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Summary record of the 230th meeting

Topic:
Other topics

Extract from the Yearbook of the International Law Commission:-
1953 , **vol. I**

Assembly's recommendation of a draft to Members with a view to the conclusion of a convention meant that the draft must be adopted and opened for signature, then it seemed to him that the Commission ought to recommend that course to the General Assembly.

78. Mr. KOZHEVNIKOV considered that the Commission should not overestimate the importance of the work it had done. In his opinion, article 23 of the Commission's Statute was not mandatory. But in view of the difference of opinion on the matter, he thought that the Commission should first decide whether to make a recommendation or not.

79. Mr. SPIROPOULOS thought that Mr. Kozhevnikov's suggestion was very reasonable, although he disagreed with his interpretation of article 23 ; surely the enumeration of four possible courses in paragraph 1 of the article meant that a choice had to be made between them.

80. He thought that if it were merely a question of the codification of international law, nothing more would normally be desired of the General Assembly than the adoption of a report by resolution. But there were innovations in the final draft on Arbitral Procedure ; it was therefore essential that the adoption of the draft by the General Assembly should be followed by its signature by governments.

81. He supported the text of paragraph 46 of the draft report because, although it was very desirable that a convention on arbitral procedure be concluded, it was not a question of extreme urgency, on the same plane, as, for example, the conclusion of an armistice.

82. Mr. CÓRDOVA said that the Commission should first decide on what interpretation it wished to place on article 23 of its Statute.

83. Mr. YEPES said that article 22 of the Statute made it obligatory on the Commission to prepare a final draft, an explanatory report and recommendations to be submitted through the Secretary-General to the General Assembly. Mr. Spiropoulos was therefore right in saying that recommendations were obligatory.

84. Mr. KOZHEVNIKOV said that he failed to find any proof that it was mandatory on the Commission to make recommendations to the General Assembly. The meaning of article 23 was clearly that if the Commission were to make any recommendation to the General Assembly, it should choose between the four courses enumerated.

It was decided by 8 votes to 2 that the Commission should attach to its report to the General Assembly a recommendation concerning the action the latter should take on the final draft on Arbitral Procedure.

The meeting rose at 1 p.m.

230th MEETING

Monday, 3 August 1953, at 2.45 p.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 CÓRDOVA, 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.

Consideration of the draft report of the Commission covering the work of its fifth session (*continued*)

CHAPTER II : ARBITRAL PROCEDURE (A/CN.4/L.45) * (*continued*)

Paragraph 26 (35) **
(resumed from the 229th meeting) [1]

1. The CHAIRMAN invited the Commission to take up paragraph 26, to which Mr. Alfaro had proposed an addition reading :

> " It may be observed that the only elements of a *compromis* classified as obligatory by article 9 are those enumerated in paragraphs (*a*), (*b*) and (*c*) thereof, and that among the particulars classified as optional in paragraphs (1) to (10), some are indispensable to carry on an arbitration. The reason the Commission had for not classifying such particulars as obligatory is that provision is made therefor in other articles of the draft. Thus, for instance, if the Parties should omit in the *compromis* one or more of the particulars referred to in paragraphs (1) to (7), the Tribunal would apply articles 12, 13, 23 and 25 of the draft and the arbitration could be carried out without any difficulty."

2. Mr. ALFARO recalled that article 9 of the draft on Arbitral Procedure listed a number of particulars to be specified in the *compromis*, only three of which were listed as mandatory for the parties. In order to avoid unnecessary confusion, the Commission should explain

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

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

[1] See *supra*, 229th meeting, paras. 15-16.

that the division took into account the fact that provisions that would operate in the absence of the optional particulars appeared elsewhere in the draft. For example, it was essential that the law to be applied by the Tribunal should be specified in the *compromis*; if it were not, article 12 of the draft would operate and the law the Tribunal must apply would be determined thereby.

