

YEARBOOK  
OF THE  
INTERNATIONAL  
LAW COMMISSION  
1951

*Volume I*

*Summary records  
of the third session*

*16 May - 27 July 1951*

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UNITED NATIONS





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## NOTE

The present volume contains the summary records of the third session of the Commission (82nd to 134th meetings); in accordance with General Assembly resolution 987 (X) of 3 December 1955, they are printed in English only; they include the corrections to the provisional summary records which were requested by members of the Commission and such drafting and editorial modifications as were considered necessary; in particular, working papers submitted during the session were incorporated in the summary records.

Volume II contains the studies, special reports and principal draft resolutions presented to the Commission for or during its third session. In accordance with resolution 987 (X), they are printed in their original language only.

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# INTERNATIONAL LAW COMMISSION

## SUMMARY RECORDS OF THE THIRD SESSION

### 82nd MEETING

Wednesday, 16 May 1951, at 3.10 p.m.

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*Chairman:* Mr. A. E. F. SANDSTRÖM.

#### *Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADÓ, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, 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.

#### Opening of the session

1. In the absence of the Chairman, Mr. Georges Scelle, whose arrival had been delayed, Mr. A. E. F. Sandström, first Vice-Chairman, took the Chair.
2. The CHAIRMAN declared the third session of the International Law Commission open.
3. Welcoming his colleagues, he expressed the hope that their serious deliberations would provide satisfactory solutions to a number of problems.
4. Certain members of the Commission were absent. Sir Benegal Rau had written to say he was unable to attend the opening meeting but hoped to be present from 21 May onwards.
5. Mr. KERNO (Assistant Secretary-General) said that Mr. Faris el Khouri, whom he had seen before leaving New York, had informed him that the incidents which had occurred between Syria and Israel compelled him to remain in New York, where the Security Council was sitting, but that he hoped to join the Commission on 21 May. Mr. Hudson would be sailing on 24 May. He had, however, no news of Mr. Jaroslav Zourek.
6. The CHAIRMAN read out a telegram from Mr. Vladimir Koretsky informing the Commission that the state of his health prevented him from attending the session and requesting that the Secretariat be instructed to send him the documentation and summary records.
7. Mr. YEPES proposed that the Commission reply

to Mr. Koretsky regretting his illness and expressing the hope that he would come and take part in its work as soon as he was well enough.

*The proposal was adopted.*

#### Election of officers

8. Mr. CORDOVA suggested that it would be more courteous to wait until Mr. Scelle was present before electing the officers; he accordingly proposed deferring the election until the following day.

9. The CHAIRMAN supported that proposal.

*It was so decided.*

#### Adoption of the provisional agenda

10. The CHAIRMAN announced that a provisional agenda, drawn up by the Secretariat (A/CN.4/40) was before the Commission.<sup>1</sup> He thought it would be pref-

<sup>1</sup> Document A/CN.4/40 read as follows:

- " 1. General Assembly resolution 484 (V) of 12 December 1950: Review by the International Law Commission of its Statute with the object of recommending revisions thereof to the General Assembly.
- " 2. Preparation of a draft code of offences against the peace and security of mankind:
  - (a) Report by Mr. Spiropoulos;
  - (b) General Assembly resolution 488 (V) of 12 December 1950: Formulation of the Nürnberg principles.
- " 3. General Assembly resolution 378 B (V) of 17 November 1950: Duties of States in the event of the outbreak of hostilities.
- " 4. Law of treaties:
  - (a) Report by Mr. Briery;
  - (b) General Assembly resolution 478 (V) of 16 November 1950: Reservations to multilateral conventions.
- " 5. Arbitral procedure: report by Mr. Scelle.
- " 6. Régime of the high seas: report by Mr. François.
- " 7. Date and place of the fourth session.
- " 8. Economic and Social Council resolution 319 B III (XI) of 11 August 1950 requesting the International Law Commission to prepare the necessary draft international convention or conventions for the elimination of statelessness.
- " 9. Co-operation with other bodies.
- " 10. General Assembly resolution 494 (V) of 20 November 1950: Development of a 20-year programme for achieving peace through the United Nations.
- " 11. Other General Assembly resolutions relating to the report of the International Law Commission on its second session:
  - " (a) General Assembly resolution 485 (V) of 12 December 1950: Amendment to article 13 of the Statute of the International Law Commission;
  - " (b) General Assembly resolution 486 (V) of 12 December 1950: Extension of the term of office of the present members of the International Law Commission;
  - " (c) General Assembly resolution 487 (V) of 12 December 1950: Ways and means for making the evidence of customary international law more readily available;
  - " (d) General Assembly resolution 489 (V) of 12 December 1950: International Criminal Jurisdiction."

erable, before taking up the first item on that agenda, to wait until a larger number of members of the Commission were present so as to enable those absent at the moment to express their views.

11. Mr. YEPES remarked that the same argument might be advanced with regard to all the other items of the agenda.

12. The CHAIRMAN thought it was particularly pertinent in the case of the first item.

13. Mr. AMADO said that there was no reason why the Commission should not follow the provisional agenda but he hardly thought it would be able to complete discussion of the first item in two or three meetings. He saw no objection to postponing study of that item to a later date. He enquired whether the Chairman proposed any changes in the provisional agenda.

14. The CHAIRMAN said that the agenda was subject to modification but he himself had no proposal to make.

15. Mr. KERNO (Assistant Secretary-General) pointed out that the agenda contained two items, the study of which should be completed by the Commission during that session, since the General Assembly had asked it to report on them to its sixth session. The items were: Review by the International Law Commission of its Statute (item 1) and Reservations to multilateral conventions (item 4 (b)). According to unofficial information from the International Court of Justice, the latter would be giving its opinion the following week with regard to reservations to multilateral conventions. The Commission would need to take that factor into consideration when discussing its agenda.

16. Account would also have to be taken of the fact that not all the documents required for the work of the Commission were ready in both working languages, or even in a single working language.

17. Mr. HSU could see no serious objection to postponing the study of item 1, provided the decision were taken, not on the grounds that certain members of the Commission were absent, but because the majority of the members had not been able to attend the last session of the General Assembly and had not had time to study the question. If the Commission decided to postpone the study of item 1, he would suggest that it select a not too distant date, in view of the fact that it had to submit a report on the subject to the General Assembly.

18-20. Mr. LIANG (Secretary to the Commission) explained that the reports that year had been received by the Secretariat barely a month before the opening date of the session, which had been fixed earlier than the previous year.

21. Mr. SPIROPOULOS approved the provisional agenda in principle but agreed with Mr. Kerno that special reasons prevented the Commission from keeping to it strictly.

22. The first item of the provisional agenda was one of the questions which it was necessary for the Commission to examine during that session. The absence of a few members of the Commission should not prevent it from undertaking a preliminary discussion. The majority of its members were not, in fact, fully acquainted with the

situation and it might perhaps be of advantage to begin with a very general discussion to enable them to form an idea of what the question involved. The Commission might therefore hear a few views on the subject, allow itself time for reflection, and then, at some later date, invite certain members to submit proposals and perhaps set up a sub-committee.

23. The item relating to reservations to multilateral conventions was also one of the questions whose study the Commission would need to complete. However, as Mr. Kerno had pointed out, it was advisable to await the opinion of the International Court of Justice on the question.

24. A third point for consideration concerned the draft code of offences against the peace and security of mankind (item 2 of the agenda), but the report on the question had not yet appeared. The matter would therefore have to wait. He had endeavoured to draw up a text suitable for submission to Governments for their observations. The principles enunciated the previous year had been slightly modified in the light of the discussions at the last session, and a few comments had been added. The report therefore contained the text of the principles, some comments and an introduction. It also dealt with the special question of the definition of an aggressor (item 3 of the agenda), which had been referred to the Commission by decision of the Political Committee of the General Assembly, on a proposal of Mr. Vyshinsky. As that question was related to the Code, he had ventured to devote a special study to it, which would constitute the second part of his report.

25. As the report by Mr. François (item 6 of the agenda) had not yet been circulated, the report by Mr. Scelle (A/CN.4/18; item 5 of the agenda) was, in fact, the only one actually before the Commission. He thought it might perhaps be desirable to take up that report after holding a general discussion on the first item of the agenda. That would be only fair, seeing that the previous year the Commission had dealt with Scelle's report last and had not devoted sufficient time to it. The study might perhaps take a week, by which time the documents relating to the other items on the agenda would no doubt be ready.

26. The CHAIRMAN noted that Mr. Spiropoulos was in favour of holding a general discussion on the first item, considering next the report by Mr. Scelle and then passing on to another item on the agenda, leaving till a later date the decision as to when it would resume the study of item 1. The Commission was always free to change the order of the items on its agenda.

27. Mr. AMADO approved of Mr. Spiropoulos' proposal to discuss the report by Mr. Scelle, provided the latter agreed that his report be studied forthwith, as he hoped would be the case. For that reason he felt it desirable that the Commission should not take a decision at that meeting, but should wait until the following one.

28. The CHAIRMAN noted that all the members of the Commission were in favour of beginning with a general discussion of item 1 of the agenda, to be followed by the study of Mr. Scelle's report, if the latter approved

of that procedure, and finally of taking up the other items when the relevant documents were available.

29. Mr. LIANG (Secretary to the Commission) mentioned that the last item on the agenda had been included only for the information of the members of the Commission.

*The agenda was adopted.*

30. Mr. CORDOVA asked whether the Commission would arrange its programme on the same lines as last year.

31. The CHAIRMAN recalled that, at its previous session, the Commission had met in the mornings, keeping the afternoons free for studying the issues raised, and that it had not met on Saturdays.

32. Mr. CORDOVA pointed out that on Mondays the Commission had met in the afternoon.

33. Mr. AMADO thought the timetable of meetings at the previous session was satisfactory.

34. Mr. KERNO (Assistant Secretary-General) suggested that the Commission should not take a final decision about Saturdays, since it might be found necessary to work on Saturday mornings. Obviously some time must be allowed for reflection, but it might be possible occasionally to meet on Saturdays too.

35. Mr. CORDOVA wondered whether interpreters were necessary. If so he would speak in Spanish, but if all the members could manage without interpretation he was prepared to make a concession and not to use his own language.

36. The CHAIRMAN said that some of the members did not understand French sufficiently well, so that it was desirable not to do without interpretation altogether.

37. With regard to the question raised by Mr. Kerno, he would like to explain that, when the Commission adopted its timetable the previous year, it had not considered that it was excluding the possibility of meeting on Saturday mornings; at the same time it was desirable to have a day free to study the problems to be discussed.

38. Mr. KERNO (Assistant Secretary-General) thought that as at the next meeting the Commission would be starting the general exchange of views on the question of revision of its Statute, it might be well to recall how the Sixth Committee had arrived at the recommendation which became General Assembly resolution 484 (V).

39. Without going into details, a few pointers might be useful. The United Kingdom delegation had drawn attention to Article 17 of the Commission's Statute, under which Members of the United Nations, the principal organs of the United Nations other than the General Assembly, specialized agencies and other inter-governmental bodies, could bring specific questions before the Commission. The United Kingdom delegation had felt that such a provision was perhaps putting an unduly heavy burden on the Commission and ran the risk of diverting it from its main task. Hence it had suggested that the Commission study the possibility of revising the article.

40. The Soviet Union delegation had approved the idea of revision of Article 17.

41. The United Kingdom delegation had then observed that the financial arrangements adopted might be improved so as to enable the members of the Commission to give more time to the Commission's work. It had also suggested that the term of office of the members of the Commission be extended. The General Assembly had already taken a step in that direction, but only in respect of the initial period. It would be well to consider whether the Commission wished to propose an extension of its members' term of office for later periods. Lastly, the members of the Commission should be entirely independent of governments. That was essential.

42. It had also been suggested that a proportion of the members of the Commission, possibly up to one-third, should give their full time to the Commission's work, and that the Commission might employ jurists from *outside the circle of its members as rapporteurs or expert advisers.*

43. The Yugoslav delegation had suggested inserting in the Statute a provision similar to that in Article 13, paragraph 3, of the Statute of the International Court of Justice, with a view to ensuring the continuity of the Commission's work, and particularly of the work of the rapporteurs.

44. The CHAIRMAN added that fuller details about those suggestions could be found in the summary records of the meetings of the Sixth Committee and of the General Assembly.

#### **Tribute to the memory of Jose Philadelpho de Barsas Azevedo**

45. Mr. CORDOVA felt it appropriate that the Commission should pay tribute to the memory of Mr. Azevedo, a member of the International Court of Justice, who had just died. He proposed that the Commission telegraph its condolences to the Court and to the family of the deceased.

46. Mr. YEPES wholeheartedly supported Mr. Córdova's proposal. Mr. Azevedo's death was a great loss to international law.

*The Commission adopted Mr. Córdova's proposal and decided to stand and observe one minute's silence as a tribute to Mr. Azevedo's memory.*

47. Mr. AMADO was deeply touched by the tribute paid by the Commission to Mr. Azevedo's memory.

48. He had known Azevedo as a young teacher of philosophy in Rio de Janeiro. He was a man endowed with every gift that nature could bestow. He had been the youngest professor of law at the Faculty in Rio, after brilliant success at a public examination. During the political disturbances he had been appointed Mayor of the City of Rio. At the Supreme Court he had done magnificent work. There too he had been the youngest Judge. As a barrister he had been extremely successful. He had lived surrounded by a happy family in the enjoyment of the considerable wealth acquired by dint of his own efforts. He had been elected to the International Court of Justice in the train of men like Epitacio Pessoa and Ruy de Barbosa, and now when he had reached

the top of the ladder, death had suddenly claimed him. He personally would not easily forget the loss.

49. He thanked the Commission for the mark of its esteem, which would be greatly appreciated in Brazil.

The meeting rose at 3.30 p.m.

## 83rd MEETING

Thursday, 17 May 1951, at 10 a.m.

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*Chairman:* Mr. Georges SCELLE;  
later Mr. James L. BRIERLY.

#### *Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. Roberto CORDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, 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.

#### Opening of the meeting

1. The CHAIRMAN thanked the members of the Commission for the temporary arrangements they had made at the previous meeting owing to his absence. He was deeply touched by such kind consideration.

#### Election of officers

2. The CHAIRMAN reminded the Commission that at the opening of its second session it had decided that all its officers should be changed each year. He asked members to submit nominations for the chairmanship.

3. Mr. AMADO proposed that the Commission should entrust the chairmanship to Mr. James Leslie Brierly whose unchallenged authority in the sphere of international law was recognized by all the members. The Commission had had successively as chairmen Mr. Hudson and Mr. Scelle whose energy and wisdom it had duly appreciated. At a time when the world was concerned with questions of international law and when all eyes were turned on the Commission, it was necessary once again to place the conduct of the debates in the hands of a jurist of eminence, as the Commission would be doing if it adopted his proposal.

4. Mr. ALFARO seconded the nomination of Mr. Brierly.

5. Mr. CORDOVA thought that it was the Commission's desire to elect Mr. Brierly unanimously.

*Mr. James Leslie Brierly was unanimously elected Chairman of the Commission.*

*Mr. Brierly took the chair.*

6. The CHAIRMAN said that he was sincerely and deeply sensible of the honour done him by the Commission in making him its Chairman for one year. He was well aware of the responsibilities awaiting him after the example given him by his predecessors, Mr. Hudson and Mr. Scelle, who had distinguished themselves, the one by his driving force and ruthless efficiency, and the other by his golden tongue and gentle manners. He would endeavour to follow their example and to be "*vir fortis in re, suavis in modo*". He congratulated the retiring Chairman on his recovery and hoped that he would in future enjoy the best of health.

7. According to an old tradition, when a new Speaker was elected in the House of Commons, he solemnly presented himself before the King and read an address affirming his loyalty and zeal. The address always ended with these words: "begging your Majesty to put the best construction on all my actions". Finding himself in a similar position, he assured the Commission that any errors he might make would not be due to intentional discourtesy.

8. He asked the members of the Commission to submit nominations for the remaining offices.

9. Mr. ALFARO, seconded by Mr. CORDOVA, proposed the nomination of Mr. Shuhsi Hsu as first Vice-Chairman. He did not doubt that, in view of his profound legal knowledge and the zeal he had displayed in the Commission as a member and in the General Assembly as the Chinese representative, Mr. Hsu would be unanimously elected.

*Mr. Shuhsi Hsu was unanimously elected first Vice-Chairman of the Commission.*

10. Mr. SPIROPOULOS, seconded by Mr. SANDSTRÖM, paid tribute to the authority of Mr. Jesús María Yepes, and proposed that the Commission appoint him second Vice-Chairman.

*Mr. Jesús María Yepes was unanimously elected second Vice-Chairman of the Commission.*

11. Mr. SANDSTRÖM, supported by Mr. HSU and Mr. AMADO, emphasized the achievements of Mr. Roberto Córdova as a member of the commission and proposed that he be entrusted with the duties of Rapporteur.

*Mr. Roberto Córdova was unanimously elected Rapporteur of the Commission.*

#### Programme of work

12. The CHAIRMAN recalled that, at the previous meeting, the Commission had decided to have a preliminary general discussion on the question of the revision of its Statute (item 1 of the agenda) and then, provided Mr. Scelle agreed, to go on to arbitral procedure (item 5).

In order to give Mr. Scelle a few days grace before his report was discussed, the Commission might, once the general discussion on the Statute was finished, go on to examine the Report on the Law of Treaties which he himself had submitted (item 4 (a)).

*It was so decided.*

**General Assembly resolution 484 (V) of 12 December 1950:  
Review by the International Law Commission of its  
Statute with the object of recommending revisions thereof  
to the General Assembly (item 1 of the agenda)**

GENERAL DEBATE

13. Mr. HSU said he had taken part in the work of the Sixth Committee of the General Assembly when it examined the question of possible revision of the Commission's Statute. He had supported the proposal which had led the Sixth Committee to recommend the General Assembly to ask the Commission to review its own Statute. He had felt that it was right that the Commission should be given the privilege and the responsibility of that task. The experience it had acquired as to the way in which the Statute functioned made it incumbent upon the Commission to submit the appropriate recommendations to the General Assembly.

14. Revision of the Statute had been envisaged ever since it was drawn up. At the outset, it was intended to be provisional, as the Chairman would no doubt remember, since, like himself, he had taken part in 1947 in the work of the Committee for the Progressive Development of International Law and its Codification. Hence the time had come to tackle that problem, to decide whether it was advisable to undertake the revision, and what sort of revision should be recommended. Seven distinct suggestions had been put forward during the discussions in the Sixth Committee — six by the United Kingdom delegation, and one by the Yugoslav delegation.

15. The question of the emoluments paid to the members of the Commission had, thanks to the efforts of Mr. Spiropoulos, already been settled by the General Assembly and the matter could be regarded as closed, unless the Commission desired to re-open it.

16. The term of office of the members of the Commission had been provisionally extended from 3 to 5 years. The General Assembly had, however, taken no final decision on that point and it was for the Commission to consider whether five years was the most satisfactory period. That question should not be difficult to settle.

17. The independence of members of the Commission vis à vis the Governments of which they were nationals did not raise any serious problem, since it was already implicitly provided for in the Statute and, in particular, by the two facts that the members of the Commission were not nominated but elected (article 3), and that the General Assembly, before electing members, satisfied itself that the candidates individually possessed the qualifications required and that in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world was assured (article 8). There could, however, be no objection

to including in the Statute a more specific reference to the independence of the members of the Commission.

18. The extension of the term of office of members who, on its expiry, had not yet completed certain work on which they were engaged, had been suggested to the Sixth Committee by the Yugoslav delegation. That was a further question for consideration which the Commission should be able to resolve quite easily. To his mind the three following suggestions made to the Sixth Committee were more important: The possibility of the Commission availing itself of the services of rapporteurs who were not members of the Commission invited no serious objections. It seemed to follow logically from the existing Statute and should accordingly be envisaged.

19. During the discussions in the Sixth Committee, the suggestion had also been made that Article 17 of the Statute should be modified. That article gave the Commission the task of carrying out work entrusted to it by various international organs other than the General Assembly. The members of the Commission might perhaps consider that, if the existing methods of work were to be retained, such duties might become somewhat onerous. The solution to be recommended to the General Assembly should not, in any case, be too difficult to find.

20. Finally, it had been suggested that certain members be appointed on a full-time basis. That suggestion would require careful consideration, since it might be thought likely to render the election of members more complicated. As it was, both the personal qualifications required and considerations of geographical distribution had to be taken into account. If a distinction between two categories of members were introduced, their election would become more difficult. He himself doubted the advisability of a suggestion which, if adopted, would tend to split the Commission into two groups.

21. He would, however, like to put a few tentative ideas to the Commission with a view to assisting it in its enquiries.

22. He thought, for instance, that the Secretariat might participate to a greater extent in the Commission's work. The members of the Committee for the Progressive Development of International Law and its Codification had recommended, in 1947, that the members of the International Law Commission be appointed on a full-time basis. Had the General Assembly adopted that solution, problems such as the extension of the term of office of rapporteurs or the revision of Article 17 would not have arisen. If the Commission could ask the Secretariat to take over a larger part of its tasks, it would be spared the necessity of considering whether there was any occasion for some of its members to serve on a full-time basis, and the rapporteurs too might possibly be delighted to see their burden lightened. The Legal Department was the branch of the Secretariat with the smallest staff. If such a task were assigned it, its staff would have to be increased and the Department would benefit. Since the proposal that all the members of the Commission be appointed on a full-time basis had been rejected, the Commission could meet the demands made upon it by means of more extensive collaboration on the part of the Secretariat,

23. The world, which was in the process of unification, was awaiting the codification of the whole field of international law and would not be satisfied with partial results. The law derived from treaties and from custom was vague and full of omissions. International society needed a clear and precise body of law defining the relations of States. The Charter, in a provision introduced at the instance of China (Article 13, paragraph 1 a), recognized the need for such codification. However, at the rate at which the work of the Commission was proceeding at the moment, 25 years might be required for its completion. It was high time that efforts were made to progress more rapidly and, as the members of the Commission did not serve on a full-time basis, the part played by the Secretariat must be increased.

24. He thought it would be advisable for the Commission to form a clear idea of the purpose of its work. That purpose, in any case, followed clearly from the first paragraph of the preamble to the Statute and from article 1, which stated: "The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification." The Commission should therefore endeavour to be progressive. How indeed could one promote the progressive development of law through research which would remain purely academic? The Commission should not, of course, outstrip the law but it should encourage the current trend of the law. Such an aim was already embodied in the Statute, in particular by the words "promotion" and "progressive", but it would be desirable for it to be expressed more clearly and emphatically, so as to encourage those members who were inclined to be somewhat too conservative to become more venturesome.

25. It would be well, surely, to define more clearly the procedure to be followed in connection with the "progressive development of international law" and "codification", a procedure borrowed from the Harvard draft. Under that procedure, consultation with governments was introduced; but it had not been found successful. Very few governments replied to the questionnaires sent to them. Did the Commission intend to keep that procedure, even though in some ways it was a waste of time? It might, perhaps, have some changes to make in that direction.

26. In conclusion, he made it clear that the views he had put forward should not be regarded as formal proposals.

27. Mr. SPIROPOULOS said that he too had taken part in the discussions in the Sixth Committee on the Commission's Statute. Incidentally, any views exchanged at the moment were only tentative, their object being to help the Commission to define the problems it had to examine.

28. Of the General Assembly's suggestions concerning the Commission's Statute, some were of secondary importance, e.g., the question whether rapporteurs who had not completed their work when their term of office expired should be kept on, or the question whether the Commission should call in experts from outside the number of its members.

29. Some of the questions, on the other hand, were decidedly questions of substance, e.g., that raised by the United Kingdom delegation — the only question in his opinion which called for really thorough study by the Commission. The question was: should the International Law Commission be turned into a Commission to which its members were appointed on a full-time basis? That suggestion had been brought forward by a delegation which, apart from being one of the most important in the United Nations, had opposed such a step three years previously. At that time, the plan submitted to the General Assembly by the Codification Committee provided that the members should serve on a full-time basis. But the United Kingdom representative, Mr. Beckett, had opposed the idea that the work of the Commission's members should go on without interruption, if only on grounds of economy. The United Kingdom delegation had no doubt felt that it was better for the Commission to be a body which sat twice or three times a year. The fact that that same delegation was now in favour of the original plan, and was actually suggesting that it be taken up again, proved not merely that the United Kingdom's internal economy had improved thanks to a praiseworthy effort of national discipline, but more especially that the United Kingdom delegation had come to the conclusion that the results of the Commission's work were not being achieved quickly enough to enable it in the near future to achieve its aim, namely the codification of international law. Without making any reproach to the Commission, the United Kingdom delegation had simply wished to indicate by its proposal that it would like to see the work speeded up.

30. In regard to codification, the Commission had in fact achieved practically nothing. Its third session was now opening, and it had still not produced a definitive draft codification. Neither the question of the rights and duties of States, nor the formulation of the Nürnberg principles, nor the question of an international criminal jurisdiction came properly speaking within the sphere of codification. The three main topics chosen for codification: namely, the law of treaties, arbitration procedure and the regime of the high seas were only in preparation. It would be several years yet before definitive drafts were forthcoming.

31. The United Kingdom delegation must therefore have concluded that the slow pace at which the Commission proceeded was due to its composition, its working methods, and the constitution it had been given. It had therefore called for study of the feasibility of having the members of the Commission working on a full-time basis. The question merited thorough examination; and it was one which could not be solved overnight.

32. It might be argued that, by advocating that measure, certain members of the Commission would appear to be acting in their own personal interests. Actually there was no danger of that, since if the change were decided upon, it would not come about within the next three years, by which time the term of office of the present members would have expired. Moreover, in that matter the general interest must prevail, and possible criticisms

must be ignored, once it was concluded that such a solution would be in the general interest of the International Law Commission's work.

33. The slow rate of progress of the Commission's work was attributable to two separate causes. First of all, the fact that the General Assembly referred to the Commission for consideration various special questions such as that of the definition of the term "aggressor". It was quite right that the General Assembly should consult the Commission. It needed the advice of an independent body with recognized juridical competence. Otherwise, it could either apply to the International Court of Justice and ask for advisory opinions, or set up an *ad hoc* committee, whose members being appointed by their respective governments would not of course inspire the same confidence. Thus the part played by the Commission in that direction was an essential one.

34. The second reason for the slow progress made was the shortness of the Commission's sessions and its procedure. Half of a two months' session had to be devoted to study of special questions so that only a month remained for the work of codification, and for that work the Statute laid down a particularly complex procedure, the main stages of which were the drawing up of a preliminary report, a first and second reading of the report, communication of the report to governments and its return to the Commission for the Commission to produce the final draft. It would take at least five to seven years therefore for the codification of any topic selected by the Commission for codification to mature.

35. The Commission was at the moment engaged in the codification of three topics. The work might perhaps be finished in six years. The commission would then deal with three new topics, and in twelve years would have prepared six drafts. There had been talk of two sessions a year, but that would mean that members of the Commission would be out of their own countries for four or five months a year. He himself, as leading jurist at the Greek Ministry of Foreign Affairs, had the very greatest difficulty in absenting himself from his country in order to take part in the work of the Commission and of the General Assembly.

36. He did not support the suggestion that only some members of the Commission should be appointed on a full-time basis. The difficulty of deciding which those members were to be appeared to him insoluble.

37. He thought that the Charter ought to have provided for the establishment of a major permanent legal Commission similar to those existing in all States, with powers in the legal field comparable to those of the Economic and Social Council in the economic field. It was law which gave the necessary form to all the activities of mankind. Though the establishment of such a Commission would involve some extra expense it would enable a solution to be found for problems of very great importance.

38. Should that reform be effected the Commission would still remain a subsidiary organ of the General

Assembly. Being independent it would not be incorporated in the Secretariat. The codification of international law ought to be the work of the General Assembly, as provided in the Charter (Article 13, paragraph 1 *a*). In that case it would not clash with the Secretariat, but would co-operate with it. The staff attached to the Commission would not form part of the Secretariat. Like the International Court of Justice, the Commission would have an independent structure.

39. If the members of the Commission were to leave their work in their own countries and devote their lives to the task of codification, they must be helped to do so by being accorded equal status with the judges of the International Court of Justice. The Commission carried great weight, on account of its membership. The eminence of its three Chairmen was sufficient indication of that. Matters must therefore be so arranged that people in such important positions could devote themselves wholly to the Commission, without however necessarily having to give up all their other activities. Incompatible posts were forbidden by the Statute of the International Court of Justice, but since the members of the Commission were not judges there was no reason why they should not also be advisers to delegations or University professors. That however was a minor point.

40. He thought that the work of the Commission ought not to be confined to the codification of international law. The Commission could legitimately deal with any questions referred to it by the General Assembly, the three Councils and even, should such a case arise, by certain subsidiary organs — such as for example the preparation of special international conventions. Codification, however, should remain its principal task.

41. If such a reform were carried out there was hope of the Commission being able to submit a draft of a real code of international law. Additional expense would have to be provided for. That, however, was a consideration which did not lie within the province of the Commission. The Commission's sole duty was to advise the General Assembly on means of hastening the codification of public international law. But the financial question did not constitute a serious obstacle. The annual cost of the International Court of Justice was about \$ 400,000. Considering the daily cost of the campaign in Korea, work devoted to peaceful ends might be regarded as worth some financial effort.

42. Since such a reform would probably take a long time to carry out the Commission would have to submit its suggestions to the General Assembly, but it could already begin by appointing a rapporteur who, should those suggestions be accepted, would submit to it a report on the subject at the next session.

43. Mr. HSU said that the idea of enabling members of the Commission to serve on a full-time basis was the one he would be most inclined to support if he thought it likely to be adopted. The idea had been advanced at the outset in a joint proposal to the Codification Committee by the United States of America and China.

44. The reason he had not dealt with the matter in his

statement was that he thought the United Kingdom was not yet prepared to consider such a reform.

45. Mr. SANDSTRÖM said that he had not attended the General Assembly, but he had read the records of the proceedings in the Sixth Committee, from which he had gathered that the slow progress made by the Commission had aroused some misgiving. But it must not be forgotten that the first session had been devoted to organization and that the two months' session of the previous year had produced substantial results. In addition, the work done by the Commission might be expected to take a long time, just like work on domestic legislation or any other work demanding extensive research.

46. It was meet and proper that the study requested of the Commission should be carried out. The basic problem was the time spent on its work. If the Commission continued to meet for only two or three months every year it would be a very long time before codification projects were produced. Mr. Hsu and Mr. Spiropoulos had said that the ideal solution would be for the members of the Commission to serve on a full-time basis. It might be objected, as it had been objected during the discussion which had preceded the setting up of the Commission, that the members of the Commission should maintain contact with legal activities in their own countries. Account should be taken of that objection, since, if the proposed solution were adopted, such contact would be reduced to a minimum. In addition, the most distinguished personalities might perhaps be prevented from sitting on the Commission because they would be reluctant, for example, to give up their activities or to exile themselves. Although there was perhaps some justification for such arguments, an endeavour should be made to prolong the sessions and to make the work of the Commission the main activity of its members, any outside activities they might have then becoming secondary activities. Those were the lines along which a remedy should be sought for the present situation, since, as Mr. Spiropoulos had said, it would be unfortunate if the Commission were divided into two groups, one serving on a full-time basis and the other assembling merely for the sessions.

47. Among the causes of delay in the Commission's work had been mentioned the special questions referred to it. If the Commission remained in permanent session, the time taken up by the study of such questions would clearly be proportionately less. Conversely, given the short sessions as they then were, the time required for such study was excessive. But even if sessions were to be prolonged, some restriction should be placed on the referral of special questions to the Commission. The question whether the Statute of the Commission should be amended in that respect needed careful study.

48. In other respects, he concurred in the views expressed by Mr. Spiropoulos. If the Commission's sessions were to be longer the requisite conditions for extending them should be provided.

49. Mr. KERNO (Assistant Secretary-General) explained that there were two types of special questions, namely, those laid before the Commission by the General

Assembly itself and those referred to it in accordance with article 17 of its Statute; the latter had been a source of concern to delegations at the Sixth Committee, who had feared that the Commission might be overwhelmed by such questions.

50. All the questions so far dealt with by the Commission, with the exception of the question of the nationality of married women, had been referred to it by the General Assembly.

51. The Commission might recommend the revision of article 17 without mentioning the powers of the General Assembly, or adding a suggestion that the General Assembly should exercise some moderation in referring special questions to the Commission.

52. Mr. SPIROPOULOS recalled that the jurists were regularly consulted by the League of Nations. The General Assembly of the United Nations should be in a position to approach a Law Commission and receive a reply without delay.

52a. So far as concerned the definition of the term "aggressor", for example, when the Political Committee of the General Assembly had wished to obtain the opinion of the highest international legal authority on that very thorny question, it had not applied to the Sixth Committee, the members of which were not all well-known jurists and in which political views counted, but had preferred to consult the International Law Commission direct. That was a very sound precedent. The General Assembly would thereby obtain the opinion of an independent body composed of distinguished jurists.

53. The Commission should assist the General Assembly. There was, of course, the International Court of Justice; but that body was designed to deal with contentious matters rather than to give advisory opinions, and the opinions it did give mainly applied to questions in dispute. The Commission was marked out to assist the General Assembly, which it should not discourage from applying to it and in which the Commission's replies would enjoy great authority.

54. He would not attempt to conceal the danger latent in that procedure. The Commission's authority might be disputed. But had not the advisory opinions of the International Court of Justice also been criticised in the General Assembly?

55. The General Assembly should therefore be encouraged to consult the Commission. That might perhaps have the disadvantage of impeding the work on codification; but, if so, the Commission must become a body sitting permanently.

56. Mr. LIANG (Secretary to the Commission) thought that it was wrong to attach too much importance to the provisions of article 17. Reference had been made to the fears expressed in the Sixth Committee that the International Law Commission might be overwhelmed by the study of questions referred to it from different quarters. Experience showed that, generally speaking, the Commission's work programme had not been overloaded by requests of that type. There had so far been only two: the nationality of married women, which had already been mentioned by Mr. Kerno, and the pre-

paration of the international draft convention or conventions required to solve the problem of statelessness. Both of those problems came within the framework of the Commission's programme of work, since the Commission had listed nationality, including statelessness, among the fourteen subjects provisionally selected for codification.

57. It might also be pointed out that under article 17, paragraph 2, of its Statute, the Commission had a certain latitude, of which it had already availed itself.

58. As Mr. Hsu and Mr. Spiropoulos had said, the intention when those provisions were drafted was to set up a Commission sitting permanently, which could therefore have accepted responsibility for studying the questions referred to in article 17. But since the existing Commission only met at sessions, it had to examine its task as a whole and decide whether it would take up the study of such questions.

59. In his view, article 17 might have been incorrectly interpreted, and was not a serious obstacle to the work of the Commission.

60. Mr. SCALLE thought, after hearing the observations of Mr. Spiropoulos, who had really studied every aspect of the problem, that the dilemma facing the Commission was either that it remained broadly as it was, in which case codification would never be achieved or would be achieved only in very slight measure, or that it completed its work on codification, in which case it would have to remain in permanent session. If the latter solution was feasible it should be the only one considered. It must be ascertained whether the United Nations was prepared to review the question and transform the Commission into a truly permanent organ.

61. The 1930 Conference on the Codification of International Law at The Hague, which had to examine three questions, had produced tangible results only on the question of nationality. It had taken three months to do so and its work had been preceded by seventeen months of preparation and consultations with governments. Nevertheless, its achievements had been comparatively slight. He would ask how the International Law Commission could be expected to undertake general discussions and to complete its work satisfactorily with only three months at its disposal. It could not deal thoroughly with any of the subjects studied.

62. A solution might perhaps be found for the Commission which would succeed the present Commission. The members of the Commission could speak quite freely since their term of office would have expired before the reform of the Commission had become a reality.

63. There was, however, an intermediate course which the present Commission might adopt. That was to make wider calls upon the services of the Secretariat, which had already given valuable assistance to the Commission. Would it not be possible to provide the Secretariat with sufficient resources to enable the rapporteurs to apply to it regularly for the study of certain points of detail? The Fifth and Sixth Committees of the General Assembly might perhaps be able to consider such a course. If the

Commission was to sit permanently it would have to be in constant touch with the Secretariat. If it became a body more closely resembling the International Court of Justice or the Economic and Social Council it would have to have a Secretariat of its own and the Legal Department of the United Nations Secretariat would have to keep in constant touch with it. It might perhaps be possible to submit some proposals for the Sixth Committee to examine at the next General Assembly.

64. Article 17, referred to by Mr. Liang, might not have all the faults it was tempting to tax it with, but it did have faults, as also did articles 18 and 19 for example. Those articles acted as a brake on the Commission by prescribing a cumbrous and complicated procedure. He proposed to enquire whether it might not be possible to ask for that procedure to be made more flexible, since it postponed any final solution for four, five or six years. On some points there was no need to request the views of governments. Furthermore it should be possible to consult governments in some more flexible manner, for example by instructing the rapporteur to visit the various Ministries of Foreign Affairs and interview the competent official.

65. Such were the points to which he wished to draw the Commission's attention at that stage.

66. Mr. ALFARO thought that the Commission had two main questions to settle. The first, of which Mr. Spiropoulos had given such a clear account, was whether or not the Commission would be able to perform its difficult task if it continued to work as at present. All his colleagues, he felt, agreed with him that the ideal, theoretically speaking, would be for the Commission to sit permanently, if its tasks were to be successfully completed within a reasonable period. That solution, however, raised financial problems which could only be dealt with by the General Assembly after consultation with the Sixth and Fifth Committees.

67. In the second place the Commission was faced with the particular task of revising its Statute, on the assumption that it would continue to sit as at present. It would be advisable to study concrete proposals for each of the articles which had given rise to comment in the Sixth Committee. For his part, he was prepared to submit a new text of article 17, reserving to the General Assembly the right to refer questions to the Commission.

68. So far, the Commission had considered those two questions in conjunction, but it should treat them separately and devote itself to considering how the main problem of whether the Commission should sit permanently or not was to be presented to the General Assembly. After it had taken a decision on that point and the Rapporteur had heard the different views expressed, the Commission could take up the revision of certain articles of its Statute.

69. The CHAIRMAN emphasised that the discussion was only a provisional one; he thought it desirable that as many members as possible should express their views on the subject.

70. He himself had not been convinced by the arguments for permanent session, for there were insurmountable

difficulties connected with the expenditure involved and the composition of the Commission. It would in fact be very difficult to get persons of the highest eminence to sit on the Commission if they had to serve on a full-time basis.

71. He thought that they should reject the proposal to divide the Commission into two groups, one of which would serve on a full-time basis. It was undesirable from every point of view to have two classes of members. If the Commission did not sit permanently, it must do its best and be very modest in the changes it proposed. It was too early to be discouraged by the progress so far made in the Commission's work. As Mr. Sandström had said, the first session had been devoted to organization and during the second session results had been obtained and submitted to the General Assembly. Moreover, it could not be over-emphasised that if the Commission's work was to be carried out with proper care, it was found to be slow.

72. He thought that the best method was to examine each article separately and see what improvements could be made.

73. It was clear that the existing procedure was too complicated, particularly that laid down in articles 17, 18 and 19. There were too many provisions requiring consultation with governments. He did not wish such consultation to be abandoned, but it was clear that the provisions requiring that governments should be asked for their comments involved considerable delay in the Commission's work. They were a source of embarrassment to governments and produced hardly any results. For instance, the requests addressed by the Commission to governments in pursuance of article 19, paragraph 2, would make it almost essential for the latter to set up special departments to prepare the replies.

74. With regard to the term of office, he thought that five years would be suitable. Three years was clearly too short a period, as the General Assembly had virtually admitted when it had extended the term of the present members.

75. Mr. YEPES agreed with Mr. Spiropoulos. He was in favour of the Commission's sitting permanently, but he thought that the question had not been presented in the proper manner. The Commission must be considered as an entity, regardless of its existing composition, and consideration given to the question to whether or not it was advisable to have a Commission in permanent session, responsible exclusively for the codification of international law. He thought that if codification was to be carried out, the Commission should sit permanently since otherwise the work could not be done. Several of the objections raised to the Commission's sitting permanently were based on its existing composition and on the circumstance that a number of its members also had other duties to perform. What was needed however was to constitute a Commission whose members would in future serve on a full-time basis. The main objection to the idea of permanent session would then be automatically demolished since it would be specified in the Statute that membership of the Commission was incompatible with certain functions, and, in particular, with any

government office. The question had already arisen in connection with the International Court of Justice and such a solution had been adopted.

76. The Commission had been asked to recommend revisions of its Statute. It should simplify the procedure which it laid down. The effect of article 17, was in fact, to make its work almost impossible and it would be desirable, in particular, to amend paragraph 2, subparagraph *b*, of that article to read:

“The Commission, if it deems necessary, shall circulate a questionnaire . . .”

As the text stood, it threatened to prolong the work of the Commission indefinitely.

77. Mr. SPIROPOULOS thought that the latter was a question of detail. In his remarks at the beginning of the discussion, he had chiefly considered what was, in his opinion, the main question. The United Kingdom delegation, in suggesting that the Commission should consider whether it would not be desirable for its members to be appointed on a full-time basis, had clearly had a radical change in mind. So far, it was not any provision in its Statute which had prevented the Commission making more rapid progress in its work. When the question of the order in which to deal with the problem of codification had been raised, Mr. Koretsky had maintained that it was for the General Assembly to fix the order. The Commission had been of the opposite opinion and the General Assembly had endorsed its view. That interpretation had tended to assist the work of the Commission. He wondered which provision of the Statute might have prevented the Commission making more rapid progress with its work.

78. So far as codification was concerned, certain governments had submitted replies on the question to which Mr. François had devoted a report. Even had there been no replies, the work would not have gone forward any more swiftly. Mr. François had submitted a fresh report to the Commission. It was not the Statute which should be blamed but the lack of time. The Statute could be interpreted *intra legem* or *contra legem*, at will. What was important was the problem of organization. The matter of the Statute was a question of detail. The factor which hampered the Commission was the fact that it sat for only two months each year. That being so, it would clearly serve no purpose at all to amend the Statute. To remedy the evil, the Commission would have to seek out its cause, and that was shortage of time.

79. To take his own report as an example, he had the previous year submitted a text which had been discussed. If the Commission had been an organ sitting permanently, within a month it would have produced a new text which would have been submitted to governments for their examination. It was a wise precaution, as a matter of fact, to submit texts to governments in order not to assume full responsibility for them, since if the observations of governments were not taken into account, there was always the danger that the General Assembly would comment on the work of the Commission in the same way as it had done in connection with the Nürnberg principles.

80. The evil was therefore that the Commission did not have enough time to do its work. If, for financial reasons, it was not possible to act on the United Kingdom proposal, the situation would have to be accepted, but the Commission should not waste its time in the belief that the situation could be successfully remedied by amending the articles of the Statute.

81. Mr. SANDSTRÖM drew attention to the fact that the object of General Assembly resolution 484 (V) was to have the work of the Commission expedited. The primary question, therefore, was the time at the latter's disposal and that fact should be clearly brought out in the report to the General Assembly. The other questions, such as the revision of the Statute and the collaboration of the Secretariat, were of secondary importance.

82. Mr. SCALLE agreed with Mr. Spiropoulos that, so far, the Statute had not really hampered the work of the Commission. The Statute was, however, like a constitution, and there were countries in which the constitution had to be changed because it did not work. He did not think that Mr. Spiropoulos had meant to imply that the Commission should not recommend any revisions of the Statute. When all the members of the Commission had expressed their opinion, they could, as Mr. Alfara had proposed, then discuss the Statute article by article and suggest appropriate amendments.

83. Mr. CORDOVA thought that in order to achieve a real codification of international law it was necessary to set up a body sitting permanently. That was, in his opinion, the main question. Budgetary considerations should not, however, be overlooked. No person could devote his whole time to the work of a body of that nature unless he received emoluments of such magnitude that it would be difficult to obtain them from the budget of the United Nations. Furthermore, in order to have a body performing really effective work, the General Assembly would perhaps be compelled to abandon the idea of equitable geographical distribution and take into consideration individual qualifications only. In a word, the Commission needed to know what the States Members had had in mind when they had set up the Commission. Had they been thinking in terms of technical work, or had they wished to have an expression of the legal ideas accepted in the world? If they desired the latter, the Commission should include persons with experience of international relations and representing all parts of the world. Such a system required a budget as large as that of the International Court of Justice. It would be impossible to obtain the desired end in any other way. The members of the Commission had other duties in their own countries and could not abandon them in order to devote themselves to the work of the Commission on a full-time basis, unless they received appropriate emoluments.

84. He hoped that the Commission would be able to find a solution. Perhaps the best thing would be to increase the staff of the Secretariat so that it could include enough experts to do the preparatory work of the Commission. In that way, the latter would always

have at its disposal documents of the kind it had had before it at its first session. It might perhaps also be possible to make the sessions longer. He doubted whether it would be possible to arrange for the Commission to be in permanent session.

85. Mr. HSU said that he had declared himself in favour of the Commission sitting permanently but would not press the point. However, since objections had been raised to the idea of a permanent session, he would endeavour to reply to them. It had been said that it was very difficult to obtain the services of highly qualified persons. That was not the real difficulty. Everything depended on the inducement offered to such persons to sit on the Commission. Anyone's services could be obtained for a sufficiently high salary.

86. Mr. KERNO (Assistant Secretary-General) agreed with Mr. Spiropoulos that the Statute had not hitherto greatly retarded the work of the Commission, but it was nevertheless true that certain articles might prove an encumbrance in the future.

87. In the case of several of the matters so far studied, the Commission had decided that, since they involved special tasks outside the general work of codification, the procedure laid down in the Statute need not necessarily be applied. But in the case of matters really coming within the scope of codification, it would be otherwise. For instance the Commission now had before it Mr. Brierly's second report on treaties (A/CN.4/43), which it had decided to begin discussing at the next meeting. If it approved the articles proposed, that would be codification work to which it must apply the procedure laid down in articles 21-22, etc., which constituted a veritable strait-jacket and the Commission would, for the first time, become aware that its Statute required simplification. It would therefore be advisable to review the articles of the Statute and to see what amendments should be submitted to the General Assembly.

88. The CHAIRMAN announced that the general discussion on the first item of the agenda was provisionally closed but would be resumed when the remaining members of the Commission had arrived.<sup>1</sup>

The meeting rose at 12.50 p.m.

<sup>1</sup> See summary record of the 96th meeting, para. 110.

## 84th MEETING

Friday, 18 May 1951, at 10 a.m.

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*Chairman:* Mr. James L. BRIERLY,  
followed by Mr. Shushi HSU

*Rapporteur:* Mr. Roberto CORDOVA

*Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. A. E. F. SANDSTRÖM, 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.

**The Law of Treaties: report by Mr. James L. Brierly (item 4 (a) of the agenda) (A/CN.4/43)**

1. The CHAIRMAN requested Mr. HSU, the first Vice-Chairman, to take the Chair.

*Mr. Shuhsi Hsu took the Chair.*

2. The CHAIRMAN felt that there was no need to engage in a general discussion before examining the draft articles contained in Mr. Brierly's report.

3. Mr. BRIERLY agreed with the Chairman.

The Commission *decided* to proceed to examine the articles contained in the report.

ARTICLE 1

4. Mr. BRIERLY reminded the Commission that at its previous session it had devoted three and a half days to considering the law of treaties. He had studied the records of the discussions with care and had almost finished preparing his comments, which would shortly be communicated to the members of the Commission. He felt that the work of the Commission would make better progress if such a wide subject were split up into parts. The General Assembly had shown its preference for that procedure by specially inviting the Commission, in General Assembly resolution 478 (V), to study the question of reservations to multilateral conventions separately. He had therefore devoted a separate report to the conclusion of treaties, a subject intrinsically suitable for independent study. The question of the ability to make treaties might receive similar treatment, for the same reasons.

5. The articles in the report (A/CN.4/43) were to take the place of articles 6-10 in his first report on the law of treaties (A/CN.4/23). The Commission had not examined the latter articles, but he had gathered from informal exchanges of view that they were regarded as departing too far from the traditional terminology, dispensing as they did with expressions such as "ratification" and "accession". The argument had not quite convinced him, but he had preferred not to press his point in order to avoid appearing revolutionary.

6. He had introduced a distinction between the conclusion of a treaty, which in his view was the establishment of a final text, and its entry into force, i.e., its becoming binding on two or more States. It would be for the Commission to consider whether or not that distinction were sound.

7. Article 5, sub-paragraph (b) of the draft Convention on the Law of Treaties drawn up by Harvard University, which read as follows: "In the absence of agreement

upon a procedure which dispenses with the necessity for signature, a treaty must be signed on behalf of each of the States concluding it", was accompanied by the following comment: "The word 'concluding' as used in this paragraph has reference to the totality of acts which are necessary to bring a treaty into force. A treaty is 'concluded' not when it has been negotiated, but only when such further steps are taken as may be necessary to bring it into force."<sup>1</sup> The comment thus assimilated "conclusion" to "entry into force" and did not make the distinction he suggested. But it appeared necessary to distinguish between two processes. In the first place there was the establishment of a text which would subsequently enter or not enter into force; secondly, there was the entry into force which made the text binding, a process which might consist in signature, ratification or some other procedure laid down by the provisions of the treaty itself.

8. Article 1 of the report had been criticised for not conforming with the procedure for the conclusion of treaties followed by the United Nations. Although it was not provided for in the Charter, conclusion of treaties by the United Nations had become an established practice. He had at first thought that sub-paragraph (b) of article 1 of his report, which made special provision for conventions drawn up by an international organization, might also cover conventions concluded by the United Nations. He now saw that that was not the case and that the text would have to be modified in order to cover that type of convention as well. The comment on article 5 of the report (A/CN.4/43) mentioned United Nations practice in that connexion. Possibly that comment too would have to be modified, but Mr. Keruo or Mr. Liang would be able to give fuller particulars.

9. Mr. ALFARO wished to speak about the use of the words "conclusion" and "concluded" in article 1. The verb "to conclude" could not be translated into Spanish by "*concluir*". "To conclude" had two meanings: in the first place it meant "to terminate or put an end to", and in the second place "to concert, to arrange or to reach a compact", the Spanish equivalents of which were: "*concertar*" or "*celebrar*". Obviously in the case in question "concluded" did not mean "terminated" but "concerted". Translation of the draft article into Spanish would therefore raise serious difficulties.

10. Mr. BRIERLY considered Mr. Alfaro's remarks very just. For him, "to conclude" meant "to establish the text". Replying to a question by Mr. Alfaro, he said that the words "A treaty is entered into" would be by ambiguous.

11. Mr. YEPES supported Mr. Alfaro. "*Concluir*" in Spanish meant "to terminate", and the Spanish equivalent of "to conclude" was "*celebrar*". The Spanish title to article 1 ought to be "*Celebración de tratados*". The English wording gave rise to great difficulties when it came to translating it into Spanish.

12. Mr. SCELLE had remarks to make very similar

<sup>1</sup> *American Journal of International Law*, vol. 29, (1935) Supplement, Part III, "Law of Treaties", p. 732.

to those of Mr. Alfaro and Mr. Yepes. In French a concluded treaty was a complete, definitive treaty. It was therefore not possible to say that a treaty was concluded by the act of signature. For French-speaking jurists, a signed treaty was a draft treaty.

13. A distinction must be made between the legal effects of signature and those of putting into force. When a treaty came into force it was wholly binding on the signatories. The terminological difficulties the Commission was considering arose out of the historical development of the legal meaning of treaties. For centuries these instruments had been regarded as contracts; but in 90 per cent of cases treaties were not contracts but laws. A proof of that was the fact that the report had been obliged to assimilate conventions concluded by the specialized agencies of the United Nations to treaties proper.

14. There were differences between a treaty concluded by States, which might for the sake of convenience, though incorrectly, be called a treaty concluded on the *do ut des* principle, and a convention established by an international organization, which was unquestionably of a legislative character.

15. In the case of a convention drawn up by an international organization, the organ which prepared the "*celebración*" established a text which, though final or quasi-final, was not binding upon anyone. It would only enter into force as a result of ratifications or accessions. That type of law-making treaty had become so common that Mr. Brierly's report assimilated them to treaties concluded on the *do ut des* principle, which was, he thought, unfortunate.

16. A law-making treaty of that kind altered the powers of a great number of possessors of rights: the staff of administrations, judges of courts of law, individuals (in the case of commercial treaties for example): even legislators were bound by the terms of such a treaty, which was not a contract at all but a legislative act which altered the legal position of all the signatories in general and of an indefinite number of persons.

17. After a treaty had been drawn up it was still merely a proposal. It was like a bill which had been passed by one chamber of a parliament but had still to be passed by the other before it became law. If the treaty did not get beyond the drafting stage the legal effects of the text remained minor ones. After signature it was therefore merely a proposed text which had been approved by certain international legislators but had still, before it became complete, to receive the sanction of other legislators.

18. He was most anxious that the democracies should continue to enjoy the great benefits of the procedure of parliamentary ratification. What he disliked in the report was the way in which signature tended to gain importance at the expense of ratification. To decrease the importance of ratification was to risk opening the door to "informal engagements" which might be misused by administrations and by dictatorships.

19. He would confine himself for the moment to saying that it was important not to regard a treaty as concluded

by the act of signature. In principle a signed treaty was a draft treaty. He supported what Mr. Alfaro had said. He asked the Commission to study the legal effects of the mere signature of treaties, and to distinguish them clearly from those of putting into force.

20. Mr. CORDOVA wondered whether "conclude" was the right word, because even in English it conveyed the idea of finality, and signature alone did not impart finality to a treaty. In Spanish at any rate it was inappropriate.

21. For the purposes of the question at issue he saw no difference between law-making treaties and treaties concluded on the *do ut des* principle, both of which implied a text, signatures and ratifications. The distinction applied mainly at the national level. At the international level, what were called law-making treaties had to be ratified, just like treaties concluded in the *do ut des* principle. The only difference was that in most cases a law-making treaty arose out of an earlier treaty which had been previously and duly ratified, and which provided for the possibility, within certain limits and in respect of certain matters, of making treaties which did not need individual ratification. At the national level, in the case of ratification of law-making treaties, that, in his opinion, was an instance of ratification effected previously, at the time of ratification of the original treaty.

22. Mr. SPIROPOULOS was surprised at the discussion. It had been felt necessary to mention the fact that "to sign" was not the same as "to conclude". If the man in the street read in his newspaper that a treaty had been signed or had been concluded, he would imagine that the treaty had force of law, but before giving an opinion on the matter a jurist would ascertain whether or not the procedure for bringing it into force had been completed. A definition of all the words appearing in article 1 could not be expected. The word "concluded" must be understood in its context. Its meaning was explained in sub-paragraph (a) which stated that a treaty was concluded when it "has been duly signed or initialled *ne varietur* on behalf of two or more States". It was the clearest text he had ever seen.

23. The difficulty of translating the text into Spanish had been mentioned. But in drafting a text one had obviously to observe the rules of the language in which it was being drawn up. Since the text was in English it was the suitability of the English words which had to be considered. The rest was a matter of translation.

24. Mr. AMADO, in support of the remarks made by Mr. Alfaro, Mr. Yepes and Mr. Scelle, quoted a passage from Anzilotti and Gidel, *Cours de droit international*: "Signature by the plenipotentiaries merely establishes a *draft treaty* which may or may not be followed by declarations of a common intent to conclude."<sup>2</sup> In his view that was a classical and perfect definition. The "common intent" mentioned in the passage was ratification.

25. By way of reply to the very clearly put statement of Mr. Spiropoulos, he would remark that the Brazilian

<sup>2</sup> Anzilotti and Gidel, *Cours de droit international*, vol. 1, p. 369, Paris, 1929.

Constitution gave the President of the Republic the right to conclude treaties *ad referendum* subject to ratification by the national Congress.<sup>3</sup> That meant that the President could sign treaties.

26. When Latin roots were employed in English they frequently underwent a complete change of meaning. He gave a number of examples. Similarly the words "is concluded" in Mr. Brierly's text meant "*est signé*", whereas for Latin countries "*un traité conclu*" was a definitive treaty in force.

27. The idea that a treaty was a form or mould should not be abandoned; the definition given by Professor Rousseau might be called to mind: "the only satisfactory technical definition of the international treaty is a formal definition expressed in terms of the procedure employed for its conclusion. The international treaty is defined by its form not by its content".<sup>4</sup> In the case of Brazil a further difficulty would arise if article 1 and in particular its last sentence were adopted. The Brazilian plenipotentiary who signed a treaty *ad referendum* would be deemed not to have signed, but the Brazilian Constitution stipulated that he must only sign *ad referendum*; even the President was subject to the same stipulation.

28. Mr. ALFARO felt that Mr. Spiropoulos had not properly understood his earlier statement. He had not said anything about use of the words "conclusion" and "concluded" in the English text. He had merely pointed out that those words could not be translated into Spanish by "*conclusión*" and "*concluido*". "Concluded" was appropriate in the English text, but the Spanish equivalent was "*celebrado*" or "*concertado*".

29. Mr. SANDSTRÖM remarked that it was hardly appropriate to use the word "conclusion" in the sense in which it was employed in article 1, when that sense was so remote from the one given it by the Harvard draft.

30. Mr. FRANÇOIS felt that the discussion had gone beyond a matter of terminology. It should be understood that mere signature did not bind the signatory States and that ratification was required, but tradition did sanction the idea that a treaty was concluded before it was ratified.

31. He had always ascribed to the French word "*conclure*", a different meaning from that given it by Mr. Scelle. According to the Constitution of the Netherlands, the authors of which had drawn extensively on French terminology, the King *concluded* treaties but only ratified them after receiving the consent of parliament.<sup>5</sup> That being so, "conclusion" did not create legal ties. He would be grateful if Mr. Scelle would tell the Commission whether his interpretation was generally accepted in French law and doctrine.

32. Mr. SCELLE thought that what Mr. François had said was correct with regard to the terminology of constitutions, but that terminology was scientifically faulty. At the time of Montesquieu foreign affairs were

exclusively a matter for princes and governments. Modern constitutions bore traces of that fact, a legacy from the past which no longer corresponded with reality.

33. A text entitled "Conclusion of Treaties", containing provisions such as those of article 1, was likely to prove misleading. When the press announced the signature of the Schuman Plan, which was a treaty, it was the victim of no such misunderstanding. All the newspapers had been careful to point out that though the instrument had been signed it had not thereby come into force. Before coming into force it had to be ratified by the various countries.

34. A distinction should therefore be made between drawing up and putting into force. A drawn up treaty was not a concluded treaty. The "treaty . . . concluded" referred to in article 1 was only a draft. A treaty was by no means complete when it had been drawn up and signed. It was only a text offered to the parties for their acceptance. It was the Commission's duty not to continue to use faulty terminology.

35. When a convention of the International Labour Organisation was drawn up, for example, it was called a draft convention. It was drawn up by a two-thirds majority vote of the Conference of the Organisation. It only became binding after ratification or accession. Our of a liking for the idea of the treaty concluded on the *do ut des* principle, the French Government had for a considerable time actually held the view that a single accession was insufficient, whereas in reality a multilateral convention had binding force for any State which had ratified it, even if that State were the only one to have done so.

36. The draft articles contained in Mr. Brierly's first and second reports smacked overmuch of undesirable novelty. For some years, particularly during and since the Second World War, very important agreements had come into force without ratification by parliaments (the Yalta and Oasis Agreements etc.). Nations were thereby committed to courses which they were obliged to follow, without their parliamentary representatives having agreed to them. Fortunately the Charter of the United Nations had provided fresh procedure to take the place of agreements concluded in the manner of the Yalta Agreements. It had been possible to claim that such undertakings were not binding. A return to sounder practices had however been made and Parliaments had been duly consulted prior to the ratifications which had preceded the entry into force of the Charter.

37. To sum up, he considered that the text submitted to the Commission was unduly influenced by the tendency to revert to the old-style law of treaties, i.e., the procedure followed by princes, dictators and public administrations, and that it did not react sufficiently against the anti-democratic trends displayed in recent years.

38. Mr. CORDOVA considered that, in all languages, as he had already observed, the word "concluded" carried with it an idea of finality. It should therefore be avoided in article 1. When a treaty was "established in final written form", that was only the initial phase; the main stages were the negotiation of the treaty, its

<sup>3</sup> Constitution of the United States of Brazil, 24 September 1946, article 87, VII.

<sup>4</sup> Charles Rousseau, *Principes généraux du droit international public*, Paris, Pedone, 1944, vol. 1, p. 156.

<sup>5</sup> See article 60 of the Constitution of the Kingdom of the Netherlands (text of 22 January 1947).

signature by duly accredited plenipotentiaries and finally, its entry into force either in accordance with a constitutional procedure or with the provisions to that end set forth in the treaty itself. A clear distinction must be made between the signature of a treaty and its entry into force, and in that respect, the word "concluded" was unsatisfactory. He proposed replacing the words "A treaty is concluded" by the words "A treaty has been negotiated".

39. The existing text encouraged the practice of executive agreements designed to avoid submitting treaties to the constitutional procedure of ratification. If article 1 and article 2 of the report were taken together, an instrument which provided that "the present treaty shall enter into force one month from the time of its signature" would in fact take effect on expiry of that period, without the ratification procedure provided for and required by the constitution of a great many committees being carried out.

40. Mr. YEPES did not wish to harp on a purely terminological question, but would like to submit certain observations in reply to the remarks by Mr. Scelle to the effect that a treaty which had merely been signed was only a draft without any binding force.

