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Summary record of the 81st meeting

Topic:
Other topics

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"Some members of the Commission thought this proposal went too far, since arbitration differed from judicial settlement of disputes in that its procedure was more flexible; consequently, various questions must be left to the agreement between the parties. It would discourage governments to impose unduly strict rules on them."¹⁰

61. Mr. HUDSON referred to the English text of the next to the last sub-paragraph, which read "... that the new convention proposed should prevent..." He thought the word "proposed" was incorrect, and should be replaced by the word "envisaged",¹¹ which incidentally would correspond to the French text. He also thought that the word "convention" should be replaced in both languages by the word "code".

It was so decided.

62. The CHAIRMAN said he would put before the Commission the second drafts of the various parts of the general report; and he asked the Commission to try not to dwell on points of detail.

63. Mr. HUDSON pointed out that the members of the Commission had not had the time to read their documents; but he suggested passing them page by page.

It was so decided.

SECOND READING

PART I: GENERAL (A/CN.4/R.7/ADD.1/REV.1)¹²

64. Mr. HUDSON was surprised at the wording of paragraph 3. It was not correct to state at that point that Mr. Koretsky had been absent from the second session. All mention of Mr. Koretsky should be omitted; in any case, paragraphs 4 - 7 referred to him.

65. Mr. KERNO (Assistant Secretary-General) thought it might merely be said that Sir Benegal Narsing Rau and Mr. Jaroslav Zourek had not taken part in the session.

66. After a short discussion, in which Mr. Brierly, Mr. Alfaro and Mr. Yepes took part, Mr. CORDOVA suggested that paragraph 3 should read:

"3. Sir Benegal Narsing Rau and Mr. Jaroslav Zourek did not attend the session. Mr. Vladimir M. Koretsky withdrew at the opening meeting."¹³

It was so decided.

67. Mr. HUDSON proposed that at the end of the third sentence of paragraph 7 the words "and has since absented himself from the meetings of the Commission" be deleted.

It was so decided.

68. Mr. HUDSON suggested fusing the two sub-paragraphs of paragraph 12 into one.

¹⁰ Instead of "was more flexible, so that various questions must be settled by agreement between the parties. It would be offensive to Governments to attempt to impose unduly strict rules on them."

¹¹ Later changed to "essential".

¹² Mimeographed document only. See footnote 1.

¹³ Later redrafted for the printed text of the "Report".

69. Mr. YEPES suggested the insertion of the words, "which was ready" after "his working paper" in paragraph 12.

It was so decided.

70. Mr. BRIERLY suggested that the heading "Time and Place of the Third Session" given in the French text should be added in the English version before paragraph 22.

It was so decided.

*Part I was adopted.*¹⁴

PART II: WAYS AND MEANS FOR MAKING THE EVIDENCE OF CUSTOMARY INTERNATIONAL LAW MORE READILY AVAILABLE (A/CN.4/R.7/REV.1)¹⁵

71. Mr. YEPES said he would like to propose just one slight modification to paragraph 29. In line 8, "evidence of customary law" should be substituted for "indications of state practice".

It was so decided.

Part II was adopted.

PART VI: PROGRESS OF WORK ON TOPICS SELECTED FOR CODIFICATION

CHAPTER I: THE LAW OF TREATIES

(A/CN.4/R.7/ADD.4/REV.1)¹⁶

72. Mr. BRIERLY suggested that the words "and the Rapporteur was asked to revise his draft" at the end of paragraph 7 (paragraph 164 of the "Report") be omitted.

It was so decided.

Part VI, Chapter I, was adopted.

The meeting rose at 6 p.m.

81st MEETING

Saturday, 29 July 1950, at 9.30 a.m.

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¹⁴ See 81st meeting, paras. 76-78.

¹⁵ Mimeographed document only. See footnote 1.

¹⁶ *Ibid.*

Chairman: Mr. Georges SCELLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. J. P. A. FRANÇOIS, Mr. Manley O. HUDSON, Mr. Faris el-KHOURY, 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).

