Document:-
A/CN.4/SR.72

Summary record of the 72nd meeting

Topic:
Arbitral Procedure

Extract from the Yearbook of the International Law Commission:-
1950 , **vol. I**

porteur of the Commission for the Codification and Progressive Development of International Law (A/AC.10/51 and A/331) had emphasized that the members of the Commission were legal advisers. The present position of those members derived from a decision adopted by the General Assembly's Fifth Committee on the basis of article 13 of the Commission's Statute, which stated that: " Members of the Commission . . . shall receive a *per diem* allowance at the same rate as the allowance paid to members of commissions of experts of the Economic and Social Council." The Commission must endeavour to secure the amendment of article 13. If the Commission was to last, and if its work was worthy of perpetuation, it had to be recognized that the members of the Commission were not merely experts. He therefore proposed that they request that article 13 be revised so as to give the members of the Commission their due status.

113. Mr. HUDSON stated that Mr. Amado's contention was supported by the provisions of article 16 (e) of the Commission's Statute, which said that " it may consult with . . . individual experts . . ." Hence, the Commission could have experts at its disposal, and, consequently, its members could not themselves be experts.

114. Mr. SPIROPOULOS agreed with Mr. Amado and Mr. Hudson. The previous year, the General Assembly had decided that the members of the Commission were experts, and should be paid at the same rate as experts. He had been astonished to see the members of the Commission described as experts. Nowhere was that stated and, in any case, everyone was an expert in his own field: cooks, chauffeurs, judges were all experts. The members of the Commission, on the other hand, were legal advisers. The question had been discussed in the Sixth Committee and its sub-committee, whose verdict had been that the members of the Commission were legal advisers. Many delegates had shared that view. The matter had then been referred to the Fifth Committee which had mishandled it by studying it on the basis of article 13 of the Statute. It was essential to submit the question to the General Assembly once more, so that the members of the Commission should be recognized as having the status of legal advisers. If the General Assembly wished to have highly qualified persons as candidates for membership in the Commission, it must afford them a status which took due account of their abilities and competence.

115. The CHAIRMAN said that the Rapporteur would mention the matter in his report.

116. Mr. HUDSON announced that he had drafted a text for submission to the General Assembly, in the following wording:

" The Commission would again draw the attention of the General Assembly to the inadequacy of the *per diem* allowances provided for by article 13 of its Statute. The assimilation of its members to members of commissions of experts of the Economic and Social Council fails to take account of the position of the International Law Commission which is endowed with a formal Statute. The assimilation is invidious, moreover, by reason of the larger allowances provided for members of the Administrative Tribunal of the United Nations."

It was decided that that text should be incorporated in the report.

117. Mr. KERNO (Assistant Secretary-General) said that before the discussion on that question came to an end, he wished to recall the efforts made by Mr. Hudson during the 1949 General Assembly. Despite the unfavourable atmosphere in the Fifth Committee, Mr. Hudson had persevered in his efforts to obtain recognition for the status due to the members of the International Law Commission. He could say that Mr. Hudson had left no stone unturned.

118. The CHAIRMAN thanked Mr. Hudson on behalf of all the members of the Commission.

The meeting rose at 1 p.m.

72nd MEETING

Thursday, 20 July 1950, at 10 a.m.

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Chairman: Mr. Georges SCELLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris el-KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

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

Advisory opinion of the International Court of Justice concerning the constitution of an arbitral tribunal

1. The CHAIRMAN observed that the members of the Commission had no doubt read in the newspapers extracts from the advisory opinion given by the International Court of Justice on 18 July. [1] The Assistant

[1] International Court of Justice, Reports of Judgments, advisory opinions and orders, 1950, p. 221.

Secretary-General had supplied him with the text of that opinion. It was a most important one and came at the right moment. The Court had given a negative opinion; that is to say it had given a negative reply to the third question submitted in General Assembly Resolution 294 (IV): " If one party fails to appoint a representative to a Treaty Commission under the Treaties of Peace with Bulgaria, Hungary and Roumania where that body is obliged to appoint a representative to the Treaty Commission, is the Secretary-General of the United Nations authorized to appoint the third member of the Commission upon the request of the other party to a dispute according to the provisions of the respective Treaties ? " It was not for the Commission to discuss the Court's opinion, but it might note that the opinion showed the rightness of the Commission's decision concerning article 23, paragraph 3, of the General Act of Arbitration which had it been ratified would have made impossible what had just occurred.

1 a. The Court declared in the first phase of the case [2] that there had been a dispute, that the three States were obligated to appoint their representatives to the Commissions, that, by not doing so, they had committed an international offence within the wide meaning given to the term by Mr. Basdevant and that their responsibility was involved. Later, however, interpreting the Paris Peace Treaties, the Court had stated that it was unable to proceed further since those Treaties did not permit the constitution of two-member Commissions. The Court had delivered its opinion by 11 votes to 2, the dissenting votes being those of Judges Read and Azevedo. Its interpretation of the two articles was based mainly on exegetic reasoning. The Commission must bow to the Court's decision.

1 b. He observed that in the present state of international law a State could evade its obligation to submit to arbitration simply by failing to appoint its arbitrator. The Commission had been well advised to recommend support for article 23, paras. 1, 2 and 3 of the General Act of Arbitration, which put a stop to such evasion. He was distressed at the thought of the effect this opinion would have on the non-legal public. " There has been failure to meet an obligation," said the Court, " but we can do nothing about it ". Public opinion would wonder what the Court was for.