41. Mr. SCELLE pointed out that, although certain secondary or lateral legal consequences arose from the signature of a treaty, a treaty which had merely been signed had no binding force with regard to the changes in competence provided for therein. The signatories were merely bound not to commit a legal abuse by refusing to ratify without valid reason. The fundamental legal consequences of treaties, or, in other words, their legal force, did not arise from the mere act of signature.

42. Mr. YEPES, continuing his previous statement, considered that a principle enunciated by such an authority as Mr. Scelle, a principle, which, as Mr. Amado had pointed out, was in accordance with the doctrine of Anzilotti, was worthy of mature consideration.

43. Were it accepted, the effect would be to devalorize, so to speak, the signatures of States and to encourage the frivolous appending of signatures right and left by State officers, in the belief that the instrument they were signing would never enter into force. There were far too many concrete examples of such a tendency in present-day international life, and particularly, in the acts of the big Powers. If the Commission declared that a signature was not binding on a State, it would be encouraging that tendency. Another concept, on the other hand, was to be found in the Charter, namely the principle of good faith as a fundamental rule of all international life. Good faith, however, required that a State which had appended its signature to a treaty was, at least, under the obligation to make every effort to ratify it and to do nothing to render ratification impossible. The concept of good faith could serve as a corrective to the thesis that a signature by itself had no binding force. The act of signature carried with it an obligation. It pledged the good faith of States.

44. Mr. SPIROPOULOS said he had misconstrued Mr. Alfaro's meaning. The question was one for linguists to settle. Some members of the Commission had asserted

that the word "conclusion" gave the impression that the Commission thereby meant the conclusion of a treaty possessing binding force. The context, however, left no doubt on the question and article 4 clearly showed that it was only ratification which gave treaties their binding force.

45. The text given in the report established existing international practice, according to which the act of signature was not sufficient to render a treaty binding.

46. It was to another problem that Mr. Yepes had referred when he said that, in order to develop law, it was desirable to endow the act of signature with a certain legal force. Such was not the task of the Commission. Its task was to codify and, according to existing law, the act of signature entailed no obligation to ratify. It did, in fact, happen that States signed treaties under the pressure of public opinion and did not subsequently ratify them. But that had nothing to do with codification.

47. There seemed to be no point in pursuing that discussion. If one of the members of the Commission did not approve of the word "conclusion", the best thing was for him to submit a text. The Commission could then compare the texts and decide.

48. Mr. YEPES shared the opinion of Mr. Spiropoulos on the need to put an end to the discussion on terminology, which was a secondary question.

49. Mr. Spiropoulos had affirmed that the sole mission of the Commission was to codify. He must protest against that interpretation. The Commission had more to do than that. It was clearly its duty to codify but it should also contribute to the progressive development of law. Mr. Spiropoulos, with his progressive spirit, would surely not declare himself in favour of that narrow limitation of the Commission's terms of reference. The latter should set itself the task of promoting the progress of international law, and it would be time enough to reconsider its attitude if the General Assembly did not approve of the solutions it submitted. By affirming that the act of signature entailed no obligation, the Commission would be contributing to the retrogression of international law. It was for that reason that he had wished to express his opinion with regard to Mr. Spiropoulos' views.

50. Mr. SPIROPOULOS thought there was a misunderstanding. He did not think that codification meant simply recording what existed. It was clearly understood that the Commission could modify, but the question, at the moment, was to decide on the sense of the word "conclusion". He had said that the text proposed by Mr. Brierly was in accordance with existing law. What he wished to suggest was that the Commission should take a decision on the question of terminology and attribute the appropriate meaning to the term. The Commission could decide later on the point raised by Mr. Yepes.

51. Mr. BRIERLY acknowledged that, despite the support given to his text by some members of the Commission, he was not satisfied with it himself. He agreed that in English the meaning of the word "conclusion" was ambiguous and might give rise to confusion, since the Harvard University text gave it a broader connota-

tion which embraced the steps necessary to bring about the entry into force of a treaty. In the narrower sense of the word, however, it did not include such steps. The wording of the article would need to be changed.

52. Mr. KERNO (Assistant Secretary-General) recalled that, at the beginning of the discussion, Mr. Brierly had stated that in its present form, article 1 might not apply to cases of multilateral treaties concluded within the framework of the United Nations. The Convention on Genocide, for example, did not come within the cases provided for in sub-paragraph (a) of article 1, since no international conference had been held. Neither did it fall within the cases covered by sub-paragraph (b), since the Charter of the United Nations contained no provisions covering the method of negotiating conventions. It would therefore be necessary to introduce into article 1 the idea of a multilateral treaty negotiated under the auspices of the United Nations.

53. While the article was not as important as it seemed at first sight, it was not without a certain value. Of course everyone agreed that the entry into force was the most important moment. Nonetheless, the prior stages in the establishment of a treaty also had legal implications. That applied to the signature, and to the adoption of a convention by the United Nations General Assembly. He would cite once again as an example the Convention on Genocide which had been adopted by a General Assembly resolution in the following terms: "The General Assembly approves the annexed Convention on the Prevention and Punishment of the Crime of Genocide and proposes it for signature and ratification or accession in accordance with its Article XI." That adoption had brought Article XI of the Convention into application. From the time of adoption: "The Convention shall be open until 31 December 1949 for signature...". The whole machinery had thus been brought into being, which was the crucial point.

54. Was article 1 necessary or not? In order to reply to that question, the Commission would have to see whether it was necessary to mention in the draft the various stages in the preparation of a treaty. It had been said at that meeting that the act of signature conferred no binding force on a treaty. That was true in the standard case where signature had to be followed by ratification. There were, however, many treaties which required binding force from the sole fact that they had been signed. Care should therefore be taken not to overlook the more and more numerous cases in which the parties were bound by the mere act of signature.

55. The problem was complicated by the fact that there were law-making treaties and treaties concluded on the *do ut des* principle. That question had been much discussed, in connexion with reservations to multilateral conventions, at the International Court of Justice, where it had even been held that some articles in the same treaty might be of a legislative and others of a contractual character.

56. Mr. SCALLE thought that article 1 was by no means unnecessary. While the mere drawing up and signature of a treaty could of course have no legal consequences, it did involve something final. To speak

in abstract terms, it involved a certain formalism which was, as a rule, final. It was true that the text was not always absolutely final, since it might be subject to reservations; but sometimes it was. What was offered was a final text which could not be tampered with, one which would be accepted or rejected but, if accepted, was accepted as it stood. Article 1 expressed that idea of the final character of the text.

57. One might perhaps say: "A treaty must be written and the text on which the parties have agreed must be regarded [in principle] as final." It could be decided later, when the question of reservations was examined, whether the words "in principle" should be kept or not. His suggested text was, so to speak, the first sentence of the article proposed in the report.

58. In that way the word "conclude" could be avoided, while the substance of what was rightly proposed in the report for acceptance by the Commission would be retained.

59. Mr. ALFARO wished to point out, in the event of the Commission deciding to retain Mr. Brierly's text, that as Mr. Kerno had stated, the article did not refer to treaties signed within the framework of the United Nations. Nor did it apply to bilateral treaties. Apart from the two lines of introduction, the article comprised two paragraphs, in neither of which was it stated whether it referred to a bilateral treaty.

60. Mr. BRIERLY explained that the first two lines of article 1 referred to bilateral treaties and that paragraphs (a) and (b) concerned special cases.

61. Mr. ALFARO said that the words which referred to bilateral treaties were therefore: "A treaty is concluded when the text agreed upon has been established in final written form."

62. The CHAIRMAN said that he had shared Mr. Alfaro's impression; he thought the text of the Article should perhaps be amended.

63. Mr. BRIERLY pointed out that he had not proposed that a vote should be taken, but that another text should be prepared. In the meantime, the Commission could pass on to the examination of article 2. It would be seen later whether article 1 was necessary and, if so, whether the new text was preferable to the one he had proposed.

64. Mr. SANDSTRÖM also suggested that it would be preferable not to take a final vote on the article at that juncture. There were several articles that were interconnected. The Commission should first discuss the principles and then take a decision on the wording of the articles.

65. Mr. SPIROPOULOS also thought that it would be preferable to take neither a provisional nor a final decision. Mr. Kerno's observation was very sound. There were treaties in existence which had not been signed; hence it was best to defer the question and revert to it later, if that were deemed necessary, in which case the necessary amendments could be made to the text.

66. Mr. CORDOVA felt that Mr. Brierly might perhaps modify the wording of the article.

67. Mr. BRIERLY thought it would be easier to do so after the other articles had been examined.

*Mr. Brierly's proposal was adopted.*

#### ARTICLE 2

68. Mr. BRIERLY said there was no need for him to comment on article 2 since it was an introduction to the following articles.

#### *Paragraph (1)*

69. Mr. CORDOVA asked whether Mr. Brierly had in mind treaties binding on a State which was not a party to them.

70. Mr. BRIERLY replied that he had not envisaged such a possibility.

71. Mr. CORDOVA said that a treaty might either be binding only on the States parties to it, or on other States also. He made that observation because reference had been made to treaties which were really universally applicable laws. Such treaties represented a method of legislating for international law. There were treaties concerning the prevention of certain acts by States, such as treaties designed to prevent the extinction of certain animal species.

72. A law-making treaty would be binding not only on the parties to it but also on third States. The treaties concerning whaling were an example. There would be no point in a certain number of States agreeing not to kill whales during the breeding season if the provisions of the treaty in question did not apply to all States. Besides, such treaties had been concluded in the interest of the whole world. While that was a new departure in international law, efforts should be made, within the framework of the development of law, to make such treaties effective throughout the world.

73. Mr. BRIERLY explained that article 2 was not designed to cover questions of that type. It gave no ruling either way. It stated the minimum requirements to enable a treaty to enter into force, namely that it should be concluded between at least two States.

74. Mr. SCALLE, supporting the remarks by Mr. Córdova, said that many multilateral treaties entered into full force after a certain number of ratifications. They were not in force for States which had not ratified them. In addition, there were treaties that were binding on third States, and that had always been so ever since treaties existed. He would refer to the Convention of Constantinople concerning the Suez Canal régime, signed in 1888.<sup>6</sup> Treaties could be binding on non-signatory States. That occurred when the signatories to a treaty had made a law for the entire world by virtue of a kind of implicit and customary delegation of power by all States to certain of their number. Such a situation arose when the States in question established international regulations, i.e., regulations governing the international use of canals, roads, etc. over which they exercised some authority.

75. When the Treaty of 1888 was signed, it was recognized that because of their *de facto* situation, the signatories had the right to lay down rules binding in relation to all States. The International Agreement for the Regulation of Whaling would not have made sense had it not been applicable to third parties. The first paragraph of article 2 did not cover that point; and it needed to be supplemented by a statement that a treaty could also be binding on non-signatory States.

76. Mr. BRIERLY replied that article 2 did not deal with that point. He would repeat that all it did was to set out the minimum conditions for the entry into force of a treaty. It did happen that treaties involved obligations for States not parties to them, but that was a question outside the scope of the article under discussion.

77. Mr. CORDOVA agreed that the text proposed by Mr. Brierly did not exclude treaties which involved obligations for third States, since it made no mention of "parties". That same problem arose incidentally in connexion with the acquisition of legal binding force. The proposed text did not specify how a treaty could become binding in relation to third parties.

78. Mr. BRIERLY thought that reference to that point was inappropriate in the article in question.

79. Mr. YEPES pointed out that article 1 concerned cases where the text of a treaty was drawn up by an international organization or a specialized agency of the United Nations. The International Labour Organisation was one of the organizations referred to and as was well known, conventions approved by the International Labour Conference could be ratified by one State only and become binding on that State. But according to article 2, before it could come into force, a treaty must be ratified by at least two States. Was it then necessary also for two States to ratify labour conventions? If the text of article 2 were kept as it now stood, such conventions would be excluded. A statement was called for in regard to them.

80. Mr. BRIERLY said he was disturbed at the notion that an international convention could be binding even if it were ratified by only one State. Obviously no other State could require its application. For that two States were needed.

81. Mr. SCALLE took a contrary view. If he remembered rightly, the question had been raised by the French Government when Poincaré was President. It had raised the same objection, asking how there could be a convention if there was only one party. Albert Thomas had replied that the labour regulations were binding on France because she had ratified the Versailles Peace Treaty, where it was laid down in Part XIII. The International Labour Conference adopted final texts of draft conventions, and no reservations were permissible. The texts were then kept open for ratification by all States Members of the International Labour Organisation, and could be ratified by a single State. In that case, States found themselves bound in relation to all the other States, which could call for the application of the Convention. Obviously that procedure was exceptional. The Convention on the eight-hour day had been adopted at a time when he was

<sup>6</sup> A "Convention intended to guarantee the free use of the Suez Maritime Canal for all time and to all Powers, signed at Constantinople on 29 October 1888", in de Martens, *Nouveau recueil général des traités*, 2nd series, vol. 15, p. 557.

principal Secretary to the Minister of Labour. The French Government had been prepared to ratify the Convention, but had felt that it could not be the only one to bind itself. The Ministers of Labour of France, Great Britain, and Germany had met in Berne to settle the question of how they proposed that the Convention on the eight-hour day should be applied. It was not until after that meeting that the main industrial countries had decided on ratification. That had to be the procedure, otherwise France would have been bound by an instrument without any assurance that other countries would give the same undertaking. It was a risk which she could not afford to run.

82. It was extremely difficult to regard labour conventions as treaties if the notions of bilateralism and contract were included in the definition of a treaty. But there was a whole series of treaties which had no such characteristics. They were binding laws of a general kind.

83. What was hampering the Commission at the moment was the evolution of international law. It was noteworthy that Mr. Hudson's book should be entitled "International Legislation". The Commission was hampered because, in its view, a treaty was still a contract. But a treaty was made for an international community composed of national communities. The whole body of those national communities had become the international community. All the legal rules included in the treaty constituted a special type of unification of international law. If a treaty were regarded as a reciprocal obligation, there was no development.

84. Mr. BRIERLY said that in spite of Mr. Scelle's eloquence he could not conceive of a treaty to which there was only one party. To take the case of an international labour convention ratified by a single State, he was quite willing to admit that that State might be bound, but it was not bound by a treaty, since no treaty as yet existed.

85. Mr. FRANÇOIS supported Mr. Brierly's view. Even among recent writers the point of view upheld by Mr. Scelle was strongly contested. It was by no means an established fact that a legal obligation was created by a treaty once a single State had ratified it.

86. Mr. CORDOVA thought that a treaty should represent a common will on the part of two or more States. He did not think an international labour convention was a treaty in the legal sense. It was what was called a law-making treaty and in his opinion there was no such thing as a law-making treaty. In the same way, a resolution of the Security Council was binding on States, but it was not a treaty; it was true international legislation.

87. The real difficulty arose when there actually was a treaty between two or more States that at the same time became binding in relation to a third State.

88. Mr. SANDSTRÖM thought that ratification of a labour convention by a single State bound that State not because it had ratified the convention, but because of the previous treaty by which it had become a member of the International Labour Organisation, thus accepting

the procedure laid down for the adoption of labour conventions. The obligation arose out of the original treaty.

89. Mr. SPIROPOULOS suggested that the Commission keep to one problem at a time. It had a text before it. Mr. Córdova had asked whether a treaty concluded between certain States could impose an obligation on third States; and that was a pertinent question. But the Commission must not at the same time go into the matter of the international labour conventions, where only one ratification was required for their entry into force. He was making that remark in the interests of the Commission's work. Actually, in regard to the latter point he shared Mr. Sandström's view that the binding character of the conventions in relation to a State ratifying them arose out of its ratification of the Treaty of Versailles.

90. To return to the text under discussion, he wondered whether, in view of the many difficulties, it would not be better to leave aside the controversial point. Was the first part of paragraph 1 necessary ("A treaty enters into force when it becomes legally binding")? That was tautological. Would not paragraph 2 be sufficient? If paragraph 2 alone were adopted, it would be unnecessary to examine the second part of paragraph 1, "in relation to two or more States". Thus the whole difficulty would disappear.

91. The CHAIRMAN noted that Mr. Córdova was inclined to favour adjournment of the discussion of the problem he had raised. With regard to the point at issue between Mr. Scelle and Mr. Brierly, the Commission might examine it, but without devoting too much time to it.

92. Mr. BRIERLY was prepared to retain only paragraph 2 of the article.

93. Mr. AMADO said that as Mr. Brierly had accepted Mr. Spiropoulos' suggestion, there was no need for him to say what he had had in mind. But he would like to add in regard to the first part of the discussion that the comments made would be relevant when the effects of treaties in relation to third parties were discussed.

94. With regard to paragraph 1, he thought there was a treaty when two parties had a common intent and changed a draft treaty into a concluded treaty. In that connexion, the words "two or more States" seemed to him essential. He agreed with Mr. Spiropoulos that the first paragraph of article 2 was tautological and could be deleted.

95. Mr. KERNO (Assistant Secretary-General) agreed with Mr. Scelle. The difficulty arose from the fact that a change was taking place in the conclusion of treaties. It was an important point; more than one hundred multilateral conventions had been deposited with the United Nations Secretariat.

96. It was a peculiarity of the labour conventions that they were binding even if only one State had ratified them. The Convention on the Privileges and Immunities of the United Nations might also be cited. There was no doubt that even if only one State had acceded to it, it would be legally bound by it. Obviously it could be

argued that there was another treaty at the back of it, namely the Charter; nevertheless it was a type of convention somewhat different from the classical type.

97. Mr. SCELLE asked whether Mr. Brierly did not think it would be better first of all to consider treaties in the classical sense of the term, and for the time being, to disregard the labour conventions the system of which was different. The traditional type of treaty could hardly be placed on the same footing as international legislation. The latter and its technique were not the same as those of ordinary treaties and objections would always arise if such conventions were regarded as treaties in the classical sense. He suggested that the Rapporteur add a rider to the effect that in his draft, treaties were treaties in the classical sense, in which a previous common intent was necessary before there could be any undertaking.

98. Mr. SPIROPOULOS fully approved Mr. Scelle's suggestion. Actually the conventions concluded under the auspices of the United Nations, for example, were somewhat unusual in type. With regard to the Convention on Immunities, if a State ratified it unilaterally, it was automatically bound. That Convention was not a treaty in the classical sense. All the members of the Commission were affected by the classical doctrine. There was no reason why the Commission should not first of all establish the rules relating to treaties in the classical sense of the term, and then consider the special types of convention later. Otherwise there was a danger, as Mr. Scelle had said, of creating confusion by discussing matters which were not analogous. Hence he suggested that that procedure be adopted.

The meeting rose at 1 p.m.

## 85th MEETING

Monday, 21 May 1951, at 3.10 p.m.

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*Chairman:* Mr. Shuhsi HSU

*Rapporteur:* Mr. Roberto CORDOVA

*Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. J. P. A. FRANÇOIS, Mr. A. E. F. SANDSTRÖM, 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.

### Communication from Mr. Kerno, relating to the nationality of married women

1. Mr. KERNO (Assistant Secretary-General) informed the members of the Commission that the Commission on the Status of Women, which had just met in New York, had adopted a resolution asking the Economic and Social Council to request the International Law Commission to consider the question of the nationality of married women at its 1952 session. The resolution, of course, merely constituted a recommendation to the Economic and Social Council, which alone had the right to decide whether or not the request should in fact be made.

### Law of treaties: report by Mr. Brierly (item 4 (a) of the agenda) (A/CN.4/43) (continued)

#### ARTICLE 2 (CONTINUED)

##### Paragraph (1) (continued)

2. Mr. BRIERLY reminded the Commission that at the end of the eighty-fourth meeting Mr. Scelle and Mr. Spiropoulos had made the important suggestion that the law of treaties should be studied in two separate parts: treaties in the classical sense of the term and international legislation (Mr. Scelle) and special conventions of the modern type (Mr. Spiropoulos). He thought that the gap between those two types of treaty was not as wide as some members of the Commission appeared to think. Certain principles were common to both. A change was taking place in the law of treaties but it was still in the early stages.

3. He was prepared to accept Mr. Scelle's suggestion if it were taken over by the Commission. He proposed that the Commission should study the principles applicable to classical treaties and decide what provisions should be added or amendments made to the text of the article to make it also apply to treaties of the modern type.

4. Mr. KERNO (Assistant Secretary-General) said that he viewed with some misgivings the suggestion that classical treaties and multilateral treaties negotiated under the auspices of the United Nations should be considered separately. The Secretary-General wanted the Commission to guide him by defining the legal nature of the new treaties and the rules applicable to them. If it began by considering classical treaties it might not have time to deal with treaties of other types. He was very glad that Mr. Brierly had made his proposal. There were differences between the two types of treaty but not such as to prevent the Commission from studying them together.

5. Article 1, it would be observed, gave first a general rule and then two sub-paragraphs setting forth exceptions in the case of certain kinds of multilateral treaties.

6. He felt that certain statements made at the previous meeting had not been quite correct. Article 1 was also applicable, for example, to the Genocide Convention. The beginning of the article read: "A treaty is concluded when the text agreed upon has been established in final written form." That was a general rule applying both to classical treaties and to the majority of treaties concluded under the auspices of the United Nations. It was followed by exceptions: texts established at international conferences (sub-paragraph (a)), and texts drawn up by international organizations whose constitutions provided for the adoption of conventions (sub-paragraph (b)). Since the Charter did not provide for the adoption of conventions, sub-paragraph (b) did not apply to treaties concluded under the auspices of the United Nations; the general introductory sentence on the other hand did apply.

7. He had quoted the article to show that the gap between the two types of treaty was not perhaps as wide as had been stated at the last meeting. The Commission might therefore, while studying the question of classical treaties, consider whether special rules were not required for certain types of treaty, in particular multilateral treaties.

8. Mr. SCALLE reassured Mr. Kerno: he agreed with him that the Commission must not neglect multilateral treaties. He was sure that the present trend would continue and that multilateral treaties would take the place of treaties of the classical type. There was nothing against the Commission examining treaties of the classical type and multilateral treaties together, noting if necessary where a distinction should be made between them.

9. The CHAIRMAN called upon the Commission to proceed with its examination of article 2. The deletion of paragraph 1 of article 2 had been suggested, and Mr. Brierly had said he was willing to consider it.

10. Mr. BRIERLY was quite willing to agree to the deletion, since the paragraph added nothing material.

*The Commission decided to delete paragraph (1) of article 2.*

#### *Paragraph (2)*

11. Mr. CORDOVA did not like the words "in the first instance". A case might arise in which the text of a treaty did not state that ratification was required, but merely indicated the date of the treaty's entry into force. The rule laid down by the paragraph made no allowance for the possibility of the constitution of one of the parties requiring that treaties should be ratified before they entered into force, and seemed to imply the principle that the provisions of a treaty took precedence over those of the constitution.

12. Mr. YEPES thought that the paragraph was drafted in too absolute a manner. The terms of the treaty might not specify the conditions under which it entered into force and the constitutions of the two States might contain different provisions: one, for example requiring ratification of treaties, and the other not requiring it. He would like the text to be drafted in a manner which took more possibilities into account.

13. Mr. BRIERLY drew attention to article 5, which

provided for cases in which ratification was necessary. It was understood that the fact that a treaty did not make provision for ratification did not sanction a State failing to observe constitutional provisions which prescribed it.

14. Mr. CORDOVA asked whether Mr. Brierly would be willing to add a sub-paragraph to article 5 laying down that ratification should be necessary where the constitution of the parties required it. Sub-paragraph (d) — which read as follows: "(When ratification is necessary) (d) When the form of the treaty or the attendant circumstances do not indicate an intention to dispense with ratification" — would not be sufficient where the constitution of one of the parties requires that treaties should be ratified.

15. Mr. BRIERLY replied that of course ratification was necessary when it was required by the constitution, but he would prefer the matter not to be gone into until the Commission came to article 5. Mr. Córdova's suggestion did not relate to article 2; what he had said, however, possibly indicated the need for a provision being added to article 5.

16. Mr. CORDOVA was willing to defer consideration of the matter, as Mr. Brierly proposed.

17. Mr. BRIERLY did not think that there was any need to amend paragraph 2 of article 2.

18. Mr. CORDOVA considered that the paragraph put international law before the constitution of the parties and placed the treaty above the constitution. If the negotiators made a treaty when they were not empowered to do so, the treaty was null and void. It must not be suggested that the provisions of the treaty took precedence over the constitution, which was what conferred the power to make treaties. It was a question of capacity.

19. Mr. LIANG (Secretary to the Commission) believed that the statements of Mr. Yepes and Mr. Córdova mainly applied to article 3 concerning the application of treaties. Paragraph 2 of article 2 dealt with entry into force, as distinct from application. The Genocide Convention for example, which had already been referred to a number of times, had entered into force as an instrument, but that did not mean that it had binding force for the United Kingdom or any other country which had not yet ratified it.

20. Mr. BRIERLY thanked Mr. Liang for providing him with an argument which was very much to the point.

21. Mr. SANDSTRÖM felt that the paragraph was perhaps of more importance for multilateral treaties than for treaties of the classical type.

22. Mr. SPIROPOULOS drew the Commission's attention to a misunderstanding which had found its way into the discussion. There were two opinions about the meaning of the expression "enters into force". Paragraph 2 must be understood in relation to paragraph 1: "A treaty enters into force when it becomes legally binding in relation to two or more States". It was common knowledge that there were two opposite theories about when a treaty became legally binding: Anzilotti's theory, according to which the Head of the State bound the State even when he failed to observe the constitution

— a theory he did not accept — and the theory which he supported himself, that there could only be a treaty binding the State when the provisions of the constitution had been observed. If the Commission pronounced in favour of the latter theory it would have to enunciate a different general principle from the one expressed in paragraph 2. The text would have to read: "In principle a treaty enters into force by its ratification", and then proceed to specify the exceptions.

23. Mr. SCELLE supported Mr. Spiropoulos. A treaty was valid provided it was made by the competent authorities. Who those authorities were was determined by the constitution. The conditions of entry into force, however, were a different matter. Entry into force depended on the terms of the treaty, which could lay down for example that it would enter into force when it had received sixteen ratifications. The validity of the treaty and its entry into force must not be confused.

24. It was noteworthy that certain treaties modified constitutions. Thus by the terms of the Covenant of the League of Nations (Article 18) there were to be no more secret treaties. A number of constitutions, including the French Constitution of 1875, under which there were two types of treaties, secret treaties and those which the President of the Republic was required to submit to Parliament, had been changed — *ipso facto*.

25. That remark did not make Mr. Córdova's statement any less true. The State authorities empowered to conclude treaties must respect the constitution, otherwise a treaty would be null and void. No authority could perform an act outside its competence.

26. Mr. SPIROPOULOS thought the interpretation of the expression "enters into force" gave rise to some difficulty. Paragraph 1 must be taken into consideration, as it gave Mr. Brierly's interpretation. Furthermore, he thought the text contained an error. "Enters into force" implied legal binding force. Take for example the Convention on Genocide. It provided that it would enter into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification. That meant that so long as only nineteen States had ratified it, the Convention would have no legal binding force in relation to them; but the depositing of the twentieth instrument of ratification would have the effect of giving binding force to the Convention in relation to the twenty States. In that case, entry into force meant having legal binding force in relation to any State ratifying the Convention.

27. Mr. AMADO found the article acceptable as it stood. When the Commission came to discuss the capacity required, it would examine the observations made by Mr. Scelle, Mr. Córdova and Mr. Yepes.

28. Mr. KERNO (Assistant Secretary-General) asked the Commission to consider the position of the depositary of multilateral treaties, namely, the Secretary-General of the United Nations, whose duty it would be to apply those provisions. Article 2, paragraph 2, was necessary and satisfactory, but it was desirable to agree as to its meaning. Like Mr. Córdova, he too had intended to enquire what the words "in the first instance" meant. He thought that if a treaty stipulated the time when

it came into force, the stipulation on that point was decisive; but if the treaty made no provision, how was its muteness to be interpreted? That question was a most important one for the depositary of multilateral treaties. Where a treaty made no reference to the point, if it were a bilateral treaty it would enter into force as soon as the two parties had carried out the act duly binding them. If it were a multilateral treaty, in his opinion, it would enter into force as soon as it had been ratified by all the signatory States. It could not be said that a treaty signed by thirty States and ratified by two of them would enter into force in relation to those two. He would like the Commission to corroborate that.

29. It had also been stated that ratification was valid when it proceeded from the competent authority. That was obvious. But what was the depositary of a treaty to do if the delegation of a State concerned handed him a document signed by the President and stated that the treaty was duly ratified, and the ratification was contested in the country itself?

30. Mr. CORDOVA noted that some of the members of the Commission felt that a distinction must be made between entry into force and validity. But the proposed text did not admit of that. It stated that a treaty entered into force when it became legally binding.

31. Under the Mexican Constitution a treaty must be ratified before it became binding. Supposing a treaty provided that it should enter into force on the first day of the following year, the wording of paragraph 2 suggested that ratification could be dispensed with, or at any rate that the treaty could enter into force without previous ratification. In other words, the paragraph appeared to put treaties on the same footing as constitutions. The wording of paragraph 2 was quite in order if it were assumed that signature brought the treaty into force. But if it were held that ratification was necessary — and he thought that was the opinion of the majority of the Commission — the wording must be changed. The text proposed by Mr. Brierly was based on the theory that, as far as entry into force was concerned, ratification was the exception, and signature the general rule.

32. If that were not the case the principle should be laid down in article 5 that ratification was necessary, and the exceptions to that rule mentioned.

33. Mr. YEPES said that the very interesting discussion which had taken place made it clear that the Commission could not accept the article as it stood.

34. He suggested that the words "in the first instance" be deleted and the words "or, in default of such terms in the treaty, on the legislation of the signatory States" be added. Both possibilities must be provided for. The constitutions of States must not be disregarded in connection with the entry into force of treaties.

35. He thought it extremely dangerous to state that a multilateral treaty which did not contain a distinct statement to that effect entered into force only when all the signatory States had ratified it. That amounted to the introduction of a veto. The statement was parti-

cularly dangerous when it came from the Assistant Secretary-General, whose words carried authority.

36. Mr. AMADO pointed out that the Commission was discussing ratification, though it had not yet properly reached that stage. He asked Mr. Córdova whether, under the Mexican Constitution, accession to a treaty required ratification of the treaty.

37. Mr. CORDOVA replied that in such instances, ratification — that was to say, observance of the constitutional provisions laid down for approval of a treaty — was carried out beforehand.

38. Mr. AMADO recalled that in the classical treaties plenipotentiaries signed, and in the past their signature had been sufficient in itself: but later on, the procedure for ratification had become necessary, since plenipotentiaries no longer had the right to conclude treaties. It was the Head of the State who concluded them, and Parliament which ratified them. Later still came the postponement of signature, and still more recently, the treaty open to all States for signature. At that point the notion of acceptance had appeared. Signature then regained its former status. That was the direction in which the world was tending, as Mr. Scelle had noted, owing to the fact that treaties were becoming multilateral. In those circumstances, the constitutions of Brazil and other countries came up against a problem. To solve it, Parliament authorized the President to accept the treaty. Thus, ratification continued to be the formality by which a treaty acquired binding force.

39. An examination of the articles proposed by Mr. Brierly showed that the formula adopted by him made allowance for those various stages — signature, entry into force and ratification. He thought the Commission should approve the articles in question.

40. Mr. SCELLE said his reply to Mr. Kerno was that he fully appreciated the anxiety of the person whose duty it was to register treaties. He would like to relieve Mr. Kerno of that anxiety, though not in the way Mr. Kerno had in mind. If a multilateral treaty made no mention of its entry into force, it would never enter into force. If it meant waiting for sixty ratifications, there would be a long wait, so long that the treaty would no longer have any practical meaning.

41. It would be wise to follow out the Commission's decision to study separately under each article the classical treaties and the multilateral treaties, and to propound a rule covering the latter. All that was required was a statement that "all multilateral treaties shall make provision for their entry into force". It was unacceptable that a treaty should make no provision, leaving it to be tacitly concluded that sixty ratifications were required. That meant giving the sixtieth State the right of veto. The Commission could not admit so retrograde a step. It was essential therefore that the Commission should establish the rule that a multilateral treaty must stipulate the conditions for its entry into force. It could provide that it would enter into force after ratification by two States, for example.

42. Mr. KERNO (Assistant Secretary-General) said that that solution met his wishes entirely, and that it

was desirable to urge States to insert such a provision in treaties.

43. Mr. SPIROPOULOS thought it would be well to try to discover the real meaning of paragraph 2. If it meant that a treaty must in the first instance specify the time when it became legally binding in relation to the States ratifying it, the text ought to be approved. But if the paragraph meant that it was the treaty that settled the issue and not the constitutional law of the given country, that was another matter.

44. It would be preferable to take no decision and to pass on to the examination of the article dealing with ratification, the most important of the articles. If the Commission did not succeed in reaching agreement on the meaning to be attached to the paragraph in question, it would be better to come back to it later.

45. Mr. ALFARO said that the discussion had enlightened him as to the significance of paragraph (2); but he still found its terms disturbing. It spoke of a first instance when there were no others, and laid down the exception without formulating any general rule. As the Commission regarded the questions of ratification and entry into force as connected, it would be well to delete the words "in the first instance", and to add "and where necessary, on the rules hereinafter set out on the subjects of ratification and accession".

46. Mr. BRIERLY assumed that the words "where necessary" proposed by Mr. Alfaro meant "in default of such provision in the treaty".

47. Mr. SANDSTRÖM was in favour of Mr. Spiropoulos' proposal. He drew the Commission's attention to the fact that the question under discussion was bound up with article 6, dealing with the date of entry into force of treaties and beginning "Unless otherwise provided in the treaty itself". There were connecting links between all the articles in the draft. The text of article 2 formed a complete whole, and by deleting paragraph 1 its balance had been upset. It was desirable to discover how the balance could be redressed, though the present was not the moment to do so.

48. Mr. CORDOVA thought there were two questions at issue. The first concerned the binding force of the treaty in relation to parties, and the second, the date on which a treaty entered into force. In the report, article 2 dealt with entry into force of treaties, and article 6 referred to the date of entry into force. He found the draft text proposed by Mr. Alfaro acceptable, provided the words "where necessary" were deleted. There would then be no question of a treaty taking precedence over the constitutions of States.

49. Mr. YEPES thought that multilateral treaties should invariably include a clause specifying the date of their entry into force.

50. He agreed to the text proposed by Mr. Alfaro with the amendment by Mr. Córdova; and he suggested that a new paragraph be added to read as follows: "Multilateral treaties shall always include a clause stating the terms of their entry into force."

51. Mr. BRIERLY thought that the difficulty could be got over more easily by leaving the article for the

time being and returning to it later after the related articles had been discussed.

52. Mr. SPIROPOULOS felt that there was an order of precedence in the principles involved, and that it was advisable to begin with the basic principles. For that reason, like Mr. Sandström, he proposed that the general principle be sought. In his opinion, it was to be found in articles 4, 5 and 6. The text under consideration should be left aside for the time being, and the Commission should decide what principle should prevail, and then adopt a definitive solution.

53. Mr. YEPES was sorry that he could not share that view. What was essential in connection with a treaty was to know when it would enter into force. The Commission had before it two concrete proposals submitted by the Rapporteur, Mr. Brierly, and by Mr. Alfaro and himself respectively. He suggested that it should take a decision.

54. Mr. CORDOVA thought the Commission should adjourn the discussion on the point. The logical order was to deal first with the question of ratification, which preceded entry into force.

55. Mr. SCELLE thought that the question of principle was that of the validity of treaties, not of their entry into force. In the case of bilateral treaties, the question did not arise. They came into force as soon as the two parties had ratified them. The question was important in the case of multilateral treaties. On the other hand, all treaties were affected by the question of what conditions they must fulfil before States were bound by them. It was therefore reasonable to pass on to the following articles.

56. Mr. BRIERLY suggested taking the sense of the Commission as to the adjournment of the discussion.

57. Mr. YEPES thought that the Commission was in favour of adjourning the discussion, and therefore would not press his proposal.

58. The CHAIRMAN noted that the Commission had *decided* in favour of adjourning the discussion on article 2.

#### ARTICLE 3

59. Mr. BRIERLY said he had nothing to add to the article, which was further enlarged upon in the succeeding articles, in which there might be something contentious.

60. Mr. SCELLE suggested the wording "when that State undertakes a final obligation under the treaty whether by ratification, accession or signature". His idea was that signature should take third place, since it was rare for it to suffice alone.

61. Mr. BRIERLY replied that in the United Kingdom it was not rare.

62. Mr. KERNO (Assistant Secretary-General) said he would take up the cudgels in favour of signature. It was not in any way exceptional for signature to give legal binding force to a treaty. There were a great many treaties which entered into force on mere signature. They must of course stipulate such procedure, but they very often did so. He did not attach importance to the position of the word in the enumeration given in the

article, though the word should appear there. Article 3 was an important one, as the succeeding articles referred only to ratification and accession. It was, therefore, essential to indicate in the present article that in many instances signature was sufficient.

63. Mr. SCELLE pointed out that in such instances the signature in question was an authorized signature which was equivalent to ratification.

64. Mr. KERNO (Assistant Secretary-General) said that if a treaty provided that signature made it legally binding, it was up to the State concerned to fulfil the appropriate parliamentary requirements before signature; the signature, however, was a definitive act.

65. Mr. AMADO recalled that, except under the English system, where signature was the principal act, the general rule was that ratification was necessary. During the discussions a year previously, Mr. Brierly had quoted a remark made by Gladstone as Leader of the Opposition, when the Government was consulting Parliament on a very important treaty, to the effect that the treaty should be concluded by the Crown without reference to Parliament.<sup>1</sup> In the United Kingdom, signature was sufficient to give a treaty binding force, but the signature was appended after Parliament had taken the necessary steps for the application of the treaty. That was acceptable, but it must be stated.

66. He did not see how the French translation of the text could be accepted, as it implied that in certain cases signature was sufficient to involve a final obligation.

67. Mr. CORDOVA said that after reading the English and Spanish texts, he found the same fault in the Spanish version. There appeared to be some tautology.

68. Mr. SCELLE and Mr. AMADO said that the same tautological wording appeared in the French text.

69. Mr. BRIERLY did not feel that it was his place to discuss the translations.

70. Mr. CORDOVA pointed out to Mr. Brierly that the remark applied also to the English text.

71. Mr. SPIROPOULOS agreed with Mr. Cordova. The same objection might be made to the first paragraph of article 2, but there the tautology was not a matter of great importance. It would be better to say: "A treaty becomes legally binding in relation to a State either by signature, ratification or accession."

72. Mr. BRIERLY proposed the following draft for article 3: "A treaty may become legally binding on a State either by signature or by ratification or by accession." The new wording would merely indicate the three procedures by which a treaty could become binding.

73. Mr. YEPES thought that the words "on a State" were open to criticism. In the case of the Convention for the Prevention and Punishment of the Crime of Genocide (General Assembly Resolution 260 (III)), for example, entry into force was subject to the deposit of twenty instruments of ratification. The formula proposed by Mr. Brierly implied that when for example only fifteen ratifications had been deposited such a Convention was binding on the States which had ratified it.

<sup>1</sup> Summary record of the 52nd meeting, para. 89.

74. Mr. BRIERLY pointed out that his revised formula merely enumerated the three procedures by which a treaty could become legally binding. It did not contain provisions covering particular cases, which were dealt with in later articles. It in no way prejudged the issue.

75. Mr. YEPES said that he accepted the formula proposed by Mr. Brierly.

76. Mr. KERNO (Assistant Secretary-General) quoted from a statement made by him before the International Court of Justice on 10 and 11 April 1951 :

“ The Secretary-General is the depositary of more than sixty multilateral conventions which have been drafted or revised under the auspices of the United Nations . . . In some twenty-five of these conventions, it is provided that the sole method by which States can become parties is by the deposit of formal instruments, which may be of ratification, accession or acceptance, with the Secretary-General . . . Sixteen other conventions provide that States may become parties either by signing without reservation as to acceptance or by deposit with the Secretary-General of an instrument of acceptance. The remaining conventions provide that States become parties by signature.”

77. Thus the practice of the United Nations was not uniform. The classical method of deposit of instruments of ratification or other instruments was followed in a large number of cases. In others the new method of acceptance was employed. To begin with there had been a tendency to substitute for the classical procedure of ratification or accession, the procedure of signature without reservation as to acceptance, signature with reservation as to acceptance followed by acceptance, or acceptance, which appeared to some people to be an advance. But at the fourth session of the General Assembly in 1949 the Sixth Committee, obliged to choose between the two procedures, had given its support to the traditional method by a decision which had, however, been a purely *ad hoc* one. The recital of past events he had given clearly showed how practice had wavered. If the Commission adopted article 3 in the form proposed by Mr. Brierly, it would exclude “ acceptance ” from the means by which a treaty could become legally binding.

78. Mr. SCELLE thought the new wording of article 3 satisfactory. In order to meet Mr. Yepes’ objection, he proposed that the following words should be added at the end of the new version: “ the question of its entry into force being reserved ”. The addition would indicate that in the case of certain treaties, multilateral treaties, observance of the special conditions of entry into force was also required.

79. In reply to a remark by Mr. Brierly, Mr. SCELLE said that he thought his proposed addition to article 3 would make the article clearer and that there was nothing against repeating what already appeared in article 2.

80. Mr. BRIERLY pointed out that the Commission had not yet decided on the terms of article 2.

81. Mr. SPIROPOULOS thought the new version proposed by Mr. Brierly did not need anything added to it. He understood why Mr. Scelle had suggested an

addition, but it was not possible to say everything in a single article.

82. Replying to Mr. Kern, he said that he realized that many recent conventions employed “ acceptance ”. The new term was not fundamentally different from signature or accession. Since it existed it was legitimate to ask whether it should not be added to the list given in article 3. Reflection however suggested that it might be as well to keep to general terms so as not to exclude other procedures which might appear later.

83. Mr. SCELLE agreed, unreservedly, to withdraw his suggestion.

84. Mr. CORDOVA wondered whether there might not be a danger of the new version of article 3 being interpreted literally as meaning that a treaty became binding by being signed.

85. Mr. SPIROPOULOS said that article 3 was to be understood in its context and merely constituted an introduction to the articles which followed.

86. Mr. SCELLE thought it was obvious that “ signature ” meant signature in conformity with the conditions laid down in the constitutions of the parties.

87. Mr. BRIERLY asked whether the Commission wished to retain article 3 in the new version he had suggested, on the understanding that the decision, like any other which the Commission might take, was in no way final.

88. Mr. SPIROPOULOS approved that proposal.

*It was so decided.*

#### ARTICLE 4

##### *Paragraph (1)*

89. Mr. BRIERLY said that the paragraph followed fairly closely article 6 of the Harvard draft convention. It contained an addition to the effect that ratification must be made “ in a written instrument ”, and it substituted for “ are . . . confirmed and approved ” the words “ confirms and accepts ”, which were closer to the terminology of chanceries.

90. Mr. FRANÇOIS observed that Mr. Brierly had introduced into his second report the idea of ratification, which he had not mentioned in his first one (A/CN.4/23). The definition he gave the word, however, could be applied to acceptance. Ratification did not simply mean any written and signed instrument. It was a formal act effected by the signature or by affixture of the seal of the Head of State. A letter from a minister or diplomatic representative giving notice of the acceptance of a treaty would be a signed instrument but not an act of ratification.

91. Mr. BRIERLY did not think the distinction a real one.

92. Mr. KERNO (Assistant Secretary-General) said that it was precisely on account of such ambiguities that the authors of certain recent conventions had frequently provided for the procedure of acceptance. It had been maintained that ratification was an act of domestic and constitutional law. It was the constitution which made ratification dependent on a parliamentary decision. In

the case of the United States of America, for example, that decision had to be expressed by a two-thirds majority of the Senate. Yet parliamentary action was not always required. In the United States, in addition to treaties requiring the Senate's approval, there were executive agreements ratification of which was not subject to previous sanction by a two-thirds majority of the Senate. The term "acceptance" could apply to all cases. Ratification had previously been a term used on both the internal and the international level, two distinct ideas or at any rate two different aspects of the same idea being thereby confused. It was in order to avoid possible misunderstanding that some persons had preferred to speak of "acceptance" in international affairs. The change of term therefore rested on a real distinction.

93. Mr. SCELLE wondered what would happen if the Secretary-General, after having registered an acceptance of a treaty, and having, moreover, no authority to judge whether or not the said acceptance was in order, then received a communication from another State disputing the validity of that acceptance. One might take as an example the hypothetical case where, after a convention had received the number of ratifications required for its entry into force, one of the parties then declared that, as one or more of the ratifications was invalid, it did not consider itself legally bound thereby. In such an eventuality, the Secretary-General would have no power to judge to what extent the protest was justified and would, on the other hand, be powerless to prevent its being made.

94. Mr. KERNO (Assistant Secretary-General) pointed out that he had referred to that problem at the previous meeting. The Secretary-General would be faced with a grave problem. It might even prove impossible to appeal to the contracting parties, since, if the protest were well-founded, there would be no contracting parties. The difficulty would be similar to that which arose when ratifications with reservations were challenged by another State. The question could only be solved by agreement between the States concerned or by reference to the International Court.

95. Mr. SPIROPOULOS agreed that the depositary of a treaty might find himself in the situation described. In such a case he would have to be guided by the principle that a body entrusted with the application of a rule is qualified to interpret it. If, on the basis of its interpretation of existing law, it was convinced that all formalities had been duly fulfilled, it must declare the acceptance valid. Similarly, if convinced of the contrary, it must reject it. The dispute which would then arise would be a matter for the International Court to settle. It was for the depositary to decide, for instance, whether, from that point of view, a treaty had entered into force or not.

96. Mr. SCELLE pointed out that the Legal Department of the Secretariat, whose task it would be to study such a question, would find itself in a very difficult situation.

97. Mr. LIANG (Secretary to the Commission) did not believe that the problem was as alarming as Mr. Scelle feared. Any of the remarks he himself was about

to make would not, of course, commit the Assistant Secretary-General. If the ratification procedure followed by a State in connection with a particular convention was challenged by another State, the Secretary-General could not do otherwise than receive the instrument of acceptance addressed to him by the Foreign Minister of the country in question. An international organization was not competent to examine the constitutionality of an act of a State. In a case of one government or State succeeding another, a problem did indeed arise; to which however the theory of inheritance of sovereignty provided the answer. Generally, by virtue of that theory, the new government or State was bound by the acts of the old. If the challenge was made by a third State, the Secretary-General was likewise not qualified to judge of its merits.

98. Mr. SCELLE pointed out that Mr. Liang's reply came to much the same thing as the views he had himself put forward. His own opinion was that the Secretary-General, in such a case, should register the acceptance without being called upon to judge of its validity. The case might, however, arise in which a State challenged the entry into force of a convention on the ground that its acceptance by another State was invalid. According to a theory defended by, among others, Anzilotti, a State had no right to challenge the ratification of another State. He himself could not accept that theory and considered that States possessed such a right.

99. Mr. AMADO thought that the discussion had gone too far. He experienced some difficulty in following those members who considered it possible to give a third State the right to challenge the constitutionality of a ratification. He preferred not to prolong the discussion on that point.

100. The text under consideration was satisfactory to him in its English version. While he would point out, in passing, that the doctrine of confirmation was a highly disputed one, any harm there might be in using the word "confirms" was dispelled by the context in which it occurred. It should however be recalled that many jurists considered that ratification was not in itself a confirmation but merely an initial act.

101. In the French translation the word "binding" was rendered by the expression "*force obligatoire*". He personally would prefer to substitute in the French text words "*comme obligatoire un traité*" for the words "*la force obligatoire d'un traité*". Unless that change were made, it might perhaps be thought that the treaty was binding only in respect of those of its clauses which actually possessed binding force.

102. He would like to know whether Mr. Scelle would accept that redrafting, which he suggested in no uncompromising spirit.

103. Mr. SCELLE said he shared Mr. Amado's view. He would also like to point out that in French the phrase "*à titre définitif*" might lead to confusion. A treaty was never final. He need only quote the proviso "*rebus sic stantibus*" to justify the omission of the three words in question. Paragraph 1 of article 4 would then run as follows:

*“La ratification est l'acte par lequel un Etat confirme et accepte un traité comme obligatoire, dans un instrument écrit, dûment signé.”*

104. Mr. FRANÇOIS, replying to a question by Mr. Brierly, developed the objection he had previously formulated (see para. 90 above). The proposed text gave too broad a connotation to the term “ratification”. When a treaty provided that “the present treaty shall be ratified and instruments of ratification exchanged”, was it sufficient if a diplomatic representative informed the Foreign Minister of another contracting State that his Government approved the terms of the Convention and if in exchange a similar communication was sent to the diplomatic representative concerned. Was such an exchange of notes equivalent to ratification? Ratification had previously been understood to be a formal act. If the term ratification was to be applied to any duly executed instrument, the Commission was getting on to the notion of acceptance irrespective of form. He wondered whether that was really the Rapporteur's intention.

105. Mr. BRIERLY thought it difficult to insist on ratification taking a particular form. A State might prescribe a certain form under its constitution, but that was not a rule of international law.

106. Mr. CORDOVA considered that the word ratification applied to the particular national procedure by which the executive power signified its consent, such consent being generally subject to the approval of the representatives of the nation. It was accordingly impossible to say that an executive agreement, an exchange of notes, constituted an act of ratification, even though it were in accordance with the definition of ratification given in article 4, paragraph 1. In his view, an executive agreement between Mexico and the United States of America (whose constitutions contained very similar provisions with regard to the conclusion of treaties) was binding on the two Governments politically, but not legally binding on the two States, since the procedure of approval by the Senates of the two nations had not been complied with. In such a case it was not possible to talk of ratification.

107. Mr. BRIERLY maintained that the distinction established by Mr. Córdova was purely a matter of domestic law and not of international law. In the United Kingdom there were no legislative provisions requiring Parliament to be consulted.

108. Mr. CORDOVA thought that, so far as ratification was concerned, domestic and international law were closely linked. The provisions of domestic law had to be taken into account. Ratification, in order to be effective, pre-supposed the fulfilment of all national requirements.

109. Mr. SPIROPOULOS thought that Mr. Córdova and Mr. Brierly were referring to somewhat different things. In the proposed text, the ratification referred to was the final instrument of ratification, whereas Mr. Córdova had in mind the course of domestic procedure prior to the establishment of the instrument.

110. In Greece and in a number of other countries,

when a treaty was signed, it was generally submitted to Parliament, which confirmed it and made it law. Whereupon, the executive organ, the King, in the case in point, signed the instrument of ratification, attesting thereby that all conditions had been fulfilled. Finally, the instrument was deposited or exchanged against those of the other signatory States.

111. Mr. CORDOVA pointed out that the text under consideration defined ratification as a written and duly executed instrument of a State. The definition, however, should stipulate that it was essential for the constitutional procedure to have been observed in its entirety.

112. Mr. SCELLE wondered whether it was quite correct to describe ratification as an act of a State. It was for the executive power to affirm that all the requirements of the constitution had been fulfilled. Ratification was not an act of any State organ, it was the act of a clearly defined organ, namely, the executive power.

113. In the French Constitution, ratification could take place, in certain specified cases, without consultation of Parliament. The Swiss Constitution was even more definite on the point: no treaty concluded for less than 15 years was subject to referendum. The conditions of validity of a treaty were thus not always the same. Ratification accordingly could not be defined as in the proposed text. It was the organ competent to ratify, i.e., the executive power, which affirmed that all legal conditions had been fulfilled.

114. Mr. BRIERLY proposed amending<sup>xx</sup> paragraph 1 of article 4 as follows: “Ratification is an act by which the competent organ of a State confirms and accepts a treaty as binding.”

115. Mr. SCELLE thought that by ratification the competent organ did not “confirm” but simply said that a treaty was binding.

116. Mr. BRIERLY remarked that the word “confirm” was current usage in that connexion.

117. Mr. ALFARO supported Mr. Brierly's new formula. It could not be forgotten that ratification was the act of the legislative power and that the act of the executive was the exchange or deposit of the ratification. In the new formula the Committee referred to both operations at once.

118. Mr. FRANÇOIS could not allow that ratification was the act of the legislature; the legislative power gave its consent but it was the executive that ratified. Such was the practice observed in nearly all countries.

119. Mr. AMADO supported Mr. François. Article 31 of the Constitution of the French Republic laid down that the President “signed and ratified” treaties. What Parliament — in Brazil the National Congress — did was to “approve” treaties. According to the country, ratification took the form of publication or of promulgation. Mr. Scelle had explained, in a study, that in his opinion promulgation was superfluous.

120. Mr. François had wondered whether a mere signed written document could be regarded as an act of ratification; in point of fact the definition given in the text more nearly applied to acceptance. Mr. Liang had

written an excellent article on the subject.<sup>2</sup> He wondered whether the traditional idea of ratification should be given, or whether it ought to be extended to include acceptance.

121. He would accept the text in question with the amendment proposed by Mr. Scelle.

122. Mr. CORDOVA considered that the new formula submitted by Mr. Brierly did not make any material addition to the former text. Mr. Scelle had shown very clearly that ratification implied that the constitutional procedure had been observed.

123. Mr. BRIERLY said that that was what he had intended to convey by using the words "competent organ".

124. Mr. AMADO remarked, for the benefit of Mr. Córdova, that the question of what authority should pronounce on the validity of undertakings made by a State *ultra vires* had given rise to endless theoretic discussions and was insoluble, as Mr. Basdevant had clearly recognised. Neither the Secretary-General nor another State had authority to declare a State's ratification invalid. A particularly clear precedent was provided by a dispute between Peru and Colombia. When a State was undergoing internal disturbances it was impossible to determine whether or not the power in control was really the legal power.

125. Mr. SANDSTRÖM proposed that in the text under discussion the words "declares that the treaty is confirmed and accepted by that State..." should be substituted for the words "confirms and accepts a treaty".

126. Mr. SPIROPOULOS said that a ratification contained no declaration.

127. Mr. YEPES submitted to the Commission a definition of ratification which appeared to him satisfactory: "Ratification is an act by which the competent organ of a State declares in an instrument duly executed that a treaty has been approved and accepted as binding."

128. Mr. SPIROPOULOS thought that any definition was dangerous. He had been much impressed by Mr. François' remark that the proposed definition would also apply to any acceptance, even where there was no formal ratification.

129. Since however some text or other had to be accepted, he proposed that the Commission should provisionally accept the last formula submitted by Mr. Brierly. The Commission would have an opportunity of examining it again. By continuing the discussion it might make confusion worse confounded. It was understood that the text was not satisfactory and would have to be improved.

130. Mr. BRIERLY confirmed that it would be a matter of a tentative acceptance.

*It was so decided*

The meeting rose at 6.5 p.m.

## 86th MEETING

Tuesday, 22 May 1951, at 10 a.m.

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*Chairman:* Mr. Shuhsi HSU

*Rapporteur:* Mr. Roberto CORDOVA

*Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. J. P. A. FRANÇOIS, Mr. A. E. F. SANDSTRÖM, 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.

**Law of treaties: report by Mr. Brierly (item 4 (a) of the agenda) (A/CN.4/43, (*continued*))**

ARTICLE 4

*Paragraph (2)*

1-3. Mr. BRIERLY thought it would be advisable for the Commission to postpone its decision on the paragraph until it had taken cognizance of the opinion of the International Court of Justice.

*Paragraph (3)*

4. Mr. BRIERLY considered that paragraph 3 was no longer necessary in view of the changes in paragraph 1, which now embodied the provisions of paragraph 3.

5. Mr. CORDOVA asked Mr. Brierly whether he really felt that, by using the words "by which the competent authority of a State", the Commission had embodied paragraph 3 in paragraph 1, thus making paragraph 3 superfluous.

6. Mr. BRIERLY pointed out that after a lengthy discussion the Commission had decided to amend paragraph 1; hence paragraph 3 was no longer necessary.

7. Mr. SPIROPOULOS agreed with Mr. Brierly. Paragraph 1 as amended<sup>1</sup> included the provisions of paragraph 3.

ARTICLE 5

8. Mr. BRIERLY explained that in article 5 he had

<sup>1</sup> See the summary records of the 85th meeting, paras. 114 and 129-130.

<sup>2</sup> "The use of the term 'acceptance' in the United Nations treaty practice", in "Legal Notes", *American Journal of International Law*, vol. 44 (1950), pp. 342-349.

taken an opposite view to the one he had taken the previous year. In his preliminary draft, the article established the presumption that ratification was not necessary. In the present article 5, the presumption was that ratification was necessary, unless provision were made to the contrary in the treaty. The article adopted the provisions of article 7 of the Harvard draft.

9. Mr. AMADO recalled that a similar change of attitude had taken place in the General Assembly during the discussion on the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. On that occasion, Mrs. Bastid had expounded the classical theory of ratification. Mr. Fitzmaurice had first of all argued that ratification was not necessary; but later he had agreed with Mrs. Bastid. Thus clearly, the United Kingdom did not hold to that view when co-operation in solving a theoretical problem was desired.

10. Mr. SCELLE supported that viewpoint. He was still opposed, as he had been hitherto, to the new method of concluding treaties without ratification. A treaty was an important matter, and when a State had signed a treaty, it must be allowed time for reflection. It had both the right and the duty to reflect. He was in favour of Mrs. Bastid's view. The opposite attitude was a distinctly retrograde step.

11. Mr. CORDOVA thought the draft should be based on some theoretical principle.

12. As he saw it, the draft laid down the general rule that a treaty became binding through the mere fact of signature, and that it was only in the instances set out in article 5 that ratification was necessary. The Commission should take the opposite course and, after laying down the general rule that ratification was necessary, enumerate the exceptions to that general rule. Otherwise, if a treaty did not come under the provisions of any of the paragraphs of article 5, the general rule on which the draft was based and under which signature was sufficient would be applied.

13. Mr. SPIROPOULOS was glad to find that Mr. Córdova shared the opinion he himself had expressed earlier. The principle must be that a treaty "becomes binding by ratification". If the Commission accepted that principle it should say so quite clearly, and then set forth the exceptions.

14. Mr. KERNO (Assistant Secretary-General) said he would like to explain what had happened in the Sixth Committee when the draft Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others was being discussed at the fourth session of the General Assembly. There had been no suggestion of a choice between signature followed by ratification or signature pure and simple constituting a final obligation. What the Third Committee had proposed was a new method of acceptance by which acceptance amounted to ratification under another name. Under that new system, a State could, if it so desired, fulfil beforehand the constitutional conditions required to enable it to bind itself definitively. After that, its representatives would approach the depositary of the

Convention and declare that their signature was not subject to reservation as to acceptance. Obviously under that new system, a State was completely free to proceed otherwise. It could also sign subject to acceptance, submit the treaty to its Parliament, and then deposit its instrument of acceptance. That would amount to the same thing as the old procedure of signature followed by ratification. There was a choice between the two alternatives.

15. As he had already pointed out, the rule could be ratification. It could therefore be stated that ratification was necessary failing any provision to the contrary in the treaty.

16. Mr. SCELLE was worried by the fact that signature appeared to bind a State even when the competent organ had not followed the prescribed procedure. The procedure Mr. Keruo had described was correct. It did not greatly matter whether the constitutional procedure came before or after signature, so long as it did take place. In certain instances it was, of course, admissible that treaties of unusual importance should be able to modify a State's constitution; but that was not the case with any and every treaty. The rule of international law was that a treaty was only valid if the constitutional provisions were observed. That customary stipulation must not be in any way challenged. An organ could not act *ultra vires*. The Commission must maintain that rule.

17. He could well understand that Mr. Fitzmaurice had been in favour of immediate signature. The British Constitution authorized that. The French Constitution did not.

18. Mr. AMADO asked permission to read out an extract from an article written by Mr. Liang:

"The question of the use of the term 'acceptance' as contained in the standard formula was again raised during the discussion on the Draft Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others in the Sixth Committee of the General Assembly during its Fourth Session (1949). The relevant article which, amongst others of the draft convention, had been referred to the Sixth Committee by the Third Committee which had drafted them, was framed in the terms of the standard formula. The representative of France (Madame Paul Bastid) introduced an amendment which provided for signature and ratification rather than acceptance as contained in the standard formula. She preferred the use of the terms 'signature, ratification and accession' because this would be in conformity with the practice of the United Nations in the two most recent conventions approved by the General Assembly — the Convention on the Prevention and Punishment of the Crime of Genocide, approved on December 9, 1948, and the Draft Convention on the International Transmission of News and the Right of Correction, approved on May 13, 1949 — as well as with the classical terminology.

"Madame Bastid added that since the term 'acceptance' as contained in the standard formula had not been used in the most recent conventions approved

by the General Assembly, it did not appear logical to revert to a system already abandoned. An additional reason for the amendment was that the constitutional processes by which ratification was effected were usually performed by the parliament of a State, and as the draft convention in question might make it necessary for a number of States to enact new legislation, it was highly desirable that the parliaments which would have to pass that legislation should first approve the convention.

“The representative of the United Kingdom (Mr. G. G. Fitzmaurice), supporting the French amendment, said that in his opinion most States would find the method of signature followed by ratification the most suitable, although he acknowledged that it was true that the use of the term ‘acceptance’ was more flexible.”<sup>2</sup>

19. That was what had happened. There were other contributions to the study of the way the problem had developed. He remembered a lecture given by Mr. Saba in 1948 on acceptance in multilateral treaty practice. Mr. Liang’s article went into the question very thoroughly. A paper by a young French jurist, Mr. Leriche, who worked in the United Nations, might also be mentioned. It was an excellently written study explaining all the advantages of the system.

20. The Commission’s task, as Mr. Scelle and Mr. Spiropoulos had stated, was to establish the general rule that signature must be followed by ratification, and then to state that exceptions such as acceptance were permissible.

