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Summary record of the 267th meeting

Topic:
Draft code of offences against the peace and security of mankind (Part I)

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he had not been quite certain of the implications of the series of amendments put to the vote.

The meeting rose at 1 p.m.

267th MEETING

Tuesday, 13 July, 1954, at 9.45 a.m.

CONTENTS

	Page
Draft Code of Offences against the Peace and Security of Mankind (item 4 of the agenda) (A/1858, A/2162 and Add. 1 and 2, A/CN.4/85) (continued)	
Article 2 (4) (continued)	129
Article 2 (5)	129
Article 2 (6)	130
Article 2 (7)	131
Article 2 (8)	131
Article 2 (9)	131
Article 2 (10)	131
Article 1 (resumed from the 266th meeting)	133

Chairman: Mr. A. E. F. SANDSTRÖM

Rapporteur: Mr. J. P. A. FRANÇOIS

Present:

Members: Mr. G. AMADO, Mr. R. CÓRDOVA, Mr. D. L. EDMONDS, Faris Bey el-KHOURI, Mr. F. GARCÍA-AMADOR, Mr. S. HSU, Mr. R. PAL, Mr. C. SALAMANCA, Mr. G. SCELLE, Mr. J. SPIROPOULOS, Mr. J. ZOUREK.

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

Draft Code of Offences against the Peace and Security of Mankind (item 4 of the agenda) (A/1858, A/2162 and Add. 1 and 2, A/CN.4/85) ¹ (continued)

Article 2 (4) (continued)

1. The CHAIRMAN recalled that the draft adopted by the Commission at its third session had been redrafted by the Special Rapporteur in the light of comments by Governments.² At its 266th meeting³ the Commission had further amended the text so that article 2 (4) now read:

“(4) The organization, or the encouragement or toleration of such organization, by the authorities of a State, of armed bands within its territory of another

State, or the toleration of the use by such armed bands of the territory of that State as a base of operations or as a point of departure for incursion into the territory of another State, as well as direct participation in such incursion.”

2. Mr. CÓRDOVA proposed that in the last phrase, after the words “direct participation in” the words “or support of” should be added.

Mr. Córdova's proposal was adopted by 9 votes to none, with 4 abstentions.

3. The CHAIRMAN put to the vote article 2 (4) as a whole as amended.

Article 2 (4) as amended was adopted by 8 votes to none, with 5 abstentions.

Article 2 (5)⁴

4. Mr. HSU proposed the insertion of the following additional paragraph immediately before paragraph 5.

“The organization, or the encouragement or toleration of such organization by the authorities of a State, of fifth columnists for activities in another State, or the support by the authorities of a State of organized groups serving for them as fifth columnists in another State.”

5. The CHAIRMAN pointed out that the Commission was discussing amendments proposed to its 1951 draft in the light of comments by governments. It might accordingly be questioned whether additional clauses which had not been proposed by any government should be considered.

6. Mr. FRANÇOIS agreed with the Chairman. The second reading of the draft did not mean that a minority was to be given an opportunity of reopening issues discussed and settled by the Commission at earlier sessions.

7. Mr. SPIROPOULOS, Special Rapporteur, pointed out that section XVII of his third report⁵ dealt with proposals by certain Governments for the insertion, in the draft Code, of offences other than those already defined in it. The Commission could deal with Mr. Hsu's proposal in the course of the discussion of section XVII.

8. Mr. HSU said that the Commission should not consider itself bound by the draft voted three years

⁴ The Commission's 1951 draft of article 2 (5) read:

“The following acts are offences against the peace and security of mankind:

...

“(5) The undertaking or encouragement by the authorities of a State of activities calculated to foment civil strife in another State, or the toleration by the authorities of a State of organized activities calculated to foment civil strife in another State.”

The Special Rapporteur did not propose any modification of that text.

⁵ A/CN.4/85, in *Yearbook of the International Law Commission, 1954*, vol. II.

¹ *Vide supra*, 266th meeting, para. 1 and footnotes.

² *Ibid.*, para. 53 and footnote 15.

³ *Ibid.*, paras. 64-69.

previously. The Commission had adopted the method of enumerating the offences. It might perhaps have been better to adopt some other method, because an enumeration could never be exhaustive. The Commission had relied on League of Nations documents and the judgements of the Nürnberg Tribunal and the Tokyo Tribunal. There was, however, a serious gap in the list it had drawn up: the question of the "fifth column". That form of subversive activity was much more important than terrorism or incursions by armed bands. Moreover, the existence of a "fifth column" involved the direct responsibility of the State which had organized it.

