out that article 12 of the Statute stated that if the Commission wished to sit elsewhere than at United Nations Headquarters, it should first consult the Secretary-General. It was therefore the Secretariat's duty to offer its advice to the Commission.

19. Each time that the Commission decided to meet in Geneva, the additional expenditure incurred had to be budgeted for in a supplementary budget which was prepared by the Secretary-General and submitted first to the Advisory Committee on Administrative and Budgetary Questions, and then to the Fifth Committee of the General Assembly. Except for the first year, when Judge Manley O. Hudson, then Chairman of the Commission, had appeared before the Advisory Committee to justify the Commission's decision, that task had fallen to himself. It was for the Advisory Committee first to approve the additional appropriation, though it had sometimes reduced the Secretary-General's estimate. The Fifth Committee had then to approve it, and that was done, though sometimes by a small majority. It had again fallen to him and to other members of the Secre-

ariat to explain to the Fifth Committee why the Commission did not wish to meet in New York, as was stipulated in its Statute. He had explained, *inter alia*, that if the Commission sat in New York during the summer, it seemed likely that several of its members would not attend, and that if it sat there at any other time several others would be unable to attend owing to their other occupations. He must frankly state, however, that those explanations were not always favourably received. In those circumstances, it would seem prudent for the Commission to adopt a somewhat more conciliatory attitude. On the present occasion, moreover, it could be argued that it was for the new members of the Commission, to be elected by the General Assembly, to decide whether they wished the next session to be held anywhere else than at Headquarters.

20. He did not of course intend to criticize the decision of the Commission that it should decide upon the time and place of its next session on the principle of the continuity of its functions.

21. Mr. AMADO said that he could confirm all that the Secretary had said, and that he wished to take the opportunity of paying tribute to the zeal with which the Secretariat had defended the Commission's decisions before the General Assembly. It was not always easy for the Secretariat to do so. Nor was it easy for those members of the Commission who were also members of delegations to the General Assembly to convince their colleagues on the Fifth Committee of the reasons for the Commission's decisions. The absence of any member of the Commission for any part of a session, however short, was deeply regrettable, but the Commission must face the fact that the final decision did not rest with it, but with bodies which did not perhaps attach the same importance to its work as it did itself.

22. The CHAIRMAN, summing up the discussion, suggested that the Commission should reply along the following lines to the teleprinter message received from the Headquarters Secretariat:

23. That for the reasons given in Mr. Alfaro's memorandum,¹ it did not consider it conducive to efficiency in its work to meet in New York; that it had doubts about the figure of 25,000 dollars mentioned by the Headquarters Secretariat, but did not intend to embark on discussions on that point; that although the decision which it had taken at its 189th meeting was in accordance with the terms of General Assembly resolution 694(VII), it recognized that certain of the objections now raised to that decision were well-founded; that it was therefore prepared to convene on Monday 17 May (or on Monday 31 May) in order that overlapping with the Economic and Social Council should be kept to the minimum; but that, in view of the fact that the minimum length of the session should be eight weeks, a certain amount of overlapping would result, although it could of course be avoided (or reduced) if arrangements could be made for the Council's session to be postponed for one or two weeks.

24. If his suggestion was acceptable, the only question which remained to be decided was whether the Commission agreed to meet in Geneva on Monday 17 May 1954.

It was agreed by 11 votes to none, with 2 abstentions, to meet in Geneva on Monday 17 May 1954.

25. Mr. LAUTERPACHT explained that, as it affected him personally, he had abstained from voting; he would otherwise have voted against the session's being convened on 17 May, since that would prevent the attendance of university teachers of international law who were unable to get leave of absence.

26. In other respects he could accept the Chairman's suggestion, except that he considered eight weeks was insufficient, for the reasons he had explained at the outset of the meeting.

27. Mr. SPIROPOULOS, seconded by Mr. ALFARO, proposed that the Commission state that provision should be made for a session lasting ten weeks.