21. Mr. SANDSTRÖM said he had interpreted article 5 of the draft as establishing the presumption that the necessity for ratification was the rule. Paragraph (d) had given him that impression. The text listed the cases where ratification was necessary, and they were three in number. But obviously, if the principle were first of all laid down, as Mr. Spiropoulos had suggested, and the exceptions mentioned subsequently, the text would be clearer. It was a question of form and not of substance.

22. Mr. ALFARO thought that on the whole the members of the Commission were in agreement on that point. The Commission should state that ratification was the rule and not that it was the exception. He proposed that article 5 be worded as follows:

“A State is not deemed to have undertaken a final obligation under a treaty until it ratifies that treaty, unless:

“(a) The treaty provides that it will not require ratification;

“(b) The treaty provides that it shall be ratified and that it shall come into force before such ratification; and

“(c) The full powers of the State’s representatives who negotiated or signed the treaty stipulated that ratification was not necessary.”

23. Mr. SCELLE saw the point of Mr. Alfaro’s proposal. He personally did not think it admissible that a treaty

should state that ratification was waived where it was required on constitutional grounds. The system of acceptance was admissible if it were put thus: that acceptance was feasible provided the State concerned had complied with the necessary constitutional conditions. Otherwise, it would be legal heresy. The system of acceptance was possible, but it must be delimited, otherwise it was no longer constitutional, i.e., plenipotentiaries would no longer be competent to accept a treaty. The very basis of treaty-making power was at stake. The United States Senate could never accept such a text.

24. Mr. SPIROPOULOS said that in establishing rules governing the question the Commission must be guided by current international practice and it could be said that ratification was the general principle. But there were treaties which provided that certain of their provisions became binding by the fact of signature alone. For instance, the Treaty of Rapallo stipulated that certain articles were applicable from the moment the treaty was signed. Similarly, the Balkan Treaty concluded in 1936 provided for application from the time of signature. That was the international practice. The Commission must not apply a general theory and disregard the facts.

25. The procedure for implementation by mere signature was not at variance with the general rule that ratification was necessary. Constitutions did not insist on ratification for all treaties. For example in Greece, a purely political treaty did not require the approval of Parliament. Where Parliamentary approval was unnecessary, the supreme executive organ of the State that signed through its representatives could stipulate that a treaty became binding once it was signed. Ratification thus took place at the same time as signature, and the principle of ratification remained intact. But when the constitution provided that the approval of Parliament was necessary, the signature of a representative who accepted a treaty and declared it binding without ratification was obviously invalid, since it conflicted with the constitution. Exceptions to the general principle should remain within constitutional limits.

26. Mr. AMADO shared the view of Mr. Spiropoulos.

27. Article 31 of the French Constitution stipulated that “The President of the Republic . . . shall sign and ratify treaties”, while article 27 listed the categories of treaties for the ratification of which Parliamentary approval was required:

“Article 27. Treaties relating to international organization, peace treaties, commercial treaties, treaties that commit the national revenues, treaties relating to the personal status and property rights of French citizens abroad, treaties that modify French domestic legislation, as well as treaties that involve the cession, exchange or addition of territory, shall not become final until they have been ratified by an act of the legislature.

“No cession, no exchange, and no addition of territory shall be valid without the consent of the peoples concerned.”

<sup>2</sup> *American Journal of International Law*, Vol. 44 (1950), p. 347.

28. Consequently, if the Government gave full powers for the final signature of a treaty relating to one of those questions, such a signature would be null and void.

29. The Commission should establish the general principle of ratification and leave it to the development of law to lend weight to the theory of acceptance.

30. Mr. SCALLE thought it should be laid down as a general principle that mere acceptance was valid only when it was in accordance with the constitution. A treaty could not relieve the authorities of a State of the duty of abiding by their constitution. In many cases a question of interpretation was involved. A typical case of difficulty of interpretation arose in the articles of the French Constitution just read out by Mr. Amado. The constitution stipulated that no territorial change could be effected unless previously sanctioned by law. The question whether such a rule applied equally to colonial territories had been the subject of some discussion in France and the majority of authors considered that the President of the Republic could ratify a treaty involving a change in a colonial territory without reference to Parliament.

31. The only point he wished to emphasize was that the rules varied from one country to another. It was, for instance, difficult to know where to fix the dividing line, from the point of view of the United States Senate, between a treaty and an agreement. It was therefore necessary for the Commission to allow a certain latitude and to confine itself to saying that it was not enough for a treaty to dispense with the need for ratification, since the possibility of doing so depended on the Constitution.

32. At the present time there was a veritable spate of simplified treaties. Authorities were taking upon themselves the right to conclude treaties and a postmaster-general, for example, had signed an agreement with a neighbouring country. Such a system was anarchical and anti-democratic. Someone might commit the State without having consulted the nation. It was a matter on which he felt rather strongly. It was quite inadmissible for the State to be committed by the mere will of plenipotentiaries and for such plenipotentiaries to declare that to expedite procedure they would sign the instrument there and then.

33. The Commission should be very firm on that point. That need not, however, prevent it from mentioning the possibility of an acceptance being valid on condition that it was in accordance with the constitution of the signatory State. Such a provision would not hamper the Secretary-General of the United Nations in the performance of his task.

34. Mr. YEPES thought that the Commission had confused ratification from an international angle with ratification from a constitutional standpoint. What was of interest at the moment was ratification from the international angle. The Commission should therefore say that a draft treaty became binding only after it had been ratified by the competent organ. The validity of the ratification, from a domestic standpoint, was dependent on the constitution of the State concerned.

Certain treaties should be ratified only by law; others by the Head of the State. Such a question did not come within the Commission's competence and it should leave each State free to organize its ratification procedure as it pleased. The Commission should simply enunciate the general principle.

35. Mr. SPIROPOULOS thought that the members of the Commission were agreed on the general principle that ratification was necessary for treaties to become binding. That did not, however, entirely solve the problem. Did the statement that a treaty became binding after ratification mean that the treaty was binding only if ratification had been effected in accordance with the constitution? That was the crux of the problem. There were two theories on that point; that of Anzilotti, who did not postulate that condition, and a second, according to which ratification conferred binding force on treaties only if it was effected in accordance with the constitution.

36. If the Commission went no further than the view expressed by Mr. Yepes, the latter question would be left unanswered. Yet it was the most important of all.

37. Mr. CORDOVA said he had suggested, since the Commission had discussed the problem at length, that it should decide that ratification should constitute the principle. With regard to the meaning of the word "ratification", he would support the argument put forward by Mr. Spiropoulos. He proposed that a provisional vote be taken on the sense of the word "ratification". Did it mean the observance of the correct constitutional procedure in the States parties to the treaty, or merely the instrument by which the competent authority of those States recognized that the treaty was binding? Mr. Brierly could then re-draft article 5 in the light of that vote.

38. Mr. BRIERLY noted that Mr. Spiropoulos had resolved the difficulties pointed out by Mr. Scelle on the question of ratification. If the authorities of a State ratified a treaty in a manner contrary to the constitution of that State, the ratification was invalid. The authority had exceeded its powers and had not committed the country. He was quite content with Mr. Alfaro's text, which seemed to provide for everything and moreover to enjoy the approval of the Commission.

39. Mr. YEPES noted that the text proposed by Mr. Alfaro was in line with the ideas he himself had put forward, though he preferred the following text:

"Treaties become binding only by virtue of their ratification by the competent organ of the State. The ratification procedure from the point of view of the constitution of each State depends on the latter's domestic legislation. Any ratification contrary to such legislation is invalid."

40. Mr. SANDSTRÖM thought the text proposed by Mr. Alfaro quite acceptable, though it did not meet the very pertinent objection of Mr. Scelle. An exception to the general rule might be expressed as follows:

"Ratification is not necessary when not required by the constitutional law of a country and when no provision for ratification has been made in the powers

conferred on the representative of the State or in the text of the treaty.”

41. Mr. ALFARO explained that it was not his intention to submit a final text but simply to formulate a system contrary to that of the original article and to establish a general rule, to which exceptions could then be made. It was, of course, understood that the ratification of a treaty should be effected in accordance with the provisions of the constitutions of States. He was willing, if it were thought necessary to expand the text, to accept some such clause as the following: “A State is not deemed to have undertaken a final obligation under a treaty until it has ratified that treaty in accordance with the procedure set forth in its constitution, unless: . . .” The text might be worded differently provided the substance remained the same. The Commission would thus have a basis for discussion.

42. Mr. SPIROPOULOS felt that the members of the Commission were more or less agreed on the substance of the question. The proposal submitted by Mr. Yepes was very much to the point. The members of the Commission considered ratification to be necessary and that it was valid if in accordance with the constitution.

43. The next question therefore was to define the exceptions. The act of signature could be sufficient when the competent organ enjoyed the right to ratify without any constitutional restriction, since in that case the organ could authorize its representatives to bind themselves by their signature.

44. Mr. KERNO (Assistant Secretary-General) remarked that the Commission was called upon to codify international law and not the constitutional law of the various States. Far be it from him to think that international law could ignore the various constitutions. It was however necessary to look at the matter from the standpoint of international law. What had to be settled was the procedure a State must follow in order to become a contracting party. The normal procedure was ratification but there were, of course, two other procedures, accession and signature. Naturally, in all three cases the act performed must be valid from the point of view of the constitution of the State concerned. Each ratification must therefore be in accordance with the constitution, since otherwise it would be invalid. The same was true of accession and the act of signature.

45. He hoped that the Commission would not introduce a system which would rule out the mere act of signature, when not contrary to the constitution of the State concerned, as a method of concluding a treaty. That would be a step backwards.

46. Mr. CORDOVA thought that the exceptions formulated in the text proposed by Mr. Alfaro appeared still to permit a treaty to dispense with the need to abide by constitutional provisions. It would be preferable to enunciate the following general principle: “Ratification must be effected in accordance with the requirements of the constitution”, and then to provide for exceptions to that rule.

47. Mr. YEPES asked Mr. Córdova whether he was in

favour of leaving the procedure for acceptance to the domestic legislation of each State.

48. Mr. CORDOVA replied that the text should clearly show that ratification must be in accordance with all the constitutional rules established by domestic legislation.

49. In that connection a drafting difficulty arose and he would be pleased if Mr. Brierly and Mr. Scelle would get together to establish a text.

50. Mr. SCELLE said that Mr. Alfaro’s text came as rather a shock, since it declared ratification to be necessary unless the treaty dispensed with the need for it. It was not, however, the treaty which dispensed with the need for ratification. There were a number of cases in which ratification was unnecessary under the constitution. It was also possible to talk of acceptance. It was, on the contrary, inadmissible for a treaty to dispense with a constitutional obligation and it was not possible to say: “unless: (a) the treaty provides otherwise, etc.”. A treaty, he would repeat, could not change the constitution.

51. That was the point on which there was a lack of agreement. All the new methods of concluding treaties which did not involve ratification were acceptable, provided they conformed with the constitution.

52. It was not because the treaty so provided that ratification became unnecessary.

53. Mr. FRANÇOIS pointed out that some of his colleagues had stated that all the members of the Commission were agreed that ratification did not confer binding force on a treaty if it conflicted with constitutional rules. He could not accept that view, since it was contrary to the theory of Anzilotti, with which he himself was in agreement as was also, indeed, Basdevant.

54. A distinction must be made between the formal and the substantive exercise of powers. If the Head of the State ratified the treaty and if, under the constitution, he was making formal use of his powers, the treaty was binding on the State under international law. The question might perhaps arise whether the Head of the State had exceeded his powers but that was a domestic matter that concerned the substantive exercise of powers. It was necessary to accept that theory. As soon as the treaty was ratified, in the classical sense of the term, by a State, there must be the certainty that it would be binding on that State.

55. Mr. SCELLE was sorry he did not agree with Mr. François. The theory of formal exercise of powers must be rejected. The essence of power was the exercise thereof. Were that not so, the whole theory of powers being exceeded was destroyed.

56. Mr. FRANÇOIS replied that that was a question of domestic law.

57. Mr. SCELLE considered it a question of general method. In France, since the work of Duguit, the criterion of formal exercise of powers had been abandoned. Basdevant, after some hesitation, had rejected the theory, as had also Madame Bastid.

58. Mr. SPIROPOULOS was surprised that Mr. François should raise the question at that stage of the discussion. Mr. François could surely have stated earlier

on that he rejected the theory, which it had been assumed that all the members of the Commission accepted.

59. He suggested that the Commission should decide what theory it wished to adopt.

60. Mr. YEPES and Mr. ALFARO supported the proposal.

61. Mr. SPIROPOULOS proposed the wording: "A treaty becomes valid on ratification provided such ratification is in accordance with the constitutional law of the State."

*Mr. Spiropoulos' proposal was adopted by 8 votes to 1.*

62. Mr. SPIROPOULOS thought that, having laid down the principle, the Commission should set out the exceptions. He suggested provisionally the wording: "A treaty may become binding either by signature or accession provided that be possible according to constitutional law."

63. Mr. SCELLE and Mr. AMADO found the text acceptable.

64. Mr. ALFARO pointed out, in connexion with Mr. Scelle's observation, that the text was entirely in keeping with the theory that no treaty may change the constitution of a State, and that if a treaty provided that it need not be submitted for ratification, it presupposed that the constitution made that possible. It was merely a question of form. He had signed several treaties with the United States in which ratification was dispensed with, since the constitutions of the United States and Panama allowed plenipotentiaries to proceed thus.

65. The text proposed by Mr. Spiropoulos was acceptable in form. The underlying idea was that all the treaties with which the Commission was dealing were concluded in conformity with the constitutions of the countries concerned.

66. Mr. SCELLE remarked that Mr. Spiropoulos and Mr. Alfaro were thinking on the lines of Talleyrand's famous dictum: "What goes without saying goes still better when said." He found Mr. Spiropoulos' proposal acceptable.

67. Mr. SPIROPOULOS reiterated that the Commission had only decided on the principle provisionally, and was leaving it to the Rapporteur to draft the article.

68. Mr. SANDSTRÖM asked whether, according to the text proposed by Mr. Spiropoulos, signature alone could give the treaty binding force.

69. Mr. SPIROPOULOS replied that, in the case of certain treaties, the provisions laid down in the constitution must be followed, whereas in other cases not subject to parliamentary sanction, the State could grant its plenipotentiary the power to commit it on the strength of his signature alone, provided of course — and that would answer Mr. Córdova's enquiry — that such delegation of powers was permissible under the constitution.

70. Replying to a question by Mr. Amado, Mr. BRIERLY explained that the whole of article 5 would have to be revised in the light of the principle just adopted by the Commission.

71. Mr. SCELLE asked Mr. Kerno whether he thought it advisable for the Commission to add, in the enumeration of the various ways in which a State could be committed, the word "acceptance". He would like that new type of international undertaking to be included in the enumeration.

72. "Acceptance" was the process by which, assuming that the constitutional formalities were complied with, an obligation was incurred on the strength of mere notice of acceptance.

73. Mr. KERNO (Assistant Secretary-General) thought that the addition would make the various procedures for binding States more flexible. Obviously, any such procedure must be in accordance with the constitution. That was a truism.

74. Mr. BRIERLY thought that the recasting of article 5 would raise a drafting complication. Some expression like the following was called for: "The act must be in accordance with constitutional requirements." But where should it be inserted? He personally felt that a formula of that kind should constitute a separate article, so as to avoid a series of repetitions.

75. Mr. SCELLE said that it should be left to the Rapporteur to choose the formula he considered most suitable. The solution just agreed upon by the Commission was flexible, since it enabled account to be taken of the fact that any constitution was capable of modification by custom, not merely when it was based on custom as in the United Kingdom, but even — though that point was more controversial — when the constitution was codified.

#### ARTICLE 6

76. Mr. FRANÇOIS thought the question of reservations accompanying ratifications also applied to article 6 and was very important. Hence article 6 should be left in abeyance until the International Court of Justice had given its advisory opinion.

77. Replying to a question by Mr. AMADO, Mr. KERNO (Assistant Secretary-General) agreed that Mr. François was right in stating that the problems raised by the existence of reservations might complicate the question of ratification. But it did not seem necessary to raise those difficulties in connexion with article 6. They could be examined later, if necessary.

78. Mr. FRANÇOIS agreed to that course.

79. Mr. YEPES asked for the three paragraphs of article 6 to be discussed and voted on separately.

*It was so decided.*

#### Paragraph (1)

80. Mr. BRIERLY pointed out that the retention of the words "Article 5" would depend on what articles were finally adopted.

81. Mr. YEPES found the proposed text too categorical. A treaty might expressly stipulate that its entry into force would take place at a given time after signature. By adopting such a text, the Commission would make it impossible for drafters of treaties to establish a specific date of application.

82. Mr. SCELLE and Mr. KERNO pointed out to Mr. Yepes, who agreed, that the introductory phrase "Unless otherwise provided in the treaty itself" allowed full latitude in the drafting of treaties.

83. Mr. AMADO was prepared to approve paragraph (1) as it stood.

84. Mr. SPIROPOULOS said that the text under consideration presupposed a treaty which did not have to be ratified, and stipulated that in such a case the treaty entered into force "on signature". But there was one point missing. It was not stated whether "signature" meant signature by all the parties. Paragraph (3) of the same article, referring to treaties subject to ratification, specified that "all the signatories" were meant.

85. Mr. KERNO (Assistant Secretary-General) said he too had been struck by that difference. Paragraph (1) must be understood to mean that as soon as two contracting parties had signed, the treaty entered into force between them. That distinction was justifiable on the grounds that in paragraph (3) a series of signatures was involved.

86. He mentioned the example of a treaty of the type provided for in paragraph (1), for the demilitarization of a territory. When two States signed a treaty of that kind, could it be said that it became binding on those two States alone? It was a knotty problem.

87. Mr. YEPES thought that paragraph (1) needed to be rounded off. If, for example, two States alone signed a regional treaty which affected a number of countries linked together by some community of interest, the treaty did not come into force between those two States, since the intention was that it should enter into force between all the signatories. Hence the words "by all the contracting States" should be added to paragraph (1).

88. Mr. SPIROPOULOS remarked that at the previous meeting some of the members of the Commission, Mr. Scelle in particular, had considered that ratification by all the signatories was not necessary, as otherwise a multilateral treaty would never enter into force. Now Mr. Yepes was proposing an amendment which would make the text much less flexible. The main point was whether it was to the interest of the parties that entry into force should apply in relation to two States only, as soon as two signatures had been obtained, or in relation to them all, on the strength of all their signatures. The will of the parties had to be ascertained.

89. Mr. YEPES said that the introductory phrase in article 6 would always allow for the insertion in the treaty of provisions differing from the prescribed rule.

90. Mr. SPIROPOULOS asked what would happen if the treaty laid down no such rule.

91. Mr. YEPES pointed out that certain collective or multilateral treaties could not enter into force in relation to one of the contracting parties alone, as for instance in the case of a treaty establishing a customs union. Suppose for example a treaty were concluded for a customs union between Turkey and the Balkan States, what would happen if the treaty were signed by Greece and Yugoslavia alone?

92. Mr. SPIROPOULOS said that the criterion to be applied in such cases was the spirit of the treaty and the will of the contracting parties. That will must be consulted in order to discover whether the entry into force of the treaty did or did not require the signature of all the parties. He had reflected for a long time before reaching that conclusion, which he thought was the only possible one.

93. To discover the intention of the parties was a tricky problem. Taking an example akin to the one just mentioned, an extradition treaty concluded by the same States might very well be applied in relations between two of those States only, if they were the only ones that signed it. Hence "contractual intention" varied with the type of treaty.

94. Mr. YEPES was of the same opinion.

95. Mr. AMADO pointed out that the text under consideration reproduced one of the provisions (article 10) of the Harvard draft.

96. What Mr. Spiropoulos had said was true. Fauchille had given examples<sup>3</sup> illustrating that principle: the treaty signed on 3 July 1880 in Madrid by a large number of European Powers for the unification of the exercise of the right of protection in Morocco provided that, subject to the special consent of the parties, its provisions should enter into force as from the date of signature. The Treaty of Rapallo, dated 16 April 1922, between Germany and the Soviet Union stipulated that article 1 (b) and article 4 should come into force on the day of ratification, while the rest of the articles would come into force immediately. Thus it was the intention of the parties that determined the date of entry into force.

97. Mr. KERNO (Assistant Secretary-General) observed that the discussion was somewhat similar to the discussions in the International Court on the question of reservations.

98. However useful a general provision as to entry into force might be, its importance must not be exaggerated, since the parties were obviously free to stipulate whatever they wished. A clause of that kind only covered cases where the convention made no reference to the point. It would be advisable for negotiators to realize the effect that signatures would have on application in the absence of a statement by them. Hence it was important that there should be a rule — stipulating either unanimity of signatures, or the depositing of two signatures only. Negotiators would then know whether departures from that rule should be provided for.

99. Mr. SANDSTRÖM pointed out that if the rules governing contracts under private law were applied by analogy, the theory propounded by Mr. Spiropoulos was the only admissible one. In each individual instance, the intention must be ascertained. Intention varied according to circumstances and according to the will of the parties. It would always be a difficult matter to discover what the intention was.

100. Replying to a question by Mr. BRIERLY, Mr.

<sup>3</sup> *Traité de droit international public*, vol. I, Part 3, Paris, 1926, pp. 321-322.

YEPES referred to his amendment to add, at the end of paragraph (1), the words "by all the contracting States".

101. Mr. KERNO (Assistant Secretary-General) pointed out that the text proposed by Mr. Yepes did not specify which parties were referred to. Was it the countries that had negotiated, or those entitled to sign the treaty? To be accurate, the wording would have to be "by all States which have participated in the negotiations" or "by all qualified to sign".

102. Mr. YEPES said that what he had meant was "all States which have participated in the negotiations".

103. Mr. SPIROPOULOS remarked that the existence of a rule would compel the parties to state their intentions, and where necessary to provide for departures from that rule in the treaty.

104. Mr. YEPES said that that was precisely the purpose of his amendment.

105. Mr. SPIROPOULOS and Mr. BRIERLY saw no objection to the amendment proposed by Mr. Yepes.

106. Mr. YEPES formally moved that his amendment be modified to read as follows: "by all the States which have participated in the negotiations". That modification took account of Mr. Kern's remarks.

*The text of article 6, paragraph (1), as supplemented by Mr. Yepes' amendment modified as above, was adopted.*

107. Mr. SCELLE said that if the rule were drafted thus, treaties would seldom be brought into force. It would be a long time before the signatures of sixty States parties to a multilateral convention were forthcoming. He regarded the rule as neither more nor less than a comminatory clause.

108. Mr. YEPES said that it was for the negotiators to insert in a convention provisions constituting exceptions to the rule.

109. Mr. KERNO (Assistant Secretary-General) pointed out that the will of the parties must obviously be ascertained, but there must be a rule to cover cases where the parties had not expressed their intention.

#### *Paragraph (2)*

*Article 6, paragraph (2) was adopted without comment.*

#### *Paragraph (3)*

*Article 6, paragraph (3) was adopted without comment.*

#### ARTICLES 7 AND 8

110. Referring to article 7, Mr. BRIERLY said he had included it in his report not because he held any brief for it, but with a view to stimulating discussion.

111. Mr. AMADO thought article 7 was superfluous, though no doubt Mr. Yepes, as the champion of international good faith, would wish it to remain. He proposed that article 7 be deleted.

112. Mr. BRIERLY supported that proposal.

113. Referring to article 8, Mr. CORDOVA thought that States should be left free to ratify or not as they wished. A State which had signed a treaty subject to ratification must not be forced into ratifying it, as the article appeared to suggest.

114. Mr. AMADO pointed out that the Pan-American Convention signed at Havana provided that a State not ratifying should give its reasons for not doing so, and that if a State delayed ratification, another State could enquire the reason for the delay.

115. Mr. SCELLE did not think that articles 7 and 8, which were obviously closely linked, were pointless. Under the theory of the abuse of rights, if a State refused to ratify with an intention to cause harm, say for instance in order to prevent a joint arrangement from materializing, it would be making use of article 8 for a purpose quite different from the one envisaged. A State surely was not entitled to decline to ratify in order to cause damage to another State. He could quote a precedent for that. A treaty to which Japan was a party provided that entry into force should take place as soon as all the signatories had ratified. Although Japan had not ratified, the rest of the parties brought the treaty into force among themselves on the grounds that they regarded the refusal to ratify as an abuse of rights on the part of Japan.

116. In private law, abuse of rights as interpreted nowadays had a very wide connotation. Abuse of rights occurred not only where there was an intent to cause harm, but also in the case of merely frivolous acts. In international law it might perhaps be going too far to admit such an extension.

117. It would be well to specify that signature — even when subject to ratification — entailed certain obligations. It was only permissible to refrain from ratifying if there were legitimate grounds. But the intent to cause harm would have to be proved. It would be wrong to go so far as to force a signatory State to ratify. Ratification had been instituted, as had been pointed out at the previous meeting, to give States a chance to reflect, but not to enable them to do harm. Ratification existed for the benefit of States, but not to enable them to commit fraud or to hamper international development. Refusal to ratify on unjustifiable grounds might thus in certain instances involve States in liability.

118. That concept was not by any means his own. Politis had expounded it at great length in a course of lectures on restrictions on sovereignty delivered at the International Law Academy at The Hague in 1925.<sup>4</sup> Why should the concept of abuse of rights not be incorporated in international law? The Commission might establish the principle.

119. The order of articles 7 and 8 should be reversed. It was article 8 that laid down the general principle.

120. Mr. SPIROPOULOS said he had followed Mr. Scelle's reasoning with great interest. He personally was in favour of extending the concept of abuse of rights to international law. He had written a monograph on abuse of rights in connexion with the exercise of the veto in the Security Council. He thought that when a big Power voted in the Security Council against the setting up of a committee to ascertain whether in a

<sup>4</sup> "Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux", *Recueil des Cours, de l'Académie de droit international*, vol. 6, 1925, pp. 5 et seq.

particular instance the Charter had been violated, it was committing an abuse of rights if its vote was intended to prevent the enquiry from taking place.

121. However, the Commission must not be content with that theoretical outlook. The abuse of rights certainly applied to every field of law, but it was not necessary to repeat it in every sentence. It was obvious once the concept was accepted. Hence there was no reason why article 8 should not be approved as it stood. He would not like to see the Commission establish the principle that a State's liability arose with non-ratification.

122. In his view, it would be better to eliminate article 7, which was not necessary.

123. Mr. YEPES found article 8 unacceptable as it stood. The present wording of the text offered an inducement to States not to honour their signatures. It was a very dangerous trend. The signatures of States must not be de-valued. The casual way in which international conventions were signed nowadays was alarming.

124. Article 8, borrowed from article 8 of the Harvard draft, was justified at the time (1935) on the grounds that the principle of good faith was then a purely moral one. Today, with the Charter of the United Nations, good faith had become a matter of positive law. He was accordingly unable to accept article 8, the terms of which should at least be modified.

125. Mr. SANDSTRÖM entirely agreed with the view of Mr. Spiropoulos. It would be very dangerous to extend the theory of abuse of rights to the sphere of treaties. States must remain free to ratify or not to ratify a treaty signed on their behalf.

126. Mr. CORDOVA pointed out that article 7 provided that the signatories to a treaty subject to ratification should refrain from taking action likely to prevent its ratification. That was a reasonable solution. The obligation involved was both moral and legal. The principle was sound, though it was possible for it to be somewhat differently expressed.

127. With regard to article 8, the Commission could not declare that the act of signature carried with it the obligation to ratify. If it did so, it would deprive a nation of the power to reject an undertaking signed by officers of its Government. It would, in fact, compel a nation to ratify conventions against its will. It should, however, be borne in mind that the only obligation which arose for a State out of the signature of a treaty was that of setting in motion the constitutional procedure of ratification. The ratification itself was not compulsory. What was compulsory was the setting in motion of the ratification procedure.

128. The hypothetical case might be taken of a multi-lateral treaty which provided that it should enter into force when fifteen ratifications had been deposited. If, when eight or ten signatories had ratified it, there happened to be one or two who did not set in motion the constitutional procedure of ratification, those States would be failing to fulfil an elementary obligation, the only one arising out of the fact of their signature, by leaving indefinitely those States which had ratified the treaty in a state of uncertainty as to the treaty's entry into force.

129. Mr. SCELLE thought it had been rightly said that the idea of abuse of rights was always tacitly understood. It should always be possible to bring a liability action against a State which had acted with malice aforethought. That being so, the question must be asked whether the text of article 8 did not make it impossible for such action to be brought.

130. Supposing that a State committed an act of deliberate fraud by taking part in negotiations only with a view to wrecking them, could it be claimed that such conduct was admissible? The formula selected by the Commission should not enable a State to shelter behind its absolute freedom not to ratify.

131. The theory of abuse of rights was an interesting legal development. The fact had been realized that powers were of value to society only if they were employed for the purpose for which they had been created. The regime of absolute rights no longer existed. Formerly, for example, it used to be claimed that property was an absolute and sacred right. At the present time, however, the view was that the owner did not possess the right to harm his neighbours.

131a. In the case in point, the Commission could not let it be implied that the right not to ratify could be exercised with a view to harming other States. If the Commission contented itself with the narrow formula proposed for article 8, States would use it as an argument to justify their not ratifying an instrument without legitimate reason. The Commission might therefore include the following provision in article 7:

“in certain cases, good faith requires that a State shall exercise its right not to ratify only when it has reason for so doing”.

132. There was perhaps not a single State whose case law rejected the idea of abuse of rights. Why then should it not be possible to extend the idea to international law? International law was not, by its nature, an absolute law. The concept of the absolute sovereignty of the State was only a relic of former days.

133. Mr. BRIERLY thought it would be preferable to consider the two texts separately. The Commission could first take a decision on article 8.

134. It seemed to him that all reference to the motive underlying a State's refusal to ratify should be left out of the text. He did not see how the Commission could examine such motives. As Mr. Spiropoulos had said, the proposed text reflected existing practice and States would insist on preserving that practice.

135. Mr. SPIROPOULOS thought that the Commission should take care not to confuse international morality with codification. To accept moral rules would be of no avail and would have no practical results.

136. Mr. YEPES considered that it was no longer possible to talk in that vein since the entry into force of the Charter.

137. Mr. SPIROPOULOS said he had the courage to stand by his remarks. If it was to accomplish something practical, the Commission must leave out of account the concept of abuse of rights, a concept which he none the less personally accepted. It had a choice between two

alternatives: either to accept or to reject the text of article 8. Either the Commission would record existing practice or it would ignore it. He therefore proposed that a vote be taken.

138. Mr. SCELLE said that if need be he would support the text of article 8. It was better than no text at all.

139. Mr. SANDSTRÖM thought that in private law the concept of abuse of rights did not apply to negative acts.

140. Mr. AMADO pointed out that the discussion on the application of the theory of abuse of rights was outside the scope of the discussion on article 8. To pursue it might lead to awkward political or moral considerations. He personally had given a great deal of time to comparing the doctrinal point of view with the facts of the situation.

141. The Commission should for the time being take a decision on article 8, which formulated the practice applied by States.

142. Mr. YEPES pointed out that he objected to the wording of article 8 only because it codified the existing law in a categorical manner and amounted to an inducement not to ratify. He proposed that at the very least, the word "legal" be inserted before the word "obligation".

143. Mr. AMADO asked Mr. Yepes what the attitude of Colombia would be if other Powers forced her to ratify a convention signed by her representatives.

144. Mr. YEPES said that Colombia had actually been a victim of such circumstances. She had had pressure brought to bear on her from outside to force her to ratify. That had been palpable interference.

145. The draft of article 8 might also be expanded to include the following formula: "But the mere fact of its signature being duly appended places the State under an obligation to take in good faith such steps as are required to ensure the constitutional ratification of a treaty signed by that State." That was the least that could be asked. A plenipotentiary must not append his signature lightly.

146. Mr. SPIROPOULOS thought the Commission should vote first of all on the amendment proposed by Mr. Yepes, and then on the article as a whole.

147. Mr. SCELLE felt that the article under discussion was too narrow and too categorical. He thought the word "obligation" should be accompanied by some expression implying that the freedom left to the State was not irrefragable. The article might be supplemented by the words: "Subject to a State's responsibility", although such a formula ran the risk of being considered too severe. The words "in principle" would meet his point.

148. Like Mr. Yepes, he thought that if the Commission adopted article 8 as it stood, governments — which did not always act in good faith — would regard an article as categorical as that as a loophole enabling them to evade the obligation to act in good faith.

149. Following an observation by Mr. Yepes, Mr.

SCELLE and Mr. SPIROPOULOS agreed to the addition of the word "legal" before the word "obligation".

150. Mr. BRIERLY had no objection to the addition of the word "legal" as it did not alter the sense of the text.

151. Mr. SANDSTRÖM was opposed to the insertion of the word "legal". It might give the impression that other obligations established by the Commission were not legal obligations.

152. Mr. ALFARO thought the discussion had reached its inevitable conclusion. The principle laid down in article 8 could not be watered down in any way. It must be either adopted or rejected.

153. Some members had pointed out that as it stood the article might encourage States to act in bad faith and refuse to ratify particular treaties. But it must be looked at from another angle, that of the relations between small States and the big Powers. Some of the small States might feel that they were being compelled to ratify for political reasons. They might be the victims of abuse of power. The last word must rest with the people, whose consent was necessary for ratification; signatures were sometimes given contrary to the will of the people.

154. In 1947, the Panama Government had signed a treaty with the United States because it had felt that there was no other way out. He himself had then been Foreign Minister, and as he did not agree, he had resigned. Subsequently ratification had been unanimously refused by the Panamanian Parliament.

155. It happened at times that treaties dealing with territorial boundaries were concluded under pressure which amounted to *force majeure*. There again it was important to let the will of the people prevail.

156. It would be remembered that in 1902 the Panama Canal Treaty had been rejected by the Colombian Senate. It was undoubtedly within its rights.

157. Hence he would vote for article 8 as it stood, and could not agree to the insertion of the word "legal". Any change in the article would weaken international law. There were cases where ratification was obligatory on moral grounds, but there were other cases where it was not. The Commission must not legislate for exceptional cases.

*Mr. Yepes' proposal to insert the word "legal" before the word "obligation" was rejected by 5 votes to 3.*

*The text of article 8 was adopted by 8 votes.*

The meeting rose at 1.15 p.m.

## 87th MEETING

Friday, 23 May 1951, at 9.30 a.m.

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*Chairman:* Mr. Shuhsi HSU

*Rapporteur:* Mr. Roberto CORDOVA

*Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. J. P. A. FRANÇOIS, Mr. A. E. F. SANDSTRÖM, 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.

**Law of treaties: report by Mr. Brierly (item 4 (a) of the agenda) (A/CN.4/43) (*continued*)**

ADDITIONAL ARTICLE PROPOSED BY MR. YEPES

1. Mr. YEPES recalled that on the previous day he had submitted a proposal for article 8, worded as follows:

“The mere fact of its signature being duly appended places the State under an obligation to take in good faith such steps as are required to ensure that the treaty thus signed is subjected to the constitutional procedure for ratification or rejection.”

He requested that his proposal be discussed before the Commission went on to examine article 7.

2. Mr. SPIROPOULOS objected on the grounds that Mr. Yepes was referring to article 8 when the Commission had already voted on that article.

3. Mr. YEPES replied that the Commission had not taken any decision on his proposal.

4. Mr. SPIROPOULOS thought the Commission had disposed of the amendment when it had voted on the article, though he would not press for the application of the rule.

5. Mr. CORDOVA said that on the previous day the Commission had begun to discuss articles 7 and 8 and had then decided to discuss article 8 only. He thought Mr. Yepes' proposal related to the obligation on the signatory prior to the entry into force of a treaty — the point dealt with in article 7.

6. Mr. BRIERLY asked Mr. Yepes to say whether his proposal related to article 7 or to article 8.

7. Mr. YEPES was prepared to accept the decision of the Commission if it considered that his text related to article 7, or to submit it as a separate article.

8. Mr. CORDOVA supported Mr. Yepes' idea that signatory States should be obliged to take the steps required to ensure that the competent authority took

a decision in regard to ratification. Many instances could be cited, especially in the Organization of American States, where a treaty was not in force because some State had postponed the procedure for ratification.

9. When a treaty declared that it should enter into force as soon as it had been ratified by, say, fourteen States, and two States failed to ratify, it was never clear whether the States which had already ratified were bound or not. The least the Commission could do was to stipulate that a State which had signed — assuming that it had signed in good faith — would set in motion the machinery for ratification.

10. Mr. AMADO thought the Commission was attempting to do the work of the chanceries. It was the task of governments to take steps to ensure that ratification took place. He did not see how a mere recommendation in a text the purpose of which was codification was likely to induce States to change their present practice. A State was free to ratify or not to ratify; and he personally was reluctant to express a recommendation in a text which should be precise and set out in legal form.

11. Mr. FRANÇOIS wondered whether Mr. Yepes had allowed for the possibility of new circumstances arising subsequent to signature. Often there were extremely complex matters which the government had not previously had time to study thoroughly. If Mr. Yepes' proposal were accepted, States might be inclined to instruct their delegations not to sign.

12. Mr. SANDSTRÖM agreed with Mr. François. Governments would hesitate before signing a treaty. That might be an advantage, but more often than not it would be a disadvantage. He hoped the Commission would not adopt the clause.

13. Mr. CORDOVA explained that the point was to stipulate that, once a treaty was signed, States must forward it to their parliaments. It was an excellent thing that a State should advise its representatives to act with prudence; but once a treaty was signed, the State should do all that was required under its constitution to have that treaty ratified. There must be no signing with a concealed intention of not ratifying, as was the case with many treaties.

14. Mr. SCELLE thought Mr. Yepes' proposal was undoubtedly progressive, but it did not represent existing law. What Mr. Córdova proposed could be found in Part XIII of the Treaty of Versailles in connexion with labour conventions. Governments were to undertake to submit to their parliaments within a restricted period any draft conventions adopted by the International Labour Conference; and they were required to do so under the terms of the Versailles Treaty which they had ratified (article 405). That was a case where a treaty was capable of modifying constitutions. It was beyond question that the Treaty of Versailles had modified constitutions, since normally it was the executive power which had to decide whether or not to submit a treaty for the approval of parliament.

15. Mr. Yepes' proposal would restrict that privilege, and he did not feel that such a proposal was in keeping with positive law. If the Commission was anxious to

take that progressive step, and he personally was in favour of doing so, it must not decide that States were invariably under an obligation to proceed according to Mr. Yepes' text, since there might be instances where a government considered that it was not desirable to submit a treaty for ratification by parliament, especially if new circumstances arose after the treaty had been signed. He did not think it feasible to establish a general rule on the matter, though he was in favour of taking a step forward. The procedure laid down in Part XIII of the Treaty of Versailles might be extended to other specialized agencies.

16. In that connexion, multilateral treaties differed from bilateral treaties. If a multilateral treaty was adopted by a specialized agency, it was natural to consider it as a draft international law, and parliaments ought to take a decision on it. It was much less natural in the case of a bilateral treaty of a political nature. In that case, it was no simple matter to try to force governments to have the treaty voted on by their parliaments. If a treaty had been signed for example under pressure from a great power, the government might find itself out of step with public opinion, and might not wish to submit the text for ratification.

17. It could be considered a step forward, at any rate so far as multilateral treaties were concerned, for a government to be required to submit them to its parliament, since that was the way in which international law was made. A text was proposed for a law, and any State was at liberty to accede to it or not; the parliament of each State then rounded off the "optional" law by making it binding.

18. Mr. Yepes' proposal was certainly a step forward; but it could not be propounded as representing current practice. Rather, it was the ideal to be achieved. It would be a way of extending and making generally applicable what Part XIII of the Treaty of Versailles had laid down for labour conventions.

19. Mr. AMADO drew attention to the effects of any such statement, which would provide political parties with an extremely useful weapon. Mr. Yepes' proposal would lead to a situation in which governments would be faced with a large number of questions from opposition parties as to what had been done about such and such a treaty which had been signed.

20. He did not see how a statement of that kind could induce States to act along the desired lines. It was a mere pious hope that people would act with a greater degree of good faith.

21. Mr. YEPES explained that it was a legal obligation and not the mere expression of a hope.

22. Mr. SCELLE thought the difference between the two points of view was a matter of temperament. He personally was in favour of fostering the influence of parliaments, whereas when Mr. Amado spoke of the State he had in mind the executive power.

23. Mr. AMADO replied that he was not concerned purely with theory; he had been a member of the Brazilian Parliament for 24 years. Actually, he shared Mr. Scelle's viewpoint *de lege ferenda*.

24. Mr. SCELLE said that by adopting the provision in question, the Commission would be providing governments with a loophole by encouraging them to refer the matter to parliament.

25. Mr. BRIERLY pointed out that the text proposed by Mr. Yepes would give a great deal of power to plenipotentiaries who would find themselves in a stronger position than the Foreign Minister and government, who had to refer the matter to the authority with the power to ratify. In the United States, when a treaty had been signed by the representatives of the country, would the President be obliged to submit it to the Senate? As was well known, he was not obliged to do so, and often he did not refer to the Senate treaties which had been signed. It would surely be foolish to say that the President must submit such treaties to the Senate, since in practice there would be no change. Furthermore, it would be contrary to the purpose of ratification, which was to give governments time to reconsider texts they had signed. To deprive them of that possibility would be to undermine the whole theory of ratification.

26. Mr. KERNO (Assistant Secretary-General) thought that the concern felt by Mr. Yepes and Mr. Córdova arose from the fact that article 8, as adopted by the Commission the day before, might give the impression that the Commission did not wish to urge States to ratify. But after all, that was the law as it now stood.

27. If Mr. Yepes' proposal were adopted, it would be a step in the direction of progress. If the majority decided against Mr. Yepes' proposal, he would like the report or comments accompanying the articles when submitted to governments to mention the fact that article 8 was not meant to discourage States from ratifying or to encourage them to sign lightly, and that States should not remain idle once they had signed.

28. Mr. ALFARO said that international relations were based on co-operation and good faith. The principle of good faith was established in Article 2, paragraph 2 of the Charter, which read: "All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter."

29. When a government decided to sign a multilateral treaty, it was because it believed in good faith that the treaty would be beneficial to its country and to the world at large. The least one could require of States was that once they had signed in good faith, they should indicate whether they proposed to ratify or not. That was a most important point. It did happen that multilateral treaties were signed by a group of States and never came into force because of the laxity of certain governments which did not submit the treaties to their parliaments. The text proposed by Mr. Yepes merely demanded that States should submit treaties to parliament for ratification.

30. That measure came within the framework of the progressive development of international law; and he felt that the Commission would be entirely justified in approving it. It might be added that States should take in good faith "within a reasonable time such

steps . . ." so as to make it clear that there was no pressure being brought to bear. The proposed rule would eliminate uncertainty as to whether the treaty was or was not to be ratified.

31. By adopting Mr. Yepes' proposal, the Commission would be taking a step in the direction of good faith and co-operation.

32. Mr. YEPES was willing to accept the additional words suggested by Mr. Alfaro.

33. The least a State could be asked to do after signing a multilateral treaty was to submit it to its parliament. Some of the members of the Commission had had the feeling that his proposal would mean bringing pressure to bear on governments. That was not the case. Its effect would be to ensure that governments submitted treaties to the constitutional procedure for ratification or rejection.

34. It frequently happened that a treaty was signed with the support of public opinion, and parliament was quite ready to ratify it, but the government was neglectful and did not give public opinion an opportunity to discuss whether the treaty should be approved or rejected. His proposal was made in a progressive spirit. There had often been complaints in the international organizations that States did not ratify multilateral treaties. That was one means of attaining the ideal which the Commission had in mind.

35. Since the words "in good faith" appeared to worry Mr. Amado in his interpretation of the article, they might well be omitted.

36. Mr. CORDOVA asked Mr. Yepes whether he would be willing to agree to add to his proposal the words "to a multilateral treaty" so that it would read: "the mere fact of its signature being duly appended to a multilateral treaty . . .".

37. Mr. YEPES agreed to the amendment.

38. Mr. SCELLE suggested the wording: "the mere fact of its signature being duly appended, especially to a multilateral treaty . . .".

39. Mr. CORDOVA and Mr. YEPES were agreeable to that version.

40. Mr. YEPES pointed out that the words "for ratification or rejection" left parliaments ample freedom.

41. Mr. CORDOVA said that the words to which Mr. Yepes had drawn the Commission's attention were very important. They covered cases in which some new factor arose between the time of signature and the forwarding of the treaty to parliament. Even when it referred the treaty to parliament, a government could point out that the situation had changed, and possibly even recommend that the treaty be rejected. Thus the text met Mr. François' objection.

42. Mr. SCELLE said that in the case of international labour conventions, a government was obliged to submit them to parliament, though it was always free to oppose them.

43. Mr. CORDOVA explained that whatever the outcome of the Commission's vote, the general report would give a clear statement of the position.

43a. A vote was then taken on the following amended text:

"The mere fact of its signature being duly appended, especially to a multilateral treaty, places the State under an obligation to take, within a reasonable time, such steps as are required to ensure that the treaty thus signed is subjected to the constitutional procedure for ratification or rejection."

*The text was adopted by 5 votes (the Chairman, Mr. Alfaro, Mr. Córdova, Mr. Scelle and Mr. Yepes) to 4 (Mr. Amado, Mr. Brierly, Mr. François and Mr. Sandström).*

43b. The Commission *decided* that Mr. Yepes' proposal be embodied in a separate article.

#### ARTICLE 7 (*resumed from the 86th meeting*)

44. Mr. BRIERLY thought that as the Commission had given ample discussion to article 7, it might take a decision quickly. He still felt that article 7 should be deleted from the draft. As Mr. Sandström had pointed out, it was not the Commission's task to codify international ethics. That being so, it was surely improper to refer to a specific example of the moral principles which States should observe. By emphasizing that good faith was called for in one particular case, some doubt might be cast on its necessity in other cases.

45. If the Commission decided to retain the article, he would have one or two drafting changes to suggest.

46. Mr. YEPES read out the commentary given in the report under article 7: "This article adopts article 9 of the Harvard draft. It is included here for the purposes of discussion, although in the opinion of the Rapporteur it states a moral rather than a legal obligation." Mr. Brierly had suggested that the Commission reject the article. He personally did not agree with what the commentary stated; the obligation was a legal one. The circumstances envisaged by the article had arisen from time to time. International treaties had laid it down that, between the time of signature and that of ratification, the parties should refrain from any act calculated to make ratification impossible. According to international jurisprudence and to writers on the subject, there was a legal obligation on States to refrain, between the time of signature and the time of ratification, from any act likely to hinder ratification.

47. Article 38 of the General Act of Berlin dated 26 February 1885<sup>1</sup> provided that, pending ratification, States signatories of the Act undertook to adopt no measure at variance with the provisions of the Act. That was an instance where States had considered that there was a legal obligation. A further instance was the Treaty of Washington of 6 February 1922 for the Limitation of Naval Armament;<sup>2</sup> and there were other treaties which might also be cited.

48. Thus a kind of practice had grown up that States should do nothing at variance with a treaty that had

<sup>1</sup> *British and Foreign State Papers*, vol. LXXVI, (1884-1885), pp. 4 *et seq.*

<sup>2</sup> Hudson, *International Legislation*, vol. II, pp. 998 *et seq.* See article 19.

been signed, even if it had not been ratified. The Mixed Greco-Turkish Arbitral Tribunal had made a ruling in the same sense. The case had been as follows: between the signature and the ratification of the Treaty of Lausanne in 1923, Turkey had ordered the seizure of a safe in a bank, in contravention of the provisions of the Treaty, which had been signed but not yet ratified. The Mixed Arbitral Tribunal had ruled that Turkey should restore the safe and its contents as having been seized in violation of a treaty signed but not yet ratified. It had pronounced that ruling on the grounds that, as from the date of signature of the treaty and pending its entry into force, the parties were under an obligation to do nothing calculated to prevent the clauses of the treaty from being executed.<sup>3</sup>

49. He might also mention the course given by Cavaglieri at the International Law Academy in The Hague, and Anzilotti's course in international law. Fauchille wrote as follows in his *Treatise on Public International Law*:

"Actually, a treaty which has been signed only, is not devoid of value. It must be recognised that once a treaty is signed, the States parties to it are under an obligation to take no step until the time of ratification, which may make ratification valueless or superfluous. If it were otherwise, and the treaty did not necessarily have to be left intact, as at the time of signature, there would be as it were a kind of breach of the undertaking given, and the door would be open wide to arbitrary action. One thing at any rate is certain about a treaty signed and not yet ratified, and that is that it is still only a draft treaty, though a draft with its clauses fully circumscribed and defined, and not admitting of any further change. Thus there is . . . an obligation to do nothing calculated to interfere with the treaty so as to make ratification superfluous."<sup>4</sup>

50. He thought the authorities cited and the philosophical arguments in its favour were sufficient to warrant approval of article 7.

51. Mr. SANDSTRÖM appreciated the weight of Mr. Yepes' arguments. But the wording of the article seemed to him somewhat vague. The text read: "Under some circumstances, however, good faith may require . . ." In the case of the award by the Mixed Arbitral Tribunal quoted by Mr. Yepes, ratification had taken place before the court was called upon to pronounce its award, and that fact might very well have influenced the decision.

52. Mr. SPIROPOULOS said that a careful reading of article 7 showed that its value was absolutely nil. That was not Mr. Brierly's fault — indeed Mr. Brierly himself was not in favour of it — and the text was taken from the Harvard draft. As Mr. Sandström had pointed out, the text read: "under some circumstances" — it did not say when. It went on "good faith may require" (a somewhat vague expression) . . . "pending the entry into force of the treaty" (that might mean a very long wait) . . . "the State shall, for a

reasonable time after signature" (what was to be understood by a reasonable time?). In his opinion, that text could be deleted, as it was not applicable in practice.

53. Mr. Yepes' argument was that the provision was in keeping with international law; but it was not a general principle. He had had experience of several similar cases. If they were examined, they turned out to be treaties imposed on the conquered by the conquerors. In the instance quoted, the defeated nation had been forced to do certain things. It was therefore inconceivable that it should be allowed to expunge everything that had obliged it to execute the treaty. It could not be allowed to do so. The treaty must begin to be effective from the moment of signature. Those principles could not be applied to all treaties.

54. Treaties were signed daily, and that rule had never been applied to them. Fundamentally, the problem was to discover the will of the parties. There again, the question appeared in different lights. One party ratified, another party did not. The question was whether the first party was bound even if the other party did not ratify until twenty years later. There again a limit must be laid down. In each individual case the will of the parties must be sought, and that must be the deciding factor.

55. A study of the question showed that the interpretation of the will of the parties was invariably the touchstone. Conventions were applied after ratification, not before. Procedure to the contrary was permissible only where the will of the parties demanded it. The Mixed Arbitral Tribunal had had to deal with a special case, and possibly it had stated its opinion in unduly broad terms.

56. In conclusion, since the will of the parties must be sought in each case, a principle such as that stated in article 7 could not be established. It was better that the text should be mute on that point.

57. It was possible that if a different tribunal were called upon to apply the principle afresh, it would not state its opinion in such comprehensive terms. Otherwise its award would be at variance with the law as applied in the great majority of cases.

58. Mr. AMADO said that no one had ever questioned that signature constituted a minimum in the negotiation of a treaty. The notion of good faith was implicit in State practice. It was the Harvard draft which had included the reference to good faith in article 9, with a view to producing as comprehensive a text as possible. But the comment on the article explained that in declaring that "good faith" might require a policy of abstention on the part of signatories in the circumstances mentioned, it did not envisage a legal duty. The comment went on to say that the non-performance of obligations under a treaty signed but not yet ratified: "may expose the non-performing State to the charge of bad faith, or may impair its good name and reputation; but it does not render such State liable to damages for violation of a legal obligation, because no legal obligation existed which could be violated".<sup>5</sup>

<sup>3</sup> Award of 26 July 1926. *Recueil des décisions des Tribunaux arbitraux mixtes*, p. 395, vol. 8, pp. 390 et seq.

<sup>4</sup> Fauchille, *Traité de droit international public*, vol. I, Part III, pp. 319-320.

<sup>5</sup> *American Journal of International Law*, vol. 29 (1935), Supplement, p. 781.

59. Mr. YEPES pointed out that the Harvard draft was ten years older than the Charter.

60. Mr. AMADO replied that the Charter did not constitute the whole of international law.

61. The question of signature had taken on a wide significance under the influence of Mr. Scelle, who had changed the notion of contract into the notion of law. Signature had become the manner in which the community of States adopted a law. It enabled the international community to have a majority and a minority.

62. Personally he had no doubt that in some cases, signature had a greater value than in others. In certain cases, States had to give an undertaking, and then the signature had a significance which did not merely correspond to the theoretical minimum.

63. The idea of referring to good faith was a fine one. He was not afraid of being regarded as a Utopian, but when it came to codification, there was no room for provisions of that kind. He would vote against the article which, incidentally, its authors had recognized as having no value. He did not understand why the Rapporteur, who had likewise been convinced of its uselessness, had inserted it in his report.

64. Mr. SCELLE said he had constantly to admire the learning displayed by Mr. Amado. He had been touched by the reference to a doctrine which had no other merit than that of being in accordance with the development of the facts.

65. He considered the article most useful. He was not surprised that Harvard University had taken the trouble to go closely into the question. Actually, the Harvard group had stated its view that it was desirable to discover whether or not positive law was involved.

66. The article was very interesting. It consisted of two parts, a positive part and a negative part. Mr. Spiropoulos had said that treaties were interpreted according to the will of the parties. But a distinction must be made between the classical type of treaty, corresponding to the old idea of contract, and multi-lateral treaties, which were in keeping with modern practice and were not contracts. In a multilateral treaty, of the type now being dealt with by the Commission, there was an optional law, a draft law which became binding in the event of ratification. There was no will of the parties to be interpreted. The Commission was concerned at the moment with the interval between signature and ratification, and it had been argued that there was no undertaking prior to ratification.

67. What the article under consideration called for was that a legal norm should be established by which in given circumstances, pending entry into force, a State should refrain from performing certain acts. The Commission was being asked to state whether it felt that abstention from certain acts was called for by the fact of signature.

68. How was it conceivable to argue that that was not so? A quotation had been read from Fauchille, the most recent edition of whose work was published in 1924. Thus for a quarter of a century the statement made by Fauchille had been accepted practically unanimously by jurists. For a quarter of a century the statement of

that writer, who had never been regarded by anyone as a revolutionary writer, had stood, and there they were being told that signature involved no obligation.

69. He would admit that article 7 was very vague and not strong enough; but failure to adopt the article would mean the abandonment of an advance which was virtually consolidated.

70. His idea would be to delete the mention of good faith and to say: "Under some circumstances, however, a State must abstain..." As for what was meant by reasonable time, it began with signature and might cover a fairly considerable period. Did the Commission propose to define more clearly the length of such a reasonable time? He hardly imagined that the Anglo-Saxon members would wish to do so. The period might be of varying length. The international authorities would determine the length of the period when an action was brought before them.

71. He was quite decided in his intention to vote in favour of the article, subject perhaps to the reservation that certain drafting changes were made to it. If the article were rejected, he would request that it be expressly mentioned that he had voted in favour of it.

72. Mr. SPIROPOULOS said that the question had a very particular theoretical importance. He feared that the Commission would be making a mistake if it adopted that principle, which did not mean what its authors had intended.

73. He did not believe that a codification should include the whole series of principles. If it did, that would still not get rid of the difficulty. The principles must always be interpreted.

74. For him, the speeches by Mr. Amado and Mr. Scelle had thrown a clearer light on the question. If treaties could be made binding from the time of signature, the difficulty would not arise. Unfortunately, under the existing procedure, there was a certain time-lag between signature and ratification. In treaties other than peace treaties, the will of the parties was that the contract should become effective after its entry into force, and such treaties constituted the majority of cases. If that principle were to be applied, the will of the parties must be established in each individual instance — not by reason of the fact that the treaty had been signed, since the text could not be binding unless there had been concurrence of will. It was not ratification that produced will. Will was present from the time the treaty was signed. He felt that it would be better not to press that principle.

75. Take for example a peace treaty signed but not ratified, e.g. the Treaty of Sèvres between the Allied Powers and Turkey. The will of the parties had been that Turkey should execute the provisions of the treaty immediately upon signature. Turkey had not ratified the treaty at all. Could she be said to have violated the treaty? There had been no obligation to ratify. The acts committed by Turkey in defiance of her obligations had not constituted violation of the treaty, since the treaty had not been ratified. Thus the question was by no means simple.

76. He reiterated that it should not be settled by an express provision in the draft.

77. Mr. SANDSTRÖM, referring to the award cited by Mr. Yepes, again stressed that the fact of the treaty being ratified subsequent to the events responsible for recourse to a court, might have had some influence.

78. It could not be said that a party was executing a convention in good faith if it changed the situation between signature and ratification. Like Mr. Spiropoulos, he felt that, if the treaty had not been ratified, the Tribunal could not have taken that decision. It was wise not to interpret judicial decisions too literally.

79. He felt that it would be too difficult to propound that principle precisely in the text, and therefore he would vote against the adoption of the article.

80. Mr. YEPES pointed out that he was not pleading *pro domo*. He was defending the proposed article.

81. In his remarkable speech, Mr. Spiropoulos had tried to persuade the Commission that the article called for the execution of the treaty in the interval between signature and ratification. That was not at all what he had had in mind. What he was suggesting was that, between the time of signature and the time of ratification, none of the States should do anything at all calculated to make the ratification of the treaty impossible.

82. Suppose for example that a treaty were signed providing for the reduction of armaments, and a period of several months was allowed for ratification; if in the interval between signature and ratification, one of the signatories increased its armaments, ratification would be made impossible. That was an abuse of power which must be provided against. The report was intended to obviate situations of that kind.

83. Mr. AMADO asked whether Mr. Yepes was forgetting the clauses of treaties by which parties safeguarded their interests. It was not for the articles of the draft codification to do the safeguarding for them.

*It was decided by 5 votes (Mr. Amado, Mr. Brierly, Mr. François, Mr. Sandström and Mr. Spiropoulos) to 4 (Mr. Alfaro, Mr. Córdova, Mr. Scelle and Mr. Yepes), with one abstention (the Chairman), to delete article 7.*

84. Mr. SPIROPOULOS said he would like to explain his vote. In voting against the article, his intention had been merely to indicate that he was opposed to the formulation of a principle which at the same time he admitted was sound. It was for the courts to judge, in the light of all the factors, as to the behaviour of States in specific cases submitted to them.

85. Mr. SANDSTRÖM pointed out that the Commission would have to review the decisions it had taken at its previous meeting. At Mr. Spiropoulos' suggestion, it had adopted two general principles governing the validity of treaties. So far as he was concerned, the exact scope of the decisions was still not clear. Supposing that in the convening of the Parliament of a particular country for the purpose of ratifying a treaty certain provisions of the constitutional law were not observed, would the resulting infringement make the ratification in question, and hence the treaty, invalid? It would depend on the answer given to that question whether

or not he would propose that the principles adopted be re-examined.

86. Mr. SPIROPOULOS said that Mr. Sandström and Mr. François had explained to him their viewpoints in a private conversation. At the previous day's meeting the Commission had agreed almost unanimously that ratification should be carried out in accordance with the constitutional procedure. It had recognized that before a treaty entered into force in a valid sense, the constitutional law must have been observed. Mr. François alone had held a different opinion.

87. The question of the consequences of technical infringement during the procedure for ratification also confronted the domestic court. In Greece, for example, it would take account only of substantive violations. In international law, the action of a court should be based on similar considerations.

88. The CHAIRMAN asked Mr. Sandström to raise the question again in the Commission at an opportune moment.

#### ARTICLE 9

89. Mr. BRIERLY said that article 9 of his report might give rise to a discussion similar to the one which had taken place previously in connexion with ratification and bearing on the constitutional competence of the organ responsible for accession. He would like to obviate a repetition of the same arguments; and he therefore proposed to produce in article 3 a new text dealing with that general principle. If his suggestion were adopted, article 9, paragraph (5), and article 4, paragraph (3), of the draft could be deleted.

90. He therefore proposed the insertion under article 3 of a text to read more or less as follows: "A treaty becomes legally binding in relation to a State when that State undertakes a final obligation under the treaty whether by signature, ratification or accession, in accordance with its constitutional law and practice through an organ competent for that purpose."

91. The Commission might approve that text in substance without expressly adopting it as it stood. A text of that kind would obviate the necessity for discussion as to the constitutional competence of the organ of accession in relation to article 9, and would make it possible to go on to examine the various paragraphs of the article, with paragraph (5) deleted.

*It was so decided.*

#### Paragraph (1)

92. Replying to a question put by Mr. François, Mr. SCELLE said that in his opinion the distinction made by some writers between "*adhésion*" and "accession" was an academic one.

93. Mr. FRANÇOIS pointed out that the question of accession could only arise after the time-limit laid down for signature had expired. He suggested that the words "within the prescribed time-limit" be added following the words "signed or ratified".