Commission's draft report covering the work of its second session (concluded)

SECOND READING

PART III: FORMULATION OF THE NÜRNBERG PRINCIPLES (A/CN.4/R.7/ADD.3/REV.1)¹

1. Mr. ALFARO recalled that Mr. HUDSON had made a reservation.

2. The CHAIRMAN added that he had made one also.

3. Mr. HUDSON read out the following reservation:

“In abstaining from the vote on this part of the report, Mr. Hudson stated that some confusion had existed as to the precise nature of the task entrusted to the Commission. In the report of the Commission covering its first session, which was approved by the General Assembly, the view was put forward that ‘the task of the Commission was not to express any appreciation of these principles (namely the Nürnberg Principles) as principles of international law, but merely to formulate them’. In his opinion, however, the Commission had not altogether adhered to that view in its later work, with the result that doubt subsisted as to the juridical character of the formulation adopted. Moreover, the formulation had not sufficiently taken into account the special character of the Charter and judgment of the International Military Tribunal and the *ad hoc* purpose which they served.”

He asked his colleagues to be so good as to state their comments.

4. The CHAIRMAN did not think that members of the Commission were entitled to criticise a reservation.

5. Mr. AMADO, on the contrary, considered that the wording of the reservation should be examined.

6. The CHAIRMAN explained that he had meant that there was no question of adopting the reservation.

7. Mr. HUDSON thought that reservations should be examined by members of the Commission in the same way as dissenting opinions of judges of the Permanent Court of International Justice had been examined by

the other judges. He considered that although a member of the Commission could issue a dissentient opinion, he must nevertheless submit it to the Commission so that his colleagues could state their views. He would take the suggestions put forward into account.

8. Mr. ALFARO did not wish to ask Mr. Hudson to amend the text of his reservation, but he wished to know what confusion he was referring to when he said that “in abstaining from the vote on this part of the report Mr. Hudson stated that some confusion had existed as to the precise nature of the task entrusted to the Commission”. He believed that if there had perhaps been some confusion at the first session, it had been removed by the decision taken the previous year to state that the Commission should merely formulate the Nürnberg Principles.

9. Mr. HUDSON considered that the confusion had not been removed and that no decision had been taken. The various members of the Commission had referred to existing international law on that point. Doubts subsisted as to the juridical character of the formulation adopted. He did not think that he was injuring the Commission's prestige by submitting that text.

10. Mr. AMADO suggested that it might be better to say “some doubt” rather than “some confusion”.

11. Mr. HUDSON observed that he used the word “doubt” later on, but that he was prepared to say “uncertainty”.

12. The CHAIRMAN agreed with Mr. Hudson that members of the Commission held conflicting views and that in any case they were not unanimous.

13. Mr. AMADO observed that Mr. Hudson's reservation was in conflict with that of the Chairman.

14. The CHAIRMAN said that in his reservation he was indeed expressing a contrary view. He considered that the Nürnberg Principles constituted positive international law and even that they had done so before the judgment.

14 a. He read out his reservation, which was as follows:

“Mr. Georges Scelle said that he regretted that he could not accept the view taken by the Commission of its task in this part of the report, for the same reasons as those which he had stated the previous year. The report did not enunciate the general principles of law on which the provisions of the Charter and the decisions of the Tribunal were based, but merely summarized some of them, whereas the Tribunal itself had stated that the principles it had adopted were already a part of positive international law at the time when it was established. Moreover, he considered that the final text of the report did not seem to reflect accurately the conclusions reached by the Commission during its preliminary discussions, and restricted their scope.”

14 b. He might have added that the General Assembly had itself adopted those principles, but he was uncertain whether it had done so because they were principles of international law or merely because it accepted them. He had added the words “Moreover, he con-

¹ Mimeographed document only. Parts of that document that differ from the “Report” are reproduced in footnotes to the summary records. For other parts, see the “Report” in vol. II of the present publication.

sidered that the final text of the report did not seem to reflect accurately . . ." because it was his impression that during its discussions the Commission had adopted a more positive attitude than was reflected in the report.

15. Mr. HUDSON observed that each of the two reservations made the other clearer.

16. The CHAIRMAN thought that that should help to remove what Mr. Hudson had described as confusion; there was no confusion, but rather opposition.

17. Mr. AMADO asked how the Rapporteur was going to insert the reservations. Would he include in the report a paragraph similar to paragraph 27 of the previous year's report?