2. Mr. HUDSON felt that the views expressed by the Commission on a recent occasion were much in advance of the present legal situation. The Commission's statement that there would be compulsory jurisdiction to determine whether a dispute existed and whether the dispute came within the obligation accepted by a State, was not inconsistent with what was to be found in the Court's opinion on the second question. In its first opinion the Court had declared in the same sense as the Commission, only it had given an advisory opinion whereas the Commission wished the Court to exercise its compulsory jurisdiction in ruling on those points.

3. Mr. el-KHOURY had read the passage concerning the advisory opinion in the press, but had not received quite the same impression from it as the Chairman. The Court had based its opinion on existing law. In the absence of a rule of international law giving it the necessary authority, it could not have acted otherwise. The Commission was attempting to establish a new convention with a view to its enforcement. That convention would lay an obligation upon States, but at the present moment, in the absence of a rule of law, the Court could not give any opinion different from the one it had already given.

4. The CHAIRMAN thought that Mr. el-Khoury would alter his view when he read the text of the Court's opinion and in particular the dissenting opinion of Judge Read. The Court had pronounced *de lege lata,* interpreting the law in an opinion voted by 11 of its members. The Commission had pronounced *de lege ferenda.*

5. Mr. KERNO (Assistant Secretary-General) agreed with Mr. Hudson that there was no contradiction between the Court's opinion on the first and second questions submitted to it by the General Assembly, and the provision adopted by the Commission at its last meeting. The Court had given an advisory opinion. The Commission had wished the Court to be able to pronounce a decision. In connexion with the third and fourth questions the Court had ruled that when a State refused to appoint an arbitrator nothing could be done. The Commission had adopted article 23 of the General Act of Arbitration under which the present gap could be filled by the President of the International Court of Justice being requested to appoint the arbitrator.

6. The CHAIRMAN read article 23 of the General Act of Arbitration as adopted by the Commission and stated that thenceforward the gap was filled.

Preparation of a draft code of offences against the peace and security of mankiud (resumed from the 62nd meeting). Text prepared by the Drafting Committee (A/CN.4/R.6) [3]

7. Mr. SANDSTRÖM felt that the first question to

[2] International Court of Justice, Reports of Judgments, advisory opinions and orders, 1950, p. 65.

[3] The text prepared by the Drafting Committee read as follows:

Article I

The following acts are offences against the peace and security of mankind, and are punishable as crimes under international law:

1. The employment or threat of employment of the armed forces of a State against another State for any purpose other than self-defence or execution of a decision by a competent organ of the United Nations.

2. The planning of or preparation for the employment of the armed forces of a State against another State for any purpose other than self-defense or execution of a decision by a competent organ of the United Nations.

3. The incursion into the territory of a State by armed bands coming from the territory of another State and acting for a political purpose.

4. The undertaking, encouragement or toleration by the anthorities of a State of organized activities calculated to foment civil strife in the territory of another State.

5. The undertaking, encouragement or toleration by the authorities of a State of organized activties intended or calcu-

consider was whether or not the draft was to be included in the general report. If the Commission decided against inclusion it might perhaps be as well not to examine it.

8. The CHAIRMAN did not agree. That question ought not to prevent the Commission from examining the text prepared by the Drafting Committee. He asked whether the Commission wished the draft code prepared by the Drafting Committee to remain simply for the use of the members of the Commission, or whether it wished it to be included in the report submitted to the General Assembly.

9. Mr. HUDSON observed that as the Commission wished to give the Special Rapporteur some guidance for his work the following year, the Drafting Committee had attempted to draft what it believed to be the Commission's provisional conclusions. Its sole object had been to provide guidance for the Special Rapporteur, who remained free to alter what he thought fit. In his opinion the text ought not to be included in the general report. He thought that the discussion should not be resumed. If members of the Commission felt that the document did not precisely reflect the Commission's views, they could say so, and the Rapporteur would bear what they said in mind.

10. The CHAIRMAN agreed with Mr. Hudson. The three members of the Drafting Committee had endeavoured to produce a document faithfully reflecting the views expressed in the Commission, but it was customary for the work of a sub-commission to be submitted to the parent Commission.

11. Mr. SPIROPOULOS said that the Drafting Committee had considered whether or not the Commission's conclusions should appear in the general report, but the same question also arose in the case of other reports. What was to happen in their case ? The question clearly did not arise in the cases of his own first report and the reports of Mr. Alfaro and Mr. Sandström, which dealt with items on the agenda that the Commission had finished discussing. But the Commission had not yet decided how to deal in the general report with the subjects upon which final conclusions had not yet been reached.

12. The CHAIRMAN gave it as his personal view that the results obtained ought to be mentioned in the general report. The Assembly should be kept informed of the progress of the Commission's work.

13. Mr. KERNO (Assistant Secretary-General) suggested that the Commission might follow the procedure it had adopted the previous year. On certain questions it had reached a final decision, whereas on others it had only done preparatory work, and its report to the General Assembly dealt with both; there had been a final report on the rights and duties of States and an interim report on other matters. By means of the in-

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lated to create a state of terror in the minds of particular persons or a group of persons or the general public in another State.

6. Acts by the authorities of a State in violation of international treaty obligations designed to assure international peace and security, including but not limited to treaty obligations concerning:

(a) the character or strength or location of armed forces or armaments;
(b) the training for service in armed forces;
(c) the maintenance of fortifications.

7. Acts by authorities of a State resulting in or directed toward the forcible annexation of territory belonging to another State, or of territory under an international regime.