Mr. Spiropoulos' proposal was adopted by 10 votes to 3.

Proposal by Mr. Yepes for an exchange of views on the law of treaties

28. Mr. YEPES recalled that he had often urged that priority should be given to the law of treaties, but the Commission had not yet had an opportunity of discussing it or the interesting report on it which Mr. Lauterpacht had presented (A/CN.4/63). He therefore proposed that one or two meetings at the present session should be devoted to a general exchange of views, which could then be summarized in the Commission's report. The legal world was waiting to know where the Commission stood on what was perhaps the fundamental problem of international law. He was not one of those who regarded international treaties, in other words the will of the State, as the supreme source of all international law, but he did feel that the Commission ought to give some priority to the study of the law of treaties, even if only because of the overriding importance attached to the subject by a whole school of international law.

29. The CHAIRMAN pointed out that, unless the Commission's consideration of its report was greatly accelerated, it would be unable to complete its work in time, unless it met on Saturdays. If one or two meetings were to be devoted to another subject, it would certainly have to meet on at least one or two afternoons in addition. Before it agreed to do so, it should consider whether it would in fact be of such value to devote so short a time to a general exchange of views on a report and on a subject whose importance no one could deny. It would be particularly interesting to hear Mr. Lauterpacht's view on that question.

30. Mr. YEPES said that he would phrase the question differently. Did Mr. Lauterpacht think it would be useful for him to hear the views of the other members of the Commission on his report?

¹ See *supra*, 226th meeting, para. 76.

31. Mr. LAUTERPACHT said that that would certainly be of the greatest value to him, but that the question was whether it was physically possible for all the members of the Commission who had views on the subject to express them on all the articles of his draft. If the discussion were limited to one or two meetings, he feared that not more than three or four members would have an opportunity of doing so.

32. Mr. AMADO felt that the comments which could be made at one or two meetings would be so general as to be of little use.

33. Mr. KOZHEVNIKOV said that the subject of the law of treaties was of great importance and required very careful study. It would be unwise to deal with it hastily or superficially, but an exchange of views on the fundamental principles underlying Mr. Lauterpacht's report would be useful if there were time. It was, however, too early to decide that question.

34. Mr. SPIROPOULOS shared the doubts expressed about Mr. Yepes' proposal.

35. Mr. YEPES withdrew his proposal, but suggested instead that the members of the Commission should be invited, if they so wished, to submit their views on the subject in writing to the Special Rapporteur, and that any such memoranda should be reproduced and distributed as Commission documents.

36. Mr. LAUTERPACHT said that it would be of great value to him to have such written memoranda from members of the Commission.

37. Mr. AMADO and Mr. SPIROPOULOS said that they could see no objections to Mr. Yepes' suggestion, although there was no reason why members should not submit memoranda on any subject and at any time, without being invited to do so.

38. Mr. KOZHEVNIKOV also felt that no decision by the Commission was required. Members were always free to submit memoranda, although memoranda could not have the same value as a live exchange of views.

39. Mr. YEPES said that he would not press his suggestion but that he hoped that the General Rapporteur would indicate in his report that the law of treaties would be given priority at the next session.

40. Mr. LAUTERPACHT said that he felt it right to refer in the general report on the present session to the discussion which had just taken place.

Consideration of the draft report of the Commission covering the work of its fifth session (resumed from the 226th meeting)

**CHAPTER II: ARBITRAL PROCEDURE (A/CN.4/L.45) *
(resumed from the 226th meeting)**

41. The CHAIRMAN invited members to continue

* Mimeographed document only. Incorporated with drafting changes in the "Report" of the Commission as Chapter II. (See vol. II of the present publication).

their consideration of the draft chapter on arbitral procedure, taking up paragraph 5.