94. Mr. BRIERLY thought Mr. François' remark was justified, but the wording of his amendment was not satisfactory.

95. Mr. FRANÇOIS said that the question of the wording could be settled by the Rapporteur.
96. Mr. KERNO (Assistant Secretary-General) pointed out that under the classical system, a sharp distinction was made between signature and ratification on the one hand, and accession on the other. As a rule, a treaty allowed a certain time for signature and ratification. It could also lay down accession procedure for States which had not followed the routine of signature and ratification. In principle, accession was the normal rule in the case of a treaty already in force.
97. In present-day practice, long periods were often allowed for signature, and in such cases difficulties were prone to arise. Often, of course, the treaty itself avoided the difficulties by fixing a time-limit for signature. The Convention on Genocide, for example, remained open to States for signature until 31 December 1949 only (article XI of the Convention). As from 1 January 1950, it was no longer possible to sign, though it was still possible to accede. Obviously it was possible in such cases for the treaty to enter into force before the expiry of the period during which it remained open for signature. States signing after the entry into force, but before the expiry of the time-limit, would ratify the treaty, but would not accede to it; while, if the treaty did not muster the number of ratifications necessary for entry into force before the expiry of that time-limit, it was possible for accessions to be made before its entry into force.
98. Mr. YEPES considered that there were two distinct ways in which States could accede. The General Act of Geneva signed in 1928 allowed for the possibility of separate accession to any of its provisions. A similar possibility might be allowed for by the insertion between the words "the treaty" and "as binding" of "or part of the treaty".
99. To meet Mr. Yepes' suggestion, Mr. BRIERLY proposed that the words "to a treaty" following the word "Accession" be deleted, and the words "or part of the treaty" be inserted before "as binding".
100. Mr. YEPES said that that was precisely what he had in mind.
101. Mr. KERNO (Assistant Secretary-General) did not care for the alteration. It appeared to authorize States to accede to part of a convention, even where such partial accession was not expressly provided for.
102. Mr. BRIERLY suggested that, to meet Mr. Kern's point, the words inserted might be expanded as follows: "the treaty, or, if the treaty so provides, part of the treaty, as binding".
103. Mr. SCELLE asked for the words "for that State" to be added following the words "as binding".
104. Mr. SPIROPOULOS did not think that Mr. Yepes' proposal for the addition of the words "or part of the treaty" was satisfactory. The option of acceding to part of a treaty could be laid down in the treaty itself, but the Commission must keep to general principles.
105. Mr. CORDOVA, supported by Mr. Brierly, agreed with Mr. Spiropoulos. There was no need to enumerate every provision a treaty could contain.
106. Mr. YEPES withdrew his proposal.
107. Mr. FRANÇOIS thought that accession as referred to in the General Act of Geneva was something distinct from accession in the classical sense. As in the Convention on Privileges and Immunities, it was a new type of accession, since in such instances there was to be no ratification. Paragraph (1) did not seem to him to cover such cases.
108. Mr. KERNO (Assistant Secretary-General) agreed that the Convention on Privileges and Immunities provided for accession only; but he did not think that that type of accession was essentially different from the other.
109. Under the classical system, the procedure for the entry into force of conventions was signature followed by ratification, naturally with appropriate time-limits. Once the convention was in force, participation by a State was achieved by means of a single act, preceded if necessary by consultation of parliament. The act was accession and it took the place of both signature and ratification. He found paragraph (1) satisfactory. The fears expressed by Mr. François seemed to him without foundation. Whatever examples were quoted, the fact still remained that accession was possible only for States which had not signed or ratified.
110. Mr. FRANÇOIS pointed out that a State which had signed might not ratify within the prescribed time-limit if it found the latter inadequate. There were conventions which expressly provided for the possibility of accession in such instances, e.g., the 1886 Convention of Berne, for the Protection of Literary and Artistic Works, revised at Brussels on 26 June 1948 (article 28, para. 3).<sup>6</sup>
111. Mr. CORDOVA pointed out that that particular example was outside the general rule. In principle, it was impossible to refrain from ratifying, and then to accede.
112. Mr. AMADO considered that the doctrinal rule was categorical. Accession (which must not be confused with acceptance) was the procedure for States which had not signed or ratified. Accession was more particularly reserved for States which had not taken part in the negotiations. Accession before the ratifications required for entry into force had been mustered was only possible when a treaty expressly stipulated it.
113. He found paragraph (1) entirely satisfactory.
114. Mr. BRIERLY pointed out that the convention referred to by Mr. François included an unusual provision. The suggestion made by Mr. Spiropoulos that the draft should keep to general rules would apply in that instance.
115. Mr. SPIROPOULOS agreed that when a signatory State had not had time to ratify, a legal problem arose. But it would be going beyond the sphere of codification to introduce a rule covering that particular case. Like Mr. Brierly, he felt that the Commission had no call to deal with it. Any dispute arising out of such a case should be judged by a court, or in some other way.

<sup>6</sup> *Le Droit d'auteur*, Year LXI (1950), pp. 73 et seq.

116. Mr. KERNO (Assistant Secretary-General) shared the view expressed by Mr. Spiropoulos and Mr. Brierly. Paragraph (1) was satisfactory. Exceptional circumstances should be provided for in the treaty itself. Failing such provisions, the rule contained in the latter part of paragraph (2) should be adhered to. Exceptional instances where a State had not the time to ratify should be catered for in the treaty itself. In any event, there was generally no time-limit for ratifications.

117. Mr. FRANÇOIS said that though he was not convinced, he would not press the point.

*Paragraph (1) was adopted unchanged.*

*Paragraph (2)*

118. Mr. FRANÇOIS proposed that the words "unless invited to do so by all the parties to the treaty" be replaced by "with the consent of all the parties to the treaty".

119. Mr. BRIERLY agreed to the change.

120. Mr. FRANÇOIS wondered who were the parties. That was the point that mattered in connexion with reservations.

121. Mr. KERNO (Assistant Secretary-General) agreed that the question of reservations might arise in the present instance, as in many others.

*Paragraph (2) was adopted with the above amendment.*

*Paragraph (3)*

*Paragraph (3) was adopted without comment.*

*Paragraph (4)*

122. Mr. ALFARO asked Mr. Brierly whether he would agree to the word "or" being replaced by "and". The paragraph dealt with two separate cases, not two alternatives.

123. Mr. BRIERLY was agreeable.

124. Mr. YEPES pointed out a contradiction between the text of paragraph (3) and the end of paragraph (4). According to paragraph (3), accession could only occur after the entry into force of the treaty, whereas paragraph 4 envisaged the possibility of accession before entry into force.

125. Mr. KERNO (Assistant Secretary-General) said he had been surprised when he had read paragraph (4). As was stated in the comment, the paragraph did not appear in the Harvard draft. He could well understand that.

126. In principle, accession was a definitive act and one which was not taken subject to ratification. That was how it differed essentially from signature. Subsequent ratification of accession was possible in theory, but it must remain the exception, and it presupposed an express stipulation in the treaty. The constitutional procedure should take place prior to accession.

127. He urged that paragraph (4) be deleted, so as to confine article 9 to a statement of general rules.

128. Mr. BRIERLY agreed that paragraph (4) referred to an exceptional instance. He had no objection to Mr. Kerno's suggestion.

129. Mr. ALFARO and Mr. SCELLE shared that view.

*It was decided to delete paragraph (4).*

*Paragraph (5)*

130. Mr. BRIERLY reminded the Commission that he had suggested deleting the paragraph and replacing it by the statement of a general principle in article 3.

*It was so decided.*

*ARTICLE 1 (resumed from the 84th meeting)*

131. Mr. BRIERLY suggested that the Commission turn back to the first article, on which discussion had not been completed.<sup>7</sup>

132. Mr. SCELLE said that the Commission had devoted a great deal of time to discussing that article. The word "concluded" had been criticized; at the same time article 1 embodied a valuable principle. The text of a treaty, once it was fixed by the plenipotentiaries, was, in principle, not subject to change. It was desirable to stress that fact, especially in connexion with multilateral treaties.

133. He would vote in favour of any text maintaining the principle of immutability which appeared in the original text.

134. Mr. AMADO pointed out that the authorities who wrote in French, as well as Anzilotti, used the word "parfait" to indicate that a treaty was finally established in form.

135. Mr. BRIERLY and Mr. SCELLE suggested that at the beginning of the first article the words "the text of a treaty becomes final" should be used.

136. Mr. CORDOVA referred to a previous proposal by Mr. Scelle.<sup>8</sup>

137. Replying to a question put by Mr. BRIERLY, Mr. SCELLE was agreeable to the deletion from his previous proposal of the words "in principle".

138. Mr. AMADO said he would like the expression "*ne varietur*" to be included.

139. Mr. SCELLE had no objection.

140. Mr. KERNO (Assistant Secretary-General) pointed out that Mr. Brierly's first report (A/CN.4/23) already included in its chapter III (The Making of Treaties) an article (article 6) entitled "Authentication of Texts of Treaties". He would introduce the expressions into the discussion for what they were worth.

141. Mr. SPIROPOULOS was not opposed to adopting the text proposed by Mr. Scelle. It seemed to him to express the sense of the Commission. But he thought it was tautological to state that a text was final when it was written. Such a provision would not be inserted in a civil code in connexion with private law contracts.

142. Mr. SCELLE pointed out that a text of that kind provided a prior indication which would be useful as a criterion in connexion with reservations.

143. Mr. FRANÇOIS shared Mr. Spiropoulos' misgivings about a text which did indeed seem to have shortcomings.

<sup>7</sup> See summary records of the 84th meeting, para. 67.

<sup>8</sup> *Ibid.*, para. 57.

144. Mr. SANDSTRÖM was under the impression that the Commission was proposing to adopt the formula "the text of a treaty becomes final . . .".

145. Mr. SCELLE distinguished between private law contracts and treaties. Until the time of signature, the parties were always at liberty to modify a private contract. In the case of a multilateral treaty, on the other hand, they must either accept the text as it stood, or reject it. For example, the drafts of the International Labour Conference conventions were final drafts to which no reservations could be made. It had actually been decided not to admit reservations. Reservations were replaced by special stipulations affecting particular States and inserted into the body of the draft.

146. Mr. BRIERLY thought the best solution would be to revert to the text of article 6 of his first report; he proposed that the question be studied at the next meeting.

*It was so decided.*

ARTICLE 5 (resumed from the 86th meeting)

147. Mr. BRIERLY read out the following draft text:

"Article 5. A State is not deemed to have undertaken a final obligation under a treaty until it has ratified that treaty, provided that a State is deemed to have undertaken a final obligation by its signature of the treaty

"(a) If the treaty so provides;

"(b) If the treaty provides that it shall be ratified but that it shall come into force before ratification;

"(c) If the full powers of its representatives who negotiated or signed the treaty stipulate that ratification is not necessary;

"(d) If the form of the treaty or the attendant circumstances indicate an intention to dispense with ratification."

148. Mr. SPIROPOULOS thought the Commission had adopted two principles which it was proposing to substitute for the text of article 5, namely: a treaty will be binding if ratified in accordance with constitutional procedure; and a treaty may be binding by signature or accession if the constitution so permit.

149. Mr. BRIERLY thought the Commission had accepted those principles as such, but not as draft articles. Article 5 was to be recast.

150. Mr. SPIROPOULOS said that that was indeed the position; but he felt that the new wording was not in conformity with the decision taken by the Commission.

151. Mr. BRIERLY pointed out that the first principle under which an act by a constitutional organ which was not competent would be null and void was to figure in article 3. There was no point in mentioning it again under article 5.

152. Mr. KERNO (Assistant Secretary-General) corroborated Mr. Briery's remarks. At the previous meeting the Commission had laid down the principle that all the procedure for giving binding force to a treaty must be in conformity with the constitution. The principle was expressed in the new draft of article 2. In the article

under consideration, the question was to determine in what circumstances certain procedures were permissible.

153. Mr. CORDOVA shared the viewpoint expressed by Mr. Spiropoulos. The new text did not prevent ratification as required by a constitution from being waived by means of a stipulation in the treaty.

154. Mr. SANDSTRÖM thought the members of the Commission would see the position more clearly if all the articles so far adopted were submitted to them in a document to be prepared by the Secretariat.

155. Mr. CORDOVA, supported by Mr. SCELLE, mentioned that at the previous meeting the Commission had stressed that it did not wish to see treaties derogating from constitutional procedure. The new articles 3 and 5 were mutually contradictory.

156. Mr. BRIERLY pointed out that article 5 should be read in conjunction with article 3, in which the Commission would state that a signature appended by an authority without competence was not valid. That statement could not be repeated at every step.

157. Mr. SANDSTRÖM again suggested the need for a single document setting forth the text of the articles as it emerged from the decisions so far taken by the Commission.

158. The CHAIRMAN and Mr. BRIERLY supported that suggestion.

*It was so decided.*

The meeting rose at 1.10 p.m.

## 88th MEETING

Thursday, 24 May 1951, at 9.45 a.m.

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Chairman: Mr. Shushi HSU,  
followed by: Mr. James L. BRIERLY  
Rapporteur: Mr. Roberto CORDOVA

*Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, 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.

### Communication from the President of the International Court of Justice

1. Mr. BRIERLY, as Chairman of the Commission, read out a letter from Mr. Basdevant, President of the International Court of Justice, thanking the members of the Commission for their condolences on the death of Mr. de Barsos Azevedo, Judge of the Court.

### Law of treaties: report by Mr. Brierly (item 4 (a) of the agenda) (A/CN.4.43, A/CN.4/L.4) (continued)

2. The CHAIRMAN declared open the discussion on document A/CN.4/L.4, in which the Secretariat had embodied the tentative decisions taken by the Commission during the first reading of Mr. Brierly's second report (A/CN.4/43).

#### ARTICLE 1: AUTHENTICATION OF TEXTS OF TREATIES.<sup>1</sup>

3. Mr. BRIERLY stated that article 1 of the redraft had been taken, with some slight changes, from his first report (A/CN.4/23) in which it appeared as article 6. He commended it as not employing the word "conclusion", the imprecise nature of which had been brought to light by the discussion at the eighty-fourth meeting.

4. Mr. KERNO (Assistant Secretary-General) observed that in sub-paragraph (c) of the French text the words "la constitution" had been used by mistake instead of the words "la pratique constitutionnelle". Replying to a question by Mr. SANDSTRÖM, he said he thought the French words "procédures officielles" were the equivalent of "formal means".

#### *Sub-paragraph (a)*

5. Mr. FRANÇOIS proposed that the words "which have taken part in the negotiation of that treaty" be deleted, since the minister who signed or initialled had frequently not taken part in the negotiation.

6. Mr. BRIERLY said that the sub-paragraph would be too vague if it ended with the words "of the States".

7. Mr. ALFARO considered Mr. François' remark very pertinent. During prolonged negotiations the minister

in office might be replaced. In that case his successor would sign without having taken part in the negotiation.

8. Mr. CORDOVA pointed out that the words "which have taken part in the negotiation of that treaty" referred to the States, not to the representatives.

9. Mr. YEPES thought Mr. François' proposal a very sound one, and agreed with Mr. Brierly that deletion of the last clause would leave the sub-paragraph incomplete. He therefore supported the deletion but, since the States referred to in the sub-paragraph should be clearly indicated, he also proposed that the word "contracting" be inserted before the word "States", or the word "concerned" added after it.

10. Mr. SANDSTRÖM associated himself with Mr. Cordova's observation and thought that the French text of the sub-paragraph would be clearer if the word "ayant" were substituted for the words "qui ont".

11. Mr. FRANÇOIS felt that the text would still be ambiguous.

12. Mr. AMADO said that the signatories of a treaty had not always taken part in the negotiation, giving as examples the history of relations between the Argentine and Uruguay at the beginning of the nineteenth century, and the treaty of 1785 between the United States of America and Prussia which had been negotiated for the United States by Franklin but signed by Jefferson.

13. Mr. ALFARO was willing for the clause in question to be deleted if the sub-paragraph were amended to read as follows: "The signature or initialling *ne varietur* of the duly authorized representatives of the contracting parties".

14. Mr. KERNO (Assistant Secretary-General) said that Mr. Alfaro's proposal raised a fresh difficulty. There were no contracting parties until conventions had entered into force. It was true that the expressions "High Contracting Parties" or "Contracting Parties" usually appeared in the preambles of treaties, but in the text under discussion their use would be misleading. What was meant was of course that the treaty should be signed or initialled by all those who had taken part in the negotiation.

15. The English text was not ambiguous. The word "which" could only refer to the States, not to the representatives. The French text on the other hand would remain ambiguous even if it were improved by the substitution of "ayant" for "qui ont".

16. Mr. ALFARO proposed the following formula for sub-paragraph (a) to overcome the various difficulties: "The signature or initialling *ne varietur* on behalf of the States which have taken part in the negotiation of the treaty by their duly authorized representatives".

*Mr. Alfaro's formula was adopted.*

#### *Sub-paragraph (b)*

17. Mr. KERNO (Assistant Secretary-General) pointed out that the French text did not take into account the various deletions made in the English text. It should read: "*par incorporation dans l'acte final d'une conférence de tels représentants*".

<sup>1</sup> Article 1 of document A/CN.4/L.4 read as follows:  
"The authentication of the text or texts of a treaty may be effected by:

"(a) The signature or initialling *ne varietur* of the duly authorized representatives of the States which have taken part in the negotiation of that treaty; or

"(b) Incorporation in the Final Act of a conference of such representatives; or

"(c) Incorporation in the resolution of an organ of an international organization authenticated in whatever manner the constitutional practice thereof may provide; or

"(d) Other formal means prescribed by the treaty."

18. Mr. YEPES felt that the form in which sub-paragraph (b) was cast was faulty and lacked clarity.

19. Mr. KERNO (Assistant Secretary-General) explained that while sub-paragraph (a) covered the case of plenipotentiaries signing or initialling, sub-paragraph (b) covered the possibility of a Final Act drawn up at a conference incorporating the text of the treaty. In the latter case authentication of the text was effected by its incorporation in the Final Act and what was signed was the Final Act.

20. Mr. SANDSTRÖM proposed the substitution of the words "similarly signed or initialled" for the words "of such representatives".

21. Mr. KERNO (Assistant Secretary-General) pointed out that the Final Act of a conference could be signed by all the representatives or by the Chairman of the conference alone. He proposed that the words "of such representatives" be deleted.

*It was so decided.*

22. Mr. YEPES felt that the nature of the conference should be indicated, for example, by substituting the words "an international conference" for the words "a conference".

23. Mr. BRIERLY, in order to meet Mr. Yepes' wishes, proposed the following wording: "of the conference at which the treaty was negotiated".

24. Mr. YEPES agreed.

*It was so decided.*

24a. After an exchange of views between Mr. YEPES, Mr. AMADO, Mr. KERNO (Assistant Secretary-General) and Mr. SANDSTRÖM concerning the possible substitution of the word "insertion" for the word "incorporation" in the French text, it was decided that the translation of the English word "incorporation" be left to the Languages Division.

*Sub-paragraph (b) was adopted as amended.*

*Sub-paragraph (c)*

25. Mr. LIANG (Secretary to the Commission) said that it ought to be made clear that in the English text the word "authenticated" referred to "resolution" and not to "incorporation".

26. He wished to know why the expression "constitutional practice" had been used instead of the word "constitution", in view of the fact that what appeared to be referred to was the Charter of the United Nations.

27. Lastly, it was not customary for resolutions of the United Nations to be authenticated.

28. The comment on former article 6 of the first report on the Law of Treaties (A/CN.4/23) threw little light on the three points he had raised.

29. Mr. BRIERLY, replying to Mr. Liang's first point, said he thought the redraft might be improved by substituting the words "in accordance with the constitutional practice of that organization" for "authenticated in whatever manner the constitutional practice thereof may provide".

30. He had used the expression "constitutional practice" deliberately. Though the Charter of the United Nations

did not provide specifically for that method of authentication, it had been employed in practice at the General Assembly for the adoption of draft treaties.

31. Mr. Liang's third criticism was met by the proposed amendment, which did not contain the word "authenticated".

32. Replying to a remark by Mr. YEPES, Mr. BRIERLY said that he saw nothing against the words "in a resolution" being substituted for the words "in the resolution" in the English text. The amendment did not affect the French text.

*Sub-paragraph (c) was adopted as amended.*

*Sub-paragraph (d)*

*Sub-paragraph (d) was adopted without comment.*

#### ARTICLE 2: ENTRY INTO FORCE OF TREATIES

33. Mr. BRIERLY observed that it had already been decided to delete the article.<sup>2</sup>

#### ARTICLE 3: APPLICATION OF TREATIES<sup>3</sup>

34. Mr. BRIERLY stated that the text was a new one, its purpose being to indicate that signature, ratification and accession must always be in accordance with constitutional law and practice. Inclusion of the article made it unnecessary to repeat the same thing a number of times.

35. Mr. SANDSTRÖM said that he no longer felt the misgivings which he had expressed earlier. He had no objection to the new article 3 being adopted.

36. Mr. FRANÇOIS wished once more to emphasize the possible undesirable results of such an article, even apart from the difficulties which might arise in connexion with deposit with the Secretary-General.

37. He asked the Commission to consider the imaginary case of a treaty between two States which had been signed and ratified by both parties. The heads of State had exchanged the instruments of ratification. Provisionally the treaty was in force. In one of the two countries the public criticized the head of the State for having ratified without parliamentary authorization. The matter had to go before a court — a national court since it was a matter of domestic law. The national tribunal ruled that the ratification was invalid and retrospectively null and void. In that case the other State, which had duly followed the ratification procedure and ever since the exchange of ratification had duly fulfilled its undertakings, would be faced with a partner who could say: "Since the ratification is null and void, I am not bound by the treaty."

38. A text which made such a state of affairs possible could not be accepted. It meant sacrificing the stability

<sup>2</sup> At the 85th meeting, paragraph (1) was deleted (summary records of the 85th meeting, para. 10). In document A/CN.4/L.4, it was suggested to delete paragraph (2) in view of the provision of new article 6.

<sup>3</sup> Article 3 of document A/CN.4/L.4 read as follows:

"A treaty becomes legally binding in relation to a State when that State undertakes a final obligation under the treaty whether by signature, ratification or accession, in accordance with its constitutional law and practice through an organ competent for that purpose."

of international relations to the desire to respect the national will.

39. Mr. CORDOVA pointed out that the Commission had taken a decision on that point. He noted that Mr. François attached more importance to the form of ratification than to its intrinsic features and thought that if the form was observed, ratification must be valid in all cases. But the Commission had voted against that view; it had recognized that, in order to be valid, ratification required not only observance of the form but also of the constitution, since international law was concerned with the capacity required by those who were subject to it to contract valid obligations. That capacity could only be determined with reference to domestic law. The position was the same, *mutatis mutandis*, as in the case of a contract under private law entered into by a minor without the consent of his guardian.

40. The judge determining the validity of ratification would be an international judge. That procedure had been adopted in hundreds of arbitration cases. In claims involving Mexico and the United States — a subject with which he was familiar because he had been the Mexican representative in arbitrations between the two countries and in several other cases besides — the international judge, in order to determine whether there had been a denial of justice, had had to ascertain whether the domestic law had been correctly applied. Thus it sometimes happened that domestic law became a part of international law.

41. Mr. BRIERLY agreed that there were two schools of thought. The adoption of either of them raised difficult problems. The majority of the Commission had supported the principle of respect for constitutional law, in spite of the force of the contrary argument, in defence of which Mr. François had the support of Anzilotti and, so far as theory was concerned, of Mr. Basdevant. He thought that if the Commission had any choice it might support that view. It was the feeling that States would never accept such a doctrine that had led the Commission to reject it. Its decision had been based not on legal principles, but on practical considerations.

42. Mr. SANDSTRÖM said that Mr. Córdova had forestalled him with a comment that he had himself intended to make. The validity of ratification must certainly be decided by an international court. From one point of view ratification was, indeed, a domestic act, but as an instrument deposited or exchanged it was also an international act.

43. Mr. KERNO (Assistant Secretary-General), referring to the difficulties which might confront the depositary of treaties, explained that under article 3 existing practice would be continued. The Secretary-General would be obliged to accept signatures, ratifications or accessions if they appeared at first sight to be in good and due form, until that was disputed or disproved.

44. It might also be asked whether a document intended to facilitate international relations and make them more secure should give such prominence to the principle stated in article 3. That principle was good in itself,

but should it form part of the façade of the legal edifice they were constructing?

45. Following a comment by Mr. BRIERLY, the CHAIRMAN asked Mr. François if he was formally proposing that the Commission reconsider its former decision.

46. Mr. FRANÇOIS said he was not asking for another vote, but wished to indicate that he was definitely opposed to article 3. In reply to a question by Mr. YEPES, he added that his criticisms did not concern the form of the article, but its substance.

47. The CHAIRMAN pointed out that in the past, as a result of pressure from Japan, the Chinese Government had concluded certain treaties with that country without following the constitutional procedure of the Chinese Republic. He therefore considered that there was a need for the rule formulated in article 3, with which he was fully satisfied.

48. Mr. AMADO proposed that the word "organ" be replaced by the word "organs". That amendment applied to States in which ratification depended on parliamentary approval, and several organs were consequently concerned.

49. Mr. CORDOVA did not think it would be correct to refer to "competent organs". Signature, ratification and accession took place through the agency of a single organ, even if several were concerned in the preliminary procedure.

50. Mr. SPIROPOULOS pointed out, in addition, that the word "organ", taken as a general expression, did not preclude plurality.

51. Mr. AMADO did not press his amendment.

52. Mr. BRIERLY reminded the Commission that at the previous day's meeting he had expressed the view that acceptance should be mentioned among the acts which could make a treaty legally binding. After further consideration, and having consulted Mr. Kerno, he had become aware of certain difficulties. He thought that it would be better to confine the draft to conventional procedures and not to include that new form. The Commission could explain the reasons for that deliberate omission and signify its willingness, if the General Assembly so requested, to repair it in a commentary to be inserted in its report.

53. Mr. KERNO (Assistant Secretary-General) pointed out that if acceptance were mentioned in article 3, it would be necessary to draft parallel texts of the subsequent articles taking account of that new procedure.

54. If the Commission considered that the classical doctrine was best, it should keep the present wording of article 3, but explain to the General Assembly that it was bearing acceptance in mind and was willing to include it in the draft if the General Assembly so requested.

55. Mr. CORDOVA pointed out that acceptance was one of the methods by which treaties could be concluded. The Commission should include it in the draft.

56. Mr. SPIROPOULOS thought that it would take too long for the Commission to explain acceptance. It had prepared a text on classical lines. Acceptance was

a new procedure to which others might be added in the future and the principle stated in article 3 did not rule out new procedures. Ratification, accession or acceptance were all manifestations of will, which differed only in form.

57. Mr. CORDOVA considered it the Commission's duty to codify all procedures and proposed the addition of the words "or acceptance" after the word "accession".

58. Mr. BRIERLY observed that that addition would compel the Commission to define acceptance in another article. At the present time there were three different forms of acceptance. There were agreements which were merely accepted, others which were signed subject to acceptance (in that case the procedure was very similar to ratification), and finally, other instruments which were signed without reservation as to acceptance.

59. Mr. CORDOVA agreed that his amendment might make it necessary to draw up three articles on acceptance. But what was important was to state that acceptance, also, must be in accordance with constitutional practice. Without such a provision, it might be concluded that acceptance was not necessarily subject to compliance with constitutional law.

60. Mr. AMADO read extracts from a lecture delivered in 1948 by Mr. Saba, Director of the Legal Department of the United Nations, entitled "Certain Aspects of the Development of Treaty Technique":

"For some years now, a new procedure and terminology have been adopted, which are to be found, in particular, in the Constitution of the World Health Organization, the Constitution of the International Refugee Organization, the Convention on the Intergovernmental Maritime Consultative Organization, the Protocols transferring to the United Nations certain functions previously exercised by the League of Nations under the Conventions on narcotic drugs, the traffic in women of minor and full age, the circulation of obscene publications, on statistics, and, quite recently, in the Protocol bringing synthetic drugs under international control. These Conventions and Protocols provide that a State may become a party to the agreement, either by signing without reservation as to subsequent approval or acceptance; or by signing subject to acceptance and subsequently accepting; or, finally, by accepting, without previous signature being required.

"Thus States which have no constitutional difficulty in the matter, have been given a means of becoming parties to the Convention immediately, by signing it.

"Moreover, approval or acceptance following conditional signature is very similar to the procedure of ratification and takes account of the need of certain States, under their constitution, formally to ratify Conventions which they have already signed.

"The term 'ratification' has, however, been replaced by the terms 'approval' or 'acceptance', though the relevant terminology is not yet uniform or final. The difference between the terms 'acceptance' and 'approval' and the term 'ratification' is that acceptance has a wider scope than ratification since, according to the definition of the Anglo-Saxon writers, by whom this

new procedure was inspired, acceptance must express the definite will of a State to become bound by a convention. The form in which that will is to be expressed has not been specifically laid down in the instruments, but the usual practice has been to recognize in addition to formal letters of ratification, simple written statements from the head of the government or the Minister for Foreign Affairs.

"The substitution of the term 'acceptance' for 'ratification' had another advantage. Under certain constitutions, ratification of a treaty requires a formal act by the Chief of State, performed in pursuance of a decision adopted by a two-thirds majority of the Senate. In order to avoid that long and complicated procedure, the States in question have endeavoured to employ, in the international agreements they concluded, a terminology enabling them to act outside the framework specifically provided by their Constitutions. They have, indeed, considered that in referring formally to treaties and their ratification, the Constitution was only intended to apply to formal ratification of political treaties of a general character, without excluding the possibility of entering into other agreements by a more flexible procedure. Hence they endeavoured to modify the terminology of the agreements they concluded, in that respect."

61. He regarded that text as an illustration of the line of reasoning followed by Mr. Spiropoulos. The Commission should consider whether it was really necessary to lay down rules for a procedure which was itself not fixed.

62. Mr. SPIROPOULOS thought that the Commission could get round the difficulty by indicating that the enumeration in article 2 was not exhaustive. It might, for instance, add after the word "accession" the words "or any other means by which a State expresses the will to become bound".

63. Mr. AMADO proposed the following variant: "or acceptance as the case may be".

64. Mr. FRANÇOIS said that, with regard to that particular point in Article 3, he favoured the solution recommended by Mr. Spiropoulos; but he added that the definition of "ratification" given in article 4 (1) was already so wide that it also covered acceptance. Widening the concept of ratification was one way of recognizing acceptance.

65. Mr. KERNO (Assistant Secretary-General), expressed his doubts. As the excerpt from Mr. Saba's lecture had shown, the new procedure of acceptance had of course been adopted for important treaties. Hence the Commission could not ignore it. It was necessary to decide whether it was merely a question of a new term or whether it represented a substantial innovation. Mr. Saba had stated that acceptance was a more flexible procedure, which made it possible to provide, in one and the same convention, for signature and ratification by certain States, and signature without any reservation with regard to ratification, in the case of the others. According to the classical formula, however, where there was a provision regarding ratification

in a convention, it applied to everybody. Acceptance therefore did perhaps offer differences of substance.

66. The matter was one for the Commission to decide. If it preferred to leave States the option of resorting to the more flexible formula, it should not only mention acceptance in article 3, but should go more deeply into that procedure.

67. Mr. CORDOVA pointed out that article 1, subparagraph (d), already opened the door to other procedures. The Commission should, however, safeguard the observance of constitutional rules in the case of all the procedures.

68. In his opinion, Mr. Spiropoulos had resolved the difficulty by his proposal to insert in article 3 some such phrase as: "or any other means of expressing the will of the State". He himself accepted that amendment which would make it unnecessary for the Commission to explain what constituted acceptance.

69. Mr. LIANG (Secretary to the Commission) noted that Mr. François regarded acceptance as a kind of ratification and that the article devoted to ratification dispensed with the need for making special mention of acceptance.

70. While, in the majority of cases, acceptance was in fact a kind of ratification, he had nevertheless been able to show in a recent study,<sup>4</sup> by analysing the forms of acceptance resorted to by the authors of various conventions, that acceptance and ratification were not identical.

71. Under certain provisions of the Bretton Woods Agreements (establishing the International Monetary Fund and the International Bank for Reconstruction and Development):

"It was necessary for these agreements to enter into force by a specified date by final action taken by the States representing specified percentages of quotas or minimum contributions. The need, therefore, arose for a flexible procedure in order that as many States as possible could, in accordance with their respective constitutional requirements, take the necessary final action before the specified date. The use of the 'acceptance' procedure afforded the requisite elasticity. The United States, for instance, after the requisite legislative authorization was obtained from the Congress, including financial appropriations necessary for fulfilling the obligations of membership, was able to become a party to each of these agreements by means of an instrument of acceptance, signed by the President, setting forth that the United States accepted the agreement 'in accordance with its law and has taken all steps necessary to enable it to carry out all of its obligations under the agreement.' In other words, it was thus made possible for the United States, in accordance with its municipal law, to become bound by these agreements without the need of following the procedure, including advice and consent of the Senate to ratification, reserved in the United States for treaties in the constitutional sense."

<sup>4</sup> *American Journal of International Law*, vol. 44 (1950), pp. 342-349.

72. In that instance, the case was one where acceptance was not identical with ratification but was designed to replace it. It was rather more analogous to accession. In that connexion, the study he had just mentioned contained the following passage:

"Acceptance not preceded by signature corresponds to the recognized meaning of 'accession', namely, an act by which the provisions of the treaty are formally accepted by a non-signatory State. 'Acceptance' in this sense as an alternative method to that of signature without reservation as to acceptance or to that of signature to be followed by acceptance, places a State availing itself of this method on the same level as those signatories which have become parties to the treaty, thereby blurring the traditional distinction between signatory and acceding States. In other words, for the purpose of this formula, such signatory States and the accepting (acceding) States come under one single category, namely, 'parties to the instrument'."

73. Acceptance was equivalent to ratification in most cases. It had just been shown that it could also at times be much the same thing as accession. In other cases, it possessed special features to meet particular requirements.

74. Mr. BRIERLY proposed that the Commission adopt Mr. Spiropoulos' suggestion to insert the words "or any other means of expressing the will of such a State", after the word "accession" in the third line. If the General Assembly wished the Commission to go into greater detail, the latter would draw up a complete text defining acceptance which, as Mr. Liang had said, covered three types of procedure.

*Mr. Spiropoulos's amendment was adopted.*

*Article 3 was adopted as amended.*

#### ARTICLE 4: RATIFICATION OF TREATIES<sup>5</sup>

##### *Paragraph (1)*

75. Mr. BRIERLY observed that the wording had already been provisionally approved.

*Paragraph (1) was adopted.*

##### *Paragraph (2)*

76. Mr. BRIERLY pointed out that the Commission could take no decision until it knew the opinion of the International Court of Justice.<sup>6</sup>

#### ARTICLE 5: WHEN RATIFICATION IS NECESSARY<sup>7</sup>

77. Mr. BRIERLY said that the text took account of the changes made by the Commission to the original

<sup>5</sup> Article 4 of document A/CN.4/L.4 read as follows:

"(1) Ratification is an act by which the competent organ of a State, finally and in a written instrument duly executed, confirms and accepts a treaty as binding on that State.

"(2) Ratification may be made subject to reservations or conditions in accordance with the provisions of Article 10."

(Paragraph 3 of original article 4 has been deleted by a tentative decision of the Commission at its 86th meeting, paras. 4-6 of the summary records.)

<sup>6</sup> See also paras. 121-127, *infra*.

<sup>7</sup> Article 5 of document A/CN.4/L.4 read as follows:

"A State is not deemed to have undertaken a final obligation under a treaty until it has ratified that treaty provided that a

article. It began by establishing ratification as the general rule and then provided for exceptions. It would, however, be preferable for the words "provided that a State is deemed" to form the beginning of a second paragraph. Sub-paragraph (b) made provision for a case which might arise with certain clauses.

78. Mr. YEPES drew the attention of the Commission to the lack of concordance between the French and English texts at the beginning of article 5. The form of the French text, divided into two sentences, was the one he preferred, its wording being clearer and more precise. He asked Mr. Brierly whether it would not be preferable to follow the French text.

79. Mr. BRIERLY said that Mr. Yepes was right and that the sentence in the English text was heavy.

80. At the suggestion of Mr. Brierly, Mr. Yepes and Mr. Sandström, *the Commission adopted the following text:*

"A State is not deemed to have undertaken a final obligation under a treaty until it has ratified that treaty."

"A State is, however, deemed . . ."

*Sub-paragraphs (a) and (b) were adopted.*

*Sub-paragraph (c)*

81. Mr. FRANÇOIS wondered whether the wording of the sub-paragraph was not too wide in scope. If a State sent its plenipotentiaries with permission to negotiate without having subsequently to submit the treaty for ratification, whereas the majority of the States adopted an opposite attitude and it was decided to draw up a treaty subject to ratification, sub-paragraph (c) could not then be invoked.

82. Mr. BRIERLY explained that the sub-paragraph meant that the State in question was bound. There was no objection to a State declaring that it intended to bind itself by their mere act of signature.

83. Mr. FRANÇOIS thought it would be more prudent to add: "if the treaty does not require ratification". He would remind the Commission that as full powers were never published, the nature of their contents was unknown.

84. Mr. KERNO (Assistant Secretary-General) said he shared the concern of Mr. François and wondered whether sub-paragraph (c) was necessary.

84a. Mr. BRIERLY having agreed, *it was decided to delete sub-paragraph (c).*

*Sub-paragraph (d) was adopted.*

85. On the proposal of Mr. Sandström, the title of article 5, "When ratification is necessary", was deleted.

State is deemed to have undertaken a final obligation by its signature of the treaty

"(a) If the treaty so provides ;

"(b) If the treaty provides that it shall be ratified but that it shall come into force before ratification ;

"(c) If the full powers of its representatives who negotiated or signed the treaty stipulate that ratification is not necessary ;

"(d) If the form of the treaty or the attendant circumstances indicate an intention to dispense with ratification."

ARTICLE 6: ENTRY INTO FORCE OF TREATIES<sup>8</sup>

86. Mr. CORDOVA recalled that a slight change had been made to paragraph (1) on the proposal of Mr. Yepes ; the words "of all States which have participated in the negotiations" having been added.

87. On the proposal of Mr. SPIROPOULOS, the beginning of paragraph (1) was amended to read: "A treaty not subject to ratification enters into force. . .".

*Article 6 was adopted as amended.*

ARTICLE 7: OBLIGATION OF A SIGNATORY PRIOR TO THE ENTRY INTO FORCE OF A TREATY<sup>9</sup>

*Article 7 was deleted.*

ARTICLE 8: NO OBLIGATION TO RATIFY<sup>10</sup>

88. At the suggestion of Mr. KERNO (Assistant Secretary-General), the Commission *decided* to omit the title of article 8: "No obligation to ratify", and to place the article after article 5.

NEW ARTICLE<sup>11</sup>

89. Mr. YEPES asked that the article be left where it was. He hoped there would be no discussion at that meeting in the absence of Mr. Scelle, who was one of the chief supporters of the article.

90. Observations could be submitted on second reading.

91. Mr. BRIERLY said he did not wish to reopen the discussion. He hoped the Commission realized the implication of its decision, particularly insofar as it affected the United States of America. It was like saying to the President of that country: "Your plenipotentiaries have signed the treaty but you and your Secretaries of State will not have an opportunity of re-considering the question and you must send the treaty to the Senate and leave it to the latter to accept it or reject it." If the Commission said such a thing to the United States, that country would certainly never accept the draft Code.

<sup>8</sup> Article 6 of document A/CN.4/L.4 read as follows :

"Unless otherwise provided in the treaty itself :

"(1) When a treaty is not subject to ratification, it enters into force on signature of all States which have participated in the negotiations.

"(2) A treaty which provides for the exchange or deposit of ratifications enters into force on the exchange or deposit of ratifications by all the signatories.

"(3) A treaty which is subject to ratification but which contains no provision for exchange or deposit of ratifications enters into force when it is ratified by all the signatories and when each signatory has notified its ratification to all the other signatories."

<sup>9</sup> Article 7 had been deleted by a tentative decision of the Commission at its 87th meeting, para. 83 of the summary records.

<sup>10</sup> Article 8 of document A/CN.4/L.4 read as follows :

"The signature of a treaty on behalf of a State does not create for that State any obligation to ratify the treaty."

<sup>11</sup> The new article of document A/CN.4/L.4 read as follows :

"The mere fact of its signature being duly appended, especially to a multilateral treaty, places the State under an obligation to take, within a reasonable time, such steps as are required to ensure that the treaty thus signed is subjected to the constitutional procedure for ratification or rejection."

92. Mr. CORDOVA was in favour of the article because it had almost become the custom, in inter-American relations, to sign treaties and never to ratify them. The article would clear the air. States would be morally obliged to take a decision. Furthermore, the obligation involved was that of submitting the treaty to Parliament and not that of asking for ratification. All that was asked was that the State should express its will.
93. Mr. YEPES said he would like the Commission to know that it was the United States which, at the Pan-American Conference, had taken the initiative of asking for the adoption of provisions designed to make signatory States take the necessary steps for ratification. The Commission was only following the practice adopted by the United States.
94. For instance an article had been adopted at the Inter-American Conference for the Maintenance of Peace, which met in 1936 at Buenos Aires, under which States agreed to take all the necessary steps to see that treaties were constitutionally ratified. The article now under consideration did no more than that.
95. Mr. AMADO did not wish to reopen discussion on the article but felt he must remind his colleagues that the conferences referred to had been political conferences of States at which the bases of a common American policy were laid. The Commission's purpose was to codify international law and to formulate the rules of law as they existed. The article in question however expressed a political and moral desire.
96. He deeply regretted having to say so in the absence of Mr. Scelle, but he would say in the presence of Mr. Yepes, who was also very anxious that the view be expressed, that it was difficult for him to accept that article. He shared Mr. Brierly's opinion on that point.
97. Mr. SPIROPOULOS pointed out that he had abstained when the vote had been taken, and that as a matter of fact, was how it came about that the article had been adopted. He must say that the solution of the problem lay in the importance attributed to the act of signature. In his opinion, when a State signed a treaty, it meant that the representatives had agreed on a definite text but it still remained to be decided whether the government would go any further. Agreement had been reached, after lengthy discussion, on a text which might perhaps become a treaty. It was going too far to place governments under the obligation of submitting the treaty to their competent organ. He had abstained and would continue to do so.
98. Supposing the text were adopted, he did not understand why the Commission should say: "especially to a multilateral treaty." If the principle existed, it existed for all treaties. The words should be deleted.
99. Mr. YEPES, on a point of order, observed that the article had been approved at the previous meeting.
100. Mr. SPIROPOULOS replied that it was a question of wording only.
101. Mr. SANDSTRÖM recalled that the text had only been adopted provisionally and that the final vote would be taken when the other members of the Commission they were still expecting finally arrived.
102. Mr. ALFARO considered that the inclusion of the words: "especially to a multilateral treaty" was most felicitous and highly scientific. It gave force to the article. It was, in fact with regard to multilateral treaties that the inaction of States caused the greatest harm. In the case of the Bogota Charter, for example, all the States of the American continent had had the intention of forming a juridical organization of American States which had in fact existed since the signature of the first agreement at the end of the last century. The community of American States had felt the desire to give legal force to that organization, and he did not think there was a single people opposed to it. Yet there were Governments which had not taken, and were not likely to take for a long time to come, the necessary steps to ratify the Charter. If they did not wish to ratify it, they should say so.
103. There was in existence a list of conventions signed but not ratified, from which it could be seen that one of the American Republics had signed 61 treaties and had only ratified 9 of them; not because of the opposition of the people, but because of the inertia of those in the seat of government. The inclusion of the words in question would help to dissipate such harmful uncertainty. They could not be deleted since the object was to emphasize the importance of the rule, with special reference to multilateral treaties. It was, he would repeat, in respect of the latter that the evil was greatest. By omitting the words, the Commission would destroy the whole basis of the draft.
104. Mr. LIANG (Secretary to the Commission) recalled, in connexion with that article, the suggestion submitted in 1947 by the Secretariat to the Committee on the Development and Codification of International Law, namely: to authorize the Secretary-General to remind States signatories to a multilateral convention that they should take the necessary steps to submit the convention to the constitutional procedure provided for ratification.<sup>12</sup> It was important for the development of international law that signatory States should take such measures. The members of the Commission who had been representing their countries on the above-mentioned Commission would not fail to recall that Mr. Koretsky had opposed the suggestion on the ground that States ratified when they wished to. The Secretariat's suggestion had been based on action contemplated by the League of Nations.
105. He wondered however whether such an article was in its right place in the codification of the law of treaties or whether it should not rather form the subject of a General Assembly resolution requesting the Secretary-General to draw the attention of States to the matter. He was inclined to consider that the article would assist the development of international law.
106. Mr. SPIROPOULOS said he would not deal with the substance of the question but would like to return to the matter of wording. Could it be claimed that the obligation was widened in scope by leaving the words in question in the text? If there was an obligation, it existed and its force was not increased or reduced according to

<sup>12</sup> A/AC.10/7, pp. 4-5.

the nature of the treaty. The text applied equally to the two types of treaty. On the contrary, by leaving the text as it was, it would apply more strongly to multilateral treaties.

107. He did not wish to press the point.

108. Mr. YEPES said that the discussion was contrary to the rules of procedure. The Commission would have the opportunity of discussing the article thoroughly at the second reading. He would like to confirm Mr. Liang's statements. The article reflected existing practice. In the case of the Convention on Genocide the United Nations had made innumerable representations to the signatory States to get them to ratify. There was no question of interference with the domestic sovereignty of States. It was the role of an international organization to see to it that conventions were ratified.

109. The CHAIRMAN agreed with Mr. Spiropoulos that the words "especially to a multilateral treaty" should be struck out. The text would be strengthened thereby. The Commission had not however decided to resume discussion of the article.

110. Mr. SPIROPOULOS repeated that he would not press his proposal, but on the other hand could not understand the opposition of Mr. Yepes. Articles could be changed. The Commission had done so already.

111. Mr. YEPES agreed that Mr. Spiropoulos' statement was correct. It was nevertheless true that the article had been approved at the 87th meeting by a small majority and that if the question were taken up again in the absence of Mr. Scelle, the article might be rejected.

112. Mr. SPIROPOULOS withdrew his proposal.

113. Mr. CORDOVA thought that the Commission had approved the substance of the article. He would himself be opposed to any modification but did not see why the form should not be changed. By preserving the words in question, the effect of the article with regard to bilateral treaties was weakened.

114. Mr. ALFARO would like to confirm what Mr. Yepes had said with regard to the constant practice in the Organization of American States. For a long time past the Council of the Pan-American Union had been vigorously protesting against the practice of signing treaties and not submitting them to ratification.

115. In 1928, he had himself proposed to the Council that the Governing Board send a mission to all American Governments to enquire why they did not submit the conventions they had signed to ratification. It had been considered that such an act would constitute pressure on Governments and the Governing Board had decided to publish a report on the situation every six months. In 1928, at Havana, the Pan-American Union had taken shape and a Convention had been signed. Pending ratification, the Union was to begin work and provisions to that end had been adopted. The Convention had never been approved. In 1948, a Charter had been signed at Bogotá setting up a regional organization within the framework of the United Nations and it had been decided to send to governments at regular intervals a booklet to remind them of the steps they were required to take.

116. There was a certain flexibility about the text of the article under consideration in that it specified "within a reasonable time". That meant that, in the case of multilateral treaties, the period should be shorter than in the case of bilateral treaties.

117. Mr. SPIROPOULOS pointed out that, since he had withdrawn his proposal there was no further suggestion before the Commission.

*The new article was adopted.*

#### ARTICLE 9: ACCESSION TO TREATIES<sup>13</sup>

##### *Paragraph (1)*

118. Mr. CORDOVA asked that the wording of paragraph (1) be changed in order to remove the ambiguity arising from the use of the words "on whose behalf".

119. Mr. BRIERLY replied that the words referred to the State and not to the competent organ.

120. Mr. ALFARO pointed out that the Harvard draft had adopted the habit of saying "the State on behalf of which the treaty has been signed", thereby implying that it was not the State, an abstract entity, but the plenipotentiaries who had signed, as was obvious. In the case in point, however, the expression made the text obscure. It was preferable to say "a State which has not signed". The Commission had used the same expression elsewhere.

121. Mr. LIANG (Secretary to the Commission) did not think that the formula adopted was a correct one. He would prefer the wording: "an act by which a State accepts through its competent organ". It would be necessary to use the same formula in the other articles of the draft.

122. Mr. BRIERLY recalled that article 4 had been thus amended because the Commission had not at the time taken any decision with regard to article 3 which contained the general provision relating to competence. Now that article 3 had been adopted<sup>14</sup>, it was desirable to use in article 4 the wording "by which a State...".

123. If reference were made to the competent organ in article 4, a similar reference would have to be included in article 9. In both cases he was in favour of saying simply "a State". There was no objection to that term in view of the provisions of article 3.

*It was decided both in article 9 and article 4 to substitute the words "by which a State..." for the words "by which the competent organ of a State".*

<sup>13</sup> Article 9 of document A/CN.4/L.4 read as follows:

"(1) Accession to a treaty is an act by which the competent organ of a State, on whose behalf the treaty has not been signed or ratified, formally, and in accordance with the terms of the treaty, accepts, in a written instrument duly executed, the treaty as binding for that State.

"(2) A State may accede to a treaty only when that treaty contains provisions enabling it to do so or with the consent of all the parties to the treaty.

"(3) Unless otherwise provided in the treaty itself a State may only accede to a treaty after it has entered into force."

(Paragraphs (4) and (5) of original article 9 have been deleted by tentative decisions of the Commission, 87th meeting, 23 May.)

<sup>14</sup> See para. 74, *supra*.

124. Mr. CORDOVA proposed that the text run on as follows: "by which a State which has not signed or ratified the treaty accepts . . .".

125. Mr. BRIERLY accepted that amendment.

*Mr. Córdova's amendment was adopted.*

126. Mr. SPIROPOULOS thought the words "duly executed" were unnecessary and should be deleted.

127. Mr. BRIERLY agreed.

*Mr. Spiropoulos's amendment was adopted.*

*Paragraph (1) was adopted as amended.*

*Paragraphs (2) and (3) were adopted.*

*Mr. Hsu relinquished the chair to Mr. Brierly.*

#### Programme of work

128. The CHAIRMAN proposed that at the next meeting the Commission begin discussion of the report by Mr. Spiropoulos CA/CN.4/44 on a draft code of offences against the peace and security of mankind (item 2 (a) of the agenda).

129. He enquired whether any member of the Commission was opposed to discussing a text which had so far appeared in English only.

130. Mr. CORDOVA doubted whether the text adopted on the question of treaties was substantial enough to be sent to governments or to the General Assembly. He thought it would be a good thing to continue discussion of Mr. Brierly's first report on the law of treaties in order to advance the study of a subject which was of immediate interest and concern to all.<sup>15</sup>

<sup>15</sup> Discussion of the report of Mr. Brierly was resumed at the 98th meeting. The text of articles tentatively adopted by the Commission at its 88th meeting read as follows:

#### " Article 1

" The authentication of the text or texts of a treaty may be effected by:

" (a) The signature or initialling *ne varietur* on behalf of the States which have taken part in the negotiation of that treaty by their duly authorized representatives; or

" (b) Incorporation in the Final Act of the conference at which the treaty was negotiated; or

" (c) Incorporation in a resolution of an organ of an international organization in accordance with the constitutional practice of that organization; or

" (d) Other formal means prescribed by the treaty.

#### " Application of treaties

##### " Article 2

" A treaty becomes legally binding in relation to a State when that State undertakes a final obligation under the treaty whether by signature, ratification, accession or any other means of expressing the will of the State, in accordance with its constitutional law and practice through an organ competent for that purpose.

#### " Ratification of treaties

##### " Article 3

" (1) Ratification is an act by which a State, finally and in a written instrument, confirms and accepts a treaty as binding on that State.

" (2) Ratification may be made subject to reservations or conditions in accordance with the provisions of Article 10. (This paragraph was deferred to await the advisory opinion of the International Court of Justice on the question of reservations.)

131. Mr. YEPES thought that the discussion on the draft relating to the law of treaties could not be closed. He had proposed a new article at the second session, which, it had been promised, would be included in the agenda for the third session and in the report<sup>16</sup>. He asked that that article be discussed at the next meeting. It ran as follows:

" In order to be valid, a treaty, as understood in this Convention, must have a lawful purpose according to international law. In case of any dispute regarding the lawfulness of a treaty, the International Court of Justice shall state its opinion on the matter at the request of any State directly or indirectly interested, or of the United Nations.

" A treaty with an unlawful object may not be registered with the Secretariat of the United Nations. Whenever the lawfulness of a treaty submitted for registration is in doubt, the Secretary-General of the United Nations shall ask the International Court of Justice for an advisory opinion."

#### " Article 4

" (1) A State is not deemed to have undertaken a final obligation under a treaty until it has ratified that treaty.

" (2) A State is, however, deemed to have undertaken a final obligation by its signature of the treaty if

" (a) The treaty so provides;

" (b) The treaty provides that it shall be ratified but that it shall come into force before ratification;

" (c) The form of the treaty or the attendant circumstances indicate an intention to dispense with ratification.

#### " Article 5

" The signature of a treaty on behalf of a State does not create for that State any obligation to ratify the treaty.

#### " Article 6

" The mere fact of its signature being duly appended, especially to a multilateral treaty, places the State under an obligation to take, within a reasonable time, such steps as are required to ensure that the treaty thus signed is subjected to the constitutional procedure for ratification or rejection.

#### " Entry into force of treaties

##### " Article 7

" Unless otherwise provided in the treaty itself,

" (a) A treaty not subject to ratification enters into force on signature of all States which have participated in the negotiations;

" (b) A treaty which provides for the exchange or deposit of ratifications enters into force on the exchange or deposit of ratifications by all the signatories;

" (c) A treaty which is subject to ratification but which contains no provision for exchange or deposit of ratifications enters into force when it is ratified by all the signatories and when each signatory has notified its ratification to all the other signatories.

#### " Accession to treaties

##### " Article 8

" (1) Accession to a treaty is an act by which a State which has not signed or ratified the treaty, formally and in accordance with its terms, accepts it, in a written instrument, as binding on that State.

" (2) A State may accede to a treaty only when that treaty contains provisions enabling it to do so or with the consent of all the parties to the treaty.

" (3) Unless otherwise provided in the treaty itself a State may only accede to a treaty after it has entered into force."

<sup>16</sup> See summary records of the 78th meeting, para. 49c.

132. The CHAIRMAN stated that the article had nothing to do with the section of the law of treaties with which the Commission was dealing and which concerned the conclusion of treaties.

133. Mr. YEPES thought that view was open to dispute. The Commission had established the framework of treaties but had omitted to state what could be consented to.

134. It had stated that a treaty should be signed, ratified etc., but had neglected the substance of the treaty. A State could not sign, ratify etc. a treaty with an unlawful purpose.

135. Mr. SANDSTRÖM recalled that Mr. Córdova had raised a far broader issue than Mr. Yepes and one which should be considered first. Was the draft which the Commission had just adopted the only text it was going to submit on that item to the General Assembly? That was what should be discussed.

136. Mr. CORDOVA also considered that the latter question should be settled before the problem raised by Mr. Yepes was broached. That problem could not be included in the part of the report the Commission had just adopted.

137. He would like to return to a fundamental point. What the Commission had produced was very little. Could it face the opinion of governments armed with that text alone?

138. Mr. SPIROPOULOS thought that, before taking a decision on that point, it was necessary to await the arrival of the other members of the Commission. It might then be possible to decide either to send the text to governments or to wait until the following year. Or the decision might be left until later.

139. The problem raised by Mr. Yepes was a very important one. He thought it should be kept in view, though it was not the moment to discuss it. The Commission should return to it when it began discussing the section of the law of treaties to which the problem belonged.

140. Mr. KERNO (Assistant Secretary-General) noted that the Commission had almost reached the end of the second week of its third session, which ran to only ten weeks, and had so far completed merely the provisional adoption of that small part of the report.

141. If it did not take steps to expedite its work, it would not achieve such fruitful results as at its first and second sessions.

142. During the meeting in progress, the Commission had transformed itself into a drafting committee. It might perhaps be better for it to concentrate on the important questions and leave the drafting to its rapporteur or to a drafting committee which could meet in the afternoon.

143. If the Commission maintained its decision to commence consideration of the report by Mr. Spiropoulos at its next meeting, that did not mean that it would not deal with the second report by Mr. Brierly. The report by Mr. Spiropoulos was ready for discussion and the Commission could give it priority.

144. Mr. CORDOVA thought on the other hand that since the members of the Commission had the problem of treaties fresh in their minds, it would be preferable to continue the study of the subject. It could consider Mr. Spiropoulos' report afterwards.

*It was decided to begin the study of the report by Mr. Spiropoulos at the next meeting.*

The meeting rose at 1 p.m.

## 89th MEETING

Friday, 25 May 1951, at 9.45 a.m.

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*Chairman:* Mr. James L. BRIERLY

*Rapporteur:* Mr. Roberto CORDOVA

*Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. A. E. F. SANDSTRÖM, 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.

**Preparation of a draft code of offences against the peace and security of mankind: report by Mr. Spiropoulos (item 2 (a) of the agenda) (A/CN.4/44)**

### GENERAL

1-2. Mr. SPIROPOULOS (Rapporteur) said that his task had not been a difficult one: it had been to put the report into more or less final form; after discussion it would be sent to Governments, in conformity with article 16 of the Statute of the Commission.

3. He proposed that the Commission should begin its examination of the report not with the introduction but

with the text of the draft code at article 1 and then proceed to consider the other articles, returning finally to the introduction.

4. He reminded the Commission that when the Nürnberg Principles had been examined by the General Assembly at its fifth session (1950) a large number of views had been expressed. Some delegations had criticized the general manner in which the problem had been dealt with. Others had raised individual points. Many had expressed approval of the Commission's work.

5. The Sixth Committee had felt that in drafting the Code the International Law Commission should take into account the views expressed by delegations in the General Assembly. He had thought it advisable to reproduce those views, arranged systematically, in his report. He suggested that each member of the Commission read them over in his own time. They should be read even if the Commission failed to take any decision regarding them. His personal opinion was that the delegations' views were most valuable, relating as they did to the Nürnberg Principles which were embodied in the report, albeit in a different form.

6. He further recalled that at its second session the Commission, after accepting certain principles and the definition of certain crimes, had set up a Sub-Committee, consisting of Mr. Alfaro, Mr. Hudson and himself, to prepare a preliminary draft.<sup>1</sup> The text suggested in his report was based on that draft. He had tried not to alter the text approved by the Sub-Committee. He thought that the Commission would make few alterations to the principles, since they were the ones it had adopted at its previous session.

7. He explained that the passages underlined were the definitions of crimes drafted by the Sub-Committee.

8. The CHAIRMAN observed that sub-paragraph (a) of the commentary on each article contained the text originally proposed by the Rapporteur.

9. Mr. SPIROPOULOS added that his text had been amended by the Commission.

10. He had thought it best to give the text of the article, followed by the bare comments required to explain it. He felt that the report ought to be submitted to governments after the Commission had made the amendments it thought necessary.

11. Mr. KERNO (Assistant Secretary-General) reminded the Commission of the terms of the second paragraph of the operative part of General Assembly resolution 488 (V) of 12 December 1950, which appeared in paragraph 14 of the report: "Requests the International Law Commission, in preparing the draft code of offences against the peace and security of mankind, to take account of the observations made on this formulation by delegations during the fifth session of the General Assembly". The Commission had at its disposal the records of the meetings of the Sixth Committee, while the views expressed by delegations were set out systematically in the report. The General Assembly resolution continued: "and of any observations which may

be made by Governments". The Commission had also before it a document A/CN.4/45: "Observations of Governments of Member States relating to the formulation of the Nürnberg Principles prepared by the International Law Commission". Very few Governments, it would be noted, had sent in their observations.

12. Mr. YEPES wished, before discussing the report, to pay a tribute to Mr. Spiropoulos' work. He did not, however, agree with Mr. Spiropoulos on every point. The report did not confine itself to the draft code, but contained a second chapter dealing with aggression, concerning which he wished to make every reservation. He felt that Mr. Spiropoulos was over-pessimistic. Aggression must be defined. The General Assembly and the public looked to the Commission to define it. He approved, however, of chapter I.

13. Mr. SPIROPOULOS said that chapter II of the report should not be confused with chapter I; chapter II dealt with a special topic, constituting item 3 of the Commission's agenda, which he had studied in pursuance of a decision of the Political Committee. He suggested that the Commission first study the question of the code, and then decide when to examine chapter II.

14. Mr. AMADO had been about to make a similar remark. The Commission must study the question of aggression, but it was faced with a more immediate task, that of studying the draft code, which in itself contained matters likely to provoke lengthy discussion. At a first reading he had found the formulation excellent. No less would be expected of a man of Mr. Spiropoulos' ability.

15. He wished to know why some parts were underlined and others not.

16. Mr. SPIROPOULOS explained that he had underlined certain parts of article I in order to throw into relief the crimes defined in it.

17. Mr. ALFARO observed, in connexion with the points raised by Mr. Yepes, that Mr. Spiropoulos' report dealt with two completely different subjects, one constituting item 2 of the agenda, and the other item 3 namely: "General Assembly resolution 378 B (V) of 17 November 1950: Duties of States in the event of the outbreak of hostilities". The Commission was at the present juncture only engaged in discussing the code. He had remarks to make concerning the definition of the aggressor, but he thought that it would be more appropriate if he made them later.

18. He wished to congratulate the Rapporteur on his admirable work.

*It was decided that study of the definition of aggression be deferred.*

19. Mr. YEPES explained that he had raised the question of the definition of aggression because it was the subject of a study appearing in the same report as the text of the draft code. He hoped that the Commission would study the question of aggression immediately after the code. He had been anxious to express his reservations concerning chapter II at the earliest opportunity because it was embodied in the same document.