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

(a) killing members of the group;
(b) causing serious bodily or mental harm to members of the group;
(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) imposing measures intended to prevent births within the group;
(e) forcibly transferring children of the group to another group.

9. Inhuman acts committed by the authorities of a State or by individuals against any civilian population, such as mass murder, or enslavement, or deportation, or persecutions on political, racial or religious grounds, when such acts are committed in execution of or in connection with the offences defined in Nos. 1, 2, 5 and 7.

10. Acts committed in violation of the laws or customs of war.

11. Acts which constitute:

(a) conspiracy to commit any of the offences defined in Nos. 1-10;
(b) direct incitement to commit any of the offences defined in Nos. 1-10;
(c) attempts to commit any of the offences defined in Nos. 1-10;
(d) complicity in the commission of any of the offences defined in Nos. 1-10.

Article II

The fact that a person acted as Head of State or as responsible Government official does not relieve him from responsibility for committing a crime under international law.

Article III

The fact that a person acted under the orders of a Government or a superior does not relieve him from responsibility for committing a crime under international law, provided a moral choice was in fact possible to him; but this fact may be considered in mitigation of punishment.

Article IV

Pending the establishment of a competent international criminal court, the States adopting this Code undertake to enact the necessary legislation for the trial and punishment of persons accused of committing any of the crimes under international law as defined in the Code.

Article V

The States adopting this Code undertake to refrain from denying extradition for the crimes under international law as defined in the Code on the ground that theyare political crimes.

Article VI

Disputes between the States adopting this Code relating to the interpretation or application of the provisions of the Code may be brought before the International Court of Justice by an application by any party to the dispute.

terim report the Assembly had been informed of what the Commission had done without a text being submitted to it.

14. The CHAIRMAN said that if he were given a task and was asked for a report, and he replied that he had studied the matter, the reply would probably not be found very satisfactory.

15. Mr. HUDSON thought that if the Commission included the text in its report to the General Assembly it would be discussed at length by the Sixth Committee. But the text would only be one indicating work in progress. What was the use of telling the General Assembly that the Commission had given such and such directives to its rapporteur ? It would be sufficient to mention that it had examined Mr. Spiropoulos' report. The text of the report and the records of the proceedings were at the disposal of the members of the Assembly. It was unnecessary to involve the Sixth Committte in a lengthy discussion before the report was finally adopted. The Commission was not required to inform the General Assembly in detail of what it had done. To give the members of the Assembly to understand that the text submitted constituted the Commission's final conclusion would produce a bad impression; the members of the Assembly ought moreover to know that the Commission's task was a lengthy one. Since the texts were not final ones, the Commission ought not to submit them to the Assembly.

16. The CHAIRMAN said that the Commission must certainly draw attention to the fact that the texts were only of a provisional nature. He thought that it would be helpful to know the Assembly's reaction to the results of the Commission's work.

17. Mr. HUDSON thought on the contrary that it would disturb the Commission's work. If the Commission sent the General Assembly an interim report stating such and such and then in 1951 submitted a final report, the members of the Assembly would wish to know the reason for the changes made.

18. Mr. SANDSTRÖM reminded the Commission that the previous year when the Nürnberg Principles were under discussion the Commission had reached certain preliminary conclusions but had not included them in the general report. He felt that procedure should be repeated. The Commission was not in general bound to give an account of every stage of its work. The discussion to which the draft would give rise would be a premature one.

19. Mr. YEPES did not see any reason why the Commission should not submit to the General Assembly a detailed report on its work during the current session. The resulting discussion in the Sixth Committee would, moreover, be very helpful to the Commission. If the Sixth Committee failed to approve what the Commission had done, the latter might perhaps modify its conclusions.

20. Mr. AMADO observed that a special report was a scientific work whereas a general report was a compilation of facts informing the General Assembly of what had occurred in the Commission. The previous year the Commission had devoted a passage of its report to each of the items upon which its opinion had been divided. Paragraph 27 of that report, for example, read as follows:

> " The Commission also considered the question whether, in formulating the principles of international law recognized in the Charter and judgment of the Tribunal, it should also formulate the general principles of international law which underlie the Charter and judgment. Mr. Georges Scelle advocated the latter course and in furtherance thereof presented a set of draft principles. The majority of the Commission, however, took the contrary view and were therefore unable to accept certain of the principles enunciated by Mr. Scelle which, in their opinion, went beyond the scope of the task of the Commission." [4]

20 a. That was the right course to pursue. Mention should be made of the views expressed on each item. The report should say what stage had been reached in the Commission's discussions and what opinions had been expressed. In his opinion the Assembly should be sent a report similar to that of the previous year, but he regretted that he could not agree to the Assembly being informed of all the details of the discussions.

21. Mr. SPIROPOULOS thought that the members of the Commission would be able to agree upon a single solution. The General Assembly should be provided with an account of the Commission's work. He did not agree with Mr. Hudson that a bad impression might be produced if the Commission gave the Assembly an account of what it had done and then altered its opinion the following year. To give an account of certain principles provisionally adopted could not have harmful consequences; he was not nervous of a discussion in the General Assembly. Such a discussion might even be helpful.

21 a. If reference was made to the general discussion in the General Assembly on questions other than the draft declaration on rights and duties of States appearing in the previous year's report, it would be seen that it had enabled some delegations to express their views, and those views had been useful to him in drafting his report. He had wondered whether he ought to include the Nürnberg Principles in his report without interpretation or appraisal. Some delegations had said that an appreciation was required. Discussion in the General Assembly could thus be helpful. A report containing only the Nürnberg Principles and the creation of an international tribunal would be too meagre. For psychological reasons the report should be more substantial.