18. Mr. HUDSON thought that his statement could appear as a footnote to the second sentence of paragraph 97 of the report.

19. The CHAIRMAN agreed; the statement he had made the previous year had appeared in the body of the report and also in a footnote.

20. Mr. ALFARO also had a short reservation for inclusion as a footnote. His reservation was as follows:

"Mr. Ricardo J. Alfaro declared that he voted in favour of Part III of the report with a reservation as to paragraph 96, because he believed that the reference therein contained regarding the task of formulating the Nürnberg Principles should have been inserted in the report together with a quotation of the passage in the judgment of the Nürnberg Tribunal in which the Tribunal asserted that the Charter 'is the expression of international law existing at the time of its creation and to that extent is itself a contribution to international law.'"

20 a. He thought that the two opinions should be included and the choice left to the reader. He did not propose that the Commission should approve the Tribunal's opinion, but that it should say what the Tribunal had stated. He did not think it fair to the Tribunal to include only that part of the decision which cast doubt on its juridical basis and did not show that the Tribunal believed that those principles were a part of international law. He did not approve of paragraph 96.

21. Mr. HUDSON pointed out that Mr. Alfaro was only objecting to a small part of paragraph 96. His reservation merely applied to the fact that the Commission was recalling its conclusions of the previous year in that part of the report.

22. Mr. ALFARO explained that he objected to a restatement of those conclusions in any part of the report.

23. Mr. HUDSON proposed that in that case the Commission should recall its decision without stating the opinion of the Tribunal.

24. Mr. ALFARO considered that the Commission was called upon to formulate what it considered to be international law. That was why he found it unjust to delete the whole paragraph, but thought it advisable to delete that part which cast doubt on the legal validity of the Tribunal's opinion. He would not have made any reservation if the Commission had not decided to omit the Tribunal's opinion.

25. Mr. HUDSON thought that Mr. Alfaro was right in making that reservation. The three reservations should appear in the form of a footnote, but he asked to what passage it should refer. He proposed that it should refer to the title of Part III.

25 a. He suggested that at the beginning of paragraph 98 the words "The above principle" should be replaced by the words "This principle". In footnote 16, referring to paragraph 119, he asked that the word "taking" should be underlined.² He thought that the reference to the Geneva Convention contained in that footnote was not sufficiently clear since the provision was included in the four Conventions of 1949. He proposed the following wording: "took note of the fact that the four Geneva Conventions interdict . . ."³ He said that in the English text he would prefer the word "interdict" to the word "prohibit".

26. Mr. ALFARO accepted that amendment. He explained that Mr. Hsu preferred that article 34 of the Convention Relative to the Protection of Civilian Persons in Time of War should be referred to, since that was the most appropriate reference for the question of hostages. He proposed the following wording: "Took note of the fact that the Geneva Conventions of 1949, and more specifically Article 34 of the Convention etc."

It was so decided.

PART IV: QUESTION OF INTERNATIONAL CRIMINAL JURISDICTION (A/CN.4/R.7/ADD.7/REV.1)⁴

27. Mr. HUDSON thought that paragraph 18 (paragraph 145 of the "Report") had been somewhat unduly truncated. The Commission did not state the reason why it did not recommend the establishment of a Criminal Chamber of the International Court of Justice. He would prefer the words "does not recommend it because of its possible prejudicial effect on the Court's discharge of its function of judging disputes between States". There was no doubt that several members of the Commission had taken that view. He thought the General Assembly would be glad to know the reason why the Commission did not recommend that the Statute of the Court should be amended.

28. Mr. KERNO (Assistant Secretary-General) had the same impression, but he did not think that the text proposed by Mr. Hudson should include the word "prejudicial".

29. Mr. HUDSON withdrew that word.

30. Mr. BRIERLY proposed the words "its functions under the present Statute". The new duties assigned to the Court would be very different.

31. Mr. KERNO (Assistant Secretary-General) thought that the most serious objection to the establishment of a Criminal Chamber was that its functions would be so different from those of the Court under the

² Footnote 19 of the "Report".

³ Instead of "the fact that Article 34 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 prohibits . . ."

⁴ Mimeographed document only. See footnote 1.

present Statute that the same judges would not be able to perform them.