<sup>1</sup> A/CN.4/R.6. See *Yearbook of the International Law Commission, 1950*, vol. I, summary record of the 72nd meeting, footnote 2a.

20. Mr. HSU wished to raise a preliminary question concerning paragraph 5 of the introduction to the draft code in which the Rapporteur said: "The Commission, in submitting the present text to the governments in conformity with article 16 (g) and (h) of its statute, wishes to present the following observations as to some general questions the Commission had to solve in drafting the present draft code." Thus the Rapporteur said that the document would be sent to the governments. The question of the draft code and that of the Nürnberg Principles, if he remembered correctly, had both been referred to the Commission under the same General Assembly resolution. He wondered whether it could justly be said that the work on the draft code came within the category of progressive development of international law, in view of the fact that the Commission had stated that it concerned international law as expressed in the judgment. He inclined to the view that the Commission could submit the draft code to the General Assembly directly, as it had its formulation of the Nürnberg Principles.

21. Mr. SPIROPOULOS replied that General Assembly resolution 177 (II) of 21 November 1947, which directed the Commission to formulate the Nürnberg Principles and to prepare the draft code, consisted of two parts: the first, the formulation of the principles, the Commission had regarded as a special topic, and it had submitted its work on it to the General Assembly according to the procedure employed for special topics. The code fell within the category of progressive development of international law. The Nürnberg Principles were existing law. But the code contained other principles which were not yet part of international law, such as organized terrorist activities carried out in another State, the incursion into the territory of a State by armed bands, etc. Those paragraphs defined new crimes. By them the code contributed to the progressive development of international law, and under article 16 of its Statute the Commission must send it to the governments. Even if it were not clear whether or not the code fell within the category of progressive development of international law, it would be wise to send the text adopted to governments. When some delegations had asked in the General Assembly why the Commission had not submitted the text of the Nürnberg Principles to governments, the General Assembly had decided to communicate the text to them. He repeated once again that the code fell within the category of progressive development of international law, and the Commission was therefore bound to send the draft to governments before submitting it to the General Assembly.

22. Mr. KERNO (Assistant Secretary-General) felt that the main point was to determine whether the draft code was a special topic to which special procedure could be applied, or whether it formed part of the Commission's general work on the progressive development of international law. General Assembly resolution 177 (II) contained two sub-paragraphs:

"(a) Formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgement of the Tribunal, and

"(b) Prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in sub-paragraph (a) above".

It was no longer merely a matter of indicating that place, but of preparing a draft code. The General Assembly had followed the same procedure regarding the preparation of the code as it had in directing the Commission to formulate the principles. The text could therefore be sent directly to the General Assembly. It could equally be maintained that it was a matter of the development of international law and, as Mr. Spiropoulos had done, that it was wiser to submit the text first to governments. There was no great difference between the two things in practice, since if the text were sent directly to the General Assembly the latter would communicate it to governments.

23. The CHAIRMAN thought the discussion premature.

24. Mr. HSU did not press the point.

#### TEXT OF THE DRAFT CODE

25. On the proposal of the Rapporteur, *it was decided* to substitute the words "under the provisions of paragraph . . ." for the words "through application of crime No. . . ." wherever the latter occurred in the draft code.

#### ARTICLE I

26. Mr. SANDSTRÖM observed that article 1 began with the following introduction: "The following acts are offences against the peace and security of mankind. They are crimes under international law for which the responsible individuals shall be punishable". It was followed by a list of the crimes. He would like to see the principle laid down at the beginning of the article thrown into greater relief by being given in the form of a separate paragraph placed, say, after the list of crimes and beginning: "The abovementioned crimes are crimes under international law . . .".

27. Mr. SPIROPOULOS pointed out that the Commission had decided on the present form of the text at the previous session. There appeared to be a misunderstanding. The lines referred to were not an introduction but an integral part of the text, after which came the list of crimes. They represented a positive rule.

28. Mr. YEPES observed that the lines in question therefore applied to paragraphs 1, 2, 3, 4, 5, etc.

29. Mr. KERNO (Assistant Secretary-General) understood Mr. Sandström's objection to refer to the arrangement of the text. That arrangement might be as follows: first, article I (a), containing the paragraphs, and then (b): "The abovementioned acts . . ." reproducing the first two sentences of article I. Those sentences would thus receive greater emphasis.

30. Mr. ALFARO thought that Mr. Sandström's objection deserved consideration. The article consisted of two parts: a list of crimes and a fundamental principle. The principle was placed before the enumeration, but it would be better for it to appear after it and to read: "All the crimes enumerated are crimes under international law and punishable." The article could be divided in the

manner suggested by Mr. Kerno, beginning with a list and ending with a separate paragraph.

31. Mr. SPIROPOULOS agreed to redraft the article in the manner suggested.

*It was so decided.*

*Paragraph 1*

32. Mr. AMADO said that paragraph 1 introduced the problem of the threat of employment of force and that was the vital part of the article.

33. The Nürnberg Tribunal had only regarded as a crime a war of aggression or a war in violation of international treaties, agreements or assurances (A/CN.4/5, p. 93, article 6 (a)). The text of the draft code read: "The employment or threat of employment, by the authorities of a State, of armed force against another State . . .", and Article 2, paragraph 4 of the Charter read as follows: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."

34. The problem was to state clearly, in the definition of the crime, the objective factors characterizing it. Ought threat to be put on the same footing as actual employment of armed force? For his own part he had no objection to such a course, but he felt that criminal jurists would have difficulty in finding what was the characteristic element of a threat in virtue of which it might be regarded as equivalent to the employment of armed force. The meaning of the word "threat", a crime placed by the Charter before the use of force, must be carefully weighed and distinguished.

35. Mr. ALFARO thought that the point deserved careful examination. The Charter forbade the threat or use of force. It had frequently happened in the past that a weak or small nation had been obliged to give way to pressure from a great power. It had found itself in a situation equivalent to one of *force majeure*. Nevertheless, though the provisions of the Charter were justified since no pressure ought to be brought to bear by one power on another in order to obtain an advantage, it would be going too far to class threat of employment of armed force as a crime. In a dispute between nation A and a weaker nation B, nation A could threaten to use force, for example in the economic field. The point had come up at Rio de Janeiro in 1947 and at Bogota in 1948 following a complaint by Cuba, which had protested against alleged economic aggression on the part of the United States of America in the shape of the raising of the import duty on Cuban sugar. It would be too much to suggest that nation B could appear before the court and plead that such a threat constituted a crime. The paragraph ought to confine itself to actual aggression. He doubted the wisdom of classing the threat of employment of force among crimes. Threat was a very elastic term, and it was hard to say where threat began.

36. Mr. AMADO wondered whether paragraph 2 of article 1 did not cover threat when it referred to the planning and preparation of a war of aggression. Perhaps

paragraph 2 distinguished more exactly the threat which constituted a crime. He thought it would be preferable for paragraph 1 merely to mention the employment of force, and for it to be stated that "the planning of or preparation for" a war of aggression included threat. 37. He wondered whether the Rapporteur would be willing to delete the word "threat" in paragraph 1.

38. Mr. SANDSTRÖM was more inclined to favour retention of the word "threat" in paragraph 1. In point of fact threat was very frequently the origin of armed conflict, but that did not mean he thought threat could be defined as a commencement of aggression.

39. The conclusion arrived at in the part of Mr. Spiropoulos' report dealing with the definition of a war of aggression, was that it was not always possible to determine whether or not there were an aggressor; perhaps the same applied to threat. Nevertheless he thought it would be advisable to retain the reference to threat in paragraph 1.

40. Mr. YEPES was in favour of leaving the paragraph as the Rapporteur had drafted it. There was only a difference of degree between the threat of employment of armed force and the actual employment of it. The two should be put on an equal footing.

41. It might even be said that the threat of force was more treacherous than its employment. In the latter case the aggressor ran risks; if threat enabled him to obtain the same result without running them it was a more cowardly way of making an attempt on the sovereignty of States. Mr. Alfaro had mentioned economic pressure, which was a different matter; it was reprehensible no doubt but not as serious as threatening to use force.

42. He was therefore in favour of the proposed text and desired the threat of employment of force to be constituted a crime.

43. Mr. SCALLE was also in favour of the word "threat" being retained in the paragraph. It should however be understood to mean a serious threat, not merely pressure: the French words "*menace caractérisée*" might perhaps be employed; it would be for the judge to decide whether the threat should be regarded as a "*menace caractérisée*" or simply as pressure. The paragraph described a crime, not merely a misdemeanour, and for threat to amount to a real crime it must be backed by very substantial force. Mr. Amado had been right in pointing out the relation between paragraph 1 and paragraph 2. The planning of force was a "*menace caractérisée*".

44. The CHAIRMAN wondered what the correct English translation of the words "*menace caractérisée*" would be.

45. Mr. ALFARO suggested "effective threat".

46. Mr. SCALLE explained that he meant by "*menace caractérisée*" a threat having the characteristics of a real threat, which was distinct from pressure.

47. Mr. SPIROPOULOS wondered whether the text actually left any room for doubt. It referred to the "threat of employment . . . of armed force" not to any threat, and consequently did not cover pressure.

48. Mr. Amado had asked whether the words "the planning of or preparation for . . ." did not cover threat; his reply was that threat was to appear among the crimes. At its previous session the Commission had regarded threat as something new. He himself had always opposed its inclusion in the draft, but he did not wish to press his view: it was for the Commission to decide.

49. The object was to have a text adopted, and he had therefore always tried to discern what the view of the General Assembly would be. If the General Assembly failed to adopt the code submitted to it by the Commission the code would be useless; the Commission must try to submit one which would be adopted. That was why he had opposed inclusion of the idea of threat; he did not think the General Assembly would adopt that crime. But he would not press the point.

50. Mr. LIANG (Secretary to the Commission) thought that the word "threat" had two meanings. According to Article 11 of the Covenant of the League of Nations "threat" might be interpreted as meaning an objective situation, so that it might be maintained that planning constituted a threat. He suggested, however, that the words "threat of employment . . . of armed force" in the text of the draft code and the text of Article 2, paragraph 4, of the Charter, referred to something more than an objective situation, in fact to a positive act approximating to an ultimatum. Thus Mr. Amado's suggestion only took into account part of the meaning of the word.

51. As to the advisability of making threat a crime, it might be provided that the threat must be known to the State concerned. Threatening to use force was different from attempting it, which was secret. In most cases the threat of employment of force was communicated to the other State: that was the idea to be borne in mind.

52. Mr. AMADO said he had foreseen the direction the discussion would take: that was why he had chosen his words with such care.

53. In criminal law it was acts that were punished, and it would be a difficult thing for a judge to determine what acts constituted a threat. He would accept the article if the Commission decided to retain the word "threat". Mr. Liang had put his finger on the vital spot. In speaking of threat one naturally thought of the attempt to use force, but he himself had not mentioned the attempt. It must be remembered that in criminal law the concepts bordered on each other.

54. If the Commission did not wish to distinguish threat he would vote for the article; but it would be too difficult, from the point of view of criminal law, to state what the acts were which constituted threat.

55. The CHAIRMAN asked Mr. Scelle whether the words "employment . . . of armed force" did not sufficiently distinguish threat.

56. Mr. SCELLE thought they did not, but he held no particular brief for the words "*menace caractérisée*"; "explicit threat" would do as well. He agreed with what Mr. Liang had said and Mr. Amado, a criminal jurist, had approved. There could be no condemnation

unless there had been an act. Was it a threat when a State said: "There is no telling what the consequences may be"? It was too much always to require an ultimatum. Every criminal threat was not an ultimatum. There were degrees of threatening. If the judge could find that there had been a threat of resort to arms, the case contained the elements of a "*menace caractérisée*" or an "explicit threat", should the latter term be preferred. It would be too much to make implicit threat a crime, but threat backed by steps taken was an act: he therefore desired threat to be qualified.

57. Mr. YEPES considered that threat was distinguished in the article in question by the words: "threat of employment . . . of armed force"; that was an act which should be classed as a crime.

58. Mr. CORDOVA felt that the members of the Commission were more or less agreed that threat must be classed among the crimes. The question at issue was whether the threat in question was explicit threat or whether it covered implicit threat as well.

59. He was interested in what Mr. Scelle had said. In the history of Mexico troops had been concentrated at the frontier, without explicit threat, and that had meant that a neighbouring State would employ force if Mexico refused to do what it wished; that amounted to commencing to put force into effect. He thought therefore that the Commission ought to introduce a provision into the article taking into account the point made by Mr. Scelle in his first statement during the discussion, a provision covering any commencement to put force into effect, that was to say, any preparation for the employment of force for the purpose of making a country believe it was in danger of having the will of another State imposed upon it. It must not be essential that the threat be explicit, it could be merely implicit.

60. Mr. ALFARO had been much impressed by the reasoning of Mr. Sandström, Mr. Scelle and Mr. Yepes; for his own part he was inclined to class as a crime any serious violation of the Charter, but he wondered about the implications of the provisions under discussion from the point of view of criminal law. Mr. Scelle had proposed to qualify threat as "*menace caractérisée*"; that would make the meaning clear, but he could remember no case in which a government had said: "If you do not do this I am going to resort to force". No government ever said such a thing. Of recent years the declaration of war had lost some of its significance. During the discussions between the United States of America and Japan before Pearl Harbour, Japan had repeated on a number of occasions: "Should we fail to reach agreement the consequences will be very serious." Mussolini said: "If Germany comes into the war I know which side I shall be on". States never used a "*menace caractérisée*". There were however the signs that resort to arms was imminent: mobilization for example was in itself an effective threat, but States frequently said that it was merely for the purpose of manoeuvres. It was difficult to establish clearly whether there was a threat or not.

61. Mr. SANDSTRÖM would have liked the article to refer to imminent employment of force, but that would

restrict the idea of threat too much. Nor did he care for the word "explicit", since it was rare for a State to threaten explicitly. He could support Mr. Scelle's proposal that the words "*menace caractérisée*" be used, or could support the text as it stood.

62. Mr. HSU felt that the Commission would not succeed in qualifying the word "threat"; it was extremely difficult to do so without giving rise to misunderstanding.

*It was decided that the word "threat" be retained.*

63. The CHAIRMAN asked whether the Commission desired to qualify threat by using the words "*menace caractérisée*", proposed by Mr. Scelle and supported by Mr. Sandström, alternatively he suggested "unequivocal threat". He did not like the word "unequivocal" in a legal document, but it expressed the same idea.

64. Mr. CORDOVA thought that manoeuvres were a disguised threat. What the Commission wished to do was to distinguish threat and classify it among crimes even in cases in which the threat was disguised, that was to say to enable a threat to be identified as such even when it had the appearance of some other act.

65. Mr. SPIROPOULOS was in principle opposed to use of the word "threat", but he felt that the paragraph must be left as it was. It would be for the judge to decide whether there was a threat within the meaning of paragraph 1; the Commission should not try to introduce any fresh idea.

66. Mr. YEPES approved of the article as it stood. Any attempt to clarify its meaning would narrow the idea of threat; it was for the judge to decide.

*It was decided that the text be left as it stood without qualification of the word "threat".*

*Paragraph 1 was unanimously adopted.*

67. Mr. SPIROPOULOS requested the Commission to study the commentary on paragraph 1.

#### *Commentary on paragraph 1*

68. Mr. SPIROPOULOS explained the principles he had followed in drafting the commentaries accompanying the statements of the various crimes enumerated on his second report. He had confined himself, in accordance with United Nations practice, to mentioning only essential texts.

69. In the case of paragraph 1, he had given in sub-paragraph (a) the text he had originally proposed, in order to enable governments to follow the development of the Commission's work.

70. In sub-paragraph (b) he had, in conformity with General Assembly resolution 177 (II), mentioned the article of the charter of the International Military Tribunal corresponding with the crime. It should be noted however that the report expressly mentioned<sup>2</sup> the fact that the Commission had considered at its second session that it was not bound to indicate the exact extent to which the various Nürnberg Principles had been incorporated in the draft code. Any attempt to do so would have met with considerable difficulties since there were divergencies of opinion as to the scope of some of those

principles. Only a more or less general reference to the corresponding Nürnberg Principles had been considered possible. In that connection he reminded the Commission that some of the criticisms related to the formulation of the crimes, and others to the manner in which the Nürnberg Principles had been interpreted. A further criticism had been that the formulation was incomplete. Since there were differences of opinion he had felt it necessary to indicate in a general manner the relation between the various paragraphs of the code and the Nürnberg Principles upon which they were based.

71. Sub-paragraph (c) mentioned certain basic documents essential to an understanding of the origin of the definitions given in the paragraph.

72. Sub-paragraph (d) stated who the possible perpetrators of the crime were. At its second session the Commission had taken the view that there were international crimes the perpetrators of which could be either individuals or State officials. That was laid down for example by the Genocide Convention. In the case of other crimes however, such as crimes committed by an armed force, the international responsibility of State officials only was engaged.

73. He had followed the same system, *mutatis mutandis*, in the commentary on the other paragraphs of article I.

74. Mr. HSU proposed that sub-paragraph (a) of the commentary be deleted. He thought that repetition of a text which had been amended might be interpreted as the expression of a minority view.

75. Mr. SPIROPOULOS agreed to the deletion. He had given the former texts for comparison with the new ones in order to follow United Nations practice, but it was true that governments desiring to study the stages in the preparation of the draft code could refer to the first report.

76. Mr. ALFARO admitted that the uninformed reader might wonder whether the text given in the various sub-paragraphs (a) of the commentary was not intended as a variant of the text immediately preceding it. On the other hand it was very valuable for the purpose of reconstructing the development of the Commission's work to have the two texts given together. Their juxtaposition would show what amendments had been made following the decisions of the Sixth Committee.

77. To avoid any ambiguity the words "The text originally proposed by the Rapporteur was as follows" should be substituted for the words "The text proposed by the Rapporteur reads as follows".

78. Mr. HSU felt that juxtaposition of the two texts might lead to misunderstanding. Governments could refer to the original text.

*It was decided by 5 votes to 3 with 2 abstentions that the various sub-paragraphs (a) in the commentary be deleted.*

*Sub-paragraphs (b), (c) and (d) were adopted but renumbered (a), (b) and (c).*

#### *Paragraph 2 and note*

79. Mr. YEPES suggested that, in order to keep to the terminology of Article 51 of the Charter, the words

<sup>2</sup> In the "Introduction to the draft text", para. 5 (b) (ii).

“national or collective self-defence” be replaced by “individual or collective self-defence”.

80. Mr. SPIROPOULOS saw no objection to the alteration which would apply equally to paragraph 1.

81. Following a remark by the CHAIRMAN, Mr. Yepes agreed that the word “national” was clear. He would not press the matter, though he thought it would be preferable to bring the draft code into line with the text of the Charter.

82. Mr. SCELLE, Mr. AMADO and the CHAIRMAN said they preferred the word “national”.

*Paragraph 2 and the note thereto were adopted unchanged.*

### *Paragraph 3*

83. Mr. SANDSTRÖM proposed that the words “coming from the territory of another State” be deleted, since by definition an incursion by armed bands implied crossing the frontier. If those words were retained, they might be interpreted as putting the responsibility on the State from whose territory the armed bands came.

84. Mr. AMADO thought that Mr. SANDSTRÖM’s point was all the more apt in that the incursion might be made by sea and have been prepared within the territorial waters of the State invaded.

85. Mr. CORDOVA was anxious that the international aspect should be retained in the statement of the crime; he proposed that the words which it had been suggested be deleted be replaced by the words “organized on territory under the jurisdiction of another State”.

86. Mr. AMADO pointed out that armed bands would not necessarily come from an adjoining country. They might come from a more distant country and cross the adjoining country. He suggested that the deletion be limited to the words “coming from the territories” and that the word “of” be replaced by the word “from”, so that the text would read “armed bands from another State”.

87. Mr. SANDSTRÖM thought the wording proposed by Mr. AMADO did not cover every case. Armed bands from another State might consist of nationals of the State invaded.

88. Mr. CORDOVA pointed out that frequently revolutionaries took refuge abroad. Mexican revolutionaries for example might prepare a revolutionary attack on Mexico in the United States. That would not be an international crime. Before there could be an international crime, there must be an incursion by foreigners. An operation carried out for revolutionary purposes by nationals of the invaded State did not meet that definition.

89. Mr. SPIROPOULOS recalled that, at its second session (56th meeting), the Commission had drawn a distinction in international crimes between crimes which could be committed by individuals, crimes which could be committed equally by private individuals and by State officials, and crimes which could be committed only by State officials. With regard to the crime referred to in paragraph 3, a minority group among the members of the Commission had taken the view that foreign officials allowing armed bands to invade an adjoining territory were

solely responsible. But after discussion, the Commission had agreed that international responsibility applied not merely to the foreign officials, but also to the members of the armed bands themselves. It was at liberty now to restrict responsibility to the former category. But the officials of the foreign State could already be held responsible under the crime defined in paragraph 11.

90. Mr. ALFARO agreed that the expression “coming from the territory of another State” was not altogether precise. But it was important to stress that before there was international crime, an incursion must be organized abroad.

91. He was therefore prepared to agree to the phrase which it was proposed to delete being replaced by the words “organized in another State”.

92. Mr. CORDOVA thought the object of the incursion must be taken into consideration. If the object aimed at was a domestic one, there was no international crime, even where the incursion was organized abroad. If an armed band of Mexicans coming from the United States crossed into Mexican territory with the intention of overthrowing the Government, there was both organization abroad and crossing of the frontier, but there was no international crime, at any rate so far as the members of the armed bands were concerned. The only persons on whom international responsibility could be placed would be the United States agents who had allowed the incursion to be organized.

93. The Commission must therefore find some wording which took account of those factors; he suggested the following “coming from outside and acting according to an international political purpose”.

94. Mr. KERNO (Assistant Secretary-General) said that the drafting difficulty arose from the fact that the Commission was trying to cover both the responsibility of the individuals taking part in an incursion and the responsibility of the authorities who tolerated such an incursion. Under the proposed text as it stood, the incursion alone appeared to be punishable. Thus if responsibility were to be extended to foreign agents, the use of the word “organized” was not sufficient, since the word “incursion” would still be the key word.

95. Mr. SPIROPOULOS pointed out that, while it was true, as Mr. Kerno had said, that only the members of the armed bands were internationally responsible under paragraph 3, paragraph 11 made the State officials taking part in the organization of the incursion punishable also.

96. When the Commission had examined the war crime of aggression, it had agreed that only high officials were responsible, and that the ordinary soldier, as a member of a mobilized force, could not be held responsible. But the members of an armed band effecting an incursion were volunteers. The Commission had established their responsibility.

97. As for the example given by Mr. Córdova of a Mexican band with a political aim of a domestic nature coming from the United States and making an incursion into Mexican territory, in his opinion that was not altogether a domestic matter. It had its international

aspect — the fact that a foreign territory was selected as a base for the action, and that generally speaking, the moment such an action reached a certain amplitude, it was not feasible without the consent of the authorities of the territory where it was organized. The individuals taking part in such an incursion could therefore be regarded as foreign residents. The Commission was at liberty to restrict responsibility exclusively to State officials, but the members of such bands, inasmuch as they were free to act and caused a threat to peace owing to the international conflicts which might arise from their action, should be held internationally responsible.

98. Mr. CORDOVA was convinced by the explanation given by Mr. Spiropoulos that incursions taking place for a political purpose of a purely domestic nature also constituted a danger to peace.

99. Mr. SANDSTRÖM explained that his proposal was not meant to alter the interpretation given a year previously of the crime defined in paragraph 3. On the contrary, his idea had been to prevent any possibility of the formula being interpreted in any other way.

100. After some discussion, in which the CHAIRMAN and Mr. SPIROPOULOS took part, Mr. SANDSTRÖM withdrew his request for the deletion of the words "coming from the territory of another State".

#### *Commentary on paragraph 3*

*In accordance with the decision taken previously (see supra, para. 78), sub-paragraph (a) was deleted.*

#### *Sub-paragraph (b)*

101. Mr. LIANG (Secretary to the Commission) thought the word "invasion" should be replaced by "incursion".

*It was so decided.*

102. Mr. SANDSTRÖM thought it would be desirable to mention in sub-paragraph (b), in addition to the crime formulated in paragraph 11, the crimes mentioned in paragraphs 4 and 5. The latter paragraphs would after all apply if for example an incursion were organized to foment civil strife in another country.

103. Mr. KERNO (Assistant Secretary-General) remarked that the crime specified in paragraph 3 could only be committed by members of the armed band. Nevertheless, leaving aside the provisions of paragraph 11, those same acts could involve the responsibility of the authorities of a State, since they constituted the crimes defined in paragraphs 4 and 5. As far as he was concerned, he was not sure that it was necessary to mention those paragraphs in the commentary.

104. Mr. SANDSTRÖM said that he had merely wished to put the question; he did not press it. He had wanted to point out that there could be overlapping between the crimes.

105. Mr. SPIROPOULOS agreed. It would be for the judge to rule whether paragraphs 4 and 5 constituted grounds for indictment in specific instances.

*Sub-paragraph (b) as amended was adopted.*

#### *Paragraph 4*

106. Mr. CORDOVA wondered whether the word "organized" should be kept. He was thinking of the

case of a politician who enjoyed considerable prestige in his own country and who fomented civil strife from abroad by broadcasting.

107. Mr. SPIROPOULOS pointed out that the word "organized" did not appear in the original text. It had been inserted to show that the activity of one or two individuals was not sufficient to constitute crime.

108. Mr. YEPES thought the word "organized" should be kept. The Commission could not make every act committed abroad by an individual against his government an international crime. He mentioned the example of wireless broadcasts or newspaper articles. Such acts were purely national crimes.

109. Mr. FRANÇOIS read out article 4 of the Draft Declaration on the Rights and Duties of States on which paragraph 4 was based, and which also contained the idea of organization.<sup>3</sup>

110. Mr. HSU criticized the expression "fomenting civil strife". It struck him as incomplete. Suppose there was already civil strife and activities were organized to keep it alive. He mentioned his proposal of the previous year that subversive acts be included in the definition of the crime (A/CN.4/R.1)<sup>4</sup>. At least subversive support given by foreign countries to civil strife could be made punishable — the kind of support covered by the English expression "aiding and abetting".

111. The CHAIRMAN pointed out that the expression "fomenting" was taken from article 4 of the Draft Declaration on the Rights and Duties of States; he thought it could not be changed.

112. Following a discussion in which Mr. SPIROPOULOS, Mr. YEPES and the CHAIRMAN took part, Mr. HSU reiterated his view that all cases of subversive action were not covered by the expression in question.

113. Following a proposal by Mr. SPIROPOULOS and an exchange of views in which the CHAIRMAN and Mr. SANDSTRÖM took part, *it was decided to leave paragraph 4 in abeyance*, and to take it up again after reference to the summary records of the meetings at which the text had been formulated.<sup>5</sup>

#### *Commentary on paragraph 4*

*In accordance with the decision taken previously (see supra, para. 18), sub-paragraph (a) was deleted.*

#### *Sub-paragraph (b)*

114. Mr. CORDOVA, supported by Mr. SPIROPOULOS, proposed the insertion of the whole of article 4 of the Draft Declaration on the Rights and Duties of States in the sub-paragraph under consideration.

*It was so decided.*

*Sub-paragraph (c) was adopted.*

#### *Paragraph 5*

115. Mr. KERNO (Assistant Secretary-General) said he would prefer the simpler version proposed originally

<sup>3</sup> General Assembly resolution 375 (IV) of 6 December 1949.

<sup>4</sup> See *Yearbook of the International Law Commission, 1950*, vol. I, 60th meeting, footnote 15.

<sup>5</sup> See summary record of next meeting, paras. 1–21.

by the Rapporteur, In an attempt to define "terrorist activities", which was a current expression, terms like "a state of terror" had been used. Such expressions would merely embarrass a judge.

116. Mr. ALFARO pointed out that the new version was taken from the 1937 Geneva Convention for the Prevention and Punishment of Terrorism.<sup>6</sup>

117. The CHAIRMAN said that that was an explanation, though not a justification.

118. Mr. ALFARO agreed that the proposed expression was too literary.

119. Mr. SPIROPOULOS suggested reverting to the original text.

120. Mr. SANDSTRÖM pointed out that the wording of the text would have to be altered to bring it into line with the text of the preceding paragraphs.

121. Mr. YEPES thought that the purpose of terrorist activities should be defined. It would be advisable to specify that the reference was to terrorist activities pursued for some international purpose.

122. The CHAIRMAN suggested that the Rapporteur be asked to make the necessary drafting changes.

*Subject to the necessary drafting changes, it was decided to replace paragraph 5 by the original text proposed by the Rapporteur.*

#### *Commentary on paragraph 5*

*In accordance with the decision taken previously (see supra, para. 78), sub-paragraph (a) was deleted.*

*Sub-paragraph (b)*

*Sub-paragraph (b) was adopted.*

*Sub-paragraph (c)*

123. Mr. CORDOVA suggested replacing the words "crime No. 5" by the words "this crime".

*Sub-paragraph (c) was adopted as thus amended.*

*Sub-paragraph (d)*

124. The CHAIRMAN said that the Rapporteur would make such changes in the text as were called for by the changes already decided upon in parallel instances.

*Sub-paragraph (d) was adopted, subject to the necessary drafting changes.*

#### *Paragraph 6*

125. Mr. FRANÇOIS thought the wording of the paragraph too comprehensive. It would be well to make it clear that the authorities of a State would be held responsible for violation of such treaty obligations only when armaments exceeded the limits laid down in the treaty. The proposed formula might be interpreted as also covering violation arising from the level of armaments being too low. He cited as an example the North Atlantic Treaty.<sup>7</sup> A case of that type would not constitute a war crime, and such action should not be denounced under paragraph 6.

126. Mr. SPIROPOULOS agreed that failure to execute an undertaking to maintain armed forces at a certain

<sup>6</sup> League of Nations document C.94.M.47.1938.V.

<sup>7</sup> Signed at Washington, 4 April 1949.

level might have consequences of a negative kind for the maintenance of peace. Nevertheless, it could not be regarded as an international crime.

127. After a discussion in which Mr. KERNO, the CHAIRMAN and Mr. AMADO took part, Mr. SANDSTRÖM proposed that the addition, at the end of the paragraph, of the words "restrictions as to".

*It was so decided.*

*Paragraph 6 was adopted as thus amended.*

*Sub-paragraphs (i), (ii), and (iii) were adopted.*

#### *Commentary on paragraph 6*

*In accordance with a decision taken previously (see supra, para. 78), sub-paragraph (a) was deleted.*

*Sub-paragraph (b)*

128. Mr. LIANG and Mr. SPIROPOULOS suggested that the words "the above" be inserted before "violation of treaty obligations".

*Sub-paragraph (b) was adopted as thus amended.*

*Sub-paragraph (c)*

129. The CHAIRMAN remarked that the text would have to be altered in the same way as all the other parallel texts.

*Sub-paragraph (c) was adopted, subject to the necessary drafting changes.*

The meeting rose at 1.5 p.m.

## 90th MEETING

Monday, 28 May 1951, at 3 p.m.

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*Chairman:* Mr. James L. BRIERLY

*Rapporteur:* Mr. Roberto CORDOVA

#### *Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. A. E. F. SANDSTRÖM, 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.

**Preparation of a draft code of offences against the peace and security of mankind: report by Mr. Spiropoulos (item 2 (a) of the agenda) (A/CN.4/44) (continued)**

ARTICLE 1 (continued)

Paragraph 4 (resumed from the preceding meeting)

1. The CHAIRMAN opened that two matters had been left over from the previous meeting, namely, the amendment proposed by Mr. Hsu<sup>1</sup> and the question of retaining the word "organized". For his part, he failed to see why the word "organized" had been included in the definition of the crime in question.
2. Mr. FRANÇOIS recalled that Mr. Hudson had pressed for the inclusion of the word "organized" and that in paragraph 11 of document A/CN.4/SR.57 it was stated that: "the Commission decided by 7 votes to 5 that the fomenting of civil war in another State by private individuals acting on their own account should not be considered a crime under international law under the terms of the draft code". Hence the fomenting of civil strife was a crime under international law only where the activities had been organized, not where individuals had acted solely on their own account.
3. It was possible to visualize the need for the activities to have been organized in the case of toleration, but when it came to the question of undertaking or encouragement, it was not necessary. It was sufficient that the activities had taken place. In any case, as regards undertaking, it was sufficient if there had been isolated activities.
4. He proposed the division of the article into two parts, one of which would deal with undertaking and encouragement, and the other with toleration.
5. Mr. AMADO saw the point. All that was required was to show that toleration was another aspect of the crime. He suggested the following wording: "the undertaking or encouragement by the authorities of a State of activities intended or calculated to foment civil strife in one territory of another State, or the toleration of organized activities for that purpose".
6. Mr. FRANÇOIS was agreeable to the suggested wording.
7. Mr. YEPES read out article 4 of the Declaration on the Rights and Duties of States: "Every State has the duty to refrain from fomenting civil strife in the territory of another State and to prevent the organization within its territory of activities calculated to foment such civil strife."
8. That article seemed to him to support the views expressed by Mr. François. The two questions were, in fact, entirely separate. He suggested that the article of the Code be brought into conformity with article 4 of the Declaration on the Rights and Duties of States.
9. Mr. SPIROPOULOS asked why. The Commission was engaged in drafting a penal code and that was something quite different from the Declaration.
10. Mr. AMADO summed up the position: Mr. François had suggested that undertaking and encouraging the fomenting of civil strife could not be treated on the

same footing as the toleration of such activities. Only as regards the latter did it appear necessary for there to have been organized activities before there could be any question of a crime. Mr. Yepes had pointed out that the draft Declaration on the Rights and Duties of States made a similar distinction. It had been suggested that those two aspects of the crime be covered by the same article.

11. Mr. SPIROPOULOS agreed that there was a difficulty. He agreed to draft a new text.

12. Mr. KERNO (Assistant Secretary-General) recalled that the question of fomenting civil strife had been discussed by the Commission at considerable length during preceding sessions. It had been held at the time that the draft Declaration on the Rights and Duties of States should certainly be taken into consideration, but that there were other things as well. The Commission had come to a decision on the matter the previous year, and he was not sure whether that fact had been fully taken into account when it came to a different decision.

13. The CHAIRMAN did not think the Commission had as yet made any fundamental change in its decision of the previous year.

14. Mr. ALFARO said that Mr. François had pointed out that there were three ways of fomenting civil strife: first, by the authorities of a State undertaking activities to foment it; secondly, by their encouraging such activities, and thirdly by their toleration of activities already organized. In the first case, it was pointless to include the word "organized", since it was the authorities that had undertaken to foment civil strife and that was sufficient to establish the crime. By adopting the wording suggested by Mr. François, the Commission had clarified the text and had made it possible for everyone to appreciate the varying degrees of gravity attached to such activities, the most serious being the undertaking of them, and the most venial that of toleration.

15. The CHAIRMAN noted that the Commission was prepared to leave it to the Rapporteur to draft a text in the light of what had been said during the discussion.

16. Mr. HSU suggested that the point he had raised be settled first, and if the Commission agreed to his proposal, that the Rapporteur be asked to prepare a text, taking into account the points raised by Mr. François and himself.

17. The amendment he had suggested was very simple. It consisted in adding two or three words to the text and in saying: "to foment, aid or abet civil strife..." and to add to sub-paragraph (b) of the commentary a sentence explaining why aiding and abetting had been included. Actually, if the fomenting of civil strife was to be prohibited, that was to say, initiating action to that end, aiding and abetting must also be prohibited. As such action was calculated to prolong or intensify the strife, it was just as serious.

18. The CHAIRMAN wondered why Mr. Hsu had given such a restricted meaning to the word "foment", which was a general term and included "aiding and abetting". "Fomenting" did not only mean taking the initiative and the word "aiding and abetting" did not add anything to the meaning of the word "foment".

<sup>1</sup> Summary record of the 89th meeting, para. 110.

19. Mr. SCELLE pointed out that the Chairman's statement applied equally to the French word "*foment*" which likewise had a wider meaning, and aiding and abetting were fomenting. It was only the act of toleration that was not covered by "*foment*" in French.

20. Mr. ALFARO was also of the opinion that the word "foment" covered aiding and abetting. It might be stated in sub-paragraph (b) of the commentary that aiding and abetting were also covered by paragraph 4.

21. Mr. HSU accepted Mr. Alfaro's suggestion and withdrew his amendment.

*Paragraph 4 was adopted.*

*Paragraph 7*

22. Mr. FRANÇOIS recalled that the Commission had originally based its discussion on the text submitted by the Rapporteur: "The annexation of territories in violation of international law".<sup>2</sup> Some members, of whom he was one, had considered the text too vague and Mr. Sandström had suggested the wording: "The annexation of territories by the threat or use of force for an aggressive purpose, or otherwise, in a manner incompatible with the right of a State to independence".<sup>3</sup>

23. As the Commission had been unable to agree on a text, it had left it to its Drafting Committee to prepare a new one. That spoke of "the forcible annexation of territory . . ." (A/CN.4/R.6) which he did not like at all. Actually the forcible annexation of territory did not necessarily constitute a violation of international law. Moreover, annexation without the use of force was not always legitimate, and he wondered whether the Commission would not do better to go back to the wording originally proposed by its Rapporteur, perhaps amended as Mr. Sandström had suggested.

24. Mr. YEPES also considered that the notion of the condemnation of all annexation, whether by force or otherwise, should be included in the article, since its scope could not be restricted just to forcible annexation. In fact, under that definition, the Anschluss would not be a crime. The disguised annexations, of which examples were to be found practically all over eastern Europe, were crimes against peace, and were one of the causes of the prevailing state of insecurity throughout the world. A clearer and more general wording should be used.

25. Mr. CORDOVA supported the proposal to revert to the Rapporteur's original formula.

26. Mr. AMADO asked the members of the Commission to re-read paragraph 7 very carefully. It was worded as follows: "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 régime". The previous year, the acts by which annexation was brought about were made criminal, and it had been seen how difficult it was to achieve precision on that point. That was why the Commission had said "acts directed toward . . .". It was a question of the processes by means of which a State directed its activities towards the achievement of that result. He felt

that a careful reading of paragraph 7 would dissipate the objections that had been raised.

27. Mr. FRANÇOIS suggested the wording "the annexation of a territory", and the addition at the end of the proposed text of the words "in violation of international law".

28. Mr. AMADO was reluctant to admit that any annexation could take place in conformity with international law.. The previous year, the Commission had hesitated to go so far; but it was a point of minor importance and he would accept the amendment proposed by Mr. François.

29. Mr. CORDOVA considered that the only objection to Mr. François' proposal was that it did not lay sufficient stress on the fact that recourse to force should constitute a factor in the crime. He proposed: "forcible annexation . . . in violation of international law". He would not like to see the Commission abandon that stipulation in its definition of the crime.

30. The CHAIRMAN said that the proposal met Mr. Yepes' objection. The Anschluss had been brought about after the fomenting of internal strife. It constituted a violation of international law, but there had been no forcible intervention.

31. Mr. YEPES proposed the wording: "Acts by authorities of a State resulting in or directed toward the annexation, by means contrary to international law and to the Purposes of the United Nations, of territory belonging to another State". Article 2, paragraph 4 of the Charter, in fact, provided that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations".

32. Mr. SCELLE was of the opinion that, if the Commission accepted Mr. Yepes' proposal, Mr. Córdova might be told that the word "forcible" was redundant. Actually, if it were said that annexation must be carried out in conformity with international law, forcible intervention was *ipso facto* excluded. The text as it stood reading: "resulting in or directed toward annexation. . .". met with his approval. It was in any case only a drafting matter.

33. Mr. ALFARO supported Mr. Yepes' proposal. The word "forcible" was redundant in the present state of international law as the words "in violation of international law and contrary to the Purposes of the United Nations" implied nothing more nor less than the use of force.

34. Mr. SANDSTRÖM thought it was a mistake to say "resulting in" in connexion with forcible annexation, since the acts in question were contrary to international law. On the other hand one could quite well say "directed toward the forcible annexation".

35. Mr. KERNO (Assistant Secretary-General) observed that Mr. Yepes proposed to say: "annexation by means contrary to international law and to the Purposes of the United Nations". But the Purposes of the United Nations formed part of international law. It would

<sup>2</sup> A/CN.4/25, *Appendix*, Crime No. VII.

<sup>3</sup> Summary record of the 58th meeting, para. 89.

therefore be necessary to say: "and notably to the Purposes of the United Nations".

36. The CHAIRMAN observed that he did not like the word "notably".

37. Mr. CORDOVA did not believe that international law had anything to do with the Purposes of the United Nations. The latter took political decisions and, in taking them, was not obliged to conform to international law.

38. The CHAIRMAN remarked that those words appeared in the Charter.

39. Mr. CORDOVA replied that the Charter did not compel the Security Council to take account of international law.

40. Mr. KERNO (Assistant Secretary-General) was entirely opposed to that view. The question had been discussed at length at San Francisco. A perusal of Article 1 of the Charter would show that the Purposes of the United Nations were: "... and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace". Consequently, efforts should in every case be made to bring about the adjustment or settlement of disputes or situations in conformity with international law. That was one of the basic principles of the United Nations.

41. Mr. SCALLE observed that the General Rapporteur was inclined to express heretical views.

42. Mr. LIANG (Secretary to the Commission) asked whether it was necessary to broaden the formula. If reference was to be made to the Charter it was the Principles rather than the Purposes that should be cited. Article 2 of the Charter contained a number of definite obligations and it was to that Article that reference should be made. It would therefore, be better, he thought, either to say nothing at all or to mention international law and the Purposes and Principles of the United Nations.

43. Mr. YEPES agreed to the wording "the Purposes and Principles of the United Nations".

44. Mr. ALFARO pointed out, in connexion with Mr. Kern's statement, that he had been a member of the Sub-Committee entrusted with the drafting of the first two chapters of the Charter. In conjunction with one or two others of his colleagues, he had been obliged to fight the legal experts of the big Powers to get them to agree to a reference to international law. He had drawn attention at the time to the fact that the words "international law" and "justice" did not appear anywhere in the Dumbarton Oaks Proposals, except in the title of the International Court of Justice and in the draft submitted for paragraph 7 of Article 2 of the Charter. But in the latter case the words had been used not to draw attention to the importance of international law and justice, but to restrict their scope in the interests of national jurisdictions. The Chinese delegation had been the first to propose the insertion of a reference to international law and justice in the first two chapters of the Charter. Later the representatives of Belgium and Chile and he himself had proposed the insertion of the words

"justice and international law" at the beginning of Article 1 so that they might cover all the provisions of that article. That proposal had not been adopted. All that they had been able to obtain had been the insertion of those words in the provision concerning the settlement of disputes.

45. He considered that the Commission should adopt Mr. Yepes' proposal and Mr. Liang's suggestion.

46. The CHAIRMAN noted the Commission's approval and added that it was a drafting matter and should therefore be left to the Rapporteur.

#### *Commentary on paragraph 7*

##### *Sub-paragraph (a)*

*In accordance with the decision taken at the previous meeting<sup>4</sup> sub-paragraph (a) was deleted.*

##### *Sub-paragraph (b)*

47. Mr. FRANÇOIS asked what were the various international instruments prohibiting the forcible annexation of territory. In any case the sub-paragraph should be amended so as to bring it into line with the new wording of paragraph 7, where the word "forcible" did not appear.

48. Mr. YEPES recalled that article 9 of the draft Declaration on Rights and Duties of States provided that: "Every State has the duty to refrain from resorting to war as an instrument of national policy and to refrain from the threat or use of force against the territorial integrity or political independence of another State, or in any other manner inconsistent with international law and order".

49. He said that the same notion was contained in Article 2, paragraph 4 of the Charter.

50. He considered that sub-paragraph (b) should be kept, the word "forcible" being deleted.

51. The CHAIRMAN was of the opinion that, if the word "forcible" were deleted, the scope of the provision would become too wide. There might be legal annexations carried out by virtue of a treaty.

52. Mr. SPIROPOULOS proposed the deletion of the sub-paragraph.

53. Mr. SANDSTRÖM would prefer the commentary to follow what was said in the text.

*Sub-paragraph (b) was deleted.*

##### *Sub-paragraph (c)*

54. The CHAIRMAN pointed out that the sub-paragraph contained a formula that had been modified<sup>5</sup> and it would be amended accordingly.

*Sub-paragraph (c) was adopted, subject to the necessary amendment.*

#### *Paragraph 8*

55. The CHAIRMAN remarked that in sub-paragraph (b) of the commentary it was stated that the text of the paragraph was in substance identical with that of the Convention on Genocide. He asked the Rapporteur whether there was any important divergence.

<sup>4</sup> Summary record of the 89th meeting, para. 78.

<sup>5</sup> Summary record of the 89th meeting, para. 25.

56. Mr. SPIROPOULOS replied that the Convention on Genocide did not differentiate between acts committed by the authorities of a State and acts committed by private individuals. The terms of its article IV were not, however, reproduced word for word.

57. Mr. YEPES proposed the addition of the word "political" to the enumeration. He considered that persecution on political grounds was just as serious as on any other.

58. The CHAIRMAN observed that if the Commission were to add that word, it would re-open a controversy that had already been fought out in the General Assembly.

59. Mr. KERNO (Assistant Secretary-General) recalled that the mere fact that the Commission had, the year before, contemplated the inclusion in its Code of the crime of genocide, had given rise to criticism in certain quarters. It had been asserted that, in including in the Code provisions from the Convention on Genocide, the intention had been to prejudice the Convention.

60. Should the Commission decide to include the concept of genocide in the Code, it should consider whether it was advisable to make radical changes in the subject matter of the Convention. As the members would remember, the original text of the Convention spoke of political groups. After lengthy and heated discussion it had been decided to delete the word "political".

61. Mr. YEPES announced that, in the light of that explanation, he would withdraw his amendment, though he was still sorry the word "political" did not appear in the Convention.

62. Mr. ALFARO observed that the proposed text reproduced the text of the Convention. The result might be prejudicial to that instrument. He proposed that the enumeration of acts in paragraph 8 be replaced by the words: "Acts of genocide as defined in the Convention on Genocide." That wording would leave the Convention unimpaired.

63. Mr. SANDSTRÖM supported Mr. Alfaro's proposal. Its adoption would obviate the risk that the draft Code might involve a change in the wording of the Convention on Genocide.

64. Mr. AMADO contended that such a course was out of the question in the case of a criminal code. The Commission must specify the acts which it covered. He remembered having fought for the inclusion of the enumeration at the previous session. In his opinion the enumeration of acts described as crimes was essential.

65. Mr. LIANG (Secretary to the Commission) recalled that during the discussion on Mr. Spiropoulos's first report (A/CN.4/25) the previous year, numerous suggestions had been put forward as to the way in which genocide should be dealt with in the Code. He himself had suggested that, instead of inserting the Convention in the text of the Code, it should be referred to in the preamble, as follows: "The act of genocide forms the subject of another Convention." In his opinion it would be better to adopt that course, in view of the difficulties in regard to the implementation of the Convention on Genocide; those difficulties might react on the implemen-

tation of the Code, should it contain the same provisions. He had been supported in that opinion by Mr. Spiropoulos. The Commission had finally decided that the definition of the crime given in the Convention be inserted in the Code and it had become paragraph 8. The enumeration might be replaced by the reference proposed by Mr. Alfaro, but it was unusual to find, in a code, a reference to another document. He himself had never seen a code in which that had been done.

66. If the Commission decided to define the crime of genocide in the Code, it should adopt the text as it stood in the Report. If, on the other hand, the Commission preferred merely to refer to the Convention, it should do so outside the text of the Code itself.

67. Mr. CORDOVA stated that before he came to Geneva someone had mentioned to him that inclusion of the crime of genocide in the Code would affect the fate of the Convention. Certain countries would maintain that, since the crime of genocide had been incorporated in the Code, it was not necessary to ratify the Convention.

68. Mr. Alfaro's proposal did not solve the problem, since the same argument applied. By its reference to the Convention, the Code made genocide a crime, and ratification of the Convention was therefore unnecessary.

69. Technically speaking, the Code should not, in his opinion, refer to any other law or convention, since a code was, by definition, a collection of the provisions concerning a given subject.

70. He considered that the text should be adopted as it stood, or that the crime of genocide should be left outside the Code altogether.

71. Mr. SCALLE supported Mr. Liang's and Mr. Córdova's opinion. It was not customary for a penal code to refer to any other law. The Code should be complete in itself. He hoped that the Code would go further than the Convention on Genocide. The establishment of an international court, empowered to judge that crime, would mark a step forward compared with the Convention. He would prefer to keep the text as it stood.

72. The CHAIRMAN observed that the Commission had before it three alternatives: (1) to leave the text as it stood, (2) to adopt Mr. Alfaro's proposal for a reference to the Convention on Genocide, and (3) to omit the crime of genocide and say, in the commentary, that "no mention is made of it because it forms the subject of another convention".

73. Technically speaking, he considered it undesirable to refer to the Convention. He felt too that the third solution was also inexpedient, as the crime of genocide had given rise to more discussion than any other crime, and the Commission was trying to draw up a complete code.

74. He was of the opinion that the text should be left as it stood.

75. Mr. AMADO said he had been the first to raise objections to the proposed reference to the Convention, and he was glad to see that his colleagues had come round to his view.

*Paragraph 8 was adopted.*

*Commentary on paragraph 8**Sub-paragraph (a)*

In accordance with the decision taken at the previous meeting<sup>6</sup>, sub-paragraph (a) was deleted.

*Sub-paragraph (b)*

76. Mr. SPIROPOULOS suggested: "The text proposed by the Rapporteur is, with some difference of wording, identical with . . ."

78. The CHAIRMAN considered that the text should be left as it stood.

*Sub-paragraph (b) was adopted.*

*Sub-paragraph (c)*

79. The CHAIRMAN pointed out that sub-paragraph (c) merely repeated what was stated in the definition of the crime.

80. Mr. YEPES considered that it would be better to leave the text as it stood to keep it in harmony with the commentary on other crimes.

81. Mr. SPIROPOULOS drew attention to the fact that in the definition of the preceding crimes, the text spoke of: "Acts by the authorities of a State". In the case in point, it should be emphasized that acts by private individuals were also included.

82. The CHAIRMAN observed that in that particular case mention had already been made of "acts committed by the authorities of a State or by private individuals".

83. Mr. YEPES did not press his point.

*Sub-paragraph (c) was deleted.*

*Paragraph 9*

84. Mr. CORDOVA asked what was the difference between the crime under discussion and genocide, and why the word "inhuman" was added.

85. The CHAIRMAN replied that it was because that word appeared in the Nürnberg Charter (article 6, sub-para. (c)).

86. Mr. CORDOVA objected that, if the basis of the charge was the inhumanity of the act, it was the same as for the crime of genocide.

87. Mr. AMADO recalled that he had followed very closely the discussion on that point in the Sixth Committee. By genocide was meant the destruction of a group — the Jews for instance — as such. It was a *dolus specialis*. Paragraph 9, however, related to a political massacre without any question of a group.

88. Mr. FRANÇOIS noted that, in the definition of the crime, reference was made to paragraphs 1, 2, 5, 7 and 10. He wondered why no mention was made of paragraph 3, since inhuman acts could be committed in the event of incursion by armed bands.

89. Mr. SPIROPOULOS said that the text had been adopted by the Commission, and that he had merely inserted what the Commission had decided the previous year.

90. Mr. AMADO did not see why paragraph 3 need be cited in the text relating to the crimes in question, since that paragraph dealt with very different acts. It could, however, be done.

91. Mr. CORDOVA considered that it was no argument to say that the Commission had decided in a certain sense, and that that was the reason why paragraph 3 had not been cited. In the course of the incursions referred to in paragraph 3, individuals might certainly commit mass murder and he did not see why paragraph 3 should not be referred to in paragraph 9.

92. Mr. SPIROPOULOS was ready to refer to it if the Commission so decided.

93. The CHAIRMAN remarked that in the present text, the word "mass" applied only to murder. Hence the extermination, enslavement etc. of a single individual constituted a crime. In his opinion the word "mass" should apply to all the acts. He therefore proposed that, in the English text, the word "or" before "extermination" etc. be deleted and that, in the French, the words "*en masse*" be placed after the word "*déportation*".

94. Mr. LIANG pointed out that the word "mass" did not appear in article 6, sub-paragraph (c) of the Nürnberg Charter.

95. Mr. CORDOVA considered that, in order to give the crime its specific character, the word "mass" should be made applicable to extermination, enslavement and deportation as well. The proposed amendment was an improvement on the Nürnberg text.

96. Mr. AMADO objected that, if the text of articles already adopted were incorporated, it amounted to codification, and for that a precedent was required. Article 6 of the Nürnberg Charter showed why the word "murder" was not qualified, viz. because many isolated allied soldiers had, during the war, been put to death immediately after capture. However, he did not wish to press the point.

97. The CHAIRMAN observed that the Commission was not bound by the text of the Nürnberg Charter and could, if it so desired, retain the word "mass" in paragraph 9.

98. Mr. SANDSTRÖM thought that the concept "mass" was already contained in the words "any civilian population". There was, however, no reason why it should not be repeated.

99. Mr. CORDOVA said he had now changed his mind, since the acts considered as international crimes under paragraph 9 were acts committed against the civilian population. "Civilian" was the key word. It made no difference whether they were committed against only one person or against more than one person. In such circumstances the murder of a single individual constituted an international crime. The word "mass" was therefore unnecessary.

100. The CHAIRMAN repeated that he did not consider that the murder of one individual by another should be considered as an international crime.

101. Mr. AMADO observed that the murder of a leader was a sort of mass murder, since to kill the leader of

<sup>6</sup> Summary record of the 89th meeting, para. 78.

a group was tantamount to destroying the spirit of resistance within that group.

102. Mr. SCELLE was in favour of the deletion of the word "mass".

103. Mr. CORDOVA remarked that paragraph 9 was not applicable to murder committed by a single individual. That would not be a crime under international law, whereas it would be a crime under international law for a group to murder an individual for the reasons mentioned in paragraph 9. The wording should therefore be amended so as to make it clear that the reference was to "murder by groups, etc.". Where the act was committed by an individual it did not come under international law, but constituted a crime punishable by the law of the land.

104. The CHAIRMAN asked Mr. Córdova whether he considered lynching to be a crime under international law, and Mr. CORDOVA replied that, to constitute such a crime, the lynching would have to be committed on racial grounds.

105. Mr. SCELLE considered that the characteristic feature of genocide was its special motive and not the number of the perpetrators or their victims. What distinguished it from the crime of murder under national law was its motive, the fact that the victim or victims belonged to a particular group or race. Not to admit that point was to side with the criminal lawyers, who considered that genocide was already covered by the penal codes of the various countries.

106. The word "mass" in paragraph 9 did not appear to serve any useful purpose in regard either to the perpetrators or the victims of the crime.

107. Mr. SANDSTRÖM thought that the word "mass" should be kept, especially as it had been stated that the deletion of that word would make it possible to consider an individual murder as a crime under international law. But in the case in point, the Commission had in mind only such acts as had been perpetrated in Germany in the form of mass murder, mass extermination and mass enslavement. That was clearly apparent from the title of the draft code itself, "Offences against . . . mankind" (and from the expression "civilian population" in the paragraph in question).

108. Mr. SPIROPOULOS was in favour of deleting the word "mass". The Commission had been instructed to incorporate the Nürnberg principles in its draft, and the corresponding article of the Nürnberg Charter (article 6 (c)) did not use the word "mass". The Commission should, wherever possible, keep to the wording of the Charter.

109. As to whether the crime in question did or did not presuppose a plurality of victims, i.e., mass murder, the Commission was not called upon to express an opinion. It would appear, however, that all interpretations of the definition of the crime agreed that it was in fact a mass crime. That conclusion was confirmed by the use of the expression "civilian population". The Charter would have said "civilians" if its authors had wished to suggest a different interpretation.

110. However, the matter was not one for the Commis-

sion to decide. It had to follow the wording of the Nürnberg Charter without restricting the interpretation to which it might lend itself. It would be the responsibility of the Courts to interpret the paragraph.

111. Mr. CORDOVA was in favour of deleting the word "mass", but in that case thought that the word "civilians" should be substituted for "civilian population".

112. Mr. SPIROPOULOS considered that there was no reason why the Commission should draw up a text differing from that of the Nürnberg Charter, and admitting of a different interpretation.

*It was decided by 8 votes to delete the word "mass".*

113. Mr. SCELLE pointed out that no mention had been made of cultural genocide. If that omission was to be explained solely by the silence of the Convention on Genocide in regard to the matter, that reason was insufficient, and the Commission should not disregard one of the essential forms of genocide.

114. The CHAIRMAN pointed out that the omission was the result of a decision by the General Assembly and that it was to the General Assembly that the Commission would send its draft.

115. Mr. SCELLE maintained that the Commission was not necessarily bound to abide by such a decision. Moreover, the General Assembly could, if it so desired, take a second decision to the same effect.

116. Mr. AMADO recalled that the members of the General Assembly who had voted against the inclusion of cultural genocide had based their attitude on the fact that culture was already covered to a large extent by the word "religious". That made punishable such things, for instance, as outrages on sacred books, religious symbols, etc. Moreover, the word "cultural" was difficult to define.

117. Mr. SCELLE thought that the absence of such a word represented a serious omission. The word "religious" did not cover the same ground as the word "cultural". In France for instance there were two forms of education: State education and Catholic education. Were the freedom of Catholic education to be denied that would be genocide. In certain countries persecution of the Church had often been preceded by cultural persecution. The Commission was entirely free to take its own decisions and owed it to itself to make cultural genocide a crime.

118. Mr. YEPES stated that he was strongly in favour of the addition of the words "or cultural" after the word "religious".

119. Mr. ALFARO considered that there could be no objection to the inclusion of cultural genocide in the draft code, but wondered whether, from the point of view of form, an amendment consisting in the insertion of the words "or cultural", as proposed by Mr. Scelle, would meet the desired aim. Was it possible to treat certain acts committed against a particular category of schools — for instance, the prohibition to teach a certain language — on the same footing as the murder of a civilian population? Would it not be better to deal with the crime in question separately?

120. Mr. SCELLE admitted that it would not always be possible to link cultural genocide with a war crime, since such action was not necessarily connected with war.

121. Anyone conversant with the question of minorities would be astonished if the Commission disregarded that particular form of genocide, which was already covered in treaties on minorities and which might take the form of the prohibition of schools, the prohibition of a language or the prohibition of notices (for instance the prohibition by Italy of notices in German in the part of the Tyrol annexed after the First World War).

122. It appeared to him that the words "or cultural" would apply to all acts of that description.

123. Mr. AMADO referred to the difficulties with which immigration countries were faced. In Brazil, States like Santa Catarina and Rio Grande Do Sul had a very large German population, with its own schools and churches, that did not speak the language of the country. Very difficult problems had arisen, particularly after the rise to power of Hitler, which had created a real German peril for Brazil. Similarly the State of São Paulo had experienced a large influx of Japanese. It was difficult to induce foreigners to study the language of the country and to mix with the population.

124. In view of those difficulties, he regretted that he could not associate himself with the suggested amendment. The question presented special aspects for immigration countries, desirous of assimilating foreigners.

125. Mr. SCELLE considered that France was faced with a similar problem in regard to Poles in the north and Italians in the south-west. Large numbers of immigrants had settled there with their families, priests and teachers, and received the support of their Consuls. France hoped to be able to assimilate those foreigners, but did not wish to compel assimilation. As had been said in regard to minorities "immigrants could be enticed but not forced."

126. Mr. CORDOVA recalled that the mass immigration of foreigners from a neighbouring country had resulted in the loss to Mexico of territories such as Texas and New Mexico.

127. It was legitimate to enact legislation to compel immigrants to use the language of the country — that did not constitute persecution. What were punishable were inhuman acts more or less comparable to genuine crimes.

128. He did not see the necessity of including the words "or cultural" in paragraph 9.

129. Mr. SCELLE agreed that to compel immigrants, for instance, to use the language of the country before the Courts did not constitute persecution, but if the immigrants were forbidden to use their mother tongue in private conversation that would be persecution.

130. Mr. KERNO (Assistant Secretary-General) gathered from what Mr. Scelle had said that his desire was to safeguard the cultural heritage constituted by institutions, schools and language. It would be difficult to include that concept in paragraph 9, even with the addition of the words "or cultural" to the enumeration. Murder, extermination, enslavement etc. would still be

required, if the crime was to be punishable. It would not be easy, even by means of a broad interpretation, to bring, say, the prohibition of the posting of notices in a language other than the language of the country within the provisions of that paragraph.

131. When the draft Convention on Genocide was being discussed by the General Assembly, some delegations had proposed, as an addition to the definition of that crime, a sixth sub-paragraph, referring to cultural genocide. The Commission had, however, just adopted paragraph 8, which included the definition of genocide, without modifying it in that sense.

132. Mr. SCELLE said that he had no objection to the transfer of his amendment from paragraph 9 to paragraph 8.

133. Mr. AMADO explained that the objections he had raised to the amendment proposed by Mr. Scelle had been due, in part, to the fact that he had thought that the amendment referred to paragraph 8. He would have no objection to the inclusion of the words "or cultural" in paragraph 9.

134. Mr. SPIROPOULOS said he would abstain from voting, but wished to draw the Commission's attention to the desirability of also inserting in paragraph 9 the words "national" and "ethnic" which appeared in the Convention on Genocide (article II). Paragraph 8, which followed the wording of the Convention, included those two words, whereas paragraph 9, which corresponded to the Nürnberg Charter, did not. He considered, however, that they would be equally appropriate in paragraph 9.