3. Mr. LAUTERPACHT doubted whether Mr. Alfaro's amendment was either necessary or accurate. It stated that some of the optional particulars in article 9 of the draft on Arbitral Procedure were " indispensable to carry on an arbitration ". That, he thought, was an untrue statement, as it was not indispensable to an arbitration for a *compromis* to specify, for example, the law to be applied by the tribunal, the power of the tribunal to make recommendations, the tribunal's quorum, the majority required, the time limits, or the right of members to attach dissenting opinions to the award. He agreed that the *compromis* should specify the procedure to be followed by the tribunal; but if it did not, it was clearly laid down in article 13 that the tribunal was competent to formulate its own rules.

4. Mr. ALFARO said that he did not claim that his amendment was indispensable, but that it might be useful in the sense that it would prevent other people from falling into misunderstandings similar to those certain members of the Commission had entertained. He thought that the report should demonstrate that article 9 had been carefully drafted, and that it should note in respect of the particulars mentioned as optional that if Nos. 1 and 2 did not appear in a *compromis,* then article 12 would apply; that if Nos. 3, 4 and 5 did not appear, then article 13 would apply; that if No. 6 did not appear, then article 23 would apply; and that if No. 7 did not appear, article 25 would apply. He agreed that his amendment might need redrafting.

5. Mr. YEPES recollected that in intention Mr. Alfaro's amendment was identical with certain suggestions that he (Mr. Yepes) had made during the Commission's discussion of article 9.

6. Mr. LAUTERPACHT maintained that Mr. Alfaro's amendment was inaccurate. He thought that the gist of what it said was already to be found in paragraph 33 of the draft report, where it was stated:

> " It is evident that if the Tribunal has the power, in the absence of agreement between the parties, to lay down the entire procedure, it is also enabled — and bound — to do so with regard to any particular question of procedure."

7. Mr. ALFARO did not consider that paragraph 33 of the draft report covered the points made in his amendment. He felt that any person might be just as surprised at the division made between the obligatory and the optional particulars in the *compromis* as members of the Commission had been, and that some explanation should be given.

8. Mr. HSU suggested that the general rapporteur might perhaps be able to suggest a text that would meet Mr. Alfaro's excellent intentions.

9. Mr. LAUTERPACHT suggested that an addition be made to paragraph 26, reading somewhat as follows:

> " Reference is made here to paragraph 33, which draws attention to the powers of the Tribunal to lay down any rules of procedure not included in the *compromis* ".

10. Mr. ALFARO said that that would not do. His concern was not with the powers of the Tribunal to interpret the *compromis,* but with the confused impression that article 9 would make on the reader because of the form in which it was cast.

11. Mr. SANDSTRÖM said that he had no objection in principle to Mr. Alfaro's suggestion, though the addition he had proposed certainly needed redrafting. For example, if it were agreed, following Mr. Alfaro's text, that certain particulars classified in article 9 as optional were in fact indispensable to carry on an arbitration, the reader would be even more confused, for it would not be apparent to him why those particulars had not been placed among the obligatory features of the *compromis.*

12. Mr. SCELLE recollected that he had been among those who had not been greatly enamoured of article 9. If the Tribunal was competent to make any necessary additions to an inadequate *compromis,* then all the particulars in article 9 were, in logic, on the same level, and the distinction made between those that were mandatory and those that were optional was meaningless. He considered, therefore, that the commentary on article 9 should be made as short as possible, so as not to draw embarrassing attention to the article.

13. Mr. ALFARO withdrew his amendment, as it appeared to him that it found favour neither with the Special Rapporteur nor with the General Rapporteur.

14. Mr. LAUTERPACHT thereupon withdrew his suggestion concerning an additional sentence to paragraph 26.

Paragraph 26 was approved by 9 votes to 2, with 1 abstention.

Paragraph 46 (55) (resumed from the 229th meeting)

15. Mr. LAUTERPACHT said that, in the light of the Commission's discussion at its 229th meeting,[2] he had drafted a new text for paragraph 46 reading:

> " 46. In the opinion of the Commission the draft Code as adopted calls for action, on the part of the General Assembly, contemplated in paragraph (c) of article 23 of the Statute of the Commission, namely, " to recommend the draft to Members with a view to the conclusion of a convention ". The Commission makes a formal recommendation to that effect. It is

[2] *Ibid.*, paras. 60-84.

understood that, in recommending the draft to Member States with a view to the conclusion of a convention, the General Assembly would be giving its approval to the draft Code which, after it has been completed by the addition of final clauses, would become a convention approved by the General Assembly and open to signature or accession by Members of the United Nations and, possibly, other States."