22. The CHAIRMAN thought that Mr. Amado's proposal, which was an intermediate one, would still give the Rapporteur General a great deal of work since he would have to describe the trends of opinion that had appeared in the Commission.

23. Mr. AMADO pointed out that Professor Koretsky had not sat on the Commission during the present

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[4] Official records of the General Assembly, Fourth Session, Supplement No. 10 (A/925).

session, and differences of opinion had not been so acute.

24. Mr. ALFARO had listened carefully to the arguments put forward and thought that those of both Mr. Hudson and the Chairman had considerable weight. To take Mr. Hudson's argument first: If the document in question were submitted to the Assembly after inclusion in the general report, the General Assembly would naturally tend to regard it as a finished work even when told that it was merely preparatory. It would examine not only the substance of the text but its wording. The Sixth Committee would take decisions upon it. The following year the decisions of the General Assembly or the Sixth Committee could be taken into account, but those decisions could not be other than provisional. The Commission would therefore set about drafting a new text of the code. The Code would then go back again to the General Assembly, which might contain different representatives, apart from the possibility of governments changing their views, and in that case the decisions taken might be different from those of the year before. Like Mr. Hudson, he felt that such a situation should be avoided. The document ought not to be included in the general report.

24 a. The Chairman was right too: The General Assembly should be informed of the results of the Commission's work. The Assembly should realise that the Commission was engaged in very delicate work and that it was impossible for it to complete its task in so short a time. The Assembly should be informed that the Commission had studied a draft code and that a drafting committee had prepared a text. He felt that to include in the report the individual views of each member on each item would be a lengthy and almost impossible task. It would be better to adopt the intermediate solution and submit an interim report which only mentioned the broad lines upon which the Commission was agreed.

25. The CHAIRMAN said that the Commission could inform the General Assembly that it had decided substantially that certain crimes should be included in the code and only a very general discussion of principle could take place in that connexion. In that way the Commission would show the Assembly that it had worked and arrived at conclusions. The provisional conclusions adopted made it possible for a full report on the subject to be submitted to the Assembly.

26. Mr. LIANG (Secretary to the Commission) said that the Statute made no provision for an interim report. Whether the Commission were engaged in work on the progressive development of law or in work on the codification of law, all that the Assembly expected was the final report on that particular subject. It was true that the Commission had seen fit to submit an interim report to the Secretary-General the previous year.

26 a. During the present year the Commission had completed its examination of three questions: the Nürnberg Principles, the desirability and possibility of establishing an international criminal jurisdiction, and ways and means for making the evidence of customary international law more readily available. The General Assembly would probably devote much time to discussing those questions. For the remaining items on the agenda of the present session a summary report would suffice, and it would not be necessary to summarize the records, which was always a delicate matter. The summary of the records would have to be approved by the Commission, which would mean additional meetings after 29 July, the date scheduled for the end of the current session.

26 b. With regard to the draft code of offences against the peace and security of mankind, the report would contain an account of what had taken place and give the numbers of the documents adopted. Any member of the Sixth Committee could ask for the documents and study them, but it was not necessary to submit the text of a provisional document to the Sixth Committee. Simply to submit the text of the articles without any statement of precedents or any comments would, moreover, not be in keeping with the Statute. Furthermore many members of the Commission would not be present at the General Assembly, and the members who were present would find it embarrassing to state the Commission's views in the name of the Commission.

26 c. He supported Mr. Alfaro's suggestion. The Commission should submit a very brief account of the conclusions it had reached. In the case of questions it had finished studying, it could submit a full report. If in the general report the Commission dealt with the substance of matters it had not finished studying, the Sixth Committee might waste much time discussing questions upon which the International Law Commission had only given a provisional opinion.

27. Mr. AMADO had never suggested that the individual opinions of members of the Commission ought to be included in the report. What he had said was that in the case of certain questions the Commission might inform the General Assembly that its discussions had reached such and such a point. The question of the draft code of offences was more advanced than the question of treaties. That should be indicated in the report. The previous year Professor Koretsky had asked for individual views to be mentioned because at that time opinion had been mich divided. During the present year the Commission had been divided on the question of exchanges of notes—for example, in the report on the law of treaties—and it was possible that when the general report came to be discussed some members might wish it to be mentioned that they had not accepted Mr. Brierly's views.

28. Mr. HSU thought that it would be desirable to submit to the General Assembly an interim report on the Commission's work. The draft code of offences against the peace and security of mankind ought to be included in the report, with a note stating that it was a provisional text. The Assembly was aware that the Commission had done much work on the subject. It should be emphasized that the text was a preliminary one. The Assembly should be asked for its opinion in order that the views of its members might be known.

28. Mr. SPIROPOULOS felt that the members of the Commission were of the same opinion. He himself had said a month previously what had just been said by Mr.

Liang. The Commission was not obliged to submit a report, but since it had submitted one the previous year it was advisable that it should do so again. As regards the draft code of offences against the peace and security of mankind, the Commission could say, for example, that it had adopted the principle of individual responsibility and that it was desirable to have a code incorporated in a convention. In that way the General Assembly would be shown the work that had been done, but only general principles would be mentioned, which would perhaps be wiser than enumerating all the offences.