135. Mr. SCELLE thought that the Commission might vote on the word "cultural" and leave it to the Rapporteur to add the words "national" and "ethnic".

*It was decided by 6 votes to add the words "or cultural".*

136. Mr. SANDSTRÖM recalled that, at the previous session, he had proposed the deletion of the last clause of paragraph 9, viz. "when such acts are committed in execution of or in connexion with the offences defined in Nos. etc.". He did not understand the reason for that stipulation, and the Sixth Committee had subsequently discussed the point at length.

137. The CHAIRMAN was of opinion that the deletion of the word "mass" made it necessary to retain those reservations, since otherwise a whole series of domestic crimes would be converted into crimes under international law.

138. Mr. SPIROPOULOS recalled that at the previous session the Commission had considered that the acts referred to in paragraph 9 were crimes under international law only if they were connected with war crimes or crimes against peace.<sup>7</sup>

139. In the Sixth Committee, the French delegation had criticized that view as being too narrow.<sup>8</sup> It had considered that there could be a crime against mankind in time of peace just as well as in time of war. If he

<sup>7</sup> See summary record of the 59th meeting.

<sup>8</sup> See A/C.6/SR.232, paras. 63-69.

remembered rightly no other delegation had supported that view.

140. Mr. SANDSTRÖM, taking as an example the "cultural" crime, wondered why that crime could only be directed against mankind when it was connected with war.

141. Mr. AMADO confirmed the account given by Mr. Spiropoulos of the discussion in the Sixth Committee. The French delegation had in fact advocated the widening of the concept of crime under international law. The Commission was not, however, entrusted with the preparation of a general international penal code. The acts covered by the draft code were "offences against the peace and security of mankind", that was to say, they belonged to a specific category.

142. Mr. SANDSTRÖM explained that he had not intended to submit a formal proposal.

*Paragraph 9 was adopted as amended.*<sup>9</sup>

*Commentary on paragraph 9*

*In accordance with the decision taken at the previous meeting,<sup>10</sup> sub-paragraph (a) was deleted.*

*Sub-paragraph (b)*

143. The CHAIRMAN pointed out that on page 44, line 3, the text should read "characterizes as crimes", and that No. 3 should be added to the enumeration of paragraphs in line 5.

144. Mr. HSU pointed out that as a result of the amendments made to paragraph 9, it no longer entirely corresponded to the "crimes against humanity" of the Nürnberg Charter.

145. The CHAIRMAN and Mr. SPIROPOULOS replied that the word "correspond" did not mean "to be identical with".

*Sub-paragraph (b) was adopted.*

*Sub-paragraph (c)*

*Sub-paragraph (c) was deleted.*

*Paragraph 10*

146. Mr. YEPES drew attention to the fact that, in a communication sent to the Commission at the time of its second session, the United Nations Educational, Scientific and Cultural Organization (UNESCO) had asked it to define as a crime under international law the systematic destruction of works of art and historic monuments. The Commission had replied to UNESCO at the time that its request had arrived too late for action to be taken during the second session, but that it recognized that such acts should be punishable internationally. It would consider the matter in the course of its second reading of the Draft Code of Offences against the Peace and Security of Mankind.

147. Mr. KERNO (Assistant Secretary-General) pointed out that UNESCO's request had been recorded in paragraph 153 of the Commission's report on its second

session<sup>11</sup>, and in paragraph 6 of the introduction to the Draft Code of Offences against the Peace and Security of Mankind, contained in Mr. Spiropoulos's second report (A/CN.4/44). The Commission should therefore discuss the question. But the protection of historic monuments had no connexion with the murder of a civilian population. It might possibly be included in paragraph 10 or be dealt with in a separate paragraph.

148. Mr. SPIROPOULOS thought that, although that particular instance of violation of the laws of war fell within the general concept of a war crime, it need not be mentioned specifically in the draft code.

149. In reply to a question by the CHAIRMAN, Mr. SCALLE pointed out that the acts referred to in the UNESCO communication were in fact connected with a state of war since UNESCO had specified "during a conflict". UNESCO attached great importance to the problem. It had convened a conference of curators of museums and of architects, who had studied practical means of preserving works of art, monuments, archives etc. The Commission should try to meet UNESCO's request, perhaps by referring to the relevant provisions of the The Hague and Geneva Conventions.

150. Mr. YEPES suggested that the following might be added to paragraph 10: "including the systematic destruction of artistic, historic, scientific or religious monuments or works of art".

151. Mr. SCALLE considered that that might be making too much of one particular point.

152. Mr. SPIROPOULOS referred the members of the Commission to the statements in sub-paragraphs (b) and (c) of the commentary on paragraph 10. The destruction of historic monuments etc. was undoubtedly prohibited by the laws and customs of war and Greece was keenly interested in their preservation. But how could a departure from the principle adopted by the Commission of keeping to a general definition be justified?

153. He therefore proposed that consideration be given to the possibility of drawing up a special Convention on the subject in which UNESCO was interested. That was the only means of dealing with the matter satisfactorily. If it were taken up in paragraph 10, it might well be asked why other even more important questions, such as the destruction of whole towns, had not been mentioned in that paragraph.

154. He considered that the Commission should not deal with the question in that or any other paragraph of the draft Code.

155. Mr. SANDSTRÖM thought that, without changing the paragraph itself, the Commission might meet UNESCO's wishes by enlarging on the explanation given by Mr. Spiropoulos in the accompanying commentary.

156. Mr. SPIROPOULOS pointed out that UNESCO's communication had already been referred to in the last paragraph of the introduction preceding the text of the draft Code.

<sup>9</sup> See summary record of the 91st meeting, paras. 19-86.

<sup>10</sup> Summary record of the 89th meeting, para. 78.

<sup>11</sup> *Official records of the General Assembly, Fifth Session, Supplement No. 12 (A/1316)*. Also in *Yearbook of the International Law Commission, 1950*, vol. II.

157. Mr. SCILLE did not think the Commission could tell UNESCO that it would undertake the preparation of a convention on the subject. That should be done by experts in those fields.

158. He supported Mr. Sandström's proposal. By adopting it the Commission would show UNESCO how it had dealt with its request.

159. Mr. SPIROPOULOS replied that it had not been his intention that the Commission should draw up such a Convention.

160. Mr. CORDOVA thought the Commission would do better to mention the crimes referred to by UNESCO in the commentary. That would show that the Commission was anxious to defend humanity against certain acts prejudicial to its heritage and that it had gone so far as to consider the destruction of irreplaceable monuments as a special crime no less serious than the others.

161. Mr. YEPES associated himself with Mr. Sandström's proposal. In his opinion the following paragraph should be added to the commentary: "The Commission considered whether special reference could be made in this article to the destruction of artistic, historic, scientific or religious monuments, but decided that the question was already covered by the terms of the paragraph itself".

162. Mr. SPIROPOULOS considered that some reference should nevertheless be made to UNESCO's request, otherwise the reader would be puzzled. He would, however, prefer to do it in the introduction instead of in the commentary on paragraph 10.

163. Mr. AMADO pointed out that the list of war crimes would cover pages and pages. That was why the Commission had abandoned the idea of an enumeration that could never be exhaustive. As regards the question of the protection of historic monuments, the Commission consisted of legal experts entrusted with the preparation of a penal code. It did not need to go out of its way to be polite to agencies which approached it with requests.

164. Mr. SANDSTRÖM admitted that, when he drew up his proposal, he had forgotten that UNESCO's request had already been mentioned in the introduction.

*The Commission decided not to deal with the question of protection of historic monuments either in paragraph 10 or in the relevant commentary, but to ask the rapporteur to expand the passage on that question in the introduction to the draft code.<sup>12</sup>*

*Paragraph 10 was adopted.*

165. Mr. LIANG (Secretary to the Commission) pointed out that the expression "laws or customs of war" was worded somewhat differently in the Nürnberg Charter and in its counterpart, the Charter of Tokyo. The former spoke of a "war of aggression" (article 6 (a)) while the latter used the term "a declared or undeclared war of aggression" (article 5). It was clear that the word "war" must be interpreted in its strictly legal sense in both documents.

166. The only place in which the word "war" appeared in the Commission's draft was in paragraph 10. It was necessary to specify that the laws and customs of war would also be applicable in the case of any other illicit use of force. That would avoid giving the impression that the Code drawn up by the Commission was only applicable in the case of a state of war in the restricted legal sense of the word, and hence that there could be no war crimes in the case of the illegal use of force.

167. In other words it should be made quite clear that the laws and customs of war applied even when a state of war existed only in the material sense of the term.

The meeting rose at 6 p.m.

## 91st MEETING

Tuesday, 29 May 1951, at 9.45 a.m.

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*Chairman:* Mr. James L. BRIERLY

*Rapporteur:* Mr. Roberto CORDOVA

*Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCILLE, 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.

**Preparation of a draft code of offences against the peace and security of mankind: report by Mr. Spiropoulos (item 2 (a) of the agenda) (A/CN.4/44) (continued)**

ARTICLE I (continued)

*Commentary on paragraph 10*

*In accordance with the decision taken at the 89th meeting (para. 78), sub-paragraph (a) was deleted.*

*Sub-paragraph (b)*

1. Mr. FRANÇOIS said that the view expressed in paragraph (b) of the commentary had been supported at the second session by the Chairman, by Mr. Spiropou-

<sup>12</sup> See *infra*, summary record of the 92nd meeting, paras. 108-112.

los and by other members. Yet others, however, had taken a different view, including Mr. Hsu, Mr. Alfaro and Mr. Scelle, the last-named having stated at the sixtieth meeting that the "regulations applicable to an international police force were a guarantee of peace and security. The Commission, which had to discuss rules for safeguarding peace and security, must establish rules for the use of such a force".<sup>1</sup>

2. In order to take account of those divergent opinions, the Commission should request the Rapporteur to tone down sub-paragraph (b) a little by using some such wording as: "Although it may be doubted whether such acts actually affect the peace and security of mankind, the mere fact that they figure among the crimes enumerated in the Nürnberg Charter is a sufficient reason for including them in the present draft Code."

3. Mr. SPIROPOULOS thought that a question of principle was involved. Violations of the laws or customs of war did not affect the peace and security of mankind. They were only committed during a war.

4. Replying to an observation by Mr. François, Mr. Spiropoulos said that "peace and security" formed an entity, a single concept. "Security" should not be considered separately.

5. He did not wish to press the point but must repeat that, in his view, acts committed in violation of the laws or customs of war could not occur in peace time.

6. The CHAIRMAN thought that the commission of war crimes could be said to make it more difficult to restore peace and to put peace further off.

7. Mr. SPIROPOULOS felt that such an argument was too broad, but he would not oppose the wording suggested by Mr. François.

*It was decided to substitute the text proposed by Mr. François for the last three sentences of sub-paragraph (b).*

*Sub-paragraph (c)*

8. The CHAIRMAN observed that the Commission had already examined sub-paragraph (c) to some extent at its previous meeting. He thought that the expression "practically possible" should be replaced by "practicable" or "possible".

*Sub-paragraph (c) was adopted with that amendment.*

9. Mr. YEPES and the CHAIRMAN called attention to Mr. Liang's suggestion made at the previous meeting (para. 165) that it should be stated whether the term "war", as used in paragraph 10, was intended in the legal or the physical sense.

10. Mr. SPIROPOULOS thought that the Commission should not decide at that stage whether violations of the laws of war were a crime only in the case of "formal" war or also in war in a wider sense of the term. The question was important but it lay outside the framework of the draft code. All that the Commission had to do was to enumerate offences against the peace and security of mankind, not to specify the cases to which the Code would apply.

11. Mr. FRANÇOIS fully agreed with the view expressed by Mr. Spiropoulos. Civil war raised a similar

problem. The Red Cross Conventions signed at Geneva on 12 August 1949 contained detailed provisions as to which of their stipulations applied in the event of civil war.<sup>2</sup> That was a complex question which the Commission could not settle.

12. Mr. LIANG (Secretary to the Commission) said he had not proposed that the question be settled in the Commission, but he thought that the use of the word "war" in paragraph 10 was not in conformity with the terminology adopted in the preceding paragraphs. It would be preferable to use the expression "employment of armed force", as in paragraph 1. The formula proposed in the draft code would appear to concern war in the legal sense of the term, i.e., the formal state of war. The present wording might suggest that a formal state of war would have to exist before paragraph 10 became applicable.

13. Mr. HSU said his first impression was that no action need be taken on Mr. Liang's suggestion, and that paragraph 10 applied to all categories of war whether declared or not. But since there was a doubt in the minds of certain members, the Commission should explain in its commentary that the paragraph applied to any employment of force.

14. Mr. SANDSTRÖM thought that paragraph 10 should be left as it stood.

15. It could be explained in the commentary that the expression used was traditional and without prejudice to the field of application of the rule. He suggested the following text:

"The Commission has used the expression 'violation of the laws or customs of war' because the rules to which it refers are known under that denomination, and without entering into the question to what extent these rules are applicable in different cases of armed conflict."

16. Mr. SPIROPOULOS requested Mr. Liang to propose a text on which the Commission could take a decision.

17. Mr. ALFARO agreed with the observations of Mr. Liang and Mr. Hsu. It was clear that violations of the laws or customs of war would not be permitted in any circumstances. The rule applied to all types of war, whenever armed force was employed, even in the case of self-defence or coercive measures decided on by the Security Council. By establishing that rule the Commission would avoid the suggestion that paragraph 10 applied only to aggressors and to the vanquished.

18. Mr. LIANG (Secretary to the Commission) proposed that the following text from article 2 of the general provisions of the Geneva Conventions of August 1949 be reproduced in the commentary:

"... the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."

<sup>1</sup> Summary record of the 60th meeting, para. 11.

<sup>2</sup> See article 3 of each of the four Conventions in *The Geneva Conventions of August 12, 1949*, Geneva, 1949.

*It was decided to insert an addition, based on the above text, to the commentary on article 10.*

*Paragraph 9 and commentary (reconsidered)*

19. Mr. SPIROPOULOS recalled his reference at the previous meeting (para. 139) to the views expressed by the French delegation in the Sixth Committee. After the meeting Mr. Scelle had stated that he had not realized at the time that, owing to the reference it contained to paragraphs 1 and 2, which concerned acts of war, paragraph 9 was also connected with war.

20. He would like the decision taken by the Commission to be based on a full knowledge of the facts. The question was whether the crime referred to in paragraph 9 was a crime against humanity, like genocide, which could be committed in time of peace as well as in time of war, or, on the contrary, whether paragraph 9 referred to crimes against peace and to war crimes, as stated in subparagraph (b) of the commentary.

21. In a recent communication, which had not been circulated to members of the Commission, the World Jewish Congress maintained that the crimes against humanity, referred to in paragraph 9, must be interpreted in a broad sense as comparable to genocide. He, personally, had thought that that crime should be understood in a restrictive sense; but, as rapporteur, he felt bound to draw the Commission's attention to the question and might even support a contrary view if one emerged from the discussion.

22. If the Commission did not go into the question, the French delegation to the Sixth Committee might justifiably claim that the Commission had disregarded its observations.

23. Mr. SCELLE admitted that, owing to an oversight, he had not realized at the previous meeting that the reference at the end of the paragraph to various other paragraphs of the draft code restricted the crime defined in paragraph 9 to times of war.

24. Like the French delegation to the Sixth Committee, he was in favour of deleting the reference, which made the article cumbersome without modifying it, and he therefore proposed the deletion of the final clause, beginning with the words "When such acts are committed".

25. He was grateful to Mr. Spiropoulos for bringing up the matter. At the previous meeting (para. 136 *et seq.*) several members had also supported the deletion of the reference to other paragraphs.

26. Mr. KERNO (Assistant Secretary-General) thought that the proposed deletion raised important problems.

27. The Commission had already deleted from paragraph 9 the word "mass", so that any isolated murder committed for specific political or other reasons now came under paragraph 9. If the Commission now eliminated the connection between that crime and the others referred to in the draft code, it would make, for example, the persecution of a single individual belonging to some political party or other a crime against humanity and, hence, an international crime.

28. In his view, such a proposal was Utopian; it would

be going too far; it would actually establish a form of individual genocide; it would transfer to the draft Code the national penal code itself.

29. Mr. SPIROPOULOS did not think the proposed deletion would involve that danger. The authority that had interpreted the text of the Nürnberg Charter, referred to in paragraph 9, was the International Military Tribunal itself, which had always considered that the acts in question must be committed against substantial fractions of the civilian population. The text contained the words "civilian population", not the one word "civilians".

30. However, it was true that the proposed deletion would not be in the nature of a mere drafting change. It might jeopardise the success of the entire draft code. Did the Commission consider that the commission of inhuman acts by a State against its own nationals was a *crime under international law*? At the London Conference, where the Nürnberg Charter had been drawn up, it had been generally agreed that, to justify action by the International Military Tribunal, the acts in question, for example the persecution of Jews, must be committed in time of war. It was only when they were connected with war that they became punishable. At all events that had been the view upheld by the United Kingdom and United States delegations.

31. If the Commission omitted the reference in the commentary to various other paragraphs, it would be creating a crime which was not intrinsically different from genocide. The new concept in the Convention on Genocide was that the latter protected nationals against acts by the State to which they belonged. It was for that reason that certain delegations were chary of ratifying the Convention.

32. The Commission must consider whether it wished to create a new crime, a crime affecting an entire civilian population, and not a form of genocide affecting a specific group. It must bear in mind the fact that in the General Assembly many delegations might refuse to accept the draft Code as a whole for the sole reason that it contained that new crime.

33. Although its decision was not final, by deciding to delete the expression in question the Commission would jeopardize the adoption of the draft Code.

34. Mr. SCELLE understood the fears expressed by Mr. Kerno, but thought they were exaggerated. Mr. Kerno's view resembled that of the criminal jurists, who thought that there was a difference between crimes according as they were committed in time of war or not.

35. While the Commission had deleted the term "mass" it had nevertheless retained "extermination", "enslavement", "deportation" and "persecution", which were acts that could not be committed by a single individual, but presupposed a certain complicity on the part of the State authorities. In addition, before there could be crime there must be specific and explicitly stated motives, so there could be no confusion with simple crimes that would be covered by an ordinary penal code.

36. In order to avoid the risk of such an interpretation the wording of paragraph 9 itself might perhaps be amended by the insertion of the expression "against

a group or against members of a group"; but the reference to various other paragraphs would involve the judge in the study of related cases, which seemed pointless. It was preferable to make the acts referred to in paragraph 9 a specific crime, related to the crime of genocide.

37. Mr. SANDSTRÖM thought that there were two aspects to the question, namely, what elements were required to constitute the crime and what were the required conditions to enable such a crime to be dealt with by a court.

38. It was the second of those two aspects that was taken into consideration in the Nürnberg Charter, which stated, *inter alia*, that "the following acts . . . are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility" (article 6, second para.), and that the crimes against humanity must have been "in execution of or in connexion with any crime within the jurisdiction of the Tribunal" (article 6, end of sub-para. (c)). Those texts provided that the jurisdiction of the Tribunal operated only where there was a connexion. But the crime could exist even without such a connexion.

39. He hoped that distinction would satisfy the requirements of both logic and expediency.

40. Mr. SPIROPOULOS thought that the Commission should not forget that the draft Code was meant to be applied by an international court.

41. With regard to the expression "political . . . grounds" contained in the text of paragraph 9, political considerations had been excluded from the Convention on Genocide. But they were now reappearing in the draft Code, and with wider implications, because paragraph 9 was not restricted to crimes of destruction committed against groups "as such". Failing the reference to the other articles in the draft Code, all inhuman acts committed on political grounds became crimes under international law. It might therefore be said that imprisonment was an inhuman act. A host of cases might be referred to the international courts. The question was whether governments were really prepared to take that risk.

42. It might also be observed that, since the draft Code was not final, the Commission might wish to ascertain the reactions of governments. Both solutions might perhaps be submitted for their consideration, namely, the deletion of the reference to other crimes, which was supported by Mr. Scelle, and the retention of that reference, which other members favoured.

43. Mr. ALFARO said that the Commission should always remember that its task was not to codify all crimes under international law, but to prepare a draft Code restricted to offences against the peace and security of mankind. All the crimes that it codified must therefore be connected with war, with preparation for war or with the consequences of war.

44. The various members who had argued that paragraph 9 duplicated the Convention on Genocide overlooked the fact that the crime referred to in the draft

Code was connected with war. If the Commission omitted the reference to various other paragraphs from its commentary, all that would be left would be a category of crimes which was already covered by the Convention on Genocide or by the penal codes of various countries.

45. Mr. Scelle had rightly observed that the use of the terms "extermination", "enslavement", "deportation" and "persecution" showed that the crime referred to in paragraph 9 could only be committed with the intervention of the State authorities. But the Commission had already deleted the expression "mass", thereby making crimes committed by a single offender against a single victim punishable as crimes under international law. Had such a text been in force at the time of the assassination of Jaurès, that assassination would have been a crime under international law. The amendment to the commentary proposed by Mr. Scelle would be feasible if, at the same time, the word "murder" and the words "by private individuals" were deleted from paragraph 9. Such a deletion would obviate the possibility of the murder of the leader of a party by one of his fellow-citizens being classified as a crime under international law.

46. Mr. Scelle had also stated that one drawback to referring in the text of paragraph 9 to various other paragraphs lay in the fact that the judge would have to refer to the definitions of other crimes in order to assess acts covered by paragraph 9. In order to meet his objection it might be preferable, instead of mentioning the numbers of the paragraphs in which those crimes were defined, to explain the nature of the crimes briefly, or to give their headings.

47. In Mr. AMADO's view, the connection of the crime defined in paragraph 9 with certain others referred to in the draft Code was an element, the elimination of which would imply that any State which expelled foreigners could be arraigned before an international court. Expulsion would become a crime under international law. Only in the heat of discussion could it be maintained that the assassination of Jaurès or of Gandhi were crimes under international law.

48. He favoured the retention of paragraph 9 and the relevant commentary as they stood.

49. Mr. SCELLE was unconvinced by Mr. Amado's remarks. It was true that the Commission had been instructed to prepare a draft international penal code limited to offences against the peace and security of mankind; but if that code was to be complete, the Commission would certainly not hesitate to refer to international courts a whole series of crimes which at present came within the jurisdiction of national courts, such as white slave trafficking, counterfeiting, etc. The Commission had disregarded such acts only because they were outside its terms of reference, that was to say, because they did not endanger peace and security.

50. But peace and security might be endangered by crimes like those which he wished to see included in paragraph 9. He saw no need for stipulating a connexion between the crime defined in paragraph 9 and other crimes in the draft Code; nor was it necessary to limit

the competence of the international courts in the matter by postulating such a connexion.

51. The expulsion of foreigners without valid reason was admittedly an international act that might endanger peace; it might be punishable as a crime under international law, provided, of course, that it was attended by the racial or other motives referred to in paragraph 9.

52. He wondered why the Commission should have misgivings about recognizing the competence of the international courts in relation to such crimes. So far as concerned white slave trafficking or counterfeiting, the day would certainly come when those crimes would be referred to international courts.

53. Mr. HSU said that the question under discussion was important. In his view, crimes against humanity were also offences against peace. Genocide was itself an offence against peace.

54. In addition, there was no reference in paragraph 8 to the other paragraphs of article 1. Why then should they be mentioned in paragraph 9? The distinction drawn between paragraphs 8 and 9 was artificial. It was true that paragraph 8 had been taken from the Convention on Genocide, and paragraph 9 from the Nürnberg Charter; but the crimes referred to in those two texts were the same. Might it not be advisable to combine the two texts, especially now that Mr. Scelle had proposed the deletion of the reference to other crimes in paragraph 9?

55. He proposed that the Commission invite Mr. Scelle to prepare two texts, one as a substitute for paragraph 9 and the other a text combining paragraphs 8 and 9. The Commission could then take its choice.

56. Mr. AMADO said that the crime of genocide was a crime *per se*, irrespective of circumstances, when all of its constituent elements were present, for example, in the case of the destruction of a human group standing in the way of a dictator's ambition for a simple political party. That was a specific crime. The crimes referred to in paragraph 9 were already regarded as crimes *per se* under the penal codes of all countries, but became crimes under international law through being connected with acts calculated to disturb the peace. Thus, the expulsion of aliens was an act which any State was legally entitled to commit, but it became a crime under international law if carried out in connexion with the crimes defined in paragraphs 1, 2, 5, 7 and 10. He did not see how any confusion was possible.

57. Mr. SCELLE considered that paragraph 8 referred to genocide as such, whereas paragraph 9 referred to genocide "in small doses".

58. In view of the obvious connexion between paragraphs 8 and 9, which Mr. Hsu had just brought out, the commentary on paragraph 9 should contain a reference to paragraph 8.

59. In his view, it would be difficult to combine those two texts; paragraph 8 referred to the destruction of a group as such while paragraph 9 referred to inhuman acts resulting in genocide of more limited scope. The first of those texts concerned what might be called "Hitlerian crimes", while the second referred not to

ordinary crimes, but to the practice of genocide on a small scale by an individual.

60. Mr. Amado had referred to the legality of the right of expulsion, and expulsion clearly could not be confused with deportation which was included in the enumeration as an inhuman act committed against the civil population. But it might be pointed out that in many cases expulsion had given rise to international disputes and to proceedings before international courts or arbitral tribunals. Such acts might disturb the peace.

61. Mr. SPIROPOULOS thought that a discussion on the legality of expulsion had nothing to do with the text before the Commission.

62. Replying to Mr. Hsu's proposal that paragraphs 8 and 9 should be combined, he would point out that in drawing up his report he (Mr. Spiropoulos) had observed two guiding principles: first, that no existing text should be disregarded, which was why he had borrowed from the Convention on Genocide what had become paragraph 8 and secondly, that a place should be given to the principles of international law recognized in the Nürnberg Charter, in accordance with the General Assembly's instructions (resolution 177 (II), para. (b)). He had therefore thought it necessary to draft two separate paragraphs.

63. Despite the points in common which both texts obviously possessed, it should be noted that the first concerned the destruction of a group as such, while the second referred to inhuman acts against a population. Furthermore, the second of these crimes was very general and might include the first.

64. In one sense the Commission was already going further than the Nürnberg Charter, which had postulated a connexion between the crimes in question and a war of aggression, whereas, under paragraph 9, a connexion with the crimes named in paragraphs 3, 5 or 7 was sufficient.

65. In conclusion, he thought that paragraphs 8 and 9 should be left as they stood owing to the elements peculiar to each and to the different sources from which they had been taken. If governments were ready to broaden the categories of punishable offences, the Commission could review the question.

66. At the request of Mr. CORDOVA, the CHAIRMAN first put to the vote Mr. Hsu's proposal that paragraphs 8 and 9 be combined.

*Mr. Hsu's proposal was rejected by 7 votes to 3.*

67. The CHAIRMAN then put to the vote Mr. Scelle's proposal that the final clause of paragraph 9 be deleted.

*Mr. Scelle's proposal was rejected by 7 votes to 3.*

68. Mr. SCELLE proposed that, since the Commission had decided to keep the text of paragraph 9, paragraph 8, and even paragraph 4, should be included in the list, because there was a connexion between paragraph 9 and all the others. For the sake of simplicity, the final phrase, both of paragraph 9 and of sub-paragraph (b) of the commentary, might be reworded "in connexion with any of the crimes defined in this Code".

69. Mr. SPIROPOULOS accepted that proposal, except

for the reference to paragraph 8, since the act in question must be either the one referred to in paragraph 8 or the one referred to in paragraph 9.

70. Mr. AMADO said he would vote against any such amendment.

71. Mr. ALFARO observed that an amendment referring to all other offences would be inaccurate, since it would include paragraph 6.

72. Mr. SPIROPOULOS thought that there would be nothing illogical in visualizing a possible connexion between the offence defined in paragraph 6 and the acts covered by paragraph 9.

73. Mr. ALFARO repeated that, instead of merely referring to paragraphs by numbers, the Commission might mention by name the crimes defined in each of those paragraphs.

74. Mr. SCELLE thought that the text would then become too long. He preferred the wording "a crime covered by this code".

75. Mr. AMADO said he would vote against any such amendment, but wished to point out that the inclusion of paragraph 8 in the list would weaken the Convention on Genocide, which referred to a crime which could be committed independently of war. The linking of that crime with other offences against the peace and security of mankind reduced its scope.

76. The CHAIRMAN put to the vote Mr. Scelle's proposal that the reference to paragraph numbers be replaced by the phrase "in connexion with any of the crimes defined in this code".

*Mr. Scelle's amendment was adopted by 5 votes to 2, with 3 abstentions.*

77. Mr. AMADO noted that the Rapporteur had given way on the main point.

78. Mr. SPIROPOULOS pointed out that the result of the Commission's vote meant that the crimes covered by paragraph 9 could be committed in time of peace, since the general reference embraced paragraph 8 and the crimes defined in that paragraph could be committed in time of peace.

79. Mr. ALFARO observed that the Commission had decided to use the words "any of the crimes", from which it might be inferred that the crime defined in paragraph 6, which had no connexion with paragraph 9, was included in the list. He would prefer the phrase "in connexion with other crimes".

80. The CHAIRMAN thought it would be better merely to say "another crime", since one crime would suffice.

81. Mr. SCELLE thought that the Chairman was best qualified to decide that drafting point in an English text.

82. Mr. SANDSTRÖM did not see much difference between the text proposed by Mr. Alfaro and the other wording.

83. The CHAIRMAN said that the phrase might read "in connexion with another crime defined in this code".

84. Mr. YEPES observed that the French translation read: "*lorsque ces actes sont commis au cours de l'exécution ou à l'occasion . . .*".

85. Mr. SCELLE did not approve of the translation.

86. Mr. AMADO was in favour of keeping the present wording.

*The text originally read out by the Chairman was adopted.*

#### Paragraph 11

##### Sub-paragraph (a)

87. Mr. SANDSTRÖM asked whether it was suggested that a private individual could be an accomplice in a crime which, by definition, was committed by the authorities of the State.

88. Mr. SPIROPOULOS replied that the State authorities could certainly have the complicity of private individuals. For example, a bank might arrange a loan for the purpose of financing a war of aggression.

##### Sub-paragraph (b)

89. The CHAIRMAN doubted whether it was necessary to refer to "direct" incitement. It mattered very little whether the incitement was direct or indirect.

90. Mr. SPIROPOULOS observed that the word "direct" had been used in the Convention on Genocide at the instance of the General Assembly.

91. Mr. KERNO (Assistant Secretary-General) confirmed that article III (c) of the Convention on Genocide referred to "direct and public incitement", and that had been one of the difficulties in the way of ratification of the Convention by certain States. The words "and public" had been added to soften the effect of the word "direct".

92. The CHAIRMAN thought it was inconsistent to keep the word "direct" after dropping the word "public".

*Sub-paragraph (b) was adopted.*

*Sub-paragraph (c) was adopted.*

##### Sub-paragraph (d)

93. Mr. FRANÇOIS pointed out that in the Sixth Committee the provision contained in sub-paragraph (d) had been severely criticized by Mr. Röling, the Netherlands representative. Although he did not share Mr. Röling's view, he thought he should place it on record. Mr. Röling had considered that the Commission had gone much too far in the matter of complicity. The Nürnberg Charter had visualized only complicity in conspiracy and complicity restricted to the major war criminals. Again, the Nürnberg Tribunal had limited the application of article 6 (a) of the Charter. But the Commission had accepted the principle of complicity in all acts of aggressive war, so that soldiers might be accused of complicity in that crime. Mr. Röling's fear was that such a provision might make capitulation more difficult (A/C.6/SR.236, para. 32 *et seq.*).

94. The Commission probably did not intend to declare soldiers taking part in a war of aggression to be guilty of complicity; but he thought the Commission should say so in the commentary in order to dispel misgivings such as had been expressed by Mr. Röling.

95. Mr. SPIROPOULOS thought there was no room

for doubt. Mr. Hudson had raised the problem the previous year at the 47th meeting (paras. 74 *et seq.*). The Commission had never considered the question of the responsibility of the fighting men. In the commentary on paragraph 3 of the draft code it was stated, in relation to armed bands, that:

“While in the case of crime No. 1 the simple soldier would not be criminally responsible under international law, in case of invasion by armed bands of the territory of another State, any member of the band would be responsible. This difference of treatment is justified because, in the case of State action, it would go beyond any logic to consider a mere soldier as criminally responsible for an action which has been decided and directed by the authorities of a State, while in the case of armed bands, participation in them will result from the free decision of the individual members of the band.”

96. The question before the Commission was the question of complicity. Mr. Röling's view had been expounded in the Sixth Committee, but it had received no support. Mr. Amado had replied to it in an excellent speech (A/C.6/SR.237, paras. 54-58), as had also Mr. Robinson, the Israeli representative, who had pointed out that the question of complicity would be decided by the judge and that the text was in no way dangerous.

97. He saw no need to include a special comment on the point in the text, which was sufficiently clear as it stood.

98. The CHAIRMAN thought that Mr. Röling's fears were exaggerated.

99. Mr. SANDSTRÖM wished to put a question which had a bearing on the one he had asked at the beginning of the meeting, namely, whether the actual wording of paragraph 1 did not exclude complicity? Did the employment or threat of employment of armed force apply also to mere soldiers?

100. Mr. SPIROPOULOS replied that soldiers were instruments of war in the same way as a bomb and that there could be no question of complicity in their case.

101. Mr. ALFARO said that he clearly recalled Mr. Spiropoulos' reply to Mr. Hudson, when the latter had raised the question of soldiers and also of officers. It was mentioned in the record of the 47th meeting (paras. 74 *et seq.*). Moreover, the passage in the previous year's report referring to Nürnberg Principle VII read as follows:

“125. The only provision in the Charter of the Nürnberg Tribunal regarding responsibility for complicity was that of the last paragraph of article 6 which reads as follows: ‘Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such a plan.’

“126. The Tribunal, commenting on this provision in connexion with its discussion of count one of the indictment, which charged certain defendants with conspiracy to commit aggressive war, war crimes and crimes against humanity, said that, in its opinion, the

provision did not ‘add a new and separate crime to those already listed’. In the view of the Tribunal, the provision was designed to ‘establish the responsibility of persons participating in a common plan’ to prepare, initiate and wage aggressive war. Interpreted literally, this statement would seem to imply that the complicity rule did not apply to crimes perpetrated by individual action.

“127. On the other hand, the Tribunal convicted several of the defendants of war crimes and crimes against humanity because they gave orders resulting in atrocious and criminal acts which they did not commit themselves. In practice, therefore, the Tribunal seems to have applied general principles of criminal law regarding complicity. This view is corroborated by expressions used by the Tribunal in assessing the guilt of particular defendants.”<sup>3</sup>

102. All the Commission's views had been based on that statement. The fears expressed by Mr. Röling were exaggerated. But he (Mr. Alfaro) thought that a provision on the lines suggested by Mr. François might be inserted in the commentary.

*Sub-paragraph (d) was adopted.*

*Commentary on paragraph 11*

*Sub-paragraph (a) of the commentary*

*In accordance with the decision taken at the 89th meeting (para. 78), sub-paragraph (a) was deleted.*

*Sub-paragraph (b) of the commentary*

103. Mr. ALFARO pointed out that the question of soldiers had been specifically mentioned in the records of the previous session.

104. Mr. SPIROPOULOS said that the observations submitted at the London Conference in that connexion could be found in the historical part of his report on the formulation of the Nürnberg Principles (A/CN.4/22, para. 1 *et seq.*)

105. Mr. FRANÇOIS thought that that important matter should be mentioned in the commentary, which was perhaps rather too brief.

106. Mr. AMADO agreed with Mr. François.

107. Mr. FRANÇOIS quoted the actual words spoken by Mr. Röling at the end of his speech:

“I want to apologize for the frank criticism expressed here. I happen to have been involved in the trial of Major War Criminals which lasted more than two-and-a-half long years, in which years I realized daily what consequences might come forth from hastily adopted provisions. At such a time, Mr. Chairman, such conflicts go deep into the heart and it might be that remembering these conflicts I forgot the laws of courtesy for the sake of the laws of justice” (A/C.6/SR. 236, para. 35).

108. Mr. YEPES suggested that the rapporteur be asked to prepare a short text explaining the point of view of Mr. François.

<sup>3</sup> *Official Records of the General Assembly, Fifth Session, Supplement No. 12, (A/1316), p. 14. Also in Yearbook of the International Law Commission, 1950, vol. II.*

109. Mr. SPIROPOULOS thought that the best place for such an explanation would be in the commentary on paragraphs 1 or 2, since the commentary then being discussed by the Commission applied to a special case. He had already made a similar remark in connexion with paragraph 3.

110. Mr. SANDSTRÖM said that the report actually referred to that question in the commentary on paragraph 3; but he thought it preferable to add a comment under paragraph 11, since the present text of the commentary on that paragraph appeared to cast doubts on the commentary under paragraph 3.

111. Mr. SPIROPOULOS accepted the suggested amendment.

*It was so agreed.*

*Proposal by Mr. Yepes for two new articles*

112. Mr. YEPES proposed the adoption of the following two new articles:

“The dissemination in a State of false reports, or of faked documents falsely attributed to other States, where such dissemination has taken place with evil intent and has actually helped to disturb international relations”;

and

“All forms of propaganda, in whatever country, intended or calculated to cause or encourage any threat to peace, or to break that good understanding between peoples on which peace depends.”

113. He proposed those articles as constructive contributions to the framing of a code which should be as complete as possible. A code of offences against the peace and security of mankind would be incomplete if it did not contain a condemnation of propaganda carried out by means of false reports.

114. The two articles which he proposed were based mainly on resolution 127 (II) adopted by the General Assembly in 1947, and likewise on resolutions of the Inter-Parliamentary Union and almost all peace-loving associations in the world. World opinion was in favour of war propaganda being regarded as an international crime. Had not appeals to violence and attacks on certain States actually been made from the tribune of the General Assembly? Did not such an attitude, which was so common nowadays, constitute a direct attack on peace?

115. Public opinion expected the Commission to take courageous action for peace through law. A provision should be inserted in the code making propaganda by means of false reports a crime.

116. A study of the findings of the Nürnberg Tribunal would reveal the origin of his proposal.

117. Streicher, for example, had been convicted primarily of the crime of propaganda against peace. Crimes of that nature were more serious threats to peace than certain acts which had already been designated by the Commission as offences against peace.

118. Mr. SPIROPOULOS was opposed to the proposal, since the Code should not be made the means of turning

the Commission into a propaganda commission. He was afraid that the time had not yet come to insert such crime definitions in the Code. The Commission must be positive and realistic.

119. He agreed, of course, with Mr. Yepes that the acts covered by the articles proposed by him were reprehensible, but not all reprehensible acts could be inserted in the Code, otherwise it would not be a code of offences but an instrument of propaganda. Many authors had dealt with the question of offences against peace and, like the General Assembly, had opposed the inclusion of the acts covered by the articles which Mr. Yepes proposed.

120. He asked what was to be meant by “faked documents”.

121. Mr. YEPES replied that he had borrowed the expression from the General Assembly resolution. The documents referred to were deliberately falsified documents.

122. Mr. SPIROPOULOS added that the proposed provisions were also very vague and it would be going too far to insert them in a Code listing concrete acts.

123. He was in sympathy with the aims of the proposal, but did not see how the acts referred to would fit in with the other crimes which were of an entirely different nature.

124. Mr. YEPES said he had submitted those articles as a basis for discussion, since he wished the Commission to take a decision on those lines. The rapporteur could amend the text as he chose, so long as he left the substance of the articles intact. Mr. Spiropoulos had said that he did not wish the Commission to be turned into a propaganda platform. But to what propaganda was he referring? If it was anti-war propaganda, he himself was prepared to accept the description. If the reference was to any other form of propaganda he could not accept it.

125. Mr. SPIROPOULOS observed that Mr. Yepes had mentioned the case of persons who had been convicted for acts of propaganda, but the acts in question had provoked a war. Such acts were covered by article I, paragraph 2, of the draft code:

“The planning of or preparation for the employment, by the authorities of a State, of armed force against another State for any purpose other than national or collective self-defence or execution of a decision by a competent organ of the United Nations.”

But Mr. Yepes proposed that those crimes be included independently of a war of aggression, so that the examples given did not apply.

126. Mr. YEPES pointed out that the first of the two articles he had proposed referred to the disturbance of international relations.

127. Mr. AMADO said that the texts proposed by Mr. Yepes were expressions of his generous nature. Mr. Yepes wished to improve the world. The systematic list of international crimes drawn up by Mr. Pella also referred to war propaganda; but the difficulty, even with texts as well prepared as those of Mr. Yepes, was how to define the crime. It was not possible for a rec-

ommendation to be made in a code. In the age of broadcasting and television to define such crimes was a very risky matter. While paying tribute to the sentiment behind the texts, he could not give them his practical support.

128. Mr. SANDSTRÖM thought that the two articles submitted by Mr. Yepes represented an organic whole. They were designed to abolish propaganda which was harmful to peace. They were perhaps even intended to put an end to the "cold war". The underlying motive was a praiseworthy one. But he considered that the second of those articles went too far and was too vague. The subject was a very delicate one, and it would be very easy to come into conflict with freedom of speech and of opinion. He could not support the second article.

129. As to the first article, although it was more precise he did not think it would have much effect.

130. He would very regretfully be obliged to vote against both articles.

131. Mr. YEPES said that, as Mr. Amado had stated, he had submitted those articles in a constructive spirit. If discussion of his proposal would have the effect of delaying approval of the draft Code he would withdraw it.

#### ARTICLE II

132. Mr. FRANÇOIS approved in substance the amendments made by Mr. Spiropoulos; but he wondered whether article II should not be expressed in a different form. Article 8 of the Nürnberg Charter was in the nature of a warning. In the previous year's report Mr. Spiropoulos had quoted the following statement from the "United States Manual" of 1944 (A/CN.4/25, para. 114):

"Individuals and organizations who violate the accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defence or in mitigation of punishment."

The warning words used were "may be punished". Thereafter, in the same report (*Ibid.*, para. 117), Mr. Spiropoulos had quoted the United States draft of 1945, which had served as a basis for discussion at the London Conference, viz.:

"In any trial before an International Military Tribunal, the fact that a defendant acted pursuant to order of a superior or government sanction shall not constitute a defence *per se*, but may be considered either in defence or in mitigation of punishment if the Tribunal determines that justice so requires."

133. In his view, no note of warning was sounded in the rapporteur's text. Perhaps it could be reintroduced, in view of its great value, by inserting the word "only" before the words "if justice so requires". In that way the text would give a different impression. He considered that, as it stood, it was reassuring to anyone contemplating committing the crime.

134. Mr. SPIROPOULOS said that the text which

referred to moral choice had been criticized in the General Assembly. He had no objection to the proposal submitted by Mr. François, although it did not seem to him to alter the sense of the text.

135. Mr. SCALLE recalled that the previous year at its 47th meeting (para. 26) the Commission had, on Mr. Brierly's proposal, accepted the lack of moral choice as an extenuating circumstance, but the provisional French text used the phrase "*à titre d'excuse*" whereas in criminal law the word "excuse" had no meaning whatsoever. The phrase must either be "*circonstances atténuantes*" or "*excuse absolutoire*". "*A titre d'excuse*" was a purely moral expression which never appeared in a legal text. If the Commission was prepared to go as far as defence, i.e., acquittal, "*excuse absolutoire*" must be used in the French text.

*Mr. François' proposal was adopted.*

#### Commentary

*In accordance with the decision taken at the 89th meeting (para. 78), sub-paragraph (a) was deleted.*

#### Sub-paragraph (b)

136. It was pointed out that the words "article 7" should read "article 8".

137. Mr. FRANÇOIS observed that the word "corresponds" was very ambiguous, since there were substantial differences between the Nürnberg Charter and the text adopted by the Commission. He would prefer some other word.

138. Mr. SANDSTRÖM suggested the substitution of the words "differs from" for "corresponds to". It should, however, be remembered that the Charter was solely concerned with the major war criminals. The differences between the draft Code and the Charter were so great that the grounds for those differences should be explained. That was something the text submitted by Mr. Spiropoulos did not do.

139. Mr. SPIROPOULOS pointed out that the General Assembly had directed the Commission to formulate the Nürnberg Principles and to draft a code. But it was not always possible to formulate principles, since opinions on them differed. The Commission should indicate, as far as possible, the place given to the principles. But the question now was whether the difference could be shown. In the particular case under discussion the Commission should not include the principle contained in the Charter.

140. Mr. LIANG (Secretary to the Commission) thought that the question raised serious problems. The text adopted contained very brief comments. But the article had amended the Nürnberg Charter and the reason why that had been done must be stated. Given that premise, the articles of the Charter could be quoted and that would permit of comparison, though it would still be necessary to explain the change. It remained to be decided where the explanation should be inserted.

141. Mr. SPIROPOULOS thought it would be impossible to give the reasons for the change, since the extent of the difference between the Charter and the Code was unknown, certain crimes being combined and the arrange-

ment being different. But in the case in point the crime was the same.

142. It should be noted that the General Assembly had not accepted the Commission's interpretation, so that the question was whether the Commission should adopt its last year's interpretation. Which interpretation was the right one? The Commission itself could not answer that question. The text adopted the previous year made no reference to a defence. Before any comparison could be made and before it could be shown to what extent the interpretations differed, the correct interpretation must be ascertained.

143. The CHAIRMAN thought that the Commission should state in what particulars the text it proposed differed from the Charter. He himself thought the difference lay in the fact that the proposed text made it possible for a superior order to be a defence, while the Charter did not.

144. Mr. SANDSTRÖM thought that it was permissible to state that the article departed from the Charter, since the draft Code was a general document, whereas the Charter had been prepared for the trial of the major war criminals.

145. Mr. SPIROPOULOS considered that the principle adopted the previous year by the Commission was the same, but differently worded. The text which he was submitting was correct. It expressed the same principle in other terms. His previous text might equally well be adopted.

146. Several members of the Commission having proposed amendments to the text submitted in the report, the CHAIRMAN requested Mr. Spiropoulos to prepare a text for the following meeting in the light of those suggestions.

The meeting rose at 1 p.m.

## 92nd MEETING

Wednesday, 30 May 1951, at 9.45 a.m.

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Chairman: Mr. James L. BRIERLY

Rapporteur: Mr. Roberto CORDOVA

Present:

Members: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, 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.

**Preparation of a draft code of offences against the peace and security of mankind: report by Mr. Spiropoulos (item 2 (a) of the agenda) (A/CN.4/44) (continued)**

ARTICLE II (continued)

Commentary (continued)

Sub-paragraph (b) (continued)

1-2. The CHAIRMAN pointed out that the Commission had before it the following draft commentary submitted by Mr. Spiropoulos:

“The Commission, in its formulation of the Nürnberg principles, formulated the following principle on the basis of the interpretation given by the Nürnberg Tribunal to article 8 of its Charter:

In drawing up this article, the Commission has taken into account certain views expressed concerning the principle at the fifth session of the General Assembly and, in particular, the observations on the concept of ‘moral choice’, which was criticized for its lack of clarity.

“The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law provided a moral choice was in fact possible to him”.

(Principle IV. See the report of the Commission on its second session, A/1316, p. 12).

3. Mr. CORDOVA considered that the Commission should explain clearly why it had departed from the Nürnberg principles. Perhaps, however, the rapporteur had taken the view that, since the point had already been made clear in the second report to the General Assembly, the Commission's reasons were already known to the Assembly.

4. Mr. SPIROPOULOS replied that the conclusion of the Commission had been that it had not departed from the text of the Nürnberg Charter. Although he personally was of a different opinion, he had respected the Commission's decision.

5. Mr. KERNO (Assistant Secretary-General), supported by Mr. SANDSTRÖM, thought the text proposed for the commentary on article II met Mr. Córdova's point. It stated, in fact, that the Commission had formulated the following principle on the basis of the interpretation given by the Nürnberg Tribunal to article 8 of its Charter. The Commission therefore considered

that it had not departed from the principle, since what it had adopted appeared in the judgment of the Tribunal.

6. Mr. CORDOVA declared himself satisfied.

*Sub-paragraph (b) which, with the deletion of sub-paragraph (a), became the whole commentary, was adopted.*

#### ARTICLE II OF DOCUMENT A/CN.4/R.6

7. Mr. YEPES enquired the reason for the omission of the text of article II (A/CN.4/R.6): "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", which had been adopted by the Commission the previous year. (See *Yearbook of the International Law 1950*, vol. I, summary record of the 72nd meeting, footnote 3, for the text of doc. A/CN.4/R.6).

8. Mr. SPIROPOULOS replied that that article was embodied in the Convention on Genocide and that many jurists considered it to be absurd. If the text he proposed were left as it stood, it went without saying that the fact of acting as Head of State did not relieve the author of a crime under international law of his responsibility.

9. Mr. YEPES thought the article should be included, since the text of article II proposed in Mr. Spiropoulos' second report referred only to subordinates and by so doing automatically excluded Heads of States.

10. Mr. SPIROPOULOS pointed out that a Head of State received no orders and that the article applied only to persons who received orders.

11. Mr. YEPES thought that a Head of State might plead his office as a defence. The article adopted the previous year constituted a reaction against the theoretical or practical irresponsibility of Heads of States.

12. Mr. SPIROPOULOS considered that the decision taken the previous year had been an entirely provisional one and that, moreover, the Commission was not called upon to explain the reason why it had gone back on a provisional decision.

13. The CHAIRMAN said that the Commission was of course free to go back on its decision of the previous year but that Mr. Yepes wished to know why the article had been changed.

14. Mr. YEPES said he wished to know because the provision in question, a very important one, adopted by a large majority, had nevertheless ceased to appear in the draft.

15. Mr. SPIROPOULOS replied that the explanation was very simple. He had laid down a general principle at the beginning of the list of acts in the first sub-paragraph of article I and, that being so, it was clear that the list applied to everyone.

16. Mr. SCALLE enquired whether the Commission considered, as he did, that acts committed by a Head of State were covered by the preceding articles or whether it preferred a special reference to be made to them.

17. Mr. SANDSTRÖM agreed with Mr. Scelle that the acts were covered by article I but if, despite that, the Commission still wished to discuss the desirability of inserting an article to that effect, he would add that it

was desirable to do so, since the Nürnberg principles contained a similar provision.

18. The CHAIRMAN doubted whether the Code already covered the case of Heads of States.

19. Mr. SCALLE suggested that it should be stated in the commentary that Heads of States were included in the same way as anyone else.

20. Mr. CORDOVA thought that, by providing that all concerned were responsible, the article also provided for the responsibility of Heads of States. Since, however, there was a specific reference to persons acting pursuant to orders and since, moreover, the principle of the responsibility of Heads of States was a modification of international law as it existed prior to the Nürnberg trial, he thought the principle should be included in the Code.

21. Mr. YEPES said that Heads of States were traditionally regarded under international law as not responsible. Now that the Commission was going to change that tradition, it was desirable to stipulate in the Code that a Head of State could not plead in defence that his office relieved him of responsibility.

22. Mr. KERNO (Assistant Secretary-General) recalled that the General Assembly had encountered the same problem in connexion with the Convention on Genocide and had solved it by the inclusion of article IV:

"Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."

23. The term "*gouvernants*" (constitutionally responsible rulers) had been the subject of much discussion.<sup>1</sup> In the Code, the question had been approached from another angle. The words "by the authorities of a State or by private individuals" provided for the responsibility of Heads of States. A further question was whether the old concept of the immunity of a Head of State was thereby destroyed.

24. Mr. YEPES thought that the fact should be explicitly stated.

*It was decided to include in the Code article II from the previous year's draft (A/CN.4/R.6).*

*Article II accordingly became article III.*

#### ARTICLE III (numbering in document A/CN.4/44)

*Article III was adopted without comment.*

#### Commentary

*In accordance with the decision taken at the 89th meeting (para. 78), sub-paragraph (a) was deleted.*

*Sub-paragraph (b) was adopted without comment.*

#### ARTICLE IV

25. Mr. FRANÇOIS pointed out, in connexion with the words "to grant extradition", that in modern treaties the phrase "to hand over the accused" was often used. The tendency was to adopt a more liberal attitude in the case of war crimes and not to insist on

<sup>1</sup> See *Official Records of the General Assembly, Third Session, Part I, Sixth Committee*, pp. 302-305, 314-322, and 338-343.

the formalities of extradition. Certain States were prepared to hand over their own nationals, a thing they did not do in cases of ordinary extradition; for that reason he proposed the words "to hand over". The words were used in the Peace Treaties signed with the Balkan countries and with Finland after the second world war and in the Red Cross Conventions of 1949.

26. Mr. SPIROPOULOS recalled that the Convention on Genocide used the phrase "to grant extradition in accordance with...". He did not see any reason for substituting another expression. The concept of extradition was a classical one embracing the whole of the relevant procedure, and the Convention on Genocide was one of the most recent conventions to be adopted.

27. Mr. CORDOVA wondered whether the classical concept was valid in the absence of legislation.

28. Mr. SPIROPOULOS agreed that, in the absence of legislation, the expression "to hand over" would have to be used, but he did not like it. In any case, it was always extradition that was implied.

29. The CHAIRMAN thought that Mr. François' view was that, if the words "to hand over" were used, it would make it easier for certain States to comply with article IV. That was not, however, the case for the United Kingdom.

30. Mr. FRANÇOIS remarked that, on the contrary, it was so for the Netherlands.

31. Mr. SCALLE drew attention to a contradiction in article IV. The first paragraph of the article stated that crimes defined in the Code should not be considered as political crimes for the purpose of extradition, whereas the second paragraph stipulated that the States adopting the Code undertook to grant extradition in accordance with their laws and treaties in force. Certain laws might, however, forbid extradition. It would therefore be preferable to say "in accordance with the procedure provided for by their laws and treaties in force."

32. The article included substantive and formal provisions. The rule abrogating domestic legislation was a substantive provision. States could no longer refuse extradition on the plea that the crime was a political one. The provision that they should act in accordance with their laws and treaties, on the other hand, was a procedural one. It was of course a fine point.

33. Mr. SPIROPOULOS thought there must be a mistake. Apart from the restriction laid down in the first paragraph, the article placed a State under the obligation to grant extradition only if provided for under its own laws. States which did not surrender their own nationals were not obliged to permit their extradition. That was what was laid down in the Convention on Genocide.

34. Mr. SCALLE replied that in that case he no longer agreed. States adopting the Code must undertake to grant extradition, otherwise article IV no longer had any meaning. The article declared that the crimes defined in the Code should no longer be considered as political crimes and that States should accordingly grant the extradition of those guilty of such crimes. The crimes lost their political character. The Commission would

recall the dispute between Colombia and Peru which had been submitted to the International Court of Justice. One of the parties had pleaded, rightly or wrongly, that a tradition was growing up according to which when a political crime resulted in a terrorist act it thereby lost its political character. When the Convention on Genocide stipulated that the crime defined should not be considered as a political crime, it must mean that a State could not refuse to extradite the perpetrator of the crime on the grounds that the crime was a political one; otherwise the article was meaningless. If, therefore, paragraph 2 permitted a State to decline to grant extradition in cases where its laws forbade it, paragraph 1 no longer had any meaning.

35. The meaning of article IV was, he would repeat, that the State concerned was always under the obligation to grant extradition.

36. Mr. KERNO (Assistant Secretary-General) said that article VII of the Convention on Genocide embodied the same provision. States undertook not to consider genocide as a political crime for the purpose of extradition. "The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force." If his memory was not at fault, a discussion on similar lines had taken place in the Sixth Committee, and it had been agreed that the first paragraph concerned the substantive law while the second paragraph related mainly to procedure.<sup>2</sup>

37. Mr. SCALLE thought it impossible for the article to be interpreted in any other way. If it could be, then it should be deleted.

38. Mr. FRANÇOIS pointed out that, although a State could not in fact refuse to grant extradition on the plea that a political crime was involved, it might have other grounds for refusing extradition. It sometimes happened that the extradition of a State's own nationals was forbidden by the Constitution.

39. Mr. SCALLE did not agree with Mr. François. Either the object of the Convention on Genocide and the draft Code was to provide for extradition in all cases without exception, or else they were purposeless. The perpetrator of an international crime became denationalized.

40. Mr. CORDOVA remarked that Mexican law forbade the extradition of Mexican subjects. It seemed to him that if a rule regarding extradition were established, it must stipulate that it was not possible to refuse extradition on the grounds that the accused was a national of the State concerned. Otherwise a distinction would be established between States whose laws forbade the extradition of their own nationals and those whose law did not.

41. Mr. SPIROPOULOS recalled that the question was one which had been discussed at the previous session, during which the Commission had adopted the text in its existing form.<sup>3</sup> At that time, everyone had agreed that the Convention on Genocide should be followed: that Convention stipulated that genocide was not a

<sup>2</sup> *Ibid.*, pp. 327-338.

<sup>3</sup> Summary record of the 62nd meeting, paras. 88 *et seq.*

political act but that the obligation to grant extradition of the State's own nationals existed only in so far as provided for by its domestic law. That decision had been taken because certain States did not surrender their own nationals. The Anglo-Saxon countries, on the contrary, did.

42. If the Commission had changed its view on the point, that was another matter. The discussion could be resumed but, he would repeat, the text he had submitted was in accordance with the decision taken the year before.

43. Personally, he was not in favour of going any further and taking a fresh decision. The question of extradition must be considered within the framework of the Code. The laws of the countries of Europe had not yet reached the stage of development where they would agree to surrender their own nationals to another State. The Code was based on the legal system in force in many European countries, in the Arab countries and in other parts of the world. If the Commission departed from such usage, there was little likelihood of the principle being adopted by many States.

44. Mr. SCALLE did not agree with Mr. Spiropoulos. The question was not merely one of handing the accused over to another State, since the Code provided that "pending the establishment of a competent international criminal court, the States . . . undertake (article III)". The object of the Code was to bring accused persons before such an international court. There was also another problem, one of general penal law. The territorial jurisdiction was the normal jurisdiction. Accordingly, in the case of an international crime, it was preferable, pending the establishment of the international court, that the accused be tried by a court of the territory in which the crime had been committed.

45. He wished to re-affirm that, if article IV did not mean that extradition must be granted even though the substantive provisions of municipal law did not permit it, then the article meant nothing at all. Otherwise, indeed, paragraph 1 would state that extradition must take place and paragraph 2 that the State retained the right not to grant extradition. The true explanation was that given by Mr. Kerno. There was, first, a substantive rule providing for extradition and then a formal rule laying down the manner in which the substantive rule was to be applied. In the case in point, the effect of the substantive rule was to make the crime no longer a political one, but, as far as the formal rule was concerned, each State should be guided by its own laws and treaties when determining the competent court, the manner of apprehending the accused etc. The Commission had taken a decision on those lines the previous year, attributing to the article the sense he gave it. He recognized, however, that the article was amphibological.

46. Mr. SPIROPOULOS said that the Commission had taken a decision on the provision contained in the Convention on Genocide during the discussion of that Convention. The fact that Mr. Kerno had expressed himself somewhat ambiguously had given Mr. Scelle the impression that they were both in agreement, whereas, in point of fact Mr. Kerno was in agreement with him

(Mr. Spiropoulos). Every one was agreed on the text. To take a concrete example: supposing Greece were asked to grant the extradition of a Frenchman: if there was an extradition treaty between France and Greece, the latter country could not refuse to grant extradition on the ground that a political crime was involved, since paragraph 1 precluded that. To take next the case of a Syrian: failing an extradition treaty between the two countries, Greece would be free either to grant extradition or to refuse it. The question would depend on the interpretation given to Greek municipal law. However, if France requested the extradition of a Greek, Greece would reply that its legislation did not permit the extradition of one of its own nationals. That was the meaning which it had been agreed to give to article VII of the Convention on Genocide when it was drawn up, and Mr. Amado, Mr. Alfaro, Mr. Hsu, Mr. Kerno and Mr. Liang knew that as well as he did. He was mentioning the fact merely because he did not wish to be the only one to defend the Convention on Genocide. What the Commission had to decide was whether it wished to adhere to that text or to go further. He would like Mr. Kerno to say whether his interpretation was correct.

47. Mr. SCALLE recognized that he had misinterpreted Mr. Kerno's remarks. He agreed with Mr. Kerno on the difference between the formal and the substantive view points.

48. Mr. FRANÇOIS said that the reason States refused to grant the extradition of their own nationals was their lack of confidence in the administration of justice in another country. That lack of confidence still existed and it would only be possible to obtain extradition of a State's own nationals if they were to be brought before an international court. In the Netherlands, where the Constitution was under revision, the intention was to include such a distinction. When it was a question of bringing a Netherlands subject before an international court, his extradition would no longer be refused. On the other hand, if it was proposed to bring him before the court of another country, the old principle would be adhered to.

49. So long as no international criminal court was in existence, no other solution could be adopted than that of accepting the text and interpreting it in the sense that any State would have the right to refuse to grant the extradition of its own nationals if they were to be brought before a court of another State, regardless of the crime of which they stood accused.

50. Mr. CORDOVA thought that the Commission was bound to establish international crimes with the idea in mind that they would be punished. But it then came up against the impossibility of bringing the guilty persons to justice, unless it resolved the difficulty arising out of municipal law. It was for that reason that it affirmed that such international crimes were not political crimes, thus preventing a country from using the plea that the crime was a political one in order to avoid handing over the accused person.

51. If the Commission, while having an international crime in mind, made it possible for the accused person to find refuge in some country, it was abandoning the

idea of international crime, since the injured country would have no means of bringing the criminal to trial. When the international court was established, article IV would not automatically cease to exist. Would such acts then be allowed to go unpunished? They would remain unpunished, since the State was not obliged to grant extradition. The international court would be unable to exercise its jurisdiction.