16. The draft on Arbitral Procedure would be the first final draft to be submitted to the General Assembly by the Commission. The procedure to be followed was therefore important. In his original draft he had contemplated alternative courses that the General Assembly might take. That proposal had been justly criticized, and he therefore suggested that the Commission should make up its own mind about how it wished its draft on arbitral procedure to be treated, rather than leave the decision to the General Assembly.

17. It would be unwise to suggest that the draft on Arbitral Procedure be submitted to a special conference. He agreed that the draft was important and its subject urgent, but he doubted whether it was so urgent as to justify summoning an international conference, which might, indeed, prove something of an anti-climax.

18. Mere adoption of the Commission's report by a General Assembly resolution would have no legal effect. The resolution would not be binding on States and would thus not be relevant to a matter in respect of which precise undertakings were desirable.

19. He therefore concluded that the Commission should recommend the General Assembly to commend the draft on Arbitral Procedure to States Members, with a view to its adoption as a convention. The wording of sub-paragraph 1 (*c*) of article 23 of the Commission's Statute was, however, imprecise. Mere recommendation of the draft code would be inadequate. It must be approved in such a way as to bring the Commission's work to fruition. The draft on Arbitral Procedure should therefore be not merely approved, but also completed by the addition of the necessary final clauses, and opened for signature or accession by States Members of the United Nations and other States.

20. Mr. SANDSTRÖM said that, regardless of whether the draft it submitted was in the nature of a codification or of a development of international law, the Commission was under an obligation to make a recommendation to the General Assembly. The possible recommendations enumerated in article 23 of the Commission's Statute applied to both cases, but the precise course to be recommended depended on the nature of the draft.

21. Merely to note the report, the course which Mr. Kozhevnikov recommended, would be inconceivable. That would simply mean that the draft would be shelved. The second course suggested in article 23, namely, the adoption of a report by resolution of the General Assembly, was in his view applicable only to drafts which represented a codification of existing law in respect of which no convention was necessary, the law being already known. The commendation of the draft to States Members of the United Nations and the convocation of a conference, both courses intended to result in the signature of a new convention, were applicable to drafts containing developments of, or innovations in, international law. The Secretary had probably been justified in stating [3] that the convocation of a diplomatic conference was more appropriate for general conventions concerning many States, including States not members of the United Nations, than for conventions concerning only Member States, but it was difficult to choose between the two courses, and he (Mr. Sandström) was therefore inclined to accept the General Rapporteur's original draft.

22. Mr. SCELLE said that the essence of the development of international law was that it was a systematization of existing law. The sense of the Commission's draft report was that codification was a necessary element in the development of law, and what the Commission had done was to rearrange existing principles rather than to invent new ones.

23. If a draft submitted by the Commission to the General Assembly were truly a codification in the sense of being a record of existing law, then there would be no need for the General Assembly to discuss it; a resolution of approval at most would be necessary. But he agreed with Mr. Sandström that drafts constituting a development of international law in any sense of the word called for the conclusion of international conventions.

24. If the Commission were to recommend to the General Assembly that a special conference be called to consider the draft on Arbitral Procedure, it would in effect be recommending that its work be gone over again by that conference. A plenipotentiary conference would probably produce a different draft, which would again give rise to protracted discussions; the cause of arbitration would certainly not be thus advanced. The Commission should ask the General Assembly to approve its work in the manner which would most speedily result in the conclusion of a convention. He therefore wholeheartedly supported the General Rapporteur's new text.

25. Mr. YEPES said that article 23 of the Commission's Statute suggested alternative courses, but they were complementary and not mutually exclusive, in so far as the first course (sub-paragraph *1* (a)), by which the General Assembly would merely take note of the report, was negative, and therefore inappropriate in the case in point. Adoption of the Commission's report by resolution was certainly desirable, particularly in conjunction with the recommendation of the draft on arbitral procedure to States Members of the United Nations; but the convening of a special conference was complementary to the adoption of the report and the commendation of the draft. All three courses should

[3] *Ibid.*, paras. 63-64.

therefore be recommended to the General Assembly.