30. The CHAIRMAN felt that the members of the Commission were in general agreed that a substantial account of the trend of their work should be provided, but that they did not think it desirable to include provisional texts in the general report. That did not advance matters very far. The Commission would have to discuss the general rapporteur's report which would be a very delicate matter. It was fortunate in having as general rapporteur a man well versed in the law and accustomed to presenting views expressed in a body like the Commission, in which political opinions had some importance. He would like discussion of the report to begin as soon as possible, at least on that item. He regretted that the draft report, discussion on which might be lengthy, had not come before the Commission earlier, particularly in view of the fact that Mr. Spiropoulos had announced his departure in the near future.

Mr. Spiropoulos remarked that discussion of the report would be simple, since the Commission had decided to include the Nürnberg Principles in it and to state that it would prefer the code of offences to be incorporated in a convention. On that point there was no disagreement.

31. Mr. HUDSON pointed out that of the seven questions the Committee had to deal with at the present session, three had been the subject of a report the final text of which could be submitted to the Assembly, *viz*: ways and means for making the evidence of customary international law more readily available, the document on which was already complete and would be submitted to the General Assembly; the Nürnberg Principles, each of which had been formulated with a carefully considered commentary; and the question of an international criminal jurisdiction. The questions upon which the Commission could only make an interim report were the code of offences against the peace and security of mankind, the regime of the high seas, the law of treaties and arbitral procedure. He hoped that the interim report would not be too detailed.

32. The CHAIRMAN recalled that the Commission had reached conclusions of some importance on certain items in Mr. François' report, and that the report on the draft code of offences against peace and security had reached a fairly advanced stage. The same by no means applied to the other questions. The law of treaties had been studied only in part and arbitral procedure even less. He appreciated very much the reports of Mr. François and Mr. Spiropoulos, which would make a great impression on the Sixth Committee and on public opinion. Much work had gone into those reports and the general rapporteur could not deal with them simply in a few lines.

32 a. There remained the second question, and Mr. Sandström had been right in saying that the first question was a preliminary one. What did the Commission wish to do with the text prepared by the Drafting Committee, which reflected the principles advocated by the Commission ? Did it wish it to be merely a working paper for the Rapporteur, or did it desire to make certain that it was a true reflection of those principles ?

33. Mr. ALFARO felt that at the moment all that could be done was to pigeon-hole the document until the third session. If the Commission embarked on a discussion of the various articles it would use up the whole of its time till the end of the session. The Drafting Committee had undoubtedly endeavoured to take into account in its draft all the views expressed during the discussion. He thought, however, that in many cases members would wish to propose alterations. The alterations could be proposed when the Commission was examining the general report as a whole. There had been differences of opimion in the Drafting Committee, for example on the question whether the articles should be drafted in the form of a convention or in the form of a code. Finally the convention form had been chosen, without the word " convention " being mentioned. The words " the States adopting this Code " had been substituted for the words " parties to the Code ". There had also been the question whether or not provision for penalties should be made in the code. But all that ought to be gone into later. He proposed, therefore, that the document should not be examined at present, in order to save the Commission's time.

34. Mr. BRIERLY supported Mr. Alfaro's proposal. He added to Mr. Alfaro's arguments that if the Commission discussed the document in detail at once, it could hardly tell the General Assembly that the document was not yet in its final form. The Commission could inform the General Assembly that the text contained principles of a provisional nature to guide the Rapporteur for his report the following year.

35. The CHAIRMAN thought the proposal a wise one. The document should be regarded as a strategic reserve that had not yet been brought into action.

36. Mr. LIANG (Secretary to the Commission) agreed with the solution proposed by Mr. Alfaro and supported by Mr. Brierly. He felt it was particularly desirable to postpone study of the document because the Commission could not know at present how it would be referred to by the Rapporteur in his general report. Study of it should therefore be deferred until discussion of the general report. He further suggested that in drawing up his general report Mr. Alfaro might find it helpful to collaborate with the various special rapporteurs. The Secretariat would naturally be at the disposal of Mr. Alfaro and the special rapporteurs. He suggested that the Commission invite the special rapporteurs to collaborate with the general rapporteur.

37. The CHAIRMAN accepted Mr. Liang's suggestion.

38. Mr. HUDSON noted that the French translation of the document did not invariably tally with the English text, which appeared to him more accurate. The French text needed a number of corrections and improvements. In addition he thought a few alterations were necessary in the English text, to reflect precisely the ideas expressed by the Commission and the conclusions it had reached.

39. Mr. el-KHOURY remarked that he had found no provision in the Statute of the Commission requiring the Commission to submit interim reports. Article 17 directed the Commission to submit final reports on questions which it had finished examining. It might also, if it deemed it desirable, submit interim reports, but this was quite optional. The General Assembly therefore did not expect the Commission to submit to it interim reports on all the items it had considered but not finished. In the present year it had finished its examination of three questions on which it would have to submit final reports. In the case of other questions it might follow its procedure of the previous year and inform the General Assembly of the stage its work had reached.

40-42. The CHAIRMAN believed the Commission was in agreement with Mr. el-Khoury.

Mr. Sandström took the Chair.

43. Mr. HSU pointed out that the discussion on the examination of the document submitted to the Commission at the present meeting had not been finished. He had asked to make a statement on the question.

44. The CHAIRMAN called upon Mr. Hsu to make his statement.

45. Mr. HSU felt that the document did not fully reflect the views expressed during discussion of the report on offences against the peace and security of mankind. One important question was not mentioned in it at all, namely, the question of subversive activities. The omission seemed to him particularly unfortunate since, apart from the importance of that question, it related to a completely new practice. When he submitted a draft text on the subject [5] the Commission had referred it to the Drafting Committee in order that the latter might incorporate its main features. Nothing connected with it, however, appeared in document A/CN.6/R.6. He asked whether the Drafting Committee had examined his draft text.