9. Mr. SPIROPOULOS, Special Rapporteur, said that in his comments⁶ on article 2(5) he had mentioned the problem of a "fifth column". The mere existence of a "fifth column" could not be regarded as a criminal act; it only became criminal if its direct object was to prepare for an aggression.

10. Mr. HSU said that a "fifth column" invariably had the object of preparing an aggression.

11. Faris Bey el-KHOURI said he would abstain from the vote on paragraphs 5 and 6; indeed, he had abstained from the votes on the preceding paragraphs. He did not think that offences against the peace and security of mankind should be held to include activities which might, for example, be of an economical or an ideological nature and which did not constitute a direct threat to peace or a violation of the Charter of the United Nations.

12. Mr. ZOUREK thought that paragraph 5 did not go far enough. The expression "organized activities" in the last phrase was difficult to define and did not appear to cover all the activities which constituted a threat to the peace and security of mankind. He therefore proposed that the following sentence should be added at the end of paragraph 5: "as well as the encouragement in another State of revolution or of changes of policy favourable to the aggressor."

13. Mr. SPIROPOULOS, Special Rapporteur, thought that under such a provision nobody would be allowed to publicize his political views.

14. Mr. CORDOVA pointed out that "fifth column" activities were only criminal in so far as they were supported by a foreign State. Similar activities, if unsupported from abroad, could be perfectly lawful.

15. Mr. AMADO said that a mere intention was not a crime. The Commission had adopted the text of paragraph 5 as it stood after much discussion and he saw no reason why it should reverse its decision.

16. Mr. ZOUREK withdrew his amendment. He said he would raise the question again after the Commission had finished its study of the Special Rapporteur's draft.

17. Mr. CORDOVA asked if Mr. Hsu might not also be disposed to withdraw his amendment. After all, paragraph 5 laid down the principle of the non-intervention of one State in the affairs of another, and that was tantamount to a ban on the organization of a "fifth column".

18. Mr. HSU disagreed. In drafting a code the Commission should to the fullest extent possible, make provisions for all contingencies; the organization of a "fifth column" was a specific form of preparing aggression.

19. The CHAIRMAN put to the vote Mr. Hsu's proposed additional paragraph.

The proposed addition was rejected by 6 votes to 3, with 4 abstentions.

20. Mr. SALAMANCA explained that he had voted in favour of the proposal as it coincided with the views of Professor Duran, which had been communicated to the Commission by the Bolivian Government.

21. Mr. GARCÍA-AMADOR said that perhaps the following phrase might be added at the end of paragraph 5: "or the encouragement or fomenting of fifth columns".

22. Mr. SPIROPOULOS, Special Rapporteur, pointed out that he had explained in his comments that the organization of a fifth column was not a crime unless it constituted an act preparatory to aggression.

23. The CHAIRMAN put to the vote article 2(5) as drafted at the third session, in 1951.

Article 2 (5) was adopted by 10 votes to none, with 3 abstentions.

Article 2(6)⁷

24. Mr. ZOUREK proposed that the following words should be added at the end of the paragraph: "as well as the encouragement of subversive activities directed against another State."

25. The CHAIRMAN said that, in view of the procedure adopted by the Commission, Mr. Zourek's proposed amendment could not be considered until after all the articles of the draft Code had been discussed.

26. Mr. CORDOVA pointed out that the expression "terrorist activities" was as vague as the term "fifth

⁷ The Commission's 1951 draft of article 2(6) read:

"The following acts are offences against the peace and security of mankind:

...

"(6) The undertaking or encouragement by the authorities of a State of terrorist activities in another State, or the toleration by the authorities of a State of organized activities calculated to carry out terrorist acts in another State."

The Special Rapporteur did not propose any modification of that text.

⁶ A/CN.4/85, in *Yearbook of the International Law Commission, 1954*, vol. II.

column", which the Commission had declined to insert in paragraph 5.