*Paragraph 5 (13) ***

42. Mr. YEPES proposed that paragraph 5 be amended to read:

"The Commission was greatly aided in its work during the fifth session by the detailed commentary prepared by the Secretariat in accordance with a decision taken at the fourth session by reference to article 20 of the Statute. In the opinion of the Commission, that commentary, which contains an account and analysis of the existing practice in the matter of arbitral procedure and of available jurisprudence and doctrine, constitutes a valuable contribution to the study and the application of the law on arbitral procedure. After being revised and supplemented by the Secretariat in the light of the decisions taken by the Commission at its fifth session, the commentary should be published as a Commission document and sent to the General Assembly with the final draft on arbitral procedure."

43. The object of his amendment was to simplify the paragraph, which, as drafted, was too long and raised irrelevant issues—for example, the suggestion that there ought to be a series of commentaries prepared by the Secretariat to accompany any final drafts the Commission might present to the General Assembly. The Commission would realise from his suggestion that the Secretariat's commentary on the draft on Arbitral Procedure (A/CN.4/L.40) should be published as a conference document after appropriate revision, that he regarded it as of the greatest value. The original wording of paragraph 5, however, was open to the misinterpretation that the Commission bore full responsibility for the contents of the Secretariat's commentary.²

44. Mr. LAUTERPACHT said that he would not insist on his suggestion that commentaries prepared by the Secretariat should accompany all drafts submitted by the Commission to the General Assembly. He proposed, therefore, that the third sentence of paragraph 5 beginning: "Such commentaries, based on a systematic and critical examination...", be deleted, and that the

** The number within parentheses indicates the paragraph number in the "Report" of the Commission.

² Paragraph 5 read as follows:

[First two sentences unchanged]

"..."

"The Commission considers that, after the Secretariat has had the opportunity to revise and supplement the commentary by reference to the changes which occurred in the course of the fifth session and also in the light of any further study by the Secretariat itself, the commentary should be published as the first of the series of commentaries which, in the opinion of the Commission, ought to accompany or follow the final drafts presented by the Commission to the General Assembly. Such commentaries, based on a systematic and critical examination of the available practice, jurisprudence and doctrine may in themselves constitute a contribution, of considerable practical and scientific value, to the application and the study of international law."

second sentence of paragraph 5 be amended by the substitution of the words "by it" for the words: "as the first of the series of commentaries...", to the end of the sentence.

45. He was opposed to the suggestion that the Secretariat's commentary should accompany the final draft on Arbitral Procedure to the General Assembly. For one thing, the Secretariat ought to be allowed all the time it required for further studying and revising it. There was also the possibility that, if the commentary accompanied the final draft, some might think that the Commission bore responsibility for the substance of the commentary.

46. Mr. YEPES reminded the Commission that it had first been suggested two months previously that the Secretariat's commentary might be submitted to the General Assembly at the same time as the final draft. The Secretary had even said that the commentary could be revised and completed in time for that to be done, and he (Mr. Yepes) believed that it was, in fact, ready. If that was so, there was no reason why its publication should be further delayed.

47. Mr. LIANG (Secretary to the Commission) regretted that the Secretariat's commentary was not yet finished, for the Secretariat evidently could not give it final form until the Commission had formally adopted the text of the final draft on Arbitral Procedure. Moreover, the revision of the commentary would call for the more ample resources that were available at Headquarters particularly if, as had been suggested, additional matter was to be incorporated in it. The commentary would be available in due course.

48. Mr. YEPES agreed that the Secretariat should have time to revise the commentary. If, however, it were ready in time for consideration by the General Assembly at its eighth session, it should be presented simultaneously with the final draft of Arbitral Procedure.

49. Mr. SCELLE said that the object of the Secretariat's commentary was to summarize the situation with regard to arbitral procedure, and he, as Special Rapporteur, had greatly benefited from it. The historical and doctrinal analysis existed already in the current version of the Secretariat's commentary (A/CN.4/L.40), and not much new material need be added. It seemed to him that the Commission's needs would be met if Mr. Lauterpacht could see his way to accepting Mr. Yepes' amendment, with the deletion from the last sentence of the phrase "as a Commission document".