45 a. A discussion ensued between the CHAIRMAN, Mr. SCELLE and Mr. HSU as to whether Mr. Hsu was entitled to ask that question after the Commission had passed on to another item of the agenda.

46. Mr. ALFARO remarked that in his view Mr. Hsu was entitled to make the observation. He agreed with him that the idea of subversion was a new one. When the matter was discussed in the Drafting Committee, that Committee had held that subversion was included in some of the offences it had formulated. He felt, however, that the matter ought to be taken up again the following year. He therefore proposed that the question of subversion be mentioned in the report submitted to the Commission the following year, together with certain other questions left outstanding, such as penalties, aiding the aggressor and failure to assist the United Nations. All those questions would be dealt with in the report of the following year.

47. Mr. HSU thanked Mr. Alfaro for his remarks. He had merely wished to reserve the right to raise the question again the following year. Subversion was a method of recourse to force. It was a new one, which the Commission could not pass over in silence. The following year he would make concrete proposals, since he considered the offence of subversion not to be fully covered by the offences formulated by the Commission. The best example of the need for a thorough examination of the question of that offence was provided by events in Korea. If the Commission did not formulate a new offence to cover subversion it would be failing to keep abreast of the times. He had wished to make his statement in order that it might appear in the records.

48. The CHAIRMAN stated that Mr. Hsu's reservation would be included in the records.

Arbitral procedure: Report by Mr. Scelle (item 6 of the agenda) (A/CN.4/18) (resumed from the 70th meeting)

49. The CHAIRMAN called upon the Commission to resume examination of Mr. Scelle's report.

PARAGRAPH III OF THE PROPOSED DRAFT TEXT

50. Mr. SCELLE reminded the Commission that in paragraph II of the proposed preliminary draft text appearing in his report, he had dealt with the constitution of an arbitral tribunal. The following paragraphs were based on the assumption that the tribunal had been set up by agreement between the parties to a dispute or by a decision of the International Court of Justice. What was needed was to invest the tribunal, once constituted, with the power to lay down the law. As far as the parties to the dispute were concerned, they were obliged to regard the tribunal as being as formally and regularly constituted as the International Court of Justice. Once established the tribunal was independent of the two parties.

50 a. That being understood, he had said in the first sub-paragraph of paragraph III: " Once the arbitral tribunal has been set up by agreement between the parties or by the subsidiary procedures indicated above, it shall not be open to any of the contending Governments to alter its composition ". That clearly laid down that no tribunal and none of the parties might attempt to alter the tribunal's composition. As regards the method of appointing arbitrators, he first of all examined the question of vacancies. He had said in his report: " If a vacancy occurs, the arbitrator shall be replaced by the method laid down for appointments. " His formula followed the practice observed since the 1899 Hague Convention, which he did not think could give rise to discussion.

[5] 60th Meeting, paras. 108 et seq.; 61st Meeting, paras. 4 et seq.

50 b. In the next sub-paragraph of his text he had dealt with replacement of a single arbitrator. There again he had observed the practice followed since 1899. Next he had dealt with suspicion: " An arbitrator may not participate in the judgment of a case with which he has previously had to deal in any capacity. Any doubts in this connexion shall be decided by the tribunal." He had been very careful to specify that it was for the tribunal to decide in case of doubt. There he had adopted the procedure laid down in the Statute of the International Court of Justice.

51. Mr. AMADO wondered whether the wording used by the Rapporteur was not somewhat wide. He thought the expression " in any capacity " lacked precision.

52. Mr. SCELLE did not agree that the definition was too wide; cases occurred, for example, in which a judge had already been consulted by one of the parties to a dispute. It was for the tribunal to decide whether in such a case the arbitrator might or might not participate in the judgment of the case.

53. The CHAIRMAN asked Mr. Scelle what he meant by the words " with which he has... had to deal " (*dont il aurait connu*). Were they used in the legal sense ?

54. Mr. SCELLE replied that they were not. In his opinion the words also included the fact of having been consulted.

55. Mr. AMADO felt that the Commission ought to make the wording clearer; it was too vague. Not only the actual dispute but cases connected with it ought to be taken into account.

56. Mr. SCELLE said that he had used the wording of Articles 17 and 24 of the Statute of the International Court of Justice. He agreed that the problem might be looked into more closely, but he did not feel that the Commission would achieve anything very satisfactory by doing so. He was well aware that there might be cases connected with a dispute submitted to the Court, but he thought it would be very difficult to state precisely what those cases were. In any case, it would be for the tribunal to decide.

57. Mr. AMADO asked the Commission to consider the hypothetical case of a question of maritime law coming before the tribunal. One of the parties to the dispute proposed Mr. François as arbitrator; Mr. François was a specialist on maritime law and consequently it might be said that he had already dealt with the subject, so that he could not act as arbitrator. What was to be done in such a case ?

58. Mr. SCELLE replied that he intended it to be left to the tribunal to decide.

59. Mr. HUDSON gave another example. Suppose the tribunal was composed of three members and had to deal with a dispute between States A and B. Each of those States appointed one of their nationals a member of the tribunal. The two members agreed upon the appointment of the third member. He failed to see how in that case State A could oppose the appointment of the national arbitrator of State B. If in the case of a tribunal of three or five members the Netherlands were party to a dispute and appointed Mr. François as arbitrator, could the tribunal disallow the appointment ? He did not think it could.