27. Mr. SALAMANCA pointed out that similar doubts were expressed in the United Kingdom's comments.

28. Mr. SPIROPOULOS, Special Rapporteur, recalled that the words "terrorist activities" had a fairly precise meaning in international law. In 1937 many States had signed a convention for the prevention and punishment of terrorism.⁸

Article 2 (6) as drafted at the third session in 1951, was adopted by 10 votes to none, with 3 abstentions.

29. Mr. ZOUREK said he had abstained because he thought the paragraph incomplete; it did not cover certain types of subversive activity which were as dangerous as terrorism.

Article 2 (7)⁹

30. Mr. SPIROPOULOS, Special Rapporteur, said that in his third report he had slightly redrafted the text adopted by the Commission in 1951 in that, at the suggestion of the United Kingdom Government, he had replaced the words "in violation" by the words "constituting a major breach".

31. Mr. GARCÍA-AMADOR inquired how a major breach could be distinguished from a minor violation of obligations. Germany had rearmed despite the Versailles Treaty without committing a major breach of the letter of that Treaty.

32. The CHAIRMAN put to the vote the Special Rapporteur's amendment to article 2 (7).

The proposed redraft was rejected by 9 votes to 2, with 1 abstention.

33. The CHAIRMAN put to the vote article 2 (7) as drafted at the third session, in 1951.

Article 2 (7) was adopted by 8 votes to 1, with 2 abstentions.

Article 2 (8)¹⁰

34. The CHAIRMAN did not understand why the words "or of territory under an international régime" appeared only in paragraph 8. The Belgian Govern-

⁸ Hudson, *International Legislation*, vol. VII, p. 862.

⁹ The Commission's 1951 draft of article 2 (7) read :

"The following acts are offences against the peace and security of mankind :

...
 "(7) Acts by the authorities of a State in violation of its obligations under a treaty which is designed to ensure international peace and security by means of restrictions or limitations on armaments, or on military training, or on fortifications, or of other restrictions of the same character."

¹⁰ The Commission's 1951 draft of article 2 (8) read :

"The following acts are offences against the peace and security of mankind :

...
 "(8) Acts by the authorities of a State resulting in the annexation, contrary to international law, of territory

ment had suggested that a reference to such territories should appear in all the relevant clauses of the draft Code.

35. Mr. SALAMANCA criticized the Belgian Government's suggestion as likely to hamper the liberation of colonial peoples. History showed that the colonies had not infrequently obtained their independence as the result of rivalry between the great Powers.

36. Mr. SCALLE pointed out to Mr. Salamanca that paragraph 8 referred exclusively to acts committed in violation of international law.

37. Mr. FRANÇOIS said the Commission ought to express an opinion on the Belgian suggestion. He, personally, had no objection to it.

38. Mr. SPIROPOULOS, Special Rapporteur, suggested that a suitable comment should be inserted in the Commissions's report on the current session.

Article 2 (8) as drafted at the third session, in 1951, was adopted by 12 votes to none, with 1 abstention.

Article 2 (9)¹¹

39. Mr. SPIROPOULOS, Special Rapporteur, said that as Governments' comments on the paragraph were conflicting he had not changed the 1951 text.

Article 2 (9) as drafted at the third session, in 1951, was adopted by 10 votes to none, with 1 abstention.

Article 2 (10)¹²

40. Mr. HSU proposed that the last phrase, beginning

belonging to another State or of territory under an international régime."

The Special Rapporteur did not propose any modification of that text.

¹¹ The Commission's 1951 draft of article 2 (9) read :

"The following acts are offences against the peace and security of mankind :

...
 "(9) Acts by the authorities of a State or by private individuals, committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such, including :

(i) Killing members of the group ;
 (ii) Causing serious bodily or mental harm to members of the group ;
 (iii) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part ;
 (iv) Imposing measures intended to prevent births within the group ;
 (v) Forcibly transferring children of the group to another group."

¹² The Commission's 1951 draft of article 2 (10) read :

"The following acts are offences against the peace and security of mankind :

...
 "(10) Inhuman acts by the authorities of a State or by private individuals against any civilian population, such as murder, or extermination, or enslavement, or deportation, or persecutions on political, racial, religious or cultural grounds, when such acts are committed in execution of or in connexion with other offences defined in this article."

The Special Rapporteur did not propose any change.

with the words "when such acts", should be deleted so that the text of the paragraph would read:

"Inhuman acts by the authorities of a State or by private individuals against any civilian population, such as murder, or extermination, or enslavement, or deportation, or persecutions on political, racial, religious or cultural grounds."