50. Mr. KOZHEVNIKOV said that, by the terms of article 20 of its Statute, the Commission was required to submit its comments with any final texts it might present to the General Assembly. The questions therefore arose: was the Secretariat's commentary to be considered as an official product of the Commission, and was the Commission itself to be responsible for its revision? For, although the Commission had not discussed the Secretariat's commentary, and though Mr. Lauterpacht had indeed said that the Commission could not assume responsibility for its substance, the wording of paragraph 5 permitted the conclusion to be

drawn that the Commission in effect adopted the commentary as its own.

51. The CHAIRMAN pointed out that the amendment suggested by Mr. Scelle to Mr. Yepes' substitute text for paragraph 5 would make it clear that the Commission had no responsibility for the substance of the commentary.

52. Mr. LAUTERPACHT said that that could be made even clearer, and Mr. Kozhevnikov's apprehension, perhaps, allayed by the deletion from the last sentence of Mr. Yepes' text of the phrase "and sent to the General Assembly with the final draft on Arbitral Procedure", in addition to the deletion already suggested by Mr. Scelle. Paragraph 5 would then simply acknowledge the assistance the Commission had derived from the commentary.

53. Mr. KOZHEVNIKOV was grateful for the Chairman's and Mr. Lauterpacht's elucidations. He pointed out, however, that the second sentence of the text proposed by Mr. Yepes contained the words "In the opinion of the Commission that commentary... constitutes a valuable contribution to the study... of the law on arbitral procedure." As the Commission had not discussed the commentary, it could form no opinion on it.

54. Mr. LIANG (Secretary to the Commission) said that the Secretariat did not expect that the commentary should be identified with the Commission in the sense that the Commission would be understood as having approved its substance. The Commission had, however, asked for it to be made, and was thus closely associated with its preparation. The Secretariat's work entitled: "Study of Statelessness" (E/1112)³ was, perhaps, analogous, in that it had been prepared and published at the request of the Economic and Social Council; nevertheless, the Council could not be held responsible for its content. Similarly, the commentary on the final draft on Arbitral Procedure would be published by the Secretariat, and the responsibility of the Commission would not be engaged.

55. Mr. CORDOVA agreed with Mr. Kozhevnikov that the Commission had taken no formal decision on the usefulness of the commentary. Surely, however, all members acknowledged that the commentary had been helpful to them in their work; and a statement to that effect was the only way of publicly recognizing the Secretariat's assistance.

56. Mr. ZOUREK recalled that in his draft report Mr. Lauterpacht had suggested the inauguration of the publication of a series of commentaries. He had subsequently withdrawn the suggestion as a general proposal, maintaining, however, that the particular commentary under consideration should be published. The Commission was thus invited to pronounce on the value of a document which it had not discussed. He feared that the Commission would be unable to adopt a positive attitude in the matter, for the commentary

³ United Nations publication, Sales No.: 1949.XIV.2.

was written entirely from the point of view of the majority of the Commission, and was therefore at variance with the principle of article 20 of the Commission's Statute. Instead of being drafted in support of the controversial majority view of the nature of arbitral procedure, the commentary would have presented the case in better perspective had it explained first the classical doctrine of arbitral procedure, then that the majority of the Commission thought that that doctrine did not meet present needs, and, finally, that some members had disagreed. In that way, both sides of the argument would have been given.

57. Was it the intention that the commentary should be published in its existing general form? Would it not be preferable, besides conforming more closely with article 20 of the Commission's Statute, if the Commission were itself to prepare a commentary designed to ensure that the General Assembly was fully instructed about the different doctrines on arbitral procedure? He agreed that it would be pointless to publish the commentary after the General Assembly had taken its decision on the final draft on Arbitral Procedure.