60. Mr. SCELLE replied that the Commission was not at present concerned with the question of objection, which he dealt with in the next sub-paragraph of paragraph III. It was concerned with cases in which the arbitrator himself might have scruples about participating in a case submitted to the tribunal. That arbitrator might quite possibly ask his colleagues if they felt that he could participate in the judgment of the case because he had dealt with the matter in dispute in scientific works or had already been consulted in similar and therefore related cases. It was that kind of scruple he had had in mind when drafting the passage in question. He recalled the case of Louis Renault, who had had a great reputation as a jurist and was frequently called upon to act as arbitrator. Louis Renault had never written anything except a few short articles, which were now prized as basic texts of the greatest value. He (Mr. Scelle) had taken part in the 1907 Hague Conference and been struck by the fact that no article of the Convention there drawn up had been accepted by the Conference unless it had previously been submitted to Louis Renault.

60 a. If one of the arbitrators had scruples of that kind, it would be for the other arbitrators to reply and to take a decision. In the event of the tribunal being composed of three members the umpire would decide. He realized, however, that in the case of a *non liquet* the tribunal would frequently not be in a position to give a diecision. But he wondered who else than the Court could take a decision in case of doubt as to a judge's right to sit. The case presented no difficulties when the Court was composed of a certain number of judges, like the International Court of Justice, for example, which consisted of fifteen members.

61. Mr. HUDSON remarked that there were cases in which there was no umpire.

62. Mr. CÓRDOVA said that in some countries, such as Mexico, there were very few people with experience in international law and international affairs. But a government would always try to appoint an arbitrator who possessed that experience, and it would naturally consider first one of its own nationals. In many cases, however, it had been found that national arbitrators appointed by their governments acted on the tribunal simply as agents of their countries. He thought that the Commission ought either to sanction that practice, or categorically forbid States to nominate their own nationals as arbitrators on an arbitrary tribunal. The procedure recommended by Mr. Scelle did not seem to him acceptable.

63. Mr. KERNO (Assistant Secretary-General) noted that Mr. Scelle said in his report that if doubt arose as to whether an arbitrator might participate in the judgment of a case with which he had previously had to deal, the tribunal would decide. He asked whether the judge under suspicion would himself take part in the decision.

64. Mr. SCELLE replied that he would, but that he

would find himself in the minority. Replying to Mr. Córdova he stated that where there were national arbitrators, the umpire would always have the casting vote after the national arbitrators had stated their views.

65. Mr. YEPES thought that the wording proposed by Mr. Scelle was too wide. The alteration of a few words would make it clear and explicit. In his opinion the words " in which he has previously taken part " should be substituted for the words " with which he had previously had to deal "; or use might even be made of the wording of Article 17 of the Statute of the International Court of Justice, according to which no member of the Court " may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity ". Such wording would obviate all difficulties in connexion with that passage of Mr. Scelle's text.

66. Mr. SCELLE said that his intention had been to leave the tribunal completely free to decide in case of doubt. The Commission was not at the moment dealing with the question of objection, which was dealt with later in the text. What was in question was scruples which might be felt within the tribunal itself.

67. Mr. HUDSON remarked that Mr. Scelle's text rather narrowed the field for countries wishing to appoint one of their own nationals as arbitrators.

68. Mr. SPIROPOULOS thought that Mr. Scelle was on the wrong track. What he proposed was contrary to practice. A tribunal was a tribunal. The objections that might be made ought to be limited to instances in which a judge had already taken part in the case in question. To give the umpire the right to decide was likewise going too far. If a tribunal were composed of three members, two of whom belonged to the nations parties to the dispute, those two members would clearly tend to pronounce in favour of their own countries. Had the umpire the right to remove them ? If he had, it would nearly always be impossible for governments to appoint their own jurists as judges or arbitrators. In most cases the members of the International Court of Justice were jurists appointed by their own governments. They participated in the judgment on all cases except the ones in which they had already pleaded on behalf of their countries, etc. As far as the Statute of the Court was concerned, there was nothing to prevent governments from appointing their jurists members of the Court.

69. Mr. SCELLE said he found Mr. Spiropoulos' objection difficult to answer. Mr. Spiropoulos had said that his proposal was contrary to practice. He had not written his report to conform with practice but to fill in the gaps in existing practice. Mr. Spiropoulos had spoken of jurists. In his own experience such persons cast off the old Adam when they came to judge a dispute. They adopted the point of view of the law. Mr. Weiss, jurist to the French Government, had voted in the Permanent Court of International Justice against his own government. A Belgian judge had done the same. The members of the International Court of Justice forgot their capacity as legal advisers to their governments and their nationality. The Commission was not, however, concerned with the International Court of Justice but with the arbitral tribunal.

69 a. Article 17 of the Statute moreover forbade members of the Court to participate in the decision of a case in which they had previously taken part as agent . . . " or in any other capacity ". Mr. Yepes had quoted Article 17 of the same Statute and proposed that the words " in which he has previously taken part " should be substituted for the words " with which he has previously had to deal " in the report. He accepted the proposal, but would be sorry to see the whole passage deleted, since its object was to improve customary procedure. Governments must not be prevented from appointing their own nationals, but arbitrators appointed by them were like *ad hoc* judges in the International Court of Justice. There were strong objections to such judges.