52. Mr. KERNO, (Assistant Secretary-General) replying to Mr. Spiropoulos' request, said that Mr. Scelle had possibly interpreted his remarks too broadly. From the discussion in the General Assembly on the subject of extradition, the conclusion had appeared to emerge that article VII of the Convention on Genocide, and consequently also the first paragraph of article IV of the draft code, first of all forbade refusal to grant extradition on the ground of the political nature of the crime. As regards the rest of the article, it was in most cases a matter of procedure and the laws in force continued to be valid. The explanation given by Mr. Spiropoulos squared with the facts.

53. Mr. SANDSTRÖM said that, with regard to Mr. Córdova's statement, he must reply that it was not only the interest of the State desirous of punishing a crime which should be taken into consideration, but also the safety of the accused person. It would not be possible to go as far as Mr. Córdova wished. Mr. Scelle had said that the crime was punishable under the territorial system. He did not think it was proposed to rely on that system alone until such time as the international court was set up. He agreed with what Mr. Spiropoulos and Mr. François had said.

54. Mr. SPIROPOULOS, referring to Mr. Córdova's remarks, said that there was a misunderstanding. Article IV would apply so long as no international criminal court was in existence. As soon as that court had been set up, everything would be changed. The provision could not then be kept, otherwise the court would have no cases to try.

55. Mr. CORDOVA also thought there had been a misunderstanding. The article referred only to the period between the adoption of the Code and the establishment of the international court. It would not, however, cease to exist merely because that court had been set up.

56. Mr. SPIROPOULOS agreed. If the court was set up and not provided with a jurisdiction, the Code would prevent it from functioning. Clearly, the article would have to be changed, and provision made in the statute of the international court for extradition to be granted in all cases without exception.

57. Mr. CORDOVA thought it should be specified in the draft Code that article IV was only provisional.

58. Mr. EL KHOURY considered that the article was not in accordance with reality. In the first place, it stated that the crimes defined in the Code were not political crimes. Yet all such crimes were political crimes. It would be preferable to specify that the provision was an exceptional one.

59. Why did the article say "in accordance with their laws", if the latter forbade extradition? He proposed

that article IV be confined to the following text: "The parties to this Code pledge themselves to hand those accused of such crimes over to the international criminal court, irrespective of their laws and treaties in force."

60. The CHAIRMAN pointed out that it was necessary to draw up a text capable of application prior to the establishment of the international court and not only afterwards.

61. Mr. EL KHOURY replied that there would have to be an international court, otherwise there would be no extradition. To whom would the accused person be handed over? The rule should be imperative only if an international court existed. The exception could only be made in favour of an international court.

62. The CHAIRMAN pointed out that once the international court had been established, there would no longer be any question of extradition in the proper sense of the term; States would hand the accused persons over to the court.

63. After a discussion, in which the CHAIRMAN and Mr. CORDOVA, Mr. EL KHOURY, Mr. SCELLE, Mr. ALFARO and Mr. SANDSTRÖM took part, as to whether article IV referred to the period prior to the establishment of an international court competent to apply the Code, or whether it would apply only after the establishment of the court, Mr. CORDOVA proposed the following text: "The States adopting this Code undertake to hand over the accused to an international criminal jurisdiction in accordance with the procedure set forth in their laws and treaties." The text was not intended to replace article IV but to supplement it. Pending the establishment of the international court, the crimes would be punishable by a territorial jurisdiction and paragraph 1 of article IV would apply.

64. Mr. KERNO (Assistant Secretary-General) thought that the situation was very complicated. A long time would pass before the court was set up, and, if no provision were made for the interim period, no one would have any idea what to do in the numerous cases which might arise. The possibility of a crime being committed in one country and its perpetrator managing to escape to another had been considered. During the discussion on the Draft Convention on Genocide, the representative of India had submitted a proposal to the effect that the Convention should safeguard the right of a State to prosecute one of its own nationals for acts committed outside its territory, and the representative of Sweden had also urged that the Convention should not limit the jurisdiction of a State over crimes committed against its own nationals outside its territory.<sup>4</sup>

65. He suggested that it would be a good thing to include provisions for the interim period. If Mr. Córdova wished to add a clause to apply after the establishment of the court, that was another matter.

66. Mr. ALFARO remarked that the further the Commission departed from the proposed text the more difficulties it encountered.

<sup>4</sup> See *Official Records of the General Assembly, Third Session, Part I, Sixth Committee, p. 683-685.*

67. The discussions in the Sixth Committee on the Convention on Genocide had shown that the object of the article was to lay down the principle that in no case would the extradition of an accused person be refused because his crime was considered as a political one. Such was the sense of paragraph 1. The text did not, however, offer many advantages for the reason that, in many countries, there were other grounds for exception (prohibition of extradition of nationals, of aged persons, etc.). He thought it would be dangerous to leave out of the Code a text established to deal with the period preceding the establishment of the international criminal court, an event which might be delayed for a long time. The discussions in the General Assembly on the subject of genocide had shown what the general opinion on the point was. To depart from that opinion would be difficult and would merely mean that the same discussion would take place again in the General Assembly.

68. Mr. CORDOVA suggested that the sole assumption should be that no international tribunal had as yet been set up. Article III would provide the possibility of punishing the crimes enumerated. The Commission, when faced with a choice between two theories, i.e., that which entrusted the task of trying the criminal to the courts of the country in which the crime had been committed and that which placed him under the jurisdiction of the country in which he had been arrested, had decided in favour of the second. Accordingly, the obligation laid down by article III to enact the necessary legislation was sufficient. Provision would, however, have to be made for extradition during the period following the establishment of the international court.

69. Mr. EL KHOURY asked for Mr. Córdova's amendment to be submitted in writing.

*It was so decided.*

#### ARTICLE V

70. Mr. YEPES read out article IX of the Convention on the Prevention and Punishment of the Crime of Genocide:

"Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of the State for genocide or any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

71. The CHAIRMAN noted that the Convention referred to: "the interpretation, application or fulfilment".

72. Mr. SPIROPOULOS thought that it came to much the same thing, since application meant fulfilment.

*Article V was adopted.*

*In accordance with the decision taken at the 89th meeting (para. 79), the single paragraph of commentary was deleted.*

#### ARTICLE IV (resumed)<sup>4a</sup>

73. Mr. SPIROPOULOS thought that the amendment

proposed by Mr. Córdova arose from a certain confusion of ideas; Mr. Córdova seemed to consider that there was no further need for extradition once States were bound, under article III, to incorporate in their legislation the necessary provisions to enable those accused of crimes under international law to be brought to justice and have judgment passed on them. However, under article III, Greece, for instance, would be in no way obliged to bring to justice a Mexican who had committed a crime under international law in France and had then taken refuge on Greek territory. Only the Government of France, on whose territory the crime had been committed, was bound to bring the accused to justice. That was the answer which had been given to the question<sup>5</sup> after lengthy discussion in the General Assembly, in which he had had frequent occasion to take part. It was therefore absolutely necessary to provide for extradition to meet cases of that type.

74. Mr. FRANÇOIS wished to bring to the Commission's attention the provisions concerning extradition in the Conventions signed at Geneva, under the auspices of the Red Cross, in August 1949, since they seemed to him to furnish a possible solution to the question under consideration by the Commission. He would come back to the point when the question of the amendment proposed by Mr. Córdova had been settled.

75. Mr. YEPES said he wished to explain his intended vote. He thought that article IV, as in the report, was sufficiently clear and would vote for that text and against any other proposals.

76. The CHAIRMAN put to the vote the amendment proposed by Mr. Córdova to be substituted for the second paragraph of article IV.

*Mr. Córdova's amendment was rejected.*

77. Mr. SCALLE explained that the reason he had abstained from voting was that the international criminal jurisdiction was not yet in existence. He proposed that article IV be replaced by a clearer formula, more in harmony with the spirit of the Convention on Genocide, to read as follows: "As regards the offences defined in the present Code, the States which adopt this Code undertake not to refuse extradition on the ground that they are political crimes."

78. The adoption of such a text would of course entail the omission of the second paragraph. As a matter of fact, in the old text, the first paragraph, which established an exception to the provisions of internal legislation, seemed to contradict the second paragraph, according to which such legislation continued to have force.

79. The CHAIRMAN said that the text proposed by Mr. Scelle seemed a very good one.

80. Mr. CORDOVA pointed out that the text left out of account the question of extradition of a State's own nationals.

81. Mr. SCALLE said that he favoured extradition even where a State's own nationals were concerned but that he thought it preferable, in view of the voting in the General Assembly, to leave States freedom of choice in the matter.

<sup>4a</sup> See para. 69, above.

<sup>5</sup> Article VI of the Convention on Genocide.

82. Mr. FRANÇOIS considered the proposal acceptable but thought that the Commission could make a further step forward by taking over the provisions concerning extradition of one of the Geneva Conventions of August 1949. They read as follows: "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to the other High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case."<sup>6</sup> The text was, in short, an application of the old principle enunciated by Grotius, "*aut punire, aut dedere*". It went further than the proposal formulated by Mr. Scelle.

83. The CHAIRMAN pointed out that the Commission had three proposals before it: the text of Mr. Scelle, the formula borrowed from the Red Cross Convention, and article IV of the report.

84. Mr. SCELLE enquired whether the text of the Red Cross Convention permitted refusal to grant extradition for political crimes.

85. Mr. FRANÇOIS thought that it did but pointed out that, in such a case, a State must try the case itself. The system was admittedly different from that proposed either in the report or in the text submitted by Mr. Scelle.

86. The CHAIRMAN preferred the text proposed by Mr. Scelle.

87. Mr. SANDSTRÖM recognized that the text proposed by Mr. Scelle offered some advantages. He nevertheless felt some hesitation about accepting it and preferred the text of the report. It was always better to refer back to the General Assembly a text which it had already considered.

88. Mr. SPIROPOULOS announced his intention to abstain from the forthcoming vote. The adoption by the Commission of the text proposed by Mr. Scelle would mean expunging from the draft Code the obligation to grant extradition embodied in the Convention on Genocide. To take such a decision would not be in the interest of clarity and, in view of the concern for clarity shown by the Commission in connexion with other points, would also be illogical.

89. The CHAIRMAN proposed that the Commission first choose between the text submitted by Mr. Scelle and the text of article IV of the draft code, which differed only in their wording. He would then put to the vote the principle underlying the formula of the Red Cross Convention, the wording of which could be reviewed if the Commission adopted the principle.

*Mr. Scelle's proposal for article IV was adopted by 7 votes.*

*The Red Cross Convention formula proposed by Mr. François was rejected.*

<sup>6</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, article 49, para. 2.

90. The CHAIRMAN said that the first reading of the draft Code on offences against the peace and security of mankind having been completed, he would like to state that it was thanks to the particularly clear presentation of the report that the Commission had been able to get ahead so well with its work. The Commission owed a great deal to Mr. Spiropoulos.

91. Mr. KERNO (Assistant Secretary-General) assumed that the Commission would subject the text it had adopted to a second reading. It would then be called upon to decide whether the draft code should be submitted to the General Assembly or to governments and to take certain decisions provided for under article 16 (g) of its Statute. He would request the members of the Commission to be good enough to reflect on the question of the publicity to be given to the draft, and the explanations and supporting material referred to in that article of the Statute. Would the commentaries accompanying the draft code be sufficient? Should a report be appended? Such were the questions which would need to be considered.

#### INTRODUCTION TO THE DRAFT CODE

##### *Paragraphs 1 to 4 and sub-paragraphs 5 (a) and 5 (b) (i)*

92. Mr. SPIROPOULOS thanked the Chairman for his flattering references to the manner in which he had performed his task and added that, as the Commission was called upon to provide an introduction to the draft code, he had prepared a draft text and included it in his report (Section D). With a view to facilitating study, he had taken a large part of the text from the Commission's report on its second session. Paragraphs 1 to 4 inclusive and sub-paragraphs 5 (a) and 5 (b) (i) had been taken straight from the report and could be approved without examination.

*It was so agreed.*

93. The CHAIRMAN, replying to Mr. Hsu, pointed out that the first two lines of paragraph 5 assumed that the question to whom the Commission would submit the draft code had been settled. That question would, however, be discussed at a later stage.

##### *Sub-paragraph 5 (b) (ii)*

94. Following a discussion between the CHAIRMAN, Mr. SPIROPOULOS and Mr. SANDSTRÖM, it was decided that the first sentence be reworded as follows:

"that the Commission was not bound to indicate the exact extent to which the various Nürnberg principles had been incorporated in the draft code".

95. Mr. SPIROPOULOS, replying to the Chairman, explained that the divergencies of opinion referred to in the second sentence of the sub-paragraph under review were not only those within the Commission but also those which had come to light in the General Assembly.

96. Mr. ALFARO thought that what had been described as "considerable difficulties" was, in fact, an impossibility.

97. The CHAIRMAN remarked that the last sentence did, in fact, make that clear.

98. Mr. ALFARO thought it would be better not to

give the General Assembly too strong an impression of the divergencies of opinion between the members of the Commission. He proposed that the second sentence of sub-paragraph (b) (ii) be re-drafted as follows: "Such an attempt would have met with insuperable difficulties."

99. The CHAIRMAN agreed that it would be advisable not to mention the divergencies of opinion. He thought, however, that the term "insuperable" was too strong.

*The Rapporteur was instructed to modify the text in the light of the discussion.*

*Sub-paragraph 5 (c) (i)*

*Sub-paragraph 5 (c) (i) was adopted without comment.*

*Sub-paragraph 5 (c) (ii)*

100. Mr. SPIROPOULOS thought that the Commission would have some objections to that passage. The text of the draft code which it had adopted departed considerably from the draft of the Rapporteur who had only envisaged a single category of crimes under international law, which might be committed either by the authorities of a State or by private individuals.

101. All crimes under international law should involve the responsibility of the State authorities and of private individuals, except declarations of war or annexations, which, of course, could only be acts of States. Thus, a violation of the military clauses of a treaty could be perpetrated by individuals members of a party. The draft code, on the other hand, provided only for the responsibility of the State which had permitted that violation contrary to an international treaty.

102. The Commission, on the contrary, had established three categories: crimes which were the acts of the authorities of a State, crimes which might be committed equally by the authorities of a State or by private individuals, and, finally, crimes committed by private individuals only. In the case of each crime it had specified by whom it might be committed.

103. He considered the distinctions established by the Commission to be arbitrary. It was, for instance, arbitrary to say that terrorist activity did not involve the international criminal responsibility of its authors but only that of the authorities of the State which had tolerated or facilitated it.

104. The Commission could omit the passage in question, if it so desired.

105. Mr. SANDSTRÖM thought that the Commission might leave the text in question as it stood, in order to draw the General Assembly's attention to the matter.

106. The CHAIRMAN remarked that the lay reader would have some difficulty in grasping the meaning of the text; he would propose its deletion, if Mr. Spiropoulos agreed.

*It was decided to delete sub-paragraph 5 (c) (ii).*

*Sub-paragraph 5 (d)*

107. The CHAIRMAN read out the text, pointing out that the words "such an international criminal court" could be replaced by the words "such an organ" and that, in the English text, the words "would be the only

practical procedure" might be substituted for the phrase "would practically be the only possible procedure".

*Sub-paragraph 5 (d) was adopted with the above amendments.*

*Paragraph 6*

108. Mr. ALFARO thought that, in paragraph 6, the Commission might refer to the fact that it had defined as punishable inhuman acts committed for "cultural" reasons.

109. Mr. SPIROPOULOS thought that a crime committed for cultural reasons bore no relation to the protection of historic monuments and other works of art which was the subject of the communication from the United Nations Educational, Scientific and Cultural Organization (UNESCO).

110. Mr. ALFARO considered that the destruction of the Cathedral of Rheims or of the Library of Louvain were cultural crimes against the civilian population. Crimes committed for cultural reasons, such as, for example, the suppression of the use of a language, were akin to the matters with which UNESCO was concerned.

111. The CHAIRMAN considered that the acts of destruction referred to were not really "inhuman acts".

112. Mr. SCALLE recalled that the inscription on the tablet commemorating the library of Louvain described its destruction as barbarous. He did not see what difference there was between inhuman and barbarous.

*Paragraph 6 was adopted subject to changes covered by a previous decision.<sup>7</sup>*

113. Mr. YEPES wished to make an observation applying to the draft Code as a whole. He thought that the commentaries accompanying the articles of the Code were extremely brief. Their conciseness might well come as a surprise to the reader if he compared them, for example, with those of the Harvard draft. He thought that it would enhance the prestige of the Commission if they were expanded somewhat and would like to make that suggestion to the Rapporteur.

114. The CHAIRMAN considered that it would be difficult to reopen discussion on texts which had already been approved. It would upset the Commission's work. However, if, during the second reading, Mr. Spiropoulos had any additions to propose the Commission might consider them.

115. Mr. SPIROPOULOS thought that the commentaries should be kept as short as possible in order to facilitate their study and acceptance by the Commission. The draft Code was not a doctoral thesis but an official document. Since the Commission's Statute provided that drafts could be accompanied by supporting material (article 16 (g)), the Commission might append to its draft Code the report of the Rapporteur and all the summary records of the discussions. Governments would thus have the documentation necessary to enable them to follow the stages through which the draft Code has passed before its adoption by the Commission.

<sup>7</sup> See summary record of the 90th meeting, paras. 146 *et seq.* and in particular the decision recorded after para. 164.

116. If interpretative commentaries had to be drawn up, it was to be feared that agreement would never be reached.

117. The CHAIRMAN pointed out that Mr. Yepes left the matter entirely to the Rapporteur. The Commission could therefore leave the latter free to expand any of the commentaries already approved, if he thought it desirable.

*It was so decided.*

**General Assembly resolution 378 B (V): Duties of States in the event of the outbreak of hostilities (item 3 of the agenda) (A/CN.4/44, chapter II: The possibility and desirability of defining aggression)**

GENERAL DEBATE

118. Mr. SPIROPOULOS said that the problem of defining aggression had been studied by the principal organs of the League of Nations and by numerous authors. The organs of the League of Nations had adopted the casuistic approach and, after examining one by one all the circumstances giving rise to conflicts, had arrived at the conclusion that it was impossible to formulate such a definition. He had reproduced in the part of his report dealing with the League of Nations precedents, the essential passages of a study entitled the "Opinion of the Permanent Advisory Commission"<sup>8</sup> and a commentary drawn up by a Special Committee of the Temporary Mixed Commission for the Reduction of Armaments<sup>9</sup>. The conclusion arrived at in both documents was the more or less absolute impossibility of defining aggression.

119. Owing to the lack of success of the casuistic approach, he had thought that a dogmatic approach should be attempted with a view to ascertaining whether it was possible to define aggression or not, and, if it were, to what extent the definition could be established. Incidentally it was the first time that an officially constituted international organ had considered the question from such an angle.

120. He had come to the conclusion that it was not really possible to define aggression. One could always, it was true, draft a definition as Mr. Vyshinsky had done before the General Assembly by taking up a text of the Disarmament Conference, and as Mr. Politis had done by taking up a formula employed in the London Treaties. Any legal definition would, however, be artificial in content. In concrete cases, its application would lead to solutions contrary to natural sentiment.

121. What his researches had shown was that aggression was a primary notion like good faith, love and hate, and, as such, did not lend itself to definition but was instinctively perceived.

122. Even were such a definition possible, it would be of no value in complicated cases for the interpretation of which the simultaneous application of a whole series of criteria was necessary. The chronological order of acts, for example, could provide no solution to the question of aggression.

123. Mr. YEPES recalled that he had already had occasion to formulate reservations with regard to the chapter in Mr. Spiropoulos' report dealing with the definition of an aggressor. He would submit at the next meeting a text which he would propose be substituted for that part of the report and which would show that definition of an aggressor was an actual possibility. What was needed was not an abstract definition but a formula which would enable it to be determined who was the aggressor. The problem was not a theoretical one and might be solved by resorting to an objective criterion.

124. Mr. ALFARO thought that the difficulties inherent in a definition of aggression were not insuperable. Aggression could be defined if due account were taken of prevailing trends in international relations. The failure of previous efforts was due to the fact that an attempt had been made to define aggression by an enumeration of acts. Enumerations were, however, always incomplete and often faulty.

125. Mr. Yepes had rightly drawn attention to the fact that the definition of aggression was often confused with the determination of the aggressor.

126. If the Commission, foregoing any attempt at enumeration, examined the nature of aggression in the existing international order, it would achieve some result.

127. He had studied with pleasure the memorandum submitted by Mr. Amado, with whose ideas he was in general agreement, particularly as he recommended a flexible definition applicable to all individual cases without any enumeration.

128. As he would himself submit at the next meeting a memorandum developing his own ideas, he would confine his remarks for the moment to stating that the Commission should make an effort to solve the problem which had so exercised the minds of jurists and statesmen.

129. Mr. AMADO remarked that his memorandum did not claim to provide any solution. It was simply a very cautiously worded contribution to the study of the problem.

130. In substance, he agreed with Mr. Spiropoulos' statement that aggression could only be defined in a very general way.

The meeting rose at 12.50 p.m.

## 93rd MEETING

Thursday, 31 May 1951, at 3 p.m.

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<sup>8</sup> Chapter II, B, II.

<sup>9</sup> Chapter II, B, III.

*Chairman:* Mr. James L. BRIERLY  
*Rapporteur:* Mr. Roberto CORDOVA

*Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, 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.

**General Assembly resolution 378 B (V): Duties of States in the event of the outbreak of hostilities (item 3 of the agenda) (A/CN.4/44, chapter II: The possibility and desirability of defining aggression; A/CN.4/L.6; A/CN.4/L.7; A/CN.4/L.8) (continued)**

GENERAL DEBATE (continued)

1-2. Mr. KERNO (Assistant Secretary-General) said he had had a short note distributed to the members of the Commission, reproducing passages from the United Nations Charter, the decision taken by the Security Council on 27 June 1950 concerning assistance to the Republic of Korea, and General Assembly resolution 377 (V) (Uniting for Peace). The texts in question were for comparison with the expression "coercive action" introduced by Mr. ALFARO into the definition of aggression proposed by him (A/CN.4/L.8).

3. Mr. YEPES complimented Mr. Spiropoulos on his excellent report; its scientific integrity and wide scholarship did credit to the Commission. He begged to differ, however, on some of the conclusions in the report, and would like to consider the problem from another angle.

4. The question of defining aggression, or rather of determining the aggressor, was closely bound up with the question of national security and the prevention of war. Hence its theoretical and practical importance in any system for securing peace. As the American jurist Shotwell had written: "There is no final way of settling this question of peace and war which does not involve the definition of aggression and defense; for the one is prohibited and the other is retained and we must know which is which."<sup>1</sup> In document A/CN.4/L.7, he submitted to the Commission a series of provisions which might be used as a basis for discussion with a view to establishing the method to be followed by the international authority in determining the aggressor. The proposals were founded on a series of drafts discussed by the League of Nations, the Pan-American Conferences and various United Nations organs; and they were in keeping with the desire for the clarification of the matter manifested by public opinion for the last 30 years. They were not final proposals.

5. The main question, and the one to be settled first,

<sup>1</sup> James T. Shotwell, *War as an instrument of national policy*, New York, 1929, p. 139.

was whether determination of the aggressor was possible and desirable. Mr. Spiropoulos in his report argued that it was no more possible to define aggression than it was to define good faith, love or hatred. The conclusions which Mr. Spiropoulos had drawn from that argument seemed to him unacceptable.

6. Actually a definition of aggression was not what was required. Aggression was an abstract, theoretical and remote concept. On the other hand an aggressor was a concrete, personal, tangible reality. If the aggressor were designated, it meant that denunciation of the guilty party was possible. It was true that aggression, good faith and love could not be defined. But it could easily be ascertained whether someone was acting in good faith, or was in love, and which individual or State was the aggressor.

7. Hence the intention behind his proposals was to determine the aggressor and to provide the competent international authority with objective criteria to enable it to do so. There might be those who felt that it was preferable not to lay down fixed rules, however broad in conception, beforehand and that it would be better to allow complete freedom to the authority responsible for determining the aggressor. That was what Sir Austen Chamberlain had had in mind when he said that the definition of the aggressor was "a trap for the innocent and signpost for the guilty".<sup>2</sup> Yet the advantages of prior codification of rules were obvious. A State would then be fully aware of what it could not do without running the risk of being denounced as an aggressor. Thus certain controversial issues which gave rise to international conflicts would be eliminated.

8. In a celebrated report submitted in 1933 by Politis to the Disarmament Conference, which was the starting point for all writings on the definition of the aggressor, there occurred the following passage:

"1. The present Act (Annex I), conceived on the universal plane, aims at determining acts of aggression in a definite, practical and direct manner.

"2. In the opinion of its supporters, this method would . . . (put) an end to doubts and controversies on the point whether States which resort to force have committed aggression or not. States would thus be definitely informed in advance of what they could not do without being regarded as aggressors".<sup>3</sup>

9. That report had been used in the preparation of the 1933 London treaties between the Soviet Union and its neighbours for determining the aggressor. In those treaties the provisions of the Politis Report laying down the method for the automatic determination of the aggressor were reproduced word for word. The treaties had also been regarded by many people as a big step forward towards a better system for securing peace.

10. After the United Nations Charter had been signed, a detailed resolution concerning the determination of the aggressor had been submitted to the London Con-

<sup>2</sup> *International Conciliation*, 1930, p. 613.

<sup>3</sup> *Series of League of Nations Publications*. IX. Disarmament, 1935.IX.4, p. 679 (document Conf. D./C.G.108).

ference in 1945 by the United States, and fiercely attacked by the Soviet Union delegation.

11. In 1947 at Rio de Janeiro, the American nations, ahead of the European countries in international law, had concluded a convention on the consolidation of peace and security on the American Continent in which the idea of prior determination of the aggressor had once again been taken up. Previously that notion had been the subject matter of one of the articles of the draft proposal for setting up an Association of American Nations submitted in 1936 to the Pan-American Conference in Buenos Aires.

12. He thought the Commission should consider first of all whether it wished to draw up more or less flexible or more or less rigid rules for determining the aggressor. It might even consider the possibility of producing a single draft from the various communications before it, and try to submit to the General Assembly a set of unanimous conclusions.

13. Once it had settled the question of principle, the Commission should take up the question of the method to be followed in determining the aggressor.

14. At a later stage he would explain in detail the proposals contained in his draft.

15. Mr. FRANÇOIS remarked that three separate trends could be observed in the Commission. Mr. Spiropoulos was in favour of not formulating any definition; Mr. Yepes suggested a definition based on the enumerative method; while Mr. Alfaro and Mr. Amado recommended a general definition.

16. He was in favour of the third course. Like Mr. Yepes, he did not share Mr. Spiropoulos' view that by its very essence the notion of aggression was not susceptible of definition in that it was based on sentiment and not on legal considerations and was a "natural" notion.

17. There were of course in law concepts which could not be defined, but aggression was not one of them. In his opinion aggression was a legal concept which, if it was to be comprehensible, called for a legal definition. Such a definition could be produced — Mr. Amado's and Mr. Alfaro's memoranda gave proof of that. Mr. Spiropoulos would object that the definitions submitted by them were without any practical value. But after all, the penal codes themselves contained definitions which were insufficient in themselves to define crime, e.g. where one of the elements of the definition was the lack of justification for the act. It was, in the final analysis, the judge who had to decide whether the circumstances justified the application of an article of the code to a specific case. But that did not mean that a penal code must cease to formulate such definitions. Similarly, when Mr. Amado stated that a war of aggression was any war not waged in exercise of the right of self-defence, it was first of all necessary of course to decide in what circumstances one could speak of self-defence. When using the expression "unprovoked attack", to be found in the 1947 Treaty of Rio de Janeiro, it had first of all to be decided what was meant by "provocation", and so on. But it was beyond dispute that it was a question

of legal definitions calculated to clarify the meaning of the term.

18. Mr. Spiropoulos appeared to think that aggression must entail *animus aggressionis*. He personally considered on the contrary that unlawful aggression was possible even without *animus aggressionis*. Even where an aggressor was personally convinced that he had acted within his rights, he might be guilty of aggression.

19. While he was in favour of a general definition of aggression, he was definitely opposed to any definition based on enumeration, such as that found in the Soviet Union draft resolution or in Mr. Yepes' text. The acts listed, for example, in the Soviet Union draft resolution, acts which it was proposed to prohibit altogether, might in certain circumstances be justified under international law as a defence against a premeditated and disguised attack. It must also be realized that such definitions would enable the aggressors to evade responsibility for their acts by taking refuge behind legal texts. Such texts provided no real safeguard. For example, in the case referred to in paragraph 1 (d) of the Soviet Union draft resolution (A/C.1/608), where one State landed or led its land, naval or air forces inside the boundaries of another State without the prior permission of the latter, it would be perfectly easy to disguise the aggression either on the grounds that permission had been given by a government that had seized power in the invaded country at the eleventh hour and was in sympathy with the invader, or by denouncing the government of the country invaded as a "Puppet Government" and refusing to recognize it as the legitimate representative of the people.

20. Since it was impossible to foresee in advance all the circumstances in which resort to force might be had, a definition of aggression based on enumeration might well produce too rigid a set of rules, and thus amount to what, as Mr. Yepes had just mentioned, Sir Austen Chamberlain, in a speech in the House of Commons in 1927 had called "a trap for the innocent and a signpost for the guilty".

21. Mr. Yepes' proposal was open to criticism on other grounds also. It produced a concept of aggression which was so wide that almost any unlawful act by one State against another State could be described as aggression. Any intervention by a State or group of States, even when not accompanied by acts of violence, would constitute aggression; refusal to submit a dispute to the International Court or to arbitration would be another form of aggression; refusal in bad faith to comply with a ruling of the Court would likewise be an act of aggression. There was no reason why the list should not be extended to numerous other instances — the abuse of the right to asylum in embassies or legations for example.

22. Mr. Yepes even provided for the determination of the aggressor at some future time should the use of atomic energy be controlled. With the most laudable intentions, he was thwarting any possibility of making progress towards stamping out aggression in the proper sense of the term.

23. He personally would oppose even an enumeration

in the form of examples suggested as a secondary possibility by Mr. Alfaro. Examples of that kind would do more harm than good.

24. Mr. HSU thought the Commission was greatly indebted to Mr. Spiropoulos for having produced a report containing an historical survey and an analysis of the legal doctrines concerning the definition of aggression. But however convincing his conclusions might appear at first sight, the Commission should surely not leave the matter there. Human problems had to be solved even if their solution came up against difficulties of an academic kind. Scientific definitions themselves were only provisional. That applied even more in the social sphere; but it was nonetheless true that such definitions had been of service to the world for centuries and were the background of our civilization.

25. The study devoted over the last 25 years to the definition of aggression had achieved something. In his view, the definition proposed by Politis in 1933 was the best all-round solution so far produced. Imperfect though it was, it had nevertheless been used in the London treaties of 1933, in the United States proposal at the London Conference in 1945, and in the Rio de Janeiro Convention in 1947.

26. If that formula were taken as a starting point and a basis for discussion, it would be possible to produce something still more satisfactory.

27. In paragraph 143 of his report Mr. Spiropoulos gave some particulars about the origin of the Politis formula, which had been based on a proposal by the Soviet Union. In August 1950 in the Security Council, Mr. Jacob Malik, the Soviet Union representative, had taken up only four out of the five points in the Politis definition. The omission of one of the points, that under Article 1 (5), had been criticized in an article in the *New York Times* as disingenuous. An interview with the Turkish representative on the First Committee, also printed in the *New York Times*, had provided an explanation of that omission by the Soviet Union representative's quotation. It had been Turkey that had first suggested what later became the fifth point in the Politis definition. The Soviet Union delegation had first of all objected to it, but had finally accepted it. That explanation exonerated the Soviet Union representative from any charge of disingenuousness in his quotation, but at the same time it showed that the Soviet Union had had objections to the fifth point, which was precisely that referring to indirect aggression. Incidentally, the draft resolution on the definition of aggression submitted by the Soviet Union delegation to the First Committee on 6 November 1950<sup>4</sup> although it too consisted of five points, likewise omitted the fifth point of the Politis definition, relating to indirect aggression.

28. The Politis definition had had a profound influence. It had been used in various treaties. The 1947 Inter-American Treaty on Mutual Assistance did not contain the provision given in the fifth point of the Politis draft. It did not contain a complete enumeration of cases of

aggression. All it did was to furnish examples of aggression, while using the expression "in addition to other acts" — thus allowing for an extension of the list. But that treaty was retrograde.

29. Happily, the United Nations had got rid of those imperfections. General Assembly resolution 380 (V) (Peace through deeds) "solemnly reaffirms that, whatever the weapons used, any aggression, whether committed openly or by fomenting civil strife in the interest of a foreign Power, or otherwise, is the gravest of all crimes against peace and security throughout the world". That text covered both direct and indirect aggression. It was an improvement on the situation resulting from the 1947 Treaty.

30. The only one of the memoranda he had been able to examine in detail was Mr. Alfaro's. He liked the method followed by Mr. Alfaro, and he would be prepared to support the definition given in the memorandum (A/CN.4/L.8, para. 35) subject to certain modifications. The words "coercive action" might be replaced by "enforcement action" — the term used in Article 53 of the Charter, and the words "armed attack" might be deleted. Nowadays, self-defence might make it necessary to prevent such attack. When a big country was threatened, it could afford to wait until the attack took place, the extent of its territory enabling it to undertake withdrawal operations without endangering its existence. But if Panama for example were threatened with aggression, was she to wait for the armed attack to take place? If she forestalled it, no-one could denounce her as an aggressor. In view of such instances, he urged that the words in question be deleted or replaced by some term covering his objections. In the same way, the use of the words "by any methods" and the examples given by Mr. Alfaro in connexion with those words suggested that Mr. Alfaro's definition followed the definition given in the 1947 Treaty and disregarded indirect aggression as provided for in the Politis formula.

31. Mr. SANDSTRÖM pointed out that the purpose of the Soviet Union draft resolution was not only to define aggression, but also and especially, by the establishment of a simple concrete fact to make it possible to determine the aggressor.

32. It was no doubt possible to give a definition, but it was not possible to exhaust the subject nor to cover every point and every situation. In that respect he agreed with Mr. Spiropoulos — there was no way of avoiding in each individual case the examination and appraisal of a series of factors which were invariably very complex. As was well known, the immediate antecedents of war were themselves a long story.

33. In his draft, Mr. Yepes attempted to compile a list of acts constituting aggression. But even that definition would not make it possible to determine who was the aggressor.

34. He could not disagree with Mr. Amado and Mr. Alfaro, who proposed to make use of the text already adopted by the Commission in article 1, paragraph 1 of its draft Code of offences against the peace and security of mankind. But the authors of the proposal had omitted

<sup>4</sup> A/C.1/608 and A/CN.4/44, chapter II, A. See also *Official Records of the General Assembly, Fifth Session, First Committee, 385th meeting, paras. 32-35.*

to add one very essential point, namely a definition of what constituted self-defence. Mr. Amado made no addition at all to the draft Code; while Mr. Alfaro added a number of subsidiary points which were already implicit in it.

35. He thought the Commission might adopt as a definition of aggression article 1, paragraph 1 of the draft Code, with certain modifications.

36. Mr. CORDOVA thought that the protagonists of the three theories — Mr. Spiropoulos who considered that no definition was possible; Mr. Yepes who felt that a definition based on enumeration could be established; and Mr. Amado and Mr. Alfaro who thought that a legal definition was possible — were all more or less agreed on the impossibility of compiling an exhaustive list of cases of aggression. That was an admission that along those lines a true definition was out of the question. There could be no definition where it was impossible to delimit the field of a concept. Any enumeration involved the obligation to interpret, especially when new cases came up. Hence the enumerative method must be discarded.

37. On the other hand, a legal definition was possible; Mr. Sandström had pointed out that, in its draft Code, the Commission had already defined the crime of illegal use of force. But article 1, paragraph 1 merely laid it down that aggression was a crime; it did not define it. Now that an international organization existed with authority to settle disputes between States, aggression could be defined. Formerly, each State was the judge of its own acts. With the appearance of the United Nations and an International Court, why should a more or less rational definition of aggression not be reached?

38. It was not a question of determining the aggressor. What called for definition was aggression itself. To determine the aggressor meant examining the facts in any specific instance, just as in domestic law a judge examined the facts to try to discover who was the murderer. The criminal code gave a definition of homicide. The Commission should follow the same course and formulate what it considered unlawful in the use of force.

39. That was the procedure followed by Mr. Alfaro in declaring that the use of force by one or more States was never legitimate except for purposes of self-defence or where force was used in carrying out the decisions of the United Nations.

40. One further instance should be added, one which as a matter of fact could be brought under the heading of self-defence, namely, the instance referred to by Mr. Hsu, where a State did not wait until the first shot had been fired before defending itself.

41. Article 51 of the Charter recognized self-defence only in the event of armed attack but not in situations where an attack was merely in preparation, e.g. where a State was mobilizing its forces. Under the Charter a State was not entitled to use force unless it had been the victim of armed attack. Hence he could not accept Mr. Alfaro's proposal, which referred only to attack pure and simple.

42. Mr. HUDSON, making his first re-appearance in

the Commission, remarked on the voluminous documentation on the definition of aggression at the disposal of the Commission, and said he was rather surprised to find the Commission engaged on that subject. Only lexicographers were called upon to formulate definitions. Any given word could be defined from several different angles, according to the use it was intended to make of a particular expression, and as the word "aggression" was not to be found in the Commission's draft code, the Commission was surely not called upon to explain the sense in which it used the word. The Charter mentioned only the expression "acts of aggression". Admittedly, General Assembly resolution 498 (V) on Intervention in Korea by the Central People's Government of the Peoples' Republic of China used the word several times. But why should the Commission try to define it?

43. According to General Assembly resolution 378 B (V), which gave the Commission its terms of reference, "the question raised by the proposal of the Union of Soviet Socialist Republics could better be examined in conjunction with matters under consideration by the International Law Commission". What were those questions under consideration by the Commission? Was the reference to the draft code? If so, the definition of aggression was unnecessary, since the draft code did not contain the word.

44. Mr. SPIROPOULOS said that when the First Committee took up the question, Mr. el Khoury had pointed out that the Commission was working on a draft Code and thought that it would examine that question at the same time. In reply to the Chairman of the First Committee, who had asked whether the International Law Commission would be prepared to study it, he himself had stated that in his capacity as rapporteur he had felt it incumbent on him to study the question of the definition of aggression, and that although so far he had reached only negative conclusions, he was prepared to go on with the work. A resumé of the exchange of views in question could be found in the summary records of the discussions at the 390th meeting of the Political Committee.

45. Mr. HUDSON said that he had noted the passage in the report where Mr. Spiropoulos summarized that exchange of views (A/CN.44, para. 134). But the resolution adopted by the General Assembly did not embody Mr. el Khoury's proposal. He wondered whether one could be as positive on the subject as Mr. Alfaro was in the third paragraph of his memorandum (A/CN.4/L.8).

46. With regard to the Soviet Union draft resolution (A/C.1/608/Rev.1), the fourth paragraph of the preamble considered it "necessary to formulate essential directives for such international organs as may be called upon to determine which party is guilty of attack". The organs in question were the General Assembly and the Security Council. They were responsible for applying the Charter, the authors of which had used the expression "acts of aggression", thus preferring not to go into precise details as to the connotation of the expression.

47. Mr. Yepes, moreover, wondered whether it was really wished to put a strait-jacket on the authorities that would be called upon to apply the Charter. It

all went to show that the most the Commission could do was to explain the use of the words "act of aggression" in the Charter so as to assist the United Nations organs in interpreting them. One might even wonder whether that was desirable. On mature reflection, he was convinced that it would be neither wise nor helpful to embark on an explanation of that expression as used in the Charter. In any case, the Commission was not called upon to define aggression.

48. Mr. AMADO said that he had been present in the First Committee when the Yugoslav proposal (A/1399) had come up for discussion. Quite casually he had expressed the view that it was impossible to define aggression except in very general terms by stating that it meant any use of force not justified by self-defence or in application of Article 42 of the Charter. The idea had been suggested to him by the work of the second session of the Commission.

49. Certainly it was not feasible to enumerate all the acts of aggression, still less to define them. That was an insoluble problem. He did not consider, as did Mr. Spiropoulos, that the term was a primary notion, a first impulse of the human conscience; but like him, he did conclude that a really satisfactory definition was impossible. However, as the question was still one in which people were keenly interested, the Commission should consider whether it was not called upon to provide an answer which was not an entirely negative one. For that reason he had suggested in his memorandum a brief and general definition (A/CN.4/L.6, para. 19).

50. Mr. EL KHOURY said that the discussion in the First Committee on the subject of the Soviet Union draft resolution on the definition of aggression had made it clear to him that the resolution would not be adopted by the General Assembly.

51. As he felt that it was desirable to define aggression, he had not wished the resolution to be sent to the General Assembly only to be rejected, and he had urged that it be submitted for study by experts, i.e., that the Political Committee, not being the one entrusted with the study of legal questions, should refer the draft resolution either to the Sixth Committee, which was composed of legal experts, or to the International Law Commission.

52. He had accordingly submitted a draft resolution requesting the International Law Commission to include the definition of aggression in its studies for formulating a criminal code for international crimes, and to submit a report on the subject to the General Assembly. When he first put forward his draft resolution, many speakers had maintained that it was impossible to give a definition of aggression.

53. Realizing that if his proposal were put to the vote it would be rejected, he had altered it and submitted it afresh in the form in which it had been adopted by the General Assembly. The International Law Commission could either produce a definition of aggression or state that such a definition was impossible; but it could not make such a statement until it had discussed the matter thoroughly. Resolution 378 B (V) stated that the Soviet Union proposal was to be referred to the International

Law Commission "so that the latter may take (it) into consideration and formulate its conclusions as soon as possible".

54. The Commission might perhaps insert the definition of aggression in the Code; or it might make it the subject of a separate document. But he was most anxious that the question should not be shelved. The fact that it had been under discussion for thirty years was ample proof that such a definition was required. If attempts so far had not been crowned with success, that did not mean that it was impossible to arrive at a definition. Until it was proved to be impossible, the Commission must not give up the attempt to produce that definition.

55. Aggression was a punishable crime. All crimes should be defined; and the organ competent to define them was the International Law Commission and not the First Committee. A body consisting of jurists was essential.

56. If the Commission decided that aggression could not be defined, it was not of course obliged to make the attempt. If a majority of the members were of the same mind as Mr. Spiropoulos in his report, the Commission would simply inform the Assembly that a definition was out of the question. He personally considered that it was possible to produce one. But it must not be a definition enumerating cases one after another, since it was not feasible to compile an exhaustive list. Examples could, however, be cited. At any rate, he agreed with Mr. Alfaro that a general definition was desirable but he did not agree with Mr. Alfaro's comments accompanying that definition. The utmost care must be taken in drawing up a commentary, which was bound to be regarded as an interpretation of the text. It must not risk giving rise to any wrong interpretation of the international code. Mr. Spiropoulos had enumerated all the acts described as acts of aggression and had argued that each one of them would provide an aggressor with a pretext to justify his acts and thus to evade responsibility. The Charter provided for the use of force for the purpose of self-defence and for combating aggression. The second of those cases did not permit of any argument. Everyone knew that when the Security Council had designated the aggressor, there could be no argument. But in regard to self-defence, every aggressor would maintain that he had acted in the exercise of his right of self-defence. It was an argument frequently used in the courts by counsel for the defence. In political matters too, it was a common practice to declare that the victim was the aggressor.

57. If, however, the definition were too general, the Commission would not be providing a means of establishing precisely which party was the aggressor.

58. Again, with regard to the determination of the aggressor, was that to be left to the victor, to the General Assembly or to the Security Council? It was extremely dangerous to leave it to the victor. He thought an article should be drawn up specifying the manner in which the aggressor was to be designated, for example by the International Criminal Court. If the Court had not been set up, the task must be entrusted to some other

independent body consisting of eminent and impartial jurists.

59. Hence, a recommendation should be made to the General Assembly concerning the definition of aggression; the definition should be submitted in a general form; and a formula should be added to determine the body responsible for designating the aggressor.

60. Mr. KERNO (Assistant Secretary-General) mentioned the active part played in the First Committee by Mr. el Khoury, who was best fitted to explain how the resolution had been submitted and adopted. His first proposal was to be found in the summary records of the 389th meeting of the First Committee; it ran as follows:

“ The General Assembly,

“ Considering that aggression may better be defined in connexion with action for peace, and deeming it appropriate to refer such a legal task to the qualified subsidiary organ of the United Nations,

“ Noting that the International Law Commission is at present studying the definition of the aggressor and related matters,

“ Decides to request the International Law Commission to include the definition of aggression in its studies for formulating a criminal code for the international crimes, and to submit a report on this subject to the General Assembly.

“ The Secretary-General is requested to refer to the International Law Commission the proposal of the Union of Soviet Socialist Republics, and all the records of the First Committee dealing with this subject.”<sup>5</sup>

61. It could be seen from the summary record of the 390th meeting of the First Committee (para. 11) that Mr. el Khoury, after reaching agreement with certain representatives on the final version of the Syrian draft resolution, had put forward his definitive proposal, which had then been adopted by the First Committee and later by the General Assembly.

62. Incidentally, in the General Assembly, the Soviet Union delegation's amendment for the addition at the end of the draft resolution of the words “ and present its report not later than the next regular session of the General Assembly ” had been rejected (A/PV.308, paras. 22 and 24).

63. Mr. ALFARO pointed out that while the General Assembly had declined to specify a date, it had used the expression “ as soon as possible ” (resolution 378 B (V)). That meant that if the Commission were able to carry out the task at the present session it should do so.

64. The alternative was for the Commission either to admit that it was unable to draw up a definition of aggression, or to decide that it was able to do so. The Commission's instructions were to define aggression; and before it was relieved of that obligation, it would have to declare itself unable to comply with it.

65. He had been greatly surprised to hear Mr. Hudson say that the Commission was not called upon to define

aggression. Mr. el Khoury's reply to that objection was so satisfactory that it hardly seemed necessary to dwell on the point. The resolution and the facts spoke for themselves — the Soviet Union delegation had called for a definition of aggression which would conform with the terms used by Litvinov in 1933. The debate had centred on that point. It had been stated that a definition was desirable, but that up to the present it had proved impossible to reach agreement as to its terms. Later, on a proposal by Mr. el Khoury, it had been decided that the First Committee should entrust the task to the International Law Commission.

66. He thought the reason why no agreement had been reached so far on a satisfactory definition of aggression was that the various attempts had aimed at defining it in terms of an enumeration of acts. No attempt had been made to give a definition of aggression based on the essence of aggression as opposed to a description of it. The difference between a definition based on the essence of the object defined and a descriptive definition was clear. To define a circle for example, one could state either that it was a figure produced by tracing a line with a pencil moving in a circular direction, or that a circle was a curved figure enclosed by a line every point on which was equidistant from the centre. The second of those definitions was an “ essential ” definition. Was it possible to produce a definition of that kind?

67. Article 2, paragraph 4 of the Charter stated that “ all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations ”. That provision contained an embryonic definition of aggression. In 1936, Mr. Scelle had written that all recourse to violence was war and all war was aggression. Taking that statement in conjunction with the text established by the Commission at its second session to define the first of the crimes against the peace and security of mankind, namely: “ 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 ” (A/CN.4/R.6), one had another embryonic definition of aggression.

68. As Mr. Amado had stated in his brilliant memorandum, and as he himself had said in his study of the problem of an international criminal jurisdiction (A/CN.4/15), war was criminal, and there were only two cases where the use of force was permissible. There again one had the rudiments of a definition. Mr. Spiropoulos had referred in his excellent report to the natural notion of aggression, namely, violence, war, and the use of force. It might be argued that the South Koreans were the aggressors since they were fighting against the Chinese Communists and the North Koreans. Not at all — they were not the aggressors, since they were exercising the right of self-defence. In the same way, America, France, Turkey, etc., were fighting in accordance with a decision by the United Nations to take police measures to stop aggression and restore peace.

69. In his report of the previous year (A/CN.4/15,

<sup>5</sup> See *Official Records of the General Assembly, Fifth Session, First Committee*, 389th meeting, para. 40.

paras. 90-94) he had given a brief summary of the various concepts of war which had at different times prevailed. War had for a long time been considered as the exercise of a right. Then had come the adoption at San Francisco of the United Nations Charter, especially Article 2, paragraph 4, which outlawed every form of war. A nation could only use force for the purpose of self-defence.

70. He had always felt that it should be possible to overcome those difficulties hitherto regarded as insurmountable, by inserting in the definition of aggression the constituent elements of aggression. Later he had stated in his report that "Whatever words are used in condemning war; whether it is called illegal or declared outlawed, renounced as an instrument of national policy or branded as a crime; whether war is divided into the two categories of *just* and *unjust*, or contemplated in an abstract manner as simply the recourse to force and violence for the solution of controversies between States, the fact stands that in the minds of Governments and peoples, statesmen and jurists, and in conformity with the positive provisions of the world's Magna Carta, war is a crime" (para. 93).

71. It was not necessary to refer explicitly to aggression or a war of aggression. Contemporary international order did not recognize the legitimacy of war waged for the purposes of redressing a real or alleged wrong. In the new international order, there was no just or licit, or legal or justifiable war. The only justifications for the use of force were self-defence and coercive action by the community of States. When either of those two elements was lacking, war was illicit and was a violation of the United Nations Charter, aggression, and an international crime (*Ibid*).

72. War had already been defined; and he would define aggression as "the use of force for any purpose except self-defence or coercive action by the United Nations". In the memorandum he had submitted "The Question of the Definition of Aggression" (A/CN.4/L.8), he had referred to the capital sins of aggression, declaration of war, armed attack, blockade etc. But as he had said, the way in which aggression could be committed was beyond the imagination of jurists. When an act of force had been committed, two questions arose: was it a case of self-defence or coercive action by the United Nations? It was impossible for anyone to conceive of an instance where violence or force was used outside those two cases without constituting aggression.

73. Naturally he felt, as Mr. el Khoury did, that a distinction must be made between the definition of aggression and the determination of the aggressor. The definition of aggression must be the legal instrument for determining the aggressor. There would be a verdict to the effect that an act of armed force had been committed which did not constitute self-defence or coercive action by the United Nations. It had been committed by such and such a country, and that country was the aggressor.

74. The definition of aggression would enable the aggressor to be designated.

75. Mr. SPIROPOULOS said he was grateful to his

eminent colleague, Mr. el Khoury, for having proposed that the General Assembly refer the question to the International Law Commission. It was a mark of confidence on the part of Mr. el Khoury to have urged that the Commission be entrusted with the question, and knowing various representatives to the General Assembly, he realized that Mr. el Khoury had rendered a signal service to the Commission by doing so. But the reply given by the Commission must be carefully thought out.

76. Fundamentally there was little to be said about the matter, as it was a question of personal belief. Just as the Protestant, Catholic and Orthodox Churches each believed it had discovered the truth, so it was with the question at issue. There were two opposed viewpoints. According to the first, it was not logically possible to give a definition of aggression which would cover all that was understood by the word. The other was the opinion held by Mr. Yepes, based on the view that a definition was possible. There was no way of reconciling the two viewpoints. It was a matter of personal belief. On the other hand, there was no fundamental contradiction between the opinions expressed by Mr. Alfaro, Mr. Amado and himself.

77. Mr. Amado had stated that he agreed that it was impossible to define aggression. It was not surprising that they should agree since they had both had the same legal training and were brought up in the same legal tradition.

78. There was no contradiction between the report of his eminent colleague Mr. Alfaro and his own, as the two reports dealt with different matters. His own report dealt with the definition of the aggressor, and Mr. Alfaro's report with the question of the limits within which the United Nations Charter permitted recourse to armed force. Where recourse to force was not permissible, there was aggression. If Mr. Alfaro regarded that as a definition they were both in agreement, and there was no difference of opinion between them. But definitions of that kind were to be found in every treatise on public law.

79. When he was preparing his own report, he had consulted the various penal codes to see what they had to say. Generally speaking they included the question of self-defence. Self-defence was permissible in the fact of unjust attack, and the only question was in each particular case to decide whether such an attack existed. It was the judge who determined that. But when the General Assembly referred the question to the Commission, had it wanted the Commission to state positively what the Charter stated negatively? After all, that negative statement was to be found in the Charter (Article 2, para. 4). All that was being done was to express in other words what the Charter stated, and what Article 16 of the Covenant of the League of Nations stated. The various commissions and committees and jurists and politicians who had dealt with that question in the League of Nations had never considered that that constituted a definition. It was simply a delimitation.

80. Mr. Sandström had already drawn the Commission's attention to the Soviet Union proposal. If it were read carefully, and it must be read carefully in order to understand clearly what was the Commission's task,

it would be seen that it considered it necessary to formulate "essential directives" (A/C.1/608/Rev.1). There could be no question of saying in other words what the Charter had said; and what Mr. Alfaro was proposing was precisely that. The Commission had been asked to formulate directives. It had been asked to specify which were the actual cases constituting aggression. The act of aggression and the aggressor were one and the same thing. The text of the Soviet Union proposal would be found to state: "considering it necessary to formulate essential directives for such international organs as may be called upon to determine which party is guilty of attack". The point was to determine which party was guilty of aggression. The crux of the matter was that the Commission was being asked to clarify the issue and not to repeat in its own words what the Charter had already said. The members of the Political Committee knew the Charter at least as well as the Commission.

81. What was wanted was a definition by which in any specific instance it could be determined whether there was aggression. The Commission must not lose sight of that fundamental fact. If it transmitted to the General Assembly a reply along the lines proposed by Mr. Alfaro, the First Committee would not be so much disappointed as astonished. It would see that all the International Law Commission had to say was already in the Charter. It wanted something more. It wanted to know whether there was any means of ascertaining which party was the aggressor. All the various definitions included the enumeration of certain factors. The various commissions and committees of the League of Nations, as the historical section of his own report (Chapter II, part B) showed, had examined cases of attack, invasion, blockade etc. Specific cases had been examined, not aggression in violation of the Covenant. What it was desirable to ascertain was what acts were contrary to the Covenant.

82. With regard to the proposal submitted by Mr. Yepes, he had nothing to say on the subject. It was a matter of personal belief. If Mr. Yepes thought he could define aggression, let him do so. Personally he felt incapable of doing so. He had analysed the concept of aggression, a thing which no one had done in the League of Nations. Having completed his report he ventured to say that he was proud of it. He had thought the report would put an end to the idea of defining aggression. Was it not desirable to analyse the concept as he had done? All he had had to listen to was a series of assumptions. Mr. Yepes talked of defining; but it was first of all necessary to see whether definition was possible.

83. The usual practice in the Commission should be followed, and the report examined word by word and chapter by chapter, to see whether its contents were approved. Obviously the Commission was at liberty to change the report or reject it, but at least it was necessary to examine it and reject each separate paragraph. In his report he had spoken of primary notions. He had no objection to his text being altered, and if it were found that his report was not based on law, by all means let it be rejected. It was undoubtedly a question of personal belief.

84. For the first time — and that was very important for the future of the International Law Commission — the Political Committee of the General Assembly had recognized its existence. Hitherto only the Sixth Committee of the General Assembly had taken cognizance of the International Law Commission. Hence the Commission must establish a real report for submission to the Political Committee. Such a report was like an advisory opinion by the International Court of Justice, and he had drafted it in the form of an advisory opinion.

85. Like Mr. Alfaro and Mr. el Khoury, he thought that a reply must be given. That was the only proper attitude. No doubt it was possible to argue that the question did not much matter, but the International Law Commission was not entitled to do so. It must proceed on the assumption that the question was important.

86. In conclusion he apologized to the Commission for taking up so much of its time, and especially for his failure to observe all the rules of surface politeness. But the Commission was not a mutual congratulation society; its members were there to tackle the important and responsible task ahead of them.

87. Mr. SCELLE thought that the first thing the Commission must do was to decide what its instructions were.

88. He had not taken part in the Assembly discussions, and hence he was in an unfavourable position. But the definition submitted by the Soviet Union had been sent to the Commission along with a request for its opinion on the subject of aggression. If the Commission found that that definition was unsatisfactory, it must produce another. It must not shirk its duty.

89. He approved the conclusions reached by Mr. Amado and Mr. Alfaro. He did not think it possible to give a definition based on enumeration; but an abstract definition of what aggression was could be produced. Presumably that definition would be very similar to the definition of the crime mentioned in article I, paragraph 1 of the draft code — very similar but not identical, since all that was required for the crime was the threat of employment of force, whereas for aggression actual recourse to force was necessary.

90. The fact that the terms found in the Charter would have to be used was no reason for not giving a definition. Aggression was an extremely serious problem, as was proved by the fact that on two recent occasions, two States — North Korea and China — had been declared aggressors by the United Nations.

91. According to Article 39 of the Charter "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression...". Presumably there was a difference between breach of the peace and an act of aggression, otherwise the two terms would not have been used. Hence the attempt to define what constituted aggression was not a waste of time. It was a difficult, but not impossible task.

92. He was opposed to a definition based on enumeration, since any act of aggression could slip through the terms of a definition, and by applying the enumerative

method, the victim of aggression could be regarded as the aggressor. He did not think it was impossible to find an "essential" general and abstract definition.

93. The definition of aggression and the question of the determination of the aggressor were two different things. In a penal code, it was not infrequent to find a definition of a crime which was just as vague as any that could be imagined for aggression. Take the definition of manslaughter given in the French penal code — the Code left it to the judge to determine whether a given party had been guilty of criminal negligence. The same procedure should be adopted in defining aggression, leaving it to the competent organ — the Security Council, by virtue of Article 39, and perhaps at present the General Assembly<sup>6</sup> — to determine which party was the aggressor.

94. He would not venture to put forward a definition of aggression. The Commission would have to study the question once it had decided what the General Assembly expected of it. The Charter mentioned resort to force, in some cases on justifiable grounds and in others without justification. According to the Briand-Kellogg Pact, all recourse to armed force for the purpose of furthering a national claim was unlawful.

95. There was always a tendency to think of aggression in terms of attack; but it was conceivable for both combatants to be aggressors, if they failed to carry out the provisions of the Charter (Article 2, para. 4) prohibiting the use of force. Suppose, for example, Pakistan and India decided to go to war on the subject of Kashmir and to settle the issue by a sort of trial by combat. Both countries would be aggressors.

96. The consequences of determining the aggressor would not be the same as the consequences of a breach of the peace. Hence it would be necessary to define both concepts.

97. The question on the agenda was a concrete point for discussion. The Commission was called upon to state what constituted aggression. The determination of the aggressor, a very different question, was a matter for whatever competent organ might be required to examine questions of fact. Hence any enumeration was risky.

98. What was the General Assembly to think if the Commission did not reply to its inquiry? He was convinced that the Commission was capable of defining aggression. He did not think it was as difficult a matter as had been made out. Indeed, he thought it was a relatively easy matter; and before proceeding, he would like to know whether the Commission intended or did not intend to undertake the task entrusted to it.

99. The CHAIRMAN asked the Commission to decide whether it considered itself called upon by General Assembly resolution 378 B (V) to endeavour to produce a definition of aggression.

100. Mr. HUDSON pointed out that the question did not prejudice the attitude of the rapporteur, and that it was merely a reply to the question he had put.

101. The CHAIRMAN replied that that was the case, and that possibly the Commission might feel that the question could not be answered.

102. Mr. SPIROPOULOS said that if he understood the General Assembly resolution correctly, the Commission was to examine the problem of aggression; and in order to discover exactly what the problem was, it should refer to the discussions of the First Committee. Hence it should consider whether a definition of aggression could be given, and it should then endeavour to define aggression, unless it considered that the Soviet Union proposal provided a satisfactory definition. In his view, the Commission must not disregard the definition put forward by the Soviet Union.

*It was decided that an attempt should be made to define aggression.*

103. The CHAIRMAN asked whether the Commission considered that it should try to define aggression by enumeration.

104. He thought Mr. Yepes had been the only member to advocate that method of dealing with the question. The other members of the Commission had felt that it was impossible or dangerous to adopt that procedure.

105. Mr. HUDSON shared the majority view. No attempt should be made to produce a definition by enumeration.

106. Mr. YEPES explained that he was in favour of defining aggression and he was convinced that it was possible to do so. He had suggested a definition by the enumerative method, but he was prepared to accept any form of definition.

*It was decided to formulate an abstract definition of aggression.*

107. Mr. HUDSON referred to the other question raised by the Rapporteur: the majority might decide that it was possible to establish a definition.

108. The CHAIRMAN thought that was perhaps a little premature.

109. Mr. HSU asked whether it would not be feasible to give an enumeration in the commentary.

110. The CHAIRMAN replied that the Commission's decision did not prejudice that issue.

111. In reply to Mr. SPIROPOULOS, who had asked whether the Commission proposed to study his report, the CHAIRMAN replied that it did: but he added that, in view of the decision just taken by the Commission to try to produce an abstract definition, it would not be necessary to examine the report paragraph by paragraph.

The meeting rose at 6.15 p.m.

## 94th MEETING

Friday, 1 June 1951, at 9.45 a.m.

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<sup>6</sup> See General Assembly resolution 377 A (V) of 3 November 1950.

*Chairman:* Mr. James L. BRIERLY

*Rapporteur:* Mr. Roberto CORDOVA

*Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, 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.