26. But even the mere adoption of the Commission's report by resolution would not be so useless as Mr. Lauterpacht feared, for that course would not preclude subsequent ratification of the draft, which, once adopted, would be of considerable theoretical and doctrinal value even if unratified.

27. He therefore suggested that paragraph 46 should read as follows:

> " In accordance with paragraph 1 (*b*) of article 23 of the Commission's Statute, the Commission decided to recommend to the General Assembly, first, that the General Assembly should adopt the draft on arbitral procedure, and secondly that the General Assembly should recommend to States Members of the United Nations that a convention on the lines of the draft be concluded whether after the calling of a special conference or not."

28. Mr. HSU supported the new text proposed by the General Rapporteur.

29. His reading of article 23 of the Statute was based on his recollection of the discussions when the Committee on the Codification of International Law had been drafting it in 1947. At that time it had at first been suggested that all drafts prepared by the Commission should be cast in the form of conventions. But some had held that conventions might in some cases be undesirable, and that a General Assembly resolution would be enough. A compromise had therefore been reached to the effect that if the draft concerned a codification of international law a resolution of the General Assembly would be sufficient, as a law thus codified must be assumed to be already binding; but that if the draft concerned a development of international law a convention would be necessary. It had, however, also been decided that if a new problem were of such political complexity that the General Assembly would not wish to deal with it alone, then it would be necessary to call a special diplomatic conference. It had been accepted that, in certain cases of codification the Commission's draft would not require anything more of the General Assembly than that it take note of it.

30. In his opinion, it followed from all those considerations that, as the draft on Arbitral Procedure included elements relating to the development of international law, a convention was necessary; but he did not think that it raised such issues as to make a special conference necessary.

31. Nevertheless, he felt some slight misgivings about the draft report. Mr. Lauterpacht had said that the provision in the draft on Arbitral Procedure for declaring an award null was a mere codification of existing law. At the same time, the provisions according to which States were obliged to honour previous undertakings to go to arbitration had been described as new law. There seemed to him to be some inconsistency in that approach, and consequently a possibility that the Commission might come to the conclusion, if it took the trouble to re-examine the draft, that none of its provisions were developments, but that all were codifications, of international laws.

32. Mr. LIANG (Secretary to the Commission) said that Mr. Spiropoulos had been correct in stating that the four alternative courses enumerated in paragraph 1 of article 23 of the Commission's Statute were mutually exclusive so far as a recommendation emanating from the Commission was concerned. [4] They were, however, cumulative in the sense that the recommendation of the draft to States Members of the United Nations with a view to the conclusion of a convention necessarily included the General Assembly's taking note of and adopting the Commission's report, although the latter action did not necessarily imply the former. Thus, if the Commission wished to suggest that the General Assembly recommend a draft with a view to the conclusion of a convention, it was not necessary for it also to suggest that the General Assembly take note of or adopt the report by resolution, for all action taken by the General Assembly entailed the adoption of a resolution.

33. When the Commission's Statute had been adopted in 1947, the General Assembly had had little experience of preparing conventions, and the possibility that a special conference might be called to conclude a convention had been suggested and approved mainly on the assumption that the General Assembly would be too busy to take the necessary action itself. It had, however, since shown itself to be both able and willing to formulate and adopt conventions. Thus, in practice there was very little difference between the General Assembly's recommending a draft to States Members with a view to the conclusion of a convention, and its calling a diplomatic conference for the purpose.

34. Consequently, the General Rapporteur's new text seemed satisfactory, particularly as it made it clear that States that were not members of the United Nations might also accede to the convention.

35. Mr. KOZHEVNIKOV was still convinced that there was nothing in the Commission's Statute that made it obligatory on the Commission to make recommendations to the General Assembly; a right was not the same thing as an obligation. Nevertheless, the Commission had decided that it would exercise its right in the present instance.