69 b. He reminded the Commission that Judge Loder, the first President of the Permanent Court of International Justice, had given a lecture to the International Law Academy in 1922 on the difference between international arbitration and international justice. In connexion with an article in the draft Statute of the Court drawn up by the delegates of the Scandinavian, Swiss and Netherlands Governments, to the effect that a judge who was a national of a Power party to the dispute was to be debarred, Mr. Loder had remarked that to doubt such a judge's impartiality and to wish to debar him was " to allow for human frailty ".

70. Mr. HUDSON did not oppose Mr. Scelle's views, but wished to propose a different form of words, such as the following:

> " Neither party should name as national arbitrator a person who has previously taken an active part in dealing with the particular dispute to be arbitrated."

71. Mr. YEPES withdrew his amendment in favour of Mr. Hudson's proposal.

72. Mr. SCELLE accepted Mr. Hudson's text. It was the third occasion during the last few days on which Mr. Hudson had proposed a better text than his own. He had only one reservation to make—namely, that the last sentence of his own text did not appear in the text proposed by Mr. Hudson. Was the omission necessary ?

73. Mr. HUDSON replied that it was.

74. Mr. SCELLE said that in that case he no longer agreed, since it meant a return to the old error of leaving a gap.

75. Mr. HUDSON said he had frequently observed that States regarded nationals appointed by them as representatives of their countries, and that national arbitrators regarded themselves as their governments' agents. He did not see how that could be avoided. In the International Court of Justice the situation was quite different. The judges there were quite independent of their governments.

76. Mr. el-KHOURY felt that the idea on which Mr. Scelle's text was based could only apply to an international tribunal; it was not applicable to private or national arbitration. In the case of private or national

arbitration, the parties must be entirely free to appoint their arbitrators. Those arbitrators, in their turn, would appoint the umpire. In that kind of arbitration, neutrality of the judges could not be insisted on. In the case of international arbitration, however, neutrality was indispensable. There were gaps in the text proposed by Mr. Scelle. It made no mention, for example, of the quorum required for a decision by the tribunal. He thought that an addition should be made to the text to cover that point.

77. Mr. CÓRDOVA drew attention to Article 31 of the Statute of the International Court of Justice dealing with the nationality of judges, which made provision for States parties to a dispute being represented in the Court by judges of the parties' nationality. If the Commission accepted that principle, there could be no question of its imposing restrictions on a judge on account of his past activities. It was recognized that Governments on the whole believed, when they appointed one of their nationals, that he would take their point of view. But it was the judge's duty to judge objectively. The text proposed by Mr. Hudson was drafted in too general terms. Mr. Hudson used the words " active part ". What did he mean by the word " active " ? Did he mean that a person who had acted as advisor to his government in a dispute submitted to arbitration, or who had participated in a judgment in connexion with that dispute, had thereby taken an " active part " ? The Commission must decide whether it meant to allow States parties to a dispute to appoint arbitrators of their own nationality, or to forbid such appointments.

78. Mr. YEPES thought that *ad hoc* judges were always open to challenge. In article 17, paragraph 2 and article 31, paragraph 6, the Statute of the International Court of Justice allowed the Court to object to *ad hoc* judges.

79. Mr. SCELLE pointed out that the question of objection was dealt with later in his text.

80. Mr. SPIROPOULOS felt that the Commission was faced with a difficult situation which had no simple solution. He thought that the formula proposed by Mr. Hudson was the only one which the Commission could accept. The most that could be expected of governments was that they should not appoint persons who had already actively participated in investigating or settling the dispute submitted to arbitration. It was a very delicate matter to limit the rights of States. It was necessary in the present case, but care should be taken not to go too far. He did not think that the Commission could fill in the gaps to which Mr. Scelle had referred. He asked the Commission to adopt Mr. Hudson's formula which, as he had already said, appeared to him to represent the maximum that could be provided for.

81. Mr. SCELLE accepted Mr. Hudson's formula. The question of the nationality of judges would come up again when the Commission came to consider the next point in his report, which dealt with objection. The question before the Commission at the moment, however, was one which should be settled within the tribunal itself. In his view the arbitrators constituting the tribunal ought to decide any doubt, and whether or not an arbitrator should participate in the judgment of the case. If the doubt was serious, one of the other arbitrators would certainly propose disqualification. That, however, was a matter to be considered later.

82. The CHAIRMAN felt he was right in saying that the members of the Commission accepted Mr. Hudson's formula.

83. Mr. HUDSON said that his formula was a direction to the Rapporteur, and that it was not necessary for it to be put to the vote.

The meeting rose at 1.5 p.m.

73rd MEETING

Friday, 21 July 1950, at 10 a.m.

CONTENTS

Chairman: Mr. A. E. F. SANDSTRÖM.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris el-KHOURY, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

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

Arbitral procedure: Report by Mr. Scelle (item 6 of the agenda) (A/CN.4/18) (continued)

PARAGRAPH III OF THE PROPOSED DRAFT TEXT (*continued*)

1. Mr. SCELLE said that on the previous day the Commission had rejected the fourth sub-paragraph, under which the tribunal would decide in case of doubt whether an arbitrator could participate in the judgment of a case. He explained that the tribunal, or in some cases a third-power arbitrator, might be called on to give an opinion as to the qualifications of an arbitrator to sit on the tribunal. The question was taken up again in connexion with objections. Once a tribunal was set up, it was an organ of a particular international body; hence, its composition could no longer be changed. National arbitrators could not be interfered with. They were nominated by the two parties; the tribunal was above the parties and had no further connexion with