41. He pointed out that his proposal was in keeping with the comments of the Governments of Yugoslavia and Belgium. The Commission could not apply in that case the principles of the Charter of the Nürnberg Tribunal, as the latter had dealt with a specific situation. The interests of mankind as a whole, not only in time of war, had to be considered. Changes of régime were frequently accompanied by wholesale massacre and persecution; in certain cases a majority of the population was victimized.

42. Mr. AMADO recalled that the acts enumerated in paragraph 10 were all punishable under the domestic criminal law of the various States. They could not be regarded as international crimes unless they were committed in connexion with other acts enumerated in article 2. Accordingly he felt that the Commission should reject Mr. Hsu's proposed amendment and retain the paragraph as it stood.

43. Mr. HSU, while appreciating Mr. Amado's extensive knowledge of criminal law, pointed out that the Commission should consider the crimes in question from the international point of view, as they affected the community generally. Mr. Amado's argument would be equally applicable to the crime of genocide to which paragraph 9 related. Having adopted that paragraph the Commission should *a fortiori* amend paragraph 10 along the lines he (Mr. Hsu) had proposed. If it retained the text of the paragraph as it stood, the Commission might be criticized for condemning persecutions of small groups, while tolerating those involving vast numbers of human beings.

44. Mr. SCELLE agreed with Mr. Hsu. The acts referred to in paragraph 10 might well lead to war even if they were not connected with the other crimes enumerated in article 2.

45. Mr. GARCÍA-AMADOR also supported Mr. Hsu's proposed amendment; firstly, a large number of inhuman and criminal acts were not covered by paragraph 9 even though they constituted a potential threat to peace; secondly, if the last phrase of paragraph 10 were deleted, the article would apply also to cases where the inhuman acts referred to in the paragraph were committed in connexion with other crimes.

46. Mr. SPIROPOULOS, Special Rapporteur, recalled that when the Commission had adopted paragraphs 9 and 10 in 1951 it had borne in mind both the Convention on the Prevention and Punishment of the Crime of Genocide and article 6 of the Charter of

the Nürnberg Tribunal¹³ which covered only war crimes and other acts committed in connexion with an international war. The Commission had decided that inhuman acts committed in connexion with other offences defined in the draft Code should also be punishable. Mr. Hsu was now proposing that the Commission should go much further and treat inhuman acts, regardless of the circumstances in which they were committed, as crimes against the peace and security of mankind. The acts in question were of course abominable. However, the Commission's draft was not a general international criminal code, but a code of offences against peace and the security of mankind. All the crimes enumerated in the preceding clauses of the draft were international in character, with the possible exception of genocide which had to be included because it was already the subject of an international convention. For all those reasons he thought that the original 1951 text should stand.

47. Mr. SCELLE said the case of the Nürnberg Tribunal was not a conclusive argument. That Tribunal had dealt with one particular situation whereas the Commission was formulating a general rule. Secondly, the final phrase of paragraph 10 was in effect a *proviso* which was out of place and which, indeed, did not recur in any other clause of the draft Code. Finally, the offences in question were clearly crimes against humanity.

48. Before the Commission had taken up its work of codification, such situations as the paragraph was meant to cover had been dealt with by what was known to international law as humanitarian intervention; on several occasions governments had intervened in foreign countries on humanitarian grounds. The Commission was merely endeavouring to ensure that action by the international community would take the place of individual action by States.

49. Mr. AMADO said the whole point of the Code was that it shifted the responsibility, which was theoretically that of the State, to the authorities which committed the acts defined in paragraph 10 with a view to perpetrating the offences defined in article 2.

50. Mr. CORDOVA said that the Commission might be given the unfortunate impression of not condemning inhuman acts which were not connected with other offences defined in article 2.

51. Mr. ZOUREK proposed that, in keeping with the comment by the Belgian Government, the word *assassinat* should be replaced by *meurtre* in the French text. The offence in question would thus be declared punishable whether committed with premeditation or not.