32. Mr. HUDSON agreed to the words "the possible effect on the Court's discharge of its functions under the present Statute".

33. The CHAIRMAN had no objection to Mr. Hudson's revised text, which he found most judicious.

34. Mr. ALFARO did not think the Commission could consider the question at that stage, since it had decided by a very small majority to delete the words "for practical reasons as well as reasons of principle".⁵ Those reasons had been that the prestige of the Court would suffer, that a Convention would not be sufficient, that the members of the Court could not become criminal lawyers overnight, and that amendment of the Statute might be vetoed etc. The words "for practical reasons as well as reasons of principle" had been proposed. Without taking a vote, the Commission had adopted the words "for practical reasons"; it had then decided, by 6 votes to 5, to delete the words "as well as reasons of principle". Finally, voting on the whole proposal, the Commission had decided, by 6 votes to 4, to delete the words "for practical reasons". The Commission could not take a decision that day, since four of its members who had taken part in those votes were absent.

35. The CHAIRMAN asked whether the Commission wished to retain those words in view of the fact that there had been a formal decision. He thought it preferable not to go back on the vote.

36. Mr. el-KHOURY thought that the words "the majority of the Commission decided" might be added.

37. Mr. YEPES thought it would be more objective to state that the Commission "does not recommend it for practical reasons".

38. The CHAIRMAN pointed out that it was precisely those words which the Commission had decided to delete, and that since some members were absent it could not go back on its decisions.

39. Mr. HUDSON accepted that ruling. He added that the word "third" before "question" in the first line of paragraph 18 was unnecessary.

40. Mr. ALFARO explained that he had inserted it for the sake of clarity. The Commission had first considered the desirability and then the possibility of establishing an international judicial organ and had finally arrived at the third question, namely, the possibility of establishing a Criminal Chamber of the International Court of Justice.

41. Mr. HUDSON observed that it was not referred to as the "third" question in paragraphs 14, 15, 16 and 17. If it were to be so called, it should be so in those paragraphs also.

42. Mr. KERNO (Assistant Secretary-General) pointed out that in paragraph 13 it was stated that "The Chairman put the two points discussed to the vote"; hence the "third" question in paragraph 18.

43. Mr. HUDSON suggested that in that case the

wording should be "this third question". He proposed saying "the possibility of establishing a Criminal Chamber of the International Court of Justice and that, though it is possible to do so by amendment of the Court's Statute...".

44. Mr. YEPES remarked, from another point of view, that the report did not mention that a member of the Commission had suggested studying the Statute of the Court to see whether criminal cases could be brought before it through the intermediary of States, arguing from analogy with the *Mavrommatis Case*. He admitted that the comparison was rather forced, but thought that the Commission might consider the possibility of interpreting the Statute in that manner.

45. Mr. ALFARO recalled that at the time he had stated that the Commission had not been instructed to decide whether there was any possible means of giving the Court criminal jurisdiction, but only to examine the possibility of establishing a Criminal Chamber.

46. The CHAIRMAN pointed out that Mr. Yepes' proposal appeared in the summary record.

47. Mr. ALFARO agreed to the deletion of the word "third" in the first line of paragraph 18.

PART V: PREPARATION OF A DRAFT CODE OF OFFENCES
AGAINST THE PEACE AND SECURITY OF MANKIND
(A/CN.4/R.7/ADD.2/REV.1)⁶

48. Mr. HUDSON proposed that the beginning of the last sentence of paragraph 4 (paragraph 149 of the "Report") should be amended to read "Nor should offences connected with piracy etc. be considered as falling within the scope of the draft Code".⁷ Otherwise, the Commission would appear to be stating that those were international crimes, which he very much doubted.

49. Mr. AMADO recalled that it was owing to his intervention that the report had been amended. The report had originally read: "Such topics as...". He thought that the words "connected with" had a very precise meaning in criminal law. The reference to the offences themselves should be retained. He could not accept Mr. Hudson's text.

50. The CHAIRMAN considered that the French text was perfectly adequate.

51. Mr. HUDSON thought it impossible to affirm, for instance, that slavery was a crime under international law. He would accept the text if it were amended to read: "such matters as...".