36. The question, therefore, was to decide what recommendation to make. It was clear to him that the draft on Arbitral Procedure was not so much a codification of existing law as a statement of new law. In support of that assertion he quoted paragraph 24 in chapter II of the Commission's report covering the work of its fourth session from 4 June — 8 August 1952, which read:

> " 24. Two currents of opinion were represented in the Commission. The first followed the conception of arbitration according to which the agreement of the parties is the essential condition not only of the original obligation to have recourse to arbitration,

[4] *Ibid.*, paras. 74-75.

but also of the continuation and the effectiveness of arbitration proceedings at every stage. The second conception, which prevailed in the draft as adopted and which may be described as judicial arbitration, was based on the necessity of provision being made for safeguarding the efficacy of the obligation to arbitrate in all cases in which, after the conclusion of the arbitration agreement, the attitude of the parties threatens to render nugatory the original undertaking." [5]

37. It was clear that the conception described as judicial arbitration was new and not traditional, though the Special Rapporteur's eloquence had persuaded members to accept his thesis.

38. In such circumstances, it would not be right for the Commission to suggest to the General Assembly that it recommend the draft to States Members with a view to the conclusion of a convention. The draft should be reconsidered, and the views of governments, legal institutions and societies, and similar organizations sought. The Commission's work should not be evaluated solely in accordance with its authors' opinions, but in the light of those of the public and of society in general.

39. It should also be borne in mind that the draft on Arbitral Procedure had not been adopted by the Commission unanimously. Consequently, it could not even be said that all academic international lawyers were in agreement about its terms. He concluded, therefore, that the Commission could do no more than recommend to the General Assembly that it take no action in the matter.

40. Mr. ZOUREK said that it had been repeatedly stated that the submission of a recommendation to the General Assembly was obligatory in the case of the draft on Arbitral Procedure, because the latter was the first draft convention to be submitted to the General Assembly by the Commission. He reminded the Commission, however, that it had submitted a draft Code of Offences against the Peace and Security of Mankind, in respect of which no recommendation had been made.

41. He was glad to note that in the chapter on the régime of the high seas in the Commission's draft report, the General Rapporteur had suggested that the Commission should recommend that the General Assembly " take no action, the report having already been published ". In the case of the draft on Arbitral Procedure there was no urgency, as a corpus of international law on the subject already existed, and the draft would in any event come up against many objections in the General Assembly and elsewhere. The procedure suggested was hasty and unwarranted. It would be better for the Commission to await the reaction of governments, of delegations to the General Assembly and of legal circles in general. It should approve the wisdom of the suggestion made by the General Rapporteur in respect of the chapter in his draft report concerning the régime of the high seas, and follow it in the present case.

42. Mr. ALFARO said that when he had read the text proposed for paragraph 46 by the General Rapporteur in his draft report, it had been his intention to submit an amendment along the exact lines of the new text which Mr. Lauterpacht now proposed. That text he supported as it stood, for he shared the views which had been so admirably expressed by Mr. Scelle. The only proper, expeditious and fruitful course was that provided for in article 23, sub-paragraph 1 (*c*), of the Commission's Statute, namely for the General Assembly " to recommend the draft to Members with a view to the conclusion of a convention ". Any other course would be a mere waste of time.

43. Mr. SCELLE wished to add one or two arguments to those he had already put forward. The draft on Arbitral Procedure was the first text which the Commission had ever prepared in the form of a convention. If it did not recommend the General Assembly to submit it for the favourable consideration of States Members of the United Nations with a view to the conclusion of a convention, it would never make a similar recommendation in respect of any other convention which it subsequently prepared. Mr. Kozhevnikov had suggested that the Commission was placing too much confidence in its work, but it was the General Assembly which had itself placed confidence in the Commission by inserting in its Statute a provision — with the intention that it should, where appropriate, be applied — giving it the right to make the recommendation in question.

44. If a recommendation along the lines of sub-paragraph 1 (*c*) were adopted, all Members of the United Nations would have an opportunity of commenting on the draft before it was submitted for their favourable consideration with a view to the conclusion of a convention. It was therefore quite wrong to suggest that that course would deprive States of the opportunity of commenting.

45. If the Commission merely recommended the General Assembly to convoke a conference to conclude a convention, in accordance with sub-paragraph 1 (*d*) of article 23 of its Statute, it would not only be proposing a course which, as Mr. Alfaro had said, would waste much time, but it would also be indicating that it was content to play a much lesser role than the General Assembly itself had given it.