52. He realized why it was being proposed that the final phrase of paragraph 10 should be deleted; he

¹³ For Genocide Convention see *Official Records of the General Assembly, Third Session, Part I, Resolutions*, p. 174. For Nürnberg Charter see *The Charter and Judgment of the Nürnberg Tribunal* (United Nations publication, Sales No. 1949.V.7).

would point out, however, that the draft Code related only to crimes against the peace and security of mankind. There were, indeed, other international crimes, such as piracy, drug trafficking, white slave traffic, and others which were punishable by virtue of international custom or international conventions, but within the limits of its draft the Commission could hardly go beyond the principles of Nürnberg. The Nürnberg Tribunal had in any case interpreted those principles sufficiently broadly.

53. He did not think that the so-called interventions for humanitarian reasons referred to by Mr. Scelle were a valid precedent. Such interventions had never been dictated by genuinely humanitarian motives, but had most often taken place for political or economic purposes, while humanitarian considerations had merely served as a pretext.

54. Mr. SPIROPOULOS, Special Rapporteur, said that Mr. Hsu's proposal meant in effect that any violation of human rights that constituted an ordinary crime was to be treated as an international offence. Under the terms of reference it had received from the General Assembly, however, the Commission was expected to prepare a draft code based on the Nürnberg principles, simply by adding to the crimes mentioned in the Charter of the Nürnberg Tribunal other international crimes. There would, in itself, be nothing absurd in contemplating the possibility of the victims of any ordinary crime applying to an international court. Nevertheless, however attractive it might be, that idea was entirely outside the scope of the draft under discussion.

55. Mr. SCELLE said that it had never been suggested that all ordinary offences without distinction should be tried by an international court.

56. Mr. ZOUREK inquired whether under the terms of paragraph 10 as it stood a State would be debarred from deporting persons guilty of acts of terrorism.

57. Mr. AMADO, in reply to Mr. Scelle's last remark, said that the offences referred to in paragraph 10 were in fact ordinary crimes unless committed in connexion with other offences enumerated in article 2.

58. The CHAIRMAN put to the vote Mr. Zourek's proposal that in the French text the word *assassinat* should be replaced by the word *meurtre*.

The proposal was adopted by 7 votes to none, with 4 abstentions.

59. Mr. Hsu's proposal that the words "*when such acts are committed in execution of or in connexion with other offences defined in this article*" should be deleted from paragraph 10 was adopted by 6 votes to 5, with 1 abstention.

Article 2(10) was adopted, as amended, by 7 votes to 4, with 1 abstention.¹⁴

60. Mr. AMADO said that he had voted against the amended paragraph 10 because it would convert all ordinary crimes into international crimes.

61. Mr. FRANÇOIS said he had voted against the amended paragraph for the same reason as Mr. Amado had given. The provision as adopted was incapable of being applied.

62. Mr. ZOUREK said he had cast an adverse vote, although he was convinced that the crimes against humanity, referred to in the paragraph, should be defined, because the text was incomplete. Moreover, it discriminated quite unjustifiably between inhuman acts committed for political, racial, religious or cultural motives and inhuman acts committed for other motives.

Article 1 (resumed from the 266th meeting)

63. Mr. LIANG, Secretary to the Commission, pointed out that under article 1 as adopted at the previous meeting¹⁵ all the offences referred to in the draft Code were potentially subject to the jurisdiction of the future international criminal court; such a provision was obviously not applicable to a number of provisions of the Code, including article 2(11). For example, violation of the laws or customs of war were, by tradition, punished by the State which apprehended the offenders. Similarly, the offences mentioned in article 2(10) were clearly within the jurisdiction of the courts of the State in whose territory they had been committed. The Commission should perhaps reconsider article 1.

64. Mr. ZOUREK agreed that it would be preferable to redraft article 1 along the lines of article 6 of the Convention on the Prevention and Punishment of the Crime of Genocide.

65. The CHAIRMAN put to the vote the procedural question raised by the Secretary and Mr. Zourek.

By 9 votes to none, with 1 abstention, the Commission decided to reconsider article 1.

66. Mr. CORDOVA pointed out that the draft adopted at the previous meeting did not state that the offences in question came exclusively within the jurisdiction of the international criminal court. So long as that court had not been established, national tribunals would not lose the jurisdiction they possessed over such offences by virtue of conventions or of international custom. When that court was established, it would have exclusive jurisdiction over the offences mentioned in the draft Code. If the Commission were to make no reference to the international criminal court, the States would have an excuse for not establishing such a court; and one possible consequence of leaving national tribunals to deal with offences against the peace would be that different bodies of case law would be built up in respect of one and the same offence.