52. The CHAIRMAN recalled that the Commission had decided to delete the word "questions" in the French text.

53. Mr. AMADO suggested that another word be found.

54. Mr. ALFARO said that traffic in women was a crime.

55. Mr. HUDSON did not agree. Traffic in women was not a crime under international law. He added that

⁵ See 44th meeting, paras. 61-63.

⁶ Mimeographed document only. See footnote 1.

⁷ Instead of "Nor should such offences as piracy..."

consideration of the other offences would show that piracy was the only one which constituted a crime under international law.

56. The CHAIRMAN considered that both traffic in women and counterfeiting currency were crimes.

57. Mr. HUDSON maintained that they were not crimes under international law.

58. Mr. FRANÇOIS proposed substituting the word "*matières*" (matters) for the word "*crimes*" (offences).

It was so decided.

59. Mr. BRIERLY proposed the inclusion of a footnote to paragraph 9 (paragraph 154 of the "Report") indicating the pages of the Summary Record on which the discussion was reported.

60. Mr. HUDSON recalled that Mr. Briery had proposed that the English text of paragraph 10 (paragraph 155 of the "Report") be amended to read "under superior orders" instead of "under a superior order"; it would be better to say "under the orders of a superior".

61. Mr. ALFARO proposed the words "under the orders of a superior or of his Government".

62. Mr. HUDSON did not think it necessary to be too precise.

63. The CHAIRMAN proposed the words "under the orders of a superior".

64. Mr. ALFARO remarked that the Spanish translation would be much easier if the words "under superior orders" were adopted.

PART VI: PROGRESS OF WORK ON TOPICS SELECTED FOR CODIFICATION

CHAPTER II: ARBITRAL PROCEDURE

(A/CN.4/R.7/ADD.6/REV.1)

65. Mr. HUDSON asked whether it would not be advisable for the general rapporteur to revise the numbering of paragraph 6 and the following paragraphs, which contained a considerable number of sub-paragraphs, and were consequently difficult to refer to.

66. The CHAIRMAN accepted that proposal and said that the Secretariat would put it into effect.

67. Mr. YEPES pointed out that paragraph 4 of page 3 repeated the text of the second sub-paragraph of paragraph 1. He thought that the Commission had decided the previous day to delete paragraph 4.

68. The CHAIRMAN confirmed that that had been decided.

69. Mr. HUDSON drew attention to the heading "Paragraph I", in paragraph 5, page 3. The reader would wonder what it referred to. It should be made clear that the reference was to the report of the Special Rapporteur.

70. Mr. AMADO thought it would be preferable to retain the text quoted, but not to mention Paragraph I.

71. Mr. HUDSON considered that the origin of the

text quoted should be indicated. He proposed the words "Paragraph I of the report read as follows".

72. The CHAIRMAN observed that a difficulty arose from the fact that each paragraph of his report dealt with a different question. Nevertheless, he would be quite satisfied to add the words "Paragraph I of the report read as follows".

CHAPTER III: REGIME OF THE HIGH SEAS

(A/CN.4/R.7/ADD.5/REV.1)

73. Mr. HUDSON thought that a semi-colon should be substituted for the full stop at the end of the fourth sentence of paragraph 17 (paragraph 198 of the "Report"). He asked that the word "littoral" should be substituted for the word "riparian" since the latter applied to States bordering on a river.

74. Mr. FRANÇOIS accepted those amendments.

75. The CHAIRMAN observed that the word "*riverain*" must be left in the French text.

PART I (RESUMED FROM THE PREVIOUS MEETING)

76. Mr. HUDSON apologized for asking the Commission to revert to Part I. He found that the heading "Reports for the consideration of the General Assembly" was unsuitable, since it did not correspond to the heading regarding the Commission's future studies. Moreover, it seemed to imply that the general Report was not submitted for the consideration of the General Assembly. He proposed the words "definitive action by the Commission".

77. Mr. LIANG (Secretary of the Commission) proposed the words "Items on which the Commission has completed its study".

78. The CHAIRMAN proposed that the French title should read "*Points sur lesquels la Commission a terminé ses travaux*".

It was so decided.

Closure of the session.

79. The CHAIRMAN observed that the Commission had now reviewed the whole of its work for that year.

80. Mr. KERNO (Assistant Secretary-General) assumed that the Commission would allow the Secretariat to edit the report without, of course, making any change of substance.