46. Mr. SPIROPOULOS felt that if the authors of the Statute, among whom were several present members of the Commission, could have foreseen the present discussion, they would have omitted article 23 altogether. They had had, he recollected, no relevant experience to guide them, and their aim had been to provide the Commission with certain general directives as to the procedure it should follow; they had certainly never meant article 23 to be analysed and dissected word by word in the way in which certain members of the Commission had done.

[5] *Official Records of the General Assembly, Seventh Session, Supplement No. 9* (A/2163). Also in *Yearbook of the International Law Commission, 1952*, vol. I.

47. The great majority of the Commission were in favour of the draft on Arbitral Procedure being made into a convention. It was the responsibility of the General Assembly to decide in what manner that could best be done and whatever recommendations the Commission made in that respect, there was no guarantee whatsoever that the General Assembly would accept them. Rather was the reverse true, as experience showed. The General Assembly was, in fact, unpredictable. For example, it had instructed the Commission to formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal and to prepare a draft Code of Offences against the Peace and Security of Mankind, indicating clearly the place to be accorded to those principles. The Commission had carried out the General Assembly's instructions, and it might have been expected that its report on the subject, approved almost unanimously, would have been adopted by the General Assembly. The General Assembly, however, had done nothing of the kind; it had merely taken note of the report. The same had occurred in the case of the Commission's work on reservations to multilateral conventions. On the other hand, the Commission had abandoned the attempt to define aggression, whereupon the General Assembly had itself attempted the task. There was no point, therefore, in attempting to lay down, in anything but very general terms, the procedure to be followed, and he suggested that it was not necessary or wise to go much beyond what was said in the first sentence of article 47, namely, that, in the light of its study of the subject over a period of years, the Commission believed that a convention on arbitral procedure, on the basis provided by the draft, was highly desirable.

48. Mr. AMADO said that, in view of his experience of the General Assembly, it was natural that he should support those who had avoided undue optimism and expressed a realistic view. He felt, however, that the Commission could go further than make a recommendation to the General Assembly along the lines of subparagraph 1 (*a*) of article 23 of its Statute, as suggested by Mr. Kozhevnikov, and although he personally would have preferred a simple statement such as was contained in the first sentence of paragraph 47, he was prepared to accept a text along the lines of that now proposed by the General Rapporteur. He would merely propose that the word " formal " be deleted from the second sentence of that text together with the whole of the last sentence, since the latter went into unnecessary detail, and in any case its meaning was far from clear. How would the draft Code " become a convention approved by the General Assembly " merely by the addition of final clauses, and by whom were those clauses to be added?

49. Mr. SANDSTRÖM agreed with Mr. Spiropoulos that a very general text was all that was required, and proposed that paragraph 46 be replaced by the following text:

" The Commission decided to recommend the draft Code to the General Assembly with a view to the conclusion of a convention ".

50. Mr. YEPES felt that it was essential to refer to the relevant provisions of the Statute, since in submitting recommendations the Commission was obeying the strict instructions laid down therein.

51. Mr. SPIROPOULOS pointed out that the Commission had already approved paragraphs 44 and 45 of the draft report, in which copious references were made to the relevant provisions of the Statute. The text proposed by Mr. Sandström would follow very appropriately on paragraph 45.

52. He agreed with Mr. Amado that the last sentence of the new text submitted by the General Rapporteur was confused, and he also failed to see its precise relation to the remainder.

53. Mr. AMADO said that he could accept Mr. Sandström's proposal, but not Mr. Yepes' or the last sentence of the new text submitted by the General Rapporteur. The Commission had the right to submit recommendations to the General Assembly, but it had no right to dictate what procedure the General Assembly should follow.