58. Faris Bey el-KHOURI thought that it was the Commission's duty to ensure that the final draft on Arbitral Procedure was presented to the General Assembly in such a way as to make it readily acceptable. The Secretariat's commentary would, in his view, help governments to come to the right conclusions. He had found nothing in the commentary in the least injurious to the Commission's prestige, and nowhere was there any mention of the Commission's having approved its substance. It would, perhaps, have been preferable had the Secretariat been able to publish the commentary without a specific request from the Commission, but the Secretary had explained why that was not possible, and he (Faris Bey el-Khoury) therefore agreed that there should be an appropriate instruction in the general report.

59. Mr. LAUTERPACHT thought that the Commission could now come to a decision, and pointed out that Mr. Yepes' text was substantially similar to the original, except for the final clauses about publication of the commentary as a Commission document and its simultaneous transmittal with the final draft on Arbitral Procedure to the General Assembly.

60. Mr. YEPES attached great importance to simultaneous transmittal to the General Assembly, and thought that the object of the commentary was to inform the General Assembly about the issues raised by the final draft on Arbitral Procedure. He was, however, willing to delete from his text the phrase "as a Commission document".

61. Mr. CORDOVA thought that it could be assumed that the Secretariat would forward the commentary to the General Assembly as soon as the necessary revision had been completed.

It was decided by 9 votes to 1, with 2 abstentions, to delete from the text proposed by Mr. Yepes the phrase "and sent to the General Assembly with the final draft on arbitral procedure".

Mr. Yepes' text for paragraph 5, as amended, was approved by 7 votes to 3, with 2 abstentions.

62. As approved, paragraph 5 read:

"The Commission was greatly aided in its work during the fifth session by the detailed commentary prepared by the Secretariat in accordance with a decision taken at the fourth session by reference to article 20 of the Statute. In the opinion of the Commission that commentary, which contains an account and analysis of the existing practice in the matter of arbitral procedure and of available jurisprudence and doctrine, constitutes a valuable contribution to the study and the application of the law on arbitral procedure. After being revised and supplemented by the Secretariat in the light of the decisions taken by the Commission at its fifth session, the commentary should be published by the Secretariat".

Paragraph 6 (14)

63. The CHAIRMAN invited discussion on paragraph 6.

64. Mr. AMADO noted that in paragraph 6, as elsewhere in the report, the words "final draft" were used to describe the regulations that the Commission had drawn up on arbitral procedure. It was, however, possible that further drafts might be prepared. He accordingly wondered whether the word "final" should not be deleted *passim*.

65. The last sentence of the paragraph, which read: "It may be a matter for consideration whether the commentary... should not contain as an annex a model code of rules...", was phrased, as it were, as a question to the Commission. In that form it was hardly appropriate in the Commission's report on its own work. He wondered, indeed, whether the point should be raised at all in the report.

66. Mr. LIANG (Secretary to the Commission) agreed that there was no need to call the regulations as drafted the "final draft". He considered therefore that the word "final" should be deleted from the title which might then read: "Draft code of arbitral procedure." When it was necessary to distinguish the final draft from previous drafts the term "final draft" could be used without initial capitals.

67. In paragraph 6, reference was made to the wider sense of the term "arbitral procedure", which was defined as including "provisions for safeguarding the effectiveness of arbitration engagements accepted by the parties". That phrase, to his mind, described the purpose of the draft, and was therefore unsatisfactory as a definition of the term "arbitral procedure"; he would prefer a phrase reading: "provisions relating to arbitration engagements in general".

68. When the Commission had discussed the matter earlier, no conclusion had been reached on whether the Secretariat should annex a model code of rules on arbitral procedure to the commentary. The Secretariat itself had no strong views on the matter; but he hoped that, if the Commission intended such a code to be prepared, it would provide a clear directive.