81. Mr. HUDSON considered that most necessary.

82. Mr. KERNO (Assistant Secretary-General) said that there had been several suggestions that the summary records of the Commission should be made more easily accessible to those concerned with international law and that it might perhaps be possible to have them printed. It was for the Commission to decide whether it was advisable to make such a recommendation. The financial aspect of the question should also be considered; printing was expensive and no credits had been allocated for that purpose.

83. Mr. HUDSON was satisfied that the records should not be printed, since if they were, they would acquire a permanent value which he did not consider desirable.

84. Mr. ALFARO said that before the session closed, he wished to express the Commission's thanks to the Chairman for the success of its work. On behalf of his colleagues, he also wished to thank the Secretariat staff for the help they had given.

85. The CHAIRMAN fully endorsed Mr. Alfaro's remarks regarding the help given by the Secretariat. With regard to the thanks addressed to him by the general rapporteur, he felt that, on the contrary, it was for him to thank his colleagues both for the honour of his election and for the willingness with which they had accepted the guidance he had endeavoured to give the Commission. He was sorry for any mistakes he might have made. It was certainly difficult to be a perfect chairman, and he had often been an imperfect one. It was not easy to preside over a Commission which worked on a basis of equality and in which the office of chairman was only an occasional one. The previous year, the Commission had had an admirable chairman in Mr. Hudson, and it had worked hard; but the volume of its work had been smaller because it had been necessary first to establish a technique. The chairman of a body like the International Law Commission was torn between the difficulties of the democratic system and the spectre of dictatorship. It was difficult to steer a middle course.

85 a. The Commission was going to submit to the General Assembly three items that had been definitely disposed of; it had made a thorough study of another item—namely, the draft Code of Offences against the Peace and Security of Mankind. The other three questions had only been touched upon. Next year, when a new chairman would be directing the Commission's work, he believed that it would be advisable not to pass from one item to another. It would be preferable to study one question thoroughly; the Commission would decide that point.

85 b. He had sometimes been in opposition to the majority of the Commission. That was due to divergent views on what constituted a rule of law. The Commission had been asked to prepare a code, but the actual codification was not of course its function, since it was not a legislative body. Governments were the legislators, but they could not legislate unless their task was prepared for them. The Commission's task was to study how rules of law appeared in international society. They

emerged slowly from the conscience of the international community and at certain times assumed the form of what sociologists referred to as "ethics", which was the consciousness of what should become a rule of international law. For an ethical principle to become a rule of international law, the intervention of authority was required.

85 c. It must be recognized that in international law, international tribunals played a special part in that connexion. Although he adhered to the Latin concept of law, he had always maintained that there was judge-made law even in France, and he would go so far as to say that that was how the law came into being. In any kind of society, before the legislator there was the judge; that had been so in France. Judges had determined the rule of custom before the legislators had intervened. In international society too, the judge often acted before the legislator. That was the reason for his own attitude regarding the Nürnberg Principles. He thought that it was in conformity with the scientific facts. He owed his colleagues that explanation; he thought that the Nürnberg judges had made positive law of what had only been ethics. The Charter of the Tribunal had been drawn up by the international public authorities. That was his view.

85 d. He thanked the Commission for the work they had done together; they must never lose heart. Even if the Commission's work did not lead to positive results, it was an element in the general organization of mankind. He regretted that in the United Nations there did not seem to be a sufficient realization of the moral force which the Organization could exert. He deplored the fact because he had always maintained that without that force federalism could never be achieved. He had confidence in the conscience of the peoples and in ethical principles. On the other hand he had no confidence whatever in the power that always resisted ethical principles, but was always defeated in the end.

85 e. He admired the Secretary-General of the United Nations who, like another Noah, had remained confident in the most dramatic circumstances. Like the Commission, he had built a ship which had finally arrived in port. He had sent out several doves of peace, some of which had returned to the ark; but that did not mean that the flood was over. It was on the dove which returned with an olive branch that hopes must be fixed.

85 f. He thanked his colleagues for the friendship they had shown him and bade them farewell till the following year.

The meeting rose at 11.10 a.m.