54. Mr. LAUTERPACHT said that he had the same general objections to Mr. Sandström's and Mr. Spiropoulos' proposals. He saw no reason why the Commission should shirk the responsibilities laid upon it by article 22 of its Statute. That article stated clearly that "The Commission shall prepare a final draft and explanatory report which it shall submit with its recommendations through the Secretary-General to the General Assembly ". Article 23 indicated the different forms which those recommendations could take. He did not, however, wish to rely on that argument, or on the fact that the Commission had already decided at its previous meeting to submit its recommendations in accordance with article 23. The matter was of much greater importance. He could not understand why the Commission should now lack the courage to say what it considered the General Assembly should do with a draft which it had taken three years' work to prepare. If the Commission failed to make a positive recommendation in the present case, it would be unable to do so in any other, with adverse results for all its future work. He could not accept the argument that the alternative courses which other members urged were more " prudent " or more " realistic "; it was quite possible to hold different views as to what was the most prudent or realistic course, and in his view it would be realistic to face the fact that unless the Commission said what it wanted the General Assembly to do, the General Assembly might well do nothing.

55. As the whole question was so important, he suggested that it might be desirable to give members the opportunity of pondering it overnight before proceeding to the vote.

56. Mr. LIANG (Secretary to the Commission) suggested that it was purely a matter of policy vis-à-vis

the General Assembly whether the Commission adopted some general wording, as proposed by Mr. Sandström and Mr. Spiropoulos, or whether it adopted more detailed wording such as that contained in the last sentence of Mr. Lauterpacht's new proposal ; the results, so far as the draft code was concerned, would be the same ; the General Assembly would discuss it, probably in detail, and would take whatever further action it thought fit.

57. The last sentence of Mr. Lauterpacht's new proposal was an interpretation of sub-paragraph 1 (*c*) of article 23 of the Commission's Statute, and it was an interpretation which was perfectly in accordance with the procedure which the General Assembly had adopted in the past. For example, article 105, paragraph 3, of the Charter provided that the General Assembly " may propose conventions to the Members of the United Nations " with a view to securing the privileges and immunities necessary for the fulfilment of the Organization's purposes ; and the General Assembly had interpreted that provision as meaning that it could itself discuss the draft Convention on Privileges and Immunities and, having discussed and approved it, throw it open for signature by States Members of the United Nations. The last sentence of the text proposed by Mr. Lauterpacht was therefore unlikely to meet an unfavourable reception in the General Assembly. He agreed, however, that it was unnecessarily involved ; moreover, it did not explicitly state that the General Assembly should consider the draft code. He accordingly suggested that it might be replaced by the following :

> " It is hoped that, after considering the draft code, the General Assembly will give it its approval and open it for signature or accession by Members of the United Nations and possibly by other States ".

58. Mr. KOZHEVNIKOV agreed with Mr. Lauterpacht that it would be preferable to defer the vote, since the question was still far from clear. The last sentence of Mr. Lauterpacht's new proposal had been rightly criticized, for it would certainly be inappropriate for the Commission to address itself to the General Assembly in such terms.

59. Mr. LAUTERPACHT said that he was all in favour of deferring the vote if that would ensure universal or nearly universal support for any text. With that end in view, he could accept the wording which Mr. Liang had suggested to replace the last sentence of the text he had proposed ; alternatively, he could agree to the deletion of that sentence, as Mr. Amado had suggested, if that course commended itself to a substantial majority. He could also accept Mr. Amado's proposal that the word " formal " be deleted from the second sentence.

60. Mr. SANDSTRÖM and Mr. SPIROPOULOS withdrew their proposals in favour of Mr. Lauterpacht's new text, as amended by the Secretary.

61. Mr. KOZHEVNIKOV requested that the vote on that text and on the alternative text submitted by Mr. Yepes be deferred until the opening of the next meeting, and that the vote should then be taken without further discussion.

It was so agreed.

The meeting rose at 6.5 p.m.

231st MEETING

Tuesday, 4 August 1953, at 9.30 a.m.

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* The number within brackets corresponds to the article number in the Commission's report.

Chairman : Mr. J. P. A. FRANÇOIS.

Rapporteur : Mr. H. LAUTERPACHT.

Present :

Members : Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Roberto CÓRDOVA, 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.

Consideration of the draft report of the Commission covering the work of its fifth session (*continued*)

CHAPTER II : ARBITRAL PROCEDURE (A/CN.4/L.45) * (*continued*)

Paragraph 46 (55) ** (*continued*)

1. The CHAIRMAN said that at its 230th meeting the Commission had decided to proceed to a vote on para-

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

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