69. Mr. Scelle said that the Commission had taken the view that arbitral procedure must include all those provisions which would make certain that arbitration was carried out effectively; hence, it transcended the mere rules of procedure adopted by or before the arbitral tribunal itself. He wondered whether the mention in the last sentences of paragraph 6, of detailed rules of procedure and the suggestion that a model code of such rules be prepared, implied that Mr. Lauterpacht thought that the Committee should have adopted a narrower interpretation of the term "arbitral procedure".

70. Moreover, as the report purported to be an account of the Commission's work, it should not contain suggestions for future action. In any event, the preparation of a model code of rules of arbitral procedure, in the narrower sense of the term, was essentially a substantive issue that the Commission itself should deal with, if necessary in a supplementary report. The last part of the paragraph, from the sentence beginning: "Such detailed rules of procedure are liable to vary . . .", should therefore be deleted.

71. Mr. LAUTERPACHT said that, to the extent that the Commission's definition of the term "arbitral procedure" differed somewhat from the connotation usually given to the term, it would be reasonable to include in the report the sentences concerning detailed rules of arbitral procedure in the narrow sense, the deletion of which Mr. Scelle had suggested.

72. It would, however, be more consonant with his (Mr. Lauterpacht's) intention if the phrase: "A model code of rules of", were replaced by the phrase: "A collection of texts on".

73. He agreed with the suggestion that the regulations drafted by the Commission should be entitled "Draft code on arbitral procedure".

74. He was unable, however, to follow the Secretary's reasoning when he suggested that the phrase descriptive of the wider sense of the term arbitral procedure, reading "provisions for safeguarding the effectiveness of arbitration engagements accepted by the parties" be amended; for, to his mind, that phrase accurately described the Commission's conception of arbitral procedure.

75. Mr. KOZHEVNIKOV agreed with Mr. Scelle that it was inappropriate to suggest that the Secretariat should draw up a model draft of rules of arbitral procedure, for that was a task proper to the Commission itself. He thought also that the regulation should be referred to as "Draft articles on arbitral procedure" rather than "Final draft on arbitral procedure".

76. Arbitral procedure was a term with a precise meaning; there was no question of its having a wider or a narrower sense. The "effectiveness of arbitration engagements" derived from treaties and similar agreements. The text as it stood seemed to him authoritarian, and the draft itself to have been conceived on the wrong lines.

77. The CHAIRMAN drew attention to Mr. Lauterpacht's suggestion that the Secretariat might be asked to prepare a collection of texts rather than a model code.

78. Mr. LIANG (Secretary to the Commission) reverted to his objection to the first clause describing arbitral procedure in its wider sense as including "provisions for safeguarding the effectiveness of arbitration engagements accepted by the parties". A generally accepted definition of arbitral procedure was "the body of rules and practice relating to arbitration", and a distinction was normally drawn between arbitral procedure in that sense and the procedure adopted by or before arbitral tribunals.

79. The last sentence of the paragraph reading "It may be a matter for consideration whether the commentary to be prepared by the Secretariat and referred to in paragraph 5 of this report should not contain as an annex a model code of rules of arbitral procedure in the sense referred to above" was inadequate, as it failed to state who was to consider the matter.

80. The CHAIRMAN asked the General Rapporteur to prepare a revised text of paragraph 6 for consideration at the next meeting.

The meeting rose at 1 p.m.

228th MEETING

Friday, 31 July 1953, at 9.30 a.m.

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Chairman : Mr. J. P. A. FRANÇOIS.

Rapporteur : Mr. H. LAUTERPACHT.

Present :

Members : Mr. Ricardo J. ALFARO, Mr. Roberto CORDOVA, Mr. Shuhsi HSU, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. J. M. YEPES, Mr. Jaroslav ZOUREK.

Secretariat : Mr. Yuen-li LIANG, Director of the Division for the Development and Codification of International Law, and Secretary to the Commission.

Date and place of next session
(*resumed from the 227th meeting*)

1. The CHAIRMAN reported on his conversation with the President of the Economic and Social Council who had explained that the need for preparing the documents on the results of its work in time for presentation to the