¹⁴ See, however, above, 268th meeting, paras. 1 *et seq.*

¹⁵ *Vide supra*, 266th meeting, para. 32.

67. Mr. LIANG, Secretary to the Commission, while appreciating the force of Mr. Córdova's remarks, said it would be difficult to specify in the draft Code which tribunal would be competent. Preferably the Commission should revert to the original draft of article 1, which allowed for some latitude of interpretation. The draft adopted by the Commission at its previous meeting could only be interpreted as meaning that the international criminal court would have exclusive jurisdiction over the offences concerned.

68. Faris Bey el-KHOURI said that the Commission could not strip the national tribunals of the jurisdiction which they in any case possessed. He preferred the draft adopted by the Commission in 1951 which contained no reference to any international criminal court.

69. Mr. PAL said he had not taken part in the discussion and had abstained from the vote because the draft articles had been originally adopted as early as 1951 before he became a member of the Commission, and had since been submitted for consideration to governments. He did not wish at the present stage to raise questions which might jeopardize the final adoption of the draft Code, but he, personally, was fundamentally opposed to the introduction of criminal liability which in the present stage of international development would not give the accused fair treatment.

70. Referring to the subject under discussion he pointed out that a national court could only deal with an act punishable under the draft Code if that act was also a criminal offence under the municipal criminal law of the country in which the Court was constituted.

71. Mr. SCELLE agreed that article 1 as adopted by the Commission at its previous meeting was defective for it seemed to stipulate that the offences mentioned in the draft Code could not be tried by any court whatsoever so long as an international criminal court did not exist. Yet those acts were undeniably within the jurisdiction of the national courts, not only of the country in which they had been committed, but also of the country which succeeded in arresting the alleged offender. If the Commission's draft Code were adopted by the States, it would become an integral part of the municipal law of all the parties, and the tribunals of all those countries would hence be competent to try the offences mentioned in that Code. The Code should state expressly that the offences covered by it came within the jurisdiction of the national courts pending the establishment of an international criminal court, and would, after the latter had been established, come within its jurisdiction.

72. Mr. CORDOVA agreed that article 1 should be redrafted; at the very least, the remarks of the Secretary and of Mr. Scelle should be mentioned in the comments. At the same time, the Commission should add in the comment that it considered the establishment of an international criminal court essential.

73. Mr. SPIROPOULOS, Special Rapporteur, pointed out that the establishment of an international criminal

court and its procedure were the subject of two reports submitted to the General Assembly by special committees.¹⁶ At the moment the Commission should merely define the offences to which the draft Code under discussion was to relate.

74. Mr. ZOUREK said that not inconceivably the draft Code could become operative even if an international criminal court was not established. He pointed out that the establishment of an international criminal court and its effective operation would entail the abandonment by States of important sovereign powers. That was the main reason why he considered it impossible to establish a permanent criminal court. At the moment, however, the question of an international criminal court should not be discussed, for it was on the provisional agenda of the General Assembly's ninth session.

75. Mr. SCELLE said the international criminal court had to be mentioned in article 1.

76. The CHAIRMAN put the question to the vote.

By 8 votes to none, with 2 abstentions, it was decided that the words "by an international court" should be deleted from article 1 as adopted at the previous meeting.

The meeting rose at 1 p.m.

¹⁶ *Official Records of the General Assembly, Seventh Session, Supplement No. 11 (A/2136), and Ninth Session, Supplement No. 12 (A/2645).*

268th MEETING

Thursday, 15 July, 1954, at 9.45 a.m.

CONTENTS

	<i>Page</i>
Draft Code of Offences against the Peace and Security of Mankind (item 4 of the agenda) (A/1858, A/2162 and Add.1 and 2, A/CN.4/85) (<i>continued</i>)	
Article 2 (10) (<i>resumed from the 267th meeting</i>) . . .	135
Article 2 (11)	136
Article 2 (12)	137
Article 3	137
Article 4	138
Article 5	139
Proposals made by certain governments in their comments to insert additional provisions in the draft Code	139
Article 2: proposed new clause (<i>resumed from the 266th meeting</i>)	139

Chairman : Mr. A. E. F. SANDSTRÖM

Rapporteur : Mr. J. P. A. FRANÇOIS