**General Assembly resolution 378 (V) of 17 November 1950: Duties of States in the event of the outbreak of hostilities (item 3 of the agenda) (A/CN.4/44, chapter II: The possibility and desirability of defining aggression; A/CN.4/L.6; A/CN.4/L.7 and A/CN.4/L.8) (continued)**

GENERAL DEBATE (continued)

1. The CHAIRMAN called on Mr. Alfaro to speak on a point of order.
2. Mr. ALFARO pointed out that at the previous meeting the Commission had decided two preliminary points:
  - (i) That it must draw up a definition, as requested by the General Assembly in resolution 378 B (V);
  - (ii) That the definition must be essential, general and abstract and not a definition by enumeration.
3. The Commission should now decide whether it would adopt either of the formulas proposed, the one by Mr. Amado (A/CN.4/L.6, para. 19 or 11–12 mimeographed English text) and the other by himself (A/CN.4/L.8, para. 36). For his part, he was prepared to accept either. If the Commission decided in favour of the formula he had proposed, it might require amendment if simplicity were desired. If the Commission preferred the formula proposed by Mr. Amado, it might be necessary to supplement it. He proposed that the Commission first decide that point and then begin to discuss the substance of the question.
4. The CHAIRMAN said that he had been about to make the same observation. There were two possible texts before the Commission, proposed by Mr. Alfaro and Mr. Amado respectively. The Commission should choose which of them it wished to adopt as a basis for discussion. Mr. Amado's definition might perhaps be the more suitable, as it was the simpler of the two.
5. Mr. YEPES explained that owing to the late hour at which the meeting had risen, he had been unable to define his position the previous day. In his opinion the problem of defining the aggressor was not as complicated as it had been made out to be. The Commission should submit a concrete proposal and that had been the aim of his draft (A/CN.4/L.7). He had thought it advisable to submit a definition by enumeration, containing the list of cases in which it would be automatically declared that aggression had taken place, while leaving, in exceptional cases, a certain latitude to the international

authority competent to determine the aggressor. He had considered that method the best, and the only one in conformity with the Charter, which simply referred to cases of aggression, thus implying that cases of obvious aggression should be specified. In the absence of any better alternative, he would support any definition providing a constructive solution of the problem. He asked that his proposal be mentioned in the Commission's report to the General Assembly.

6. Mr. SANDSTRÖM thought it most desirable that the definition given should be as close as possible to that contained in article 1, paragraph 1 of the draft Code. Hence, if a formula other than that proposed by Mr. Amado were adopted, the Commission should reconsider paragraph 1 in order to decide whether it required amendment.

7. The CHAIRMAN observed that Mr. Amado's formula reproduced article 1, paragraph 1, word for word, with the exception of the reference to "threat".

8. Mr. HUDSON feared that he had not understood Mr. Sandström's wishes. The Commission should not forget the aim of formulation. Article 1, paragraph 1 of the Code was intended to define a crime. But that was not the purpose of the proposal submitted to the General Assembly by the Soviet Union delegation, which called for directives to international organs which might be called upon to determine whether an act of aggression or breach of the peace had taken place. That proposal was in the following terms: "Considering it necessary to formulate essential directives for such international organs as may be called upon to determine which party is guilty of attack" (A/C.I/608). To formulate essential directives for international organs was one thing, to determine the guilty party was another. If the crime was to be defined, that should be done in more precise terms than would be used for directives addressed to international organs. He found it rather difficult to believe that the formula proposed by Mr. Amado could usefully serve as a directive to international organs.

9. The CHAIRMAN emphasized that the Commission was not acting by virtue of the draft resolution submitted by the Soviet Union. That resolution had not been adopted. The resolution with which the Commission must conform was different. He reminded the Commission that on the previous day it had decided that it was not possible to define aggression by enumeration.

10. Mr. HUDSON considered that there were nevertheless two different problems: the determination of those guilty of the crime and the formulation of directives. The aim which the Commission should pursue was correctly stated in the Soviet Union draft resolution. Directives must be formulated for international organs, for otherwise it was impossible to see what should be done. In his opinion article 1, paragraph 1 of the Code was very satisfactory as a definition of the crime. It was useful in its proper place, but he wondered what would guide the General Assembly, the Security Council or any other organ which might be required to take a decision. It was true that the Commission was not acting by virtue of the Soviet Union draft resolution, but it should pursue the same aim.

11. Mr. ALFARO also considered that the Commission's discussions should not be based on the Soviet Union draft resolution, but rather on the resolution adopted by the General Assembly (378 B (V)).

12. He wished to point out to Mr. Hudson that he had only referred to the fourth paragraph of the Soviet Union draft. He might have quoted the first paragraph which read as follows: "Considering it necessary, in the interests of general security and to facilitate agreement on the maximum reductions of armaments, to define the concept of aggression as accurately as possible, so as to forestall any pretext which might be used to justify it." That was the fundamental aim of the Soviet Union proposal, as was clearly shown by the operative part of the resolution which was, precisely, a definition of aggression by enumeration. That led back to Mr. Scelle's remarks emphasizing that the definition of aggression should not be confused with the determination of the aggressor. The purpose of the Soviet Union draft resolution was to define the aggressor.

13. He agreed with Mr. Hudson that article 1, paragraph 1 of the Code was satisfactory. In his opinion that formula was perfect, but it could not be used just as it stood to define aggression, since it referred to the threat of employment of armed force. Threat was not aggression; aggression was the physical act of violence.

14. The object in view, which was to provide directives for the organs of the United Nations, would be achieved if aggression could be defined, since the definition would provide a means of determining the aggressor. The Commission's task was to define aggression. The competent organs of the United Nations could then designate an aggressor, just as the courts decided whether a man had committed homicide on the basis of the definition given in the Code.

15. He therefore considered that, as the Chairman had said, the Commission should adopt a basic formula for its discussions that would enable it to reach a definition of aggression.

16. Mr. SCELLE said that the definition of aggression should be followed by a second paragraph stating that it was for the competent organs to designate the aggressor or aggressors, if the need arose; that should be done in order to show the Commission's intention to distinguish between the definition of aggression and the determination of the aggressor. He was not in favour of a definition by enumeration, or even of giving examples of cases in which aggression might be committed. There was, in fact, some danger that such an enumeration might be regarded as constituting presumption of aggression if one of the cases enumerated were to arise. The organ responsible for determining the aggressor should be left full freedom.

17. He was inclined to think there was something missing in the texts proposed, for they did not mention the possibility of aggression through intermediaries. There might be intervention by armed bands in contact with a government. In that case the organ responsible for designating the aggressor would have to determine whether there had been intervention by a government.

18. Mr. SPIROPOULOS explained that in his opinion the Commission was not required to give a definition of that kind. The records of the discussions in the First Committee showed that the International Law Commission had never been asked to declare what everyone knew, namely, that a military attack was an act of aggression if carried out in violation of the provisions of the Charter. It could be seen from the records that the contents of the Soviet Union and Yugoslav proposals had been criticized.

18a. The United States representative had said that: "The Government of the United States had always considered, and was still of the opinion, that no definition of aggression could be exhaustive and that any omission might encourage an aggressor. It would be noted, for example, that the definition proposed by the USSR delegation contained no reference to indirect aggression, to subversion or to the fomenting of civil strife. Any attempt at a comprehensive definition of aggression was inconsistent with the provisions of the Charter, particularly with Article 39, which provided that the Security Council should determine the existence of any act of aggression and take the necessary steps to put an end to it" (A/C.1/SR.386, para. 36).

19. That passage showed that the First Committee had discussed cases of aggression and not a general definition. The members of the Commission could refer to the records of the general discussion. The text submitted by the Soviet Union delegation had been criticized for not including certain cases in its definition. The definition was, in fact, the sum of all acts which might constitute aggression. The Charter prohibited resort to force except for self-defence. He was not referring to coercive action, since that could never be regarded as aggression. Thus there remained only Article 51, which provided that force might be resisted. The Commission had never been asked to repeat, in other terms, what was included in the Charter. It had already been stated in article 16 of the Covenant of the League of Nations that: "Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League". If there was recourse to war in violation of Articles 12, 13 or 15, that was a war of aggression. That definition was contained in the Covenant. Nevertheless, the problem of defining aggression had arisen; that meant the problem of determining concrete cases. The League of Nations Council had been concerned with the question whether aggression was committed in the event of bombardment or blockade, etc. In all the work of the League of Nations and that of the United Nations, it was cases of aggression that had been considered.

20. A negative definition of aggression was contained in the Charter. In addition, directives were required in the light of which the United Nations could decide whether aggression had taken place; it was the Commission's duty to endeavour to draw up such directives.

21. At the San Francisco Conference, the report on Chapter VIII, section B had included the following passage:

"Various amendments proposed on this subject

recalled the definitions written into a number of treaties concluded before this war, but did not claim to specify all cases of aggression. They proposed a list of eventualities in which intervention by the Council would be automatic. At the same time they would have left to the Council the power to determine the other cases in which it should likewise intervene.

“Although this proposition evoked considerable support, it nevertheless became clear to a majority of the Committee that a preliminary definition of aggression went beyond the possibilities of the Conference and the purpose of the Charter. The progress of the technique of modern warfare renders very difficult the definition of all cases of aggression” (A/CN.4/44, para. 148).

Thus cases of aggression had been considered, not a definition of aggression, which was to be found in the Charter.

22. Reference to the work of the two Commissions set up by the League of Nations showed that the Permanent Advisory Commission had examined different cases of aggression. It had reported as follows:

“These few considerations illustrate some of the difficulties inherent in any attempt to define the expression ‘cases of aggression’ and raise doubt as to the possibility of accurately defining this expression *a priori* in a treaty, from the military point of view, especially as the question is often invested with a political character.

“ . . . . .

“But, even supposing that we have defined the circumstances which constitute aggression, the existence of a case of aggression must be definitely established” (A/CN.4/44, para. 138).

The Commission went on to say that: “In the absence of any indisputable test, governments can only judge by an impression based upon the most various factors” (*Ibid.*).

23. The special Committee of the Temporary Mixed Commission on the Reduction of Armaments, which was also a most important committee, had stated in its commentary on the definition of a case of aggression that: “It would be theoretically desirable to set down in writing, if it could be done, an exact definition of what constituted an act of aggression.” The Committee had added that: “It appears, however, to be exceedingly difficult to draw up any such definition. In the words of the Permanent Advisory Commission ‘under the conditions of modern warfare, it would seem impossible to decide even in theory what constitutes an act of aggression’” (*Ibid.*, para. 139).

24. He repeated that the Commission should make no mistake: it had not been asked for a general definition, since that was not required. Such a definition was included in the Charter.

25. The CHAIRMAN said that he had not wished to interrupt Mr. Spiropoulos, who was the Rapporteur on that question, but he thought that he was reopening a question decided the previous day.

26. Mr. HSU said that he had felt some anxiety on hearing the statement by Mr. Spiropoulos, which unfortunately dealt with only one aspect of aggression. He wished to say that he would vote against any formula which did not make it sufficiently clear that indirect aggression was included. It would be necessary to submit a commentary on the text adopted.

27. With regard to Mr. Amado’s formula, he did not think it sufficient to refer to “any war”; the definition should cover any use of force, direct or indirect.

28. On the previous day, he had spoken of the possibility of enumerating examples, even if a general definition were given; Mr. Scelle thought it inadvisable to do so, but he himself was convinced that it should be stated in the commentary that indirect aggression was included, so as not to omit one of the various kinds of aggression.

29. Mr. AMADO explained his views on the situation. He considered that the Commission should express itself as follows:

“The Commission,

“Having considered the General Assembly resolution which states:

“Considering that the question raised by the proposal of the Union of Soviet Socialist Republics can better be examined in conjunction with matters under consideration by the International Law Commission;

“Having reached the conclusion that it would be impossible to draw up a definition by enumeration; and

“Considering that the General Assembly’s resolution does not relate to directives, but to the definition of aggression;

“Concludes that it can only transmit to the General Assembly a definition so broadly worded that it will coincide with the terms of the Charter.”

30. In his opinion, the argument advanced by the Rapporteur that the Commission should not transmit to the Assembly a definition repeating the provisions of the Charter, did not carry much weight. A definition could very well consist of provisions contained in various Articles of the Charter. The important point was to declare frankly to the world that it was impossible to define aggression, but that the Assembly had been impressed by the desire of the Soviet Union delegation to submit such a definition and that the Commission, after exhausting the subject, had arrived at the conclusion either that no definition could be given or that the definition must be in those terms. That was the only possible course and he was glad that he had been able to point to it. Either it must be said that any war not waged in exercise of the right of self-defence or as coercive action by the United Nations in application of Article 42 of the Charter, was an aggressive war, or else no definition should be given.

31. The CHAIRMAN said that he took the same view as Mr. Amado.

32. Mr. EL KHOURY stated that, in sending its report on that question to the General Assembly, the Commission should consider how the Assembly, the Sixth Committee

and the First Committee, would deal with it. In the first place they would compare the report with the General Assembly's resolution and to see if it met the request made to the Commission. Very severe criticisms would then be made. Indeed, the attitude of many delegations on that subject was well known. The statement by Mr. Spiropoulos would be taken up. Many delegations would support it, and it was quite possible that the draft resolution submitted by the Commission would be rejected.

33. The only way to safeguard the Commission's draft resolution was to make it conform exactly to the General Assembly's resolution. That was what the Assembly expected of the Commission. It was clear that the resolution had been adopted as a result of the draft submitted by the Soviet Union. The General Assembly had, in fact, said so in the following terms: "Considering that the question raised by the proposal of the Union of Soviet Socialist Republics can better be examined in conjunction with matters under consideration by the International Law Commission". The question had not been referred to the Commission as a special item on its agenda, but merely, as the General Assembly's resolution stated, to be examined "in conjunction with matters under consideration". What were those matters? The reference was to the draft Code of Offences against the Peace and Security of Mankind. There was no reason to make the definition of aggression a separate item, to which a special report would be devoted. The second paragraph of General Assembly resolution 378 B (V) included the following passage: "... so that the latter may take them into consideration and formulate its conclusions as soon as possible". The Commission would do so when it formulated its conclusions on the draft code. It would then state its opinion.

34. It was unnecessary, and might even be dangerous, to devote a special report to the definition of aggression. The definition proposed by the Commission would enjoy some measure of protection if it were submitted as a paragraph of the Code. The General Assembly might adopt the definition. If it were submitted in that manner the General Rapporteur, in his report on the work of the third session, could explain the difficulties encountered in drawing up the definition and mention in particular that enumeration was impossible.

35. He knew the attitude of delegations on that point. He had had considerable difficulty in persuading them to transmit the draft resolution to the International Law Commission. There was nothing to be lost by describing the situation as it had arisen. It would therefore be preferable to add a paragraph to the Code, showing how the aggressor was to be determined. Indeed, if the war in Korea were considered, it would be seen that the Soviet Union and China still maintained that the United States and the United Nations were the aggressors. Hence, it was necessary to know how the aggressor was to be determined. A general definition might be given, as had been done by Mr. Alfaro and Mr. Amado. But it was preferable to insert it in the Code, in order to secure some protection before the General Assembly.

36. Reverting to Mr. Scelle's equation, it might be said

that: All use of force equals war, and all war equals aggression. If the definition of aggression were discussed within the framework of the Code, it would be accepted more easily.

37. Mr. CORDOVA noted that Mr. el Khoury had explained what the General Assembly expected of the Commission. He himself had been in a difficulty because the Rapporteur's report had separated the question of the draft code from that of aggression, which had made him think that the Commission might be called upon to submit a definition entirely independent of the Code. But as had been pointed out, there was a connexion between aggression and the illicit use of force. Examination of the proposals submitted by Mr. Alfaro and Mr. Amado regarding the definition of aggression and of the definition of the crime given in article 1, paragraph 1 of the draft code, showed that they were similar. The only difference was that the threat did not constitute aggression. The Commission should therefore take account of Mr. el Khoury's suggestion and provide in the draft Code that the illicit use of force constituted aggression. Hence aggression would always be regarded as a crime. The threat must be omitted since it was not an objective act. The Commission would thus conform to the Assembly's wish and there was no doubt that the General Assembly would accept the definition of aggression submitted to it by the Commission. He proposed the following text:

"Aggression, that is, the direct or indirect employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence or execution of a decision by a competent organ of the United Nations.

"The threat of aggression shall also be deemed to be a crime under this article."

38. Mr. HUDSON observed that the discussion had taken a different turn. He had been most interested by what Mr. el Khoury had said at the previous meeting, but he believed that the latter had now changed his views and was suggesting that the Commission should not submit a special report.

39. Mr. EL KHOURY explained that on the previous day he had said that the Commission was free to submit a special report or to include the definition it proposed in the Code. He had not contradicted himself at the present meeting; he had clearly stated that he would prefer the definition to be incorporated in the Code.

40. Mr. HUDSON said he had been impressed by the remarks of Mr. Córdova, who had emphasized that the definition should be included in the Code. He believed that that was what Mr. Sandström had proposed.

41. Mr. SANDSTRÖM explained that he had said he thought it desirable to keep the definition of aggression as close as possible to article 1, paragraph 1 of the Code and, consequently, to consider whether that paragraph required amendment.

42. Mr. HUDSON agreed with Mr. Córdova that the paragraph might require amendment.

43. It appeared to him that there were four different questions which could be discussed. Mr. Spiropoulos

had referred to cases of aggression, which had been the subject of the work done by the League of Nations commissions. It had been said that it was impossible to enumerate all cases of aggression and he believed that the Commission had accepted that view. Secondly, there was Mr. Amado's definition, which indicated the cases in which war was not aggression. Thirdly, it had been agreed that it was possible to define aggression and Mr. Alfaro had endeavoured to do so in a positive manner, on the lines of article 1, paragraph 1 of the Code. Fourthly, the proposal of the Soviet Union delegation referred to the necessity of defining the concept of aggression as accurately as possible and of considering whether it was possible to determine the aggressor. Mr. Scelle had made a distinction between the concept of aggression and the determination of the aggressor. He himself did not believe that anything could be added to the Charter so far as the procedure for determining the aggressor was concerned. The organs already existed. In his view those were the four questions which members of the Commission should bear in mind.

44. Mr. ALFARO pointed out that the Commission was considering Mr. el Khoury's proposal to include the definition of aggression in the Code; but he wished to remind members that they had already settled the question they were discussing and had decided to draw up a definition of aggression. Mr. el Khoury thought that the essential part of their task was to formulate conclusions linked to the Code.

45. He had read the discussions leading up to the adoption of Resolution 378 (V) and had the text of the latter before him. The question raised by the Soviet Union draft resolution was that of defining aggression by the enumeration of certain acts. The Commission was entitled, when drafting the Code, to deal with the determination of the aggressor, which depended on a clear conception of aggression. It was, in fact, necessary to have a clear idea of what constituted aggression before attempting to determine the aggressor. In attempting to define aggression, the Commission should start from one of the two formulas submitted to it.

46. On two occasions an argument had been advanced which he could not pass over without comment. Mr. Spiropoulos had asked why the Commission need draw up a definition which was contained in the Charter. He would reply that if the definition submitted was in complete conformity with the Charter, that was a merit rather than a defect. In his opinion it should not be said that the Commission was repeating the terms of the Charter, but that it was acting in conformity with the Charter. It was drawing on the latter for the elements with which it was attempting to draw up a definition. It was using Article 2, paragraph 4, which prohibited any use of force, Article 42 which provided for United Nations action to restore international peace and security and Article 51 which confirmed the right of self-defence. The merit of the proposed definition was that it combined those three elements. Mr. Spiropoulos had drawn attention to the fact that even at the time of the League of Nations it had been held that all war was aggressive war. He thought the Commission was in the position

of M. Jourdain, who spoke prose without knowing it. A definition had been discussed ever since 1945; but one had already been adopted, of which the elements were contained in Articles 2, 42 and 51 of the Charter. Aggression was the use of force for any purpose other than United Nations action or self-defence. When it was stated that that definition also appeared in article 1, paragraph 1 of the Code, that meant that the proposal was in full harmony with that paragraph. He did not say that it was identical, but that it was in full harmony; for the concept of threat must be eliminated from the definition of aggression.

47. It had been said that the General Assembly had asked the Commission to indicate concrete cases of aggression, which meant that the Commission would be up against the difficulties encountered, since the early days of the League of Nations, by those who had attempted to define aggression in that manner. Mr. Spiropoulos, Mr. Amado and he himself had reached the conclusion that it was humanly impossible to enumerate all acts of aggression. Hence it was natural that the Commission, having been asked to draw up a definition, should consider the possibility of doing so by other means.

48. With regard to Mr. el Khoury's proposal to submit the definition of aggression under cover of the Code, that might be done by dividing paragraph 1 into two paragraphs. The first would be worded as follows: "The employment, by the authorities of a State, of armed force against another State for any purpose other than national or collective self-defence or execution of a decision by a competent organ of the United Nations". It could be said that aggression was the commission of the crime described in article 1, paragraph 1 of the Code. A second paragraph would follow, beginning: "The threat of employment . . .".

49. The Commission must answer two questions: Was there, apart from self-defence or United Nations action, any act of violence by a State against another State which did not constitute aggression? And, putting it the other way round: was it or was it not aggression to commit an act of violence apart from self-defence or United Nations action? The Commission would then arrive naturally at the following definition of aggression: Aggression is the employment of force for any purpose other than self-defence or United Nations action.

50. Mr. HSU, referring to Mr. el Khoury's suggestion that the definition of aggression be inserted in the Code, said he thought that should be done only if the Commission found the definition imperfect. There were, indeed, many respects in which the definition was independent of the Code. The two questions overlapped. The Commission had discussed article 1, paragraph 1, which embodied part of its views on aggression, but only a part, for it did not include the provisions of paragraph 4 of the same article relating to the fomenting of civil strife, which covered subversive activities calculated to undermine the authority of the State. Thus the Code and the definition of aggression overlapped, but did not completely coincide.

51. The General Assembly had asked the Commission to define aggression because it greatly needed a definition

of such acts. Yugoslavia feared invasion and had, in fact, asked the United Nations what it would do in the event of aggression. The Soviet Union had given a definition which only included direct aggression. That might imply that it was thinking only of indirect aggression. At the present time no one dared be found guilty of direct aggression unless he wished to start the third world war. Only indirect aggression was thought of, so that unless the definition covered that form of aggression it would be worthless.

52. Another factor was that the Code could not be adopted for some considerable time. Hence the needs of the situation could not be met by merely inserting the definition of aggression in the Code. The Commission must give the Assembly a definition it could apply, and submit that definition separately so that it could be adopted by the Assembly in a separate resolution.

53. Mr. HUDSON asked whether Mr. Hsu meant that the contents of the Code would have to be adopted by States, whereas a definition submitted separately, in the form of directives to the United Nations organs, could be adopted directly by the General Assembly.

54. Mr. HSU replied that the definition should, indeed, give directives to the United Nations, but that if it were included in the Code it would have to await ratification of the latter. If it were submitted to the General Assembly, he thought that, contrary to what had been stated, it would be adopted if the directives were satisfactory. The world was, in fact, awaiting a definition of aggression. The League of Nations had made three attempts, the first and second of which had been complete failures. It had then been said that it was impossible to define aggression. The third attempt had been an enumeration, but that solution was inadequate. If the Commission submitted a useful solution to the General Assembly, he thought that it would enjoy strong support.

55. The CHAIRMAN observed that there were still five speakers on his list though all had already spoken at least once. He asked members to make their remarks as brief as possible. When those five had spoken, the general discussion would be closed.

56. Mr. ALFARO, on a point of procedure, said that the Commission should consider which formula it was going to take as a basis for discussion, as the Chairman had asked it to do. Furthermore, during the debate Mr. el Khoury had proposed that the definition be included either in the draft Code of Offences or in the General report.

57. Those two problems should be considered separately.

58. The CHAIRMAN thought that proposal fully justified. The Commission should first adopt a text and then decide how it should be submitted.

59. Mr. KERNO (Assistant Secretary-General) noted that various speakers considered that the question put to the Commission by the General Assembly (resolution 378 B (V)) was not clear. It had, however, arisen 30 years ago. It had been re-formulated at the San Francisco Conference during which, in his capacity as representative of Czechoslovakia, he had made the following statement :

“ This complete freedom ” (left to the Council under

chapter VIII (B), paragraph 2 of the Dumbarton Oaks Proposals relating to the ‘ determination of threats to the peace or acts of aggression and action in respect thereto ’) “ certainly has the advantage of enabling the Council to adapt its action to any situation. Yet it remains a question whether this absence of any rule of conduct will still be of advantage when the case seems absolutely clear, and when only the application of previously defined rules would seem to guarantee action sufficiently swift to prevent an unscrupulous aggressor from creating, in his own favour, a situation the redress of which may prove very lengthy and very difficult ”.<sup>1</sup>

60. That was the form of the question. It had been subsequently re-stated by the Yugoslav delegation (A/CN.1/604) and by the delegation of the Soviet Union (A/C.1/608). When the members of the Political Committee came to study aggression themselves, they had wished to obtain the opinion of an independent and authoritative legal body already dealing with related matters, thinking that if the work of both bodies were combined, some progress could be made with the problem.

61. Above all, the Commission should consider whether it was possible to propose to the political organs of the United Nations a rule which those organs could apply automatically. Rightly or wrongly, it had already rejected the solution of a definition by enumeration. It should now consider whether an abstract definition was possible. Although of less direct use, such a definition would, however, be of value to the organs of the United Nations.

62. Was it possible to draw up an abstract definition of aggression and if so, how should it be drafted? Those were the questions which the Commission had to answer.

63. With regard to the method of presentation, which had been dealt with by Mr. el Khoury, the Commission was free either to draw up a separate report on the results of its work on the subject or to submit them in a general report on its third session, stating that it had studied the question in conjunction with the Code of Offences. If the latter course were adopted, the General Rapporteur could point out that the Commission had rejected the method of definition by enumeration, recapitulate the main stages of the discussion, give the text of the definition adopted and, finally, explain why the Commission had decided to submit that definition in its general report.

64. Mr. SCALLE was sorry to see that members of the Commission were reconsidering decisions taken at the previous meeting. Except for a few minor differences, their views were identical. The Commission should next decide on the text of the definition and where to introduce it. Those two points should be considered separately.

65. Mr. AMADO wished to comment on Mr. el Khoury's suggestion that the definition should be inserted either in the draft Code of Offences or in the Commission's report, rather than be made the subject of a separate decision. It was in resolution 177 (II) that the General

<sup>1</sup> *Documents of the United Nations Conference on International Organization, San Francisco, 1945, vol. 3, p. 469.*

Assembly had asked the Commission to prepare a draft Code of Offences, whereas it was in resolution 378 B (V) that it had asked the Commission to consider the definition of aggression in conjunction with other matters.

66. In his opinion, the preparation of a draft Code dealing with clearly defined matters should be distinct from any decision on a definition of aggression. In support of that view it might be pointed out that the General Assembly asked the Commission to formulate its conclusions on the subject of the definition of aggression "as soon as possible", whereas it might be many years before the draft Code came into force.

67. The definition should be as broad as possible and should serve to clarify an idea of which the world had long been socially and legally conscious.

68. Mr. SPIROPOULOS was glad to note that the Commission was approaching agreement on many points. He proposed that a sub-committee be set up, which might include Mr. el Khoury, Mr. Alfaro, Mr. Amado, Mr. Hudson and himself as Rapporteur. The sub-committee could be instructed to give general consideration to the proposal contained in Mr. Amado's memorandum (A/CN.4/L.6) with a view to deciding whether it could be adopted or not. It could then endeavour to formulate a definition, accompanied by a draft report to the General Assembly.

69. He himself doubted the possibility of using the formula submitted by Mr. Amado. He had been impressed by Mr. Hsu's comments.

70. The CHAIRMAN recognized that it was difficult to draft a text in plenary meeting. The proposed sub-committee should not have more than five members.

71. Mr. ALFARO doubted whether anything was to be gained by setting up a sub-committee. Any decision taken by such a body would have to be examined by the Commission in plenary meeting. Moreover, all members had taken a very active part in the discussion; he did not see why only five should serve on the sub-committee.

72. Mr. AMADO was not prepared to serve on the sub-committee. The proposal he had submitted in his memorandum was very modest. During the discussion it had been criticized, but he did not wish to take it upon himself to defend it. He suggested that the Commission nominate Mr. Córdova in his place and expressed the wish that Mr. Scelle should also be appointed.

73. The CHAIRMAN and Mr. SPIROPOULOS observed that the Committee would be instructed to prepare not only a definition of aggression but also a draft report to the General Assembly.

74. Mr. SCELLE was opposed to setting up a sub-committee at that stage. If it were to be instructed to draft a report, it would be premature to set it up before the definition had been drafted.

75. The Commission had various texts before it: that of Mr. Amado (A/CN.4/L.6), that of Mr. Alfaro (A/CN.4/L.8) and that of Mr. Córdova, submitted verbally at the beginning of the meeting (para. 37). Those proposals must be examined.

76. Mr. HUDSON thought that the Commission should

not set up the sub-committee until the definition of aggression had been drafted.

*It was so decided.*

77. Mr. SPIROPOULOS had been greatly impressed by Mr. Hsu's observations and consequently wished to make certain comments on Mr. Amado's memorandum.

78. Mr. Amado had wondered whether it would be possible to draw up a definition of aggression based on the United Nations Charter. He had observed that the Charter permitted the use of force in two cases and had deduced, *a contrario*, that apart from those two cases any resort to armed force, any attack or war (there was no need to choose between those terms for the time being) constituted aggression.

79. He himself was not sure whether that general definition covered all cases of aggression possible in the future. Foresight was certainly required, since the concept was continually evolving. A few centuries ago, for instance, the idea of neutrality had not been developed. The support given by a neutral to a belligerent was not considered as aggression, whereas nowadays, if a State gave military assistance to an aggressor, it was considered as an aggressor itself.

80. He again read out the statement of the United States representative in the First Committee of the General Assembly<sup>2</sup>

81. Mr. Amado's draft, which was based on Articles 42 and 51 of the Charter, took account of the definition given in article 1, paragraph 1 of the draft Code of Offences which condemned "the employment . . . by the authorities of a State, of armed force against another State for any purpose other than . . ."; but it left out acts which, according to the United States Government, also constituted aggression, namely, indirect aggression, subversion and incitement to war, to which must also be added the incursion of armed bands referred to in article 1, paragraph 3 of the Commission's draft code.

82. If the Commission based its definition of aggression on article 1, paragraph 1 of the draft Code, and left out the other crimes also defined in the draft which were classed as acts of aggression, such as the incursion of armed bands or the forcible annexation of territory, its formula would be less comprehensive than that of Mr. Politis. Moreover, Mr. Vyshinsky also considered that the presence of foreign troops on a territory, against the wishes of the population, constituted aggression. All those considerations showed how complex the problem was.

83. In his own report, he had also examined another case and described it in the following terms:

"According to international law, no State is obliged to prevent its nationals from joining, as volunteers, the army of a belligerent. But what about a State which would allow a very important portion of its male population to enter the territory of a belligerent State in order to serve in the army of that State as volunteers? (We do not refer to the participation of Chinese troops in the Korean war since the situation

<sup>2</sup> See para. 18a, *supra*.

- there is somewhat different.) Could one say that a State which, in the above case, would allow its nationals to join a belligerent army would not be an 'aggressor' according to the general feeling of our time? A definition of aggression like that adopted by the Treaties of London would for instance leave the above case of aggression uncovered."<sup>3</sup>
84. The proposed definition left that case out of account ; that showed how dangerous any definition was. The General Assembly, to which the definition would be submitted, would no doubt consider that it was both very broad and insufficiently comprehensive. It would often be felt that a State was an aggressor, though the terms of the definition gave no express authority to call it one.
85. Mr. SCALLE asked the Commission to cut short the general discussion and begin examining the proposals before it.
86. Mr. SPIROPOULOS explained that the purpose of his remarks had been to show that Mr. Amado's solution did not cover all possible cases of aggression.
87. The CHAIRMAN noted that Mr. Spiropoulos considered that the formula contained in Mr. Amado's memorandum should be supplemented.
88. In order to show the inadequacy of certain definitions, Mr. el KHOURY cited the Corfu Channel incident. Following a decision by the Security Council, the dispute between the United Kingdom and Albania had been referred to the International Court of Justice. In its judgement, the Court had ordered Albania to pay compensation to the United Kingdom. Albania had not complied with that decision and the compensation remained unpaid. If the United Kingdom asked the Security Council to enforce the decision of the Court, it would be replied that the United Nations was not responsible for enforcing such decisions. If, in order to obtain satisfaction, the United Kingdom took measures against Albania to enforce the judgement, it would be considered as an aggressor under Mr. Amado's formula. Hence, it would not do so and the judgement of the Court remained a dead letter.
89. In his opinion the provisions of the definition of aggression should be such that resort to force to ensure the enforcement of a decision by the International Court of Justice would be regarded as legitimate, whereas under existing international law it was classed as aggression.
90. In reply to a question by the CHAIRMAN, Mr. EL KHOURY explained that he had not forgotten the provisions of Article 94, paragraph 2 of the Charter, but he considered them difficult to apply.
91. Mr. CORDOVA observed that Mr. el Khoury had meant to say that the Court's decision in favour of a State did not give that State full legal authority to enforce the judgement, and that under the above-mentioned provisions of the Charter the Security Council remained free to decide whether it should make recommendations or take enforcement measures.
92. In claiming the right of a State to take justice into its own hands, however, Mr. el Khoury was putting international law back to a stage which had now been passed.
93. Mr. EL KHOURY observed that decisions of the Security Council, under Article 94, paragraph 2, would be mere recommendations, which were not binding. The Council did not exercise its powers under Article 42 if a decision of the Court was not respected.
- 93a. The CHAIRMAN thought that Mr. el Khoury's conclusions would put international law back to a stage prior to the establishment of the League of Nations.
94. He asked Mr. Amado if he would agree to his draft being supplemented, to take account of cases of indirect aggression and armed incursion.
95. Mr. AMADO pointed out that the suggestion contained in his memorandum was only put forward tentatively, being preceded by the words: "One solution might be to say..." (A/CN.4/L.6, para. 19 or p. 11, mimeographed English text).
96. The CHAIRMAN thought that the ideas contained in Mr. Amado's formula might serve as a basis for the definition to be adopted by the Commission, whose general view it was that they should be supplemented so as to cover indirect aggression.
97. Mr. AMADO considered that, rather than allow itself to be convinced by the too plausible arguments of Mr. Spiropoulos, the Commission should seek the only solution that remained possible. In its report to the General Assembly, it should explain that it seemed impossible to enumerate all cases of aggression and unsatisfactory to give examples; that it considered that article 1, paragraph 1 of its draft code gave a sufficiently comprehensive definition of aggression, and that it had supplemented that text to cover the possibilities of indirect aggression.
98. That was the course to be followed if the Commission did not wish to evade the issue. If it abandoned the attempt, however, it would not be the first time that a learned body had admitted the impossibility of carrying out a task entrusted to it.
99. Mr. SCALLE considered that the texts submitted by Mr. Alfaro and Mr. Córdova were both amplifications of the suggestions contained in Mr. Amado's memorandum. Mr. Alfaro's definition was the more detailed. The Commission might give it preference, subject to certain deletions. It was easier to make deletions than additions.
100. The CHAIRMAN thought that Mr. Alfaro's definition did not include indirect aggression either.
101. Mr. ALFARO pointed out that indirect aggression was covered in his definition by the words "in any manner" which should be understood as meaning "whether directly or indirectly". He would not be opposed to amendment of that expression if the Commission considered it insufficient. He agreed with Mr. Hsu and, in introducing the words "in any manner" into his definition, had been thinking particularly of the constitution of the puppet state of Manchukuo in 1931.

<sup>3</sup> A/CN.4/44, para. 159.

102. He was willing to have every word of his definition discussed, but thought that in order not to waste time the Commission should begin to examine a text, whichever one it chose.

103. Mr. AMADO thought that Mr. Alfaro was taking a stand on a very controversial point in introducing into his definition the ideas of territory and people, which were very imprecise notions, like those of space and time, of which Politis had made an exhaustive study. The use of such words in a definition which could only be broad and abstract, should be ruled out if it was desired to avoid the difficulties so clearly brought out by Mr. Spiropoulos in his report. He himself would not urge their deletion, but he drew the Commission's attention to the problem.

104. Mr. CORDOVA thought that examination of the definition given by Mr. Amado might cause a repetition of the Commission's discussion in connexion with article 1, paragraph 1 of the draft Code of Offences.

105. Moreover, he thought that the words "or governments", in Mr. Alfaro's definition, should be deleted. It was, in fact, always against a State, rather than a government, that force was used.

106. The use of the words "territory" and "people" was confusing, as Mr. Amado had pointed out.

107. Mr. HSU was not satisfied with the words "in any manner", which did not give sufficient prominence to indirect aggression; he considered that they should be amended.

108. The CHAIRMAN asked Mr. Alfaro whether, by the words "use of force", he had meant "armed force".

109. Mr. ALFARO thought that such a stipulation might exclude bacteriological and gas warfare from the definition. Microbes and gas were not really arms. Moreover, the Charter did not use the words "armed force".

110. Mr. SCELLE asked the Chairman if he would be satisfied with the word "violence".

111. The CHAIRMAN preferred the word "force".

112. Mr. HUDSON pointed out that the same comment could be applied to the definition of the crime contained in article I, paragraph 1 of the draft Code of Offences.

113. Since Mr. Alfaro had explained in his memorandum<sup>4</sup> that by "force" was meant all kinds of weapons, the word "armed" would not limit the application of the word "force". If the bombs used were charged with microbes or gas, armed force was still being employed.

114. Mr. HSU considered the word "armed" unnecessary and even undesirable. Aggression might take the form of ideological action to foment civil strife or of subversive activities, which the term "armed force" appeared to exclude.

115. Mr. HUDSON was not clear what Mr. Córdova meant in his definition by the words "indirect employment of armed force". He thought that that point should be thoroughly studied. It would be better provisionally to adopt a starting point for the definition,

without seeking to include everything in the opening words.

116. Mr. KERNO (Assistant Secretary-General) asked whether the words "armed force" covered the case of volunteers sent without arms to join the ranks of a belligerent army and to be armed abroad.

117. Mr. HUDSON thought that case was not covered: The Commission could consider it later.

118. Mr. ALFARO was willing to accept the addition of the word "armed" to his definition, if the majority of the Commission thought that it corresponded to the definition of the word "force" given in his memorandum; but he warned the Commission against any qualification of the various concepts. The Charter constantly used the word "force" without justification.

119. Mr. SPIROPOULOS asked what difference there was between an enumeration given in a note and one contained in the definition itself.

120. Mr. HUDSON thought that the debate should continue. The general discussion must be brought to an end but, on the other hand, the Commission was too large a body to be turned into a drafting committee.

121. Mr. CORDOVA considered that the problems raised by the Commission were matters of substance rather than of drafting.

The meeting rose at 1.05 p.m.

## 95th MEETING

Monday, 4 June 1951, at 3 p.m.

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*Chairman:* Mr. James L. BRIERLY

*Rapporteur:* Mr. Roberto CORDOVA

*Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, 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.

<sup>4</sup> A/CN.4/L.8, para. 41.

**General Assembly resolution 378 B (V): Duties of States in the event of the outbreak of hostilities (item 3 of the agenda) (A/CN.4/44, chapter II: The possibility and desirability of defining aggression; A/CN.4/L.6; A/CN.4/L.7; A/CN.4/L.8; A/CN.4/L.10; A/CN.4/L.11; A/CN.4/L.12) (continued)**

GENERAL DEBATE (continued)

1. Mr. YEPES pointed out that he had deliberately abstained from speaking at the previous meeting as the Commission had *a priori* discarded the draft definition of aggression of which he was the author (A/CN.4/L.7). He expected the discussion to result in a formula to which all could agree.

2. His proposal had been based on the notion of an enumerative definition which would not only cover all cases which could be automatically labelled as aggression, but would also provide for the possibility of including any other unforeseen and sufficiently serious cases. It rested on an objective criterion and combined the advantages of a rigid method with those of flexibility. He did not, however, desire to press the matter as the Commission had agreed to the reproduction of the proposal in full in its report to the General Assembly on its third session.

3. It was understood that the Commission still proposed to draw up a definition of aggression. That had been decided in the first phase of the discussion and in itself represented progress. However, the new proposals which were supposed to constitute essential definitions were actually nothing more than enumerative definitions put the other way round and more dangerous than those he had himself submitted.

4. Mr. Amado, who in chronological order was the author of the first proposal, considered that "any war not waged in exercise of the right of self-defence or in application of the provisions of Article 42 of the Charter of the United Nations was an aggressive war" (A/CN.4/L.6, para. 19 or pp. 11-12, mimeographed English text). Such a definition reproduced the outdated notion of a war of aggression which the compilers of the Charter had eliminated from the legal vocabulary. It was an enumeration put the other way round of all that did not constitute aggression in the sense of the formula, and would have the effect of whitewashing any States that took part in a conspiracy against peace but could not be labelled as aggressors under its terms.

5. The definition proposed by Mr. Alfaro was the following: "Aggression is the use of force by any State or group of States, or by any Government or group of Governments, against the territory and people of other States or governments, in any manner, by any method, for any reasons and for any purposes, except individual or collective self-defence against armed attack or coercive action by the United Nations" (A/CN.4/L.8, para. 36).

6. That meant that the use of force, or rather of armed force, would be the sole criterion of aggression since, according to the author of the proposal, "aggression itself is not perpetrated until and unless some form of attack or physical offensive has taken place" (A/CN.4/L.8, para. 58).

7. That again was a typical case of enumeration put the other way round. Nothing except a physical attack, the use of armed force, constituted aggression. Furthermore, that definition would have the effect of exculpating States which, for the last fifteen years, had been branded as aggressors by international public opinion for acts such as the Austro-German Anschluss in 1938, the annexation of Czechoslovakia by Hitlerite Germany in 1939, the annexation of the Baltic Republics by the Soviet Union in 1945, the intervention of the Soviet Union in the domestic politics of Poland, Czechoslovakia, Hungary and Romania, and still more recently of China, and the intervention of the Central People's Government of the People's Republic of China in Tibet. Should the Commission adopt that definition, a whole series of acts, censured by public opinion and opposed to morality, would not be considered as aggression. It was easy to imagine the sensation that such a formula would produce in the General Assembly and the discussions to which it might give rise. As it whitewashed the aggressors of the last few years, and in some sort granted them absolution, the Soviet Union and its satellites would do their utmost to get it accepted.

8. It would not be wise to adopt solutions improvised in the course of a meeting for so delicate a problem. The Commission should ask Mr. Spiropoulos, who, as rapporteur, had given proof of remarkable scientific exactness, to examine the various formulas proposed and evolve therefrom, with the help of the directives resulting from the discussion, precise proposals which would enable the Commission to get on with its work.

9. The CHAIRMAN asked the members to end the general discussion, which had already taken up a great deal of time.

10. Mr. YEPES made the formal proposal that the various definitions before the Commission be referred to the rapporteur, with the request that, in drawing up his conclusions, he should base them on the guiding principles that had emerged from the Commission's discussions.

11. Mr. AMADO pointed out that he had not put forward a formal proposal but had only passed on his reflections to the Commission, which had considered them worthy of consideration. He wished to avoid being made the target for Mr. Yepes's attacks.

12. In his opinion no meticulous definition of aggression was possible. He had not fully grasped Mr. Yepes's argument in regard to so-called enumerative definitions put the other way round. Aggression could not be defined by the methods adopted by Politis, Mr. Vyshinsky and others. All such attempts had foundered on the same rock. They always came up against the impossibility either of enumerating or of giving examples.

13. Mr. YEPES was ready to withdraw anything he had said that might be construed as a personal criticism.

14. The CHAIRMAN informed the Commission that two new proposed definitions had been submitted, one by Mr. Córdova (A/CN.4/L.10) and the other by Mr. Hsu (A/CN.4/L.11). He asked Mr. Hsu to state what new points his proposal contained.

15. Mr. HSU said that it was the absence in the other definitions of any reference to certain aspects of aggression as, for instance, indirect aggression, that had led him to prepare a definition, based largely on General Assembly resolution 380 (V) of 17 November 1950 (Peace Through Deeds). Strictly speaking that resolution did not give a definition of aggression, but paragraph 1 of its operative part came near to constituting such a definition.

16. He considered that a definition of aggression should cover not only direct but also indirect acts, acts performed in the light of day and those hid under a disguise. Those simple words, if he had used them, would in their turn have needed defining, and it was for that reason that he had considered it necessary to expand somewhat the definition of aggression.

17. If he might explain the more important phrases of his proposal, the words "crime under international law" were based on the first paragraph of the operative part of the above-mentioned resolution of the General Assembly, which was still more explicit. "Hostile act" had appeared to him preferable to "force". A generic expression had to be used which would cover both the use of force and other acts.

18. The phrase after (a) required no comment. The Commission had already accepted that notion which, moreover, conformed to the crime defined in article 1, paragraph 1 of the draft Code of Offences against the Peace and Security of Mankind, provisionally adopted by the Commission. That wording covered, for instance, the case of the Republic of South Korea, which had been attacked, first by North Korea, and then by Communist China. The United Nations had recognized aggression in both cases, in the first by a decision of the Security Council and in the second by a resolution of the General Assembly.

19. The phrase after (b) "the arming of organized bands or of third States, hostile to the victim State, for offensive purposes", extended the notion of aggression to the arming of organized bands, and corresponded to the concept expressed by the General Assembly in paragraph 1 of the above-mentioned resolution by the words: "whether committed... or otherwise". The same concept was also included in the definition of an aggressor given by Politis in 1933. It constituted the fifth point inserted at the instigation of the Turkish Government. The acts of which Greece had been the victim in the recent past provided an example of that sort of aggression.

20. Such an act, committed by a third State, might occur in time of war or in time of peace. If it occurred in time of war, it was already condemned under the principle of neutrality which, it had to be admitted, still survived, though there might be disagreement as to the obligations deriving therefrom. In such a case the application of the principle of neutrality sufficed to condemn the third State, even if the Security Council were paralyzed by the vote of some of its permanent Members and no effect were given to the recommendations of the General Assembly.

21. In time of peace, aggression took place when a State

armed organized bands or a third State for offensive purposes, against another State. There would be no aggression if the activities in question took place for defensive purposes, as, for instance, at the present time the arming of certain States by the United States of America. It might be objected that it was difficult to define what were "offensive purposes", but interpretation, in that instance, should not be more difficult than in the case of other crimes under international law defined in the draft Code. As an example of an act of aggression, committed under such conditions, reference might be made to the seizure by the Soviet Union in Manchuria in 1945 of large quantities of machinery and all the equipment supplied under Lend-Lease and their delivery to the Chinese Communists.

22. The phrase after (c) was taken almost word for word from paragraph 1 of the General Assembly's resolution. By including the words "in the interest of a foreign Power", the latter established a restriction that did not appear in the crime as defined in article 1, paragraph 4 of the draft code. He had considered it more logical to leave that restriction in his proposal, whereas the crimes referred to in article 1, paragraph 4 of the draft code, were not confined to aggression.

23. The phrase starting with (d) was also based on the General Assembly resolution mentioned above. In the future, other acts would be labelled as aggression, and provision should be made for that contingency by inserting a clause enabling them to be included.

24. Mr. EL KHOURY remarked that, if the Commission were bound by the General Assembly's resolution, the definitions proposed by Mr. Amado and Mr. Alfaro could not be adopted, since they did not include the fomenting of civil strife among acts of aggression. While resolution 380 (V) of the General Assembly included such activities under aggression, the Commission considered that aggression presupposed the use of force. If the Commission were bound by the General Assembly's decision, it must abandon the course it had hitherto followed and find some means of including the fomenting of civil strife under the notion of aggression.

25. As representative of Syria, he had submitted to the First Committee an amendment for the deletion of that phrase, and had argued that aggression always presupposed the use of force. That amendment had, however, been rejected by the First Committee and again by the General Assembly. It therefore appeared that the General Assembly accepted the idea of aggression unaccompanied by the use of force and, in particular, the case of fomenting civil strife.

26. As a preliminary step, the Commission should decide whether it was bound, or free to take its own decisions.

27. Mr. SCALLE thought that the Commission had decided not to establish a definition by enumeration. As the definition submitted by Mr. Hsu was enumerative he proposed its rejection.

28. The general discussion should now come to an end, as the Chairman had wisely recommended, and the Commission should turn its attention to formulating

a non-enumerative definition, an "essential" definition as it had been called.

29. As to the point raised by Mr. el Khoury, he considered that the Commission was not bound by General Assembly resolution 380 (V). If that had been the case the Assembly would not have consulted the Commission.

30. Mr. HUDSON thought that Mr. Hsu had been quite right in drawing the Commission's attention to the General Assembly's resolution. That resolution had been adopted by the Assembly at the instance of the First Committee, like Resolution 378 B (V), by virtue of which the Commission was engaged in defining aggression. Those two resolutions had been adopted at the same plenary meeting of the General Assembly and were, moreover, reproduced on adjoining pages of the official record of resolutions adopted by the General Assembly during its fifth session (A/1775).

31. In its resolution 380 (V) the General Assembly had supplied the points which should be taken into account in a definition of aggression.

32. Mr. ALFARO considered that the Commission was, in fact, obliged to take account of the above mentioned resolution of the General Assembly. The matters mentioned therein should be included in any definition adopted by the Commission, together with any further points that might occur to the individual members.

33. The notions contained in the General Assembly's resolution, and in Mr. Córdova's and Mr. Hsu's proposals, were covered in his own proposal by the words "in any manner" and "by any methods". That procedure was the only way to avoid enumeration.

34. The definition had to be acceptable to people with varying conceptions of aggression. There were some who thought that the fomenting of civil strife constituted a condemnable form of aggression, whereas others might consider that the use of such an expression in the definition would be dangerous.

35. The words "in any manner" would, in any specific instance, enable a decision to be reached as to whether the fomenting of civil strife did, or did not, constitute aggression. The annexation of Czechoslovakia, of the Baltic Republics and of Manchukuo and the intervention in Tibet might be considered as a special manner of employing force for an attack on the independence or integrity of a State.

36. He felt that the Commission should examine the proposals as a whole and decide what was missing and what was redundant, with a view to arriving at a final formula. It should consider terms such as "whatever the weapons used" and "whether committed . . . or otherwise" in resolution 380 (V) and the words "in any manner" and "by any methods" in his own proposal. He would point out to Mr. Yepes that the word "armed" did not appear in his proposal which began with the words: "Aggression is the use of force". The desire had been expressed, in the Commission itself, for the qualification of the word "force" by "armed". He himself, on the contrary, had pointed out in defence of his text that there were many ways of using force without employing weapons. He considered that it would be

wiser to keep to the terms used in the Charter, so as to avoid any difficulty.

37. The Commission should aim at the best possible text. An international penal code defined offences, as for instance, manslaughter, but did not enumerate the cases in which that offence might take place. If the definition failed to give satisfaction, the blame must be placed on human fallibility.

38. Mr. KERNO (Assistant Secretary-General) observed that during the first stage of its discussion the Commission had made rapid progress and had decided that the definition of aggression should not be enumerative. Since then it had been held up by the problem as to whether an abstract definition was possible, and the longer the discussion went on, the greater appeared to be the difficulty of arriving at such a definition.

39. Under those conditions, the Commission might perhaps state in its report to the General Assembly that it did not consider an abstract definition possible, or, in accordance with Mr. Amado's ideas, that an abstract definition could only exist as a minimum and that the formula adopted did not cover all cases of aggression; that the use of force otherwise than in the exercise of the right of self-defence or coercive action by the United Nations always constituted aggression, but that there were other forms of aggression that could not be defined without recourse to the enumerative procedure rejected by the Commission. He himself did not see any other way out.

40. Mr. SCELLE, while recognizing the difficulties inherent in such a definition, did not believe that they were insuperable. Mr. Alfaro's definition came within an ace of what the Commission could accept, and was the widest of those submitted. Mr. Córdova's followed somewhat different lines but was, though only to a slight extent, enumerative.

41. He repeated the proposal he had made at the previous meeting that the Commission should study Mr. Alfaro's definition, point by point, amending it as and where necessary.

42. Mr. ALFARO wished to add to Mr. Scelle's proposal and to suggest that when his draft definition had been examined in all its details, the Commission should review the other formulas as well, to see whether a better result could not be obtained.

43. The CHAIRMAN proposed that the Commission examine Mr. Alfaro's proposal phrase by phrase (A/CN.4/L.8, para. 36).

*It was so decided.*

#### DISCUSSION OF MR. ALFARO'S PROPOSAL

(a) Opening words: "*Aggression is the use of force*"

44. Mr. HUDSON though admitting that, according to one view, threats did not constitute aggression, proposed the insertion after the words "Aggression is" of the words "the threat or".

45. The CHAIRMAN and Mr. SCELLE were opposed to the amendment.

*The amendment was rejected by a majority vote.*

45a. Mr. ALFARO remarked that, in the light of the preceding discussion, the Commission should take a decision on the advisability of inserting the word "armed" before the word "force".

46. Mr. SCELLE was not in favour of the word "armed" but would prefer "violence" to "force". The terms "force" or "armed force" presupposed an organization, but should aggression be committed by bands, a fifth column or a revolutionary party, there would be no "armed force". There would, however, be "violence". The word "violence" therefore had a wider meaning. It had been pointed out that some definitions would not cover such cases of aggression as, for instance, the annexation of Estonia and Latvia. That was a gap which should be filled.

47. Mr. YEPES said that, in his opinion, the annexation of Estonia and Latvia was most definitely a crime, but it was a crime that would not be punishable if the Commission were to adopt a weak definition.

48. He would approve the substitution of "violence" for "force". He had himself used the former word in a proposal which he was submitting (A/CN.4/L.12).

49. Mr. ALFARO stressed the importance of keeping as closely as possible to the terms used in the Charter. He would therefore vote against the use of the word "violence".

*The amendment to substitute the word "violence" for "force" was rejected by 6 votes to 3.*

50. Mr. EL KHOURY formally proposed the insertion of the word "armed".

*The amendment to insert the word "armed" was rejected by 4 votes to 4.*

(b) *"by any State or group of States, or by any government or group of governments"*

51. Mr. ALFARO explained that he had chosen the above terms in order to be more explicit. He had wished to avoid leaving unpunished political entities not recognized as States. For instance, those who did not consider that North Korea was a State, would not be able to declare its aggression punishable without the use of the word "government". He would however, agree to the deletion of those words should the Commission consider that the word "State" was sufficiently comprehensive in itself.

52. Mr. HUDSON proposed the replacement of the formula under consideration by the words "by a State or a government". The terms "group of States" and "group of governments" were unnecessary and redundant.

53. Mr. ALFARO accepted that amendment.

54. Mr. YEPES did not see what useful purpose was served by retaining the word "government". There were cases in contemporary history of *de facto* governments, which were not recognized but which should be covered by the definition if they were guilty of acts of aggression. If for instance a government were formed abroad for any given country, what standards would be applicable to any use of force to which it might have

recourse? He would vote against the retention of the word "government".

55. Mr. HUDSON pointed out that the term in question was intended to cover cases where there were two governments for one and the same country. That was actually the position in China.

56. Mr. SCELLE was of the opinion that the term should be deleted. Fundamentally, aggression took place as soon as there was a use of force. It was not necessary for the Commission to state in its definition who had to be the perpetrator of such an act in order for it to constitute aggression. It would be the business of the authority competent to determine the aggressor to state who was the offender.

57. Mr. ALFARO remarked that there was no aggression in the international sense of the word unless the act under consideration were committed by one State against another State. If force were used by one party against another, there was no international aggression. But once it was specified that the victim of aggression was the "territory and people of a State or Government" it became necessary to specify the offender as well.

58. Mr. SCELLE considered that Mr. Alfaro's argument was well founded. A term was required which would show that a State had to be implicated in the use of force before there could be any aggression. But in saying "by a State" the Commission would allow a guilty State to remain unpunished, if that State did not take action itself. Naturally a purely domestic revolution did not constitute aggression, but a revolution fomented by a foreign State did.

59. Mr. CORDOVA said that he had had that consideration in mind when he had used the words "the authorities of a State" in his proposal (A/CN.4/L.10). Those words or their equivalent were essential, if aggression such as that committed by North Korea, which was not a State, was to be made punishable.

60. Mr. AMADO pointed out that, although his formula did not constitute a formal definition, he had avoided using the word "State" so as not to limit its application to States alone.

61. Mr. SANDSTRÖM remarked that, if all reference to a State or Government were omitted, the concept of aggression might be extended to cover such acts as the Jameson Raid.

62. Mr. SCELLE considered that the Jameson Raid did constitute aggression.

63. The CHAIRMAN noted that Mr. Scelle's proposal for the deletion of the words "by any State or group of States or by any Government or group of Governments" was the one furthest removed from the text under consideration, and that he would therefore put it to the vote first.

*Mr. Scelle's proposal to delete the words "by any State or group of States or by any Government or group of Governments" was rejected.*

[64.] *Mr. Hudson's proposal to delete the phrase under discussion and substitute the phrase "by a State or a Government" was adopted.*

(c) “against the territory and people of other States or Governments”

65. Mr. YEPES proposed as an amendment the wording “against the territorial integrity or political independence of another State” in order to bring the definition more into harmony with Article 2, paragraph 4 of the Charter. In his opinion the wording of Mr. Alfaro’s text was not perhaps the best legal phrasing. The wording he proposed was nearer to what the Commission intended.

66. Mr. LIANG (Secretary to the Commission) had taken part in the Dumbarton Oaks conversations, and recalled that paragraph 4 of Article 2 had been preceded by a preliminary draft, which contained the formula “territorial integrity or political independence”. Objection had been raised to those words on the grounds that their inclusion in Article 10 of the League of Nations Covenant had enabled certain sophists to argue, at the time, that the invasion of China by Japan did not constitute an attack on the territorial integrity or political independence of China, but was for the purpose of obtaining reparation for damage suffered. It had therefore been considered necessary to find a more comprehensive formula, and the wording in Article 2, paragraph 4: “or in any other manner inconsistent with the purposes of the United Nations” had finally been adopted. It might be dangerous to use the formula proposed by Mr. Yepes by itself.

67. Mr. ALFARO was opposed to Mr. Yepes’s amendment on the grounds that merely to refer to territorial integrity or political independence would be to restrict the scope of the provision. There might be cases of aggression where neither of the two was threatened. He was thinking of bands raiding a territory for purposes of looting and then withdrawing. He also had in mind the case of Greece. The Charter did, of course, speak of territorial integrity or political independence, but it added: “Or in any other manner inconsistent with the purposes of the United Nations”. Moreover, an attack on territorial integrity or political independence was incompatible with the Charter, and that alone was enough to bring it within the definition.

68. In his opinion it would be enough to state against whom the aggression was directed. The text he had proposed said: “against the territory and people of other States or Governments”. That wording was to be found in the Inter-American Treaty of Reciprocal Assistance, signed at Rio de Janeiro in 1947:

“In addition to other acts which the Organ of Consultation may characterise as aggression, the following shall be considered as such:

“(a) Unprovoked armed attack by a State against the territory, the people or the land, sea and air forces of another State” (A/CN.4/L.8, para. 23).

69. The formula he had proposed did not mention the armed forces of States victims of aggression. The object of aggression might be the territory, the people or the armed forces. Was it necessary or expedient to introduce a reference to “armed forces” into his proposed text? He had considered that, in case of aggression against

the armed forces of a State, that State and its people were *ipso facto* attacked.

70. Mr. AMADO considered that, in speaking of territory, what was really meant was frontiers. In the case of the Chaco, the territory had not been delimited and it was a desert. The Commission had agreed on an objective criterion for its formula. If, therefore, Ethiopia had attacked the Italian forces massing on its frontier for the purposes of invasion, it would have been the aggressor. He had to make some reservations on that point.

71. Mr. EL KHOURY proposed that the words “against another State or Government” be substituted for “against the territory and people of other States or Governments” because the words “States or Governments” included the territory and the people.

72. The CHAIRMAN remarked that some members of the Commission had strayed some distance from Mr. Yepes’s concept. The latter seemed to him rather limited in its effect, as it did not include certain eventualities for which the Commission wished to make provision. If, for instance, Great Britain were to attack Albania, in order to collect the damages due to her by virtue of a decision of the International Court of Justice, that would constitute aggression.

73. Mr. YEPES withdrew his proposal on condition that Mr. el Khoury presented his own as a formal motion.

74. Mr. ALFARO was prepared to accept the amendment proposed by Mr. el Khoury, provided it was expressly understood that it covered the territory, people, armed forces and all other components of a State.

75. Mr. EL KHOURY replied that that was, of course, the case.

76. The CHAIRMAN wondered whether it would be wise to say that the use of force against a Government constituted aggression. The result of such a wording would be that an attack against the Communist Government in China would be aggression.

77. Mr. HUDSON pointed out that there were two Governments in China, and that if one were to attack the other, that would be civil war.

78. Mr. ALFARO said that Mr. Hudson had asked him whether a Government could attack another Government belonging to the same country. In his opinion, such an attack would constitute a civil war of the kind that had taken place in the United States in the nineteenth century. If, however, during the war of secession one of the contending Governments had attacked Jamaica, that would have constituted aggression. In China there were two Governments, the Communist Government and that of Formosa. Should the latter attack the Communist Government, it would constitute civil war. If, on the other hand, Mao Tse-tung attacked Siam, that would be aggression.

79. The best solution would be to delete the word “Government”, and explain in the commentary that it was to be understood that the words “aggression by a State” covered aggression committed by any Government or entity not constituting a State, but capable of

committing aggression. He accepted Mr. el Khoury's amendment.

80. Mr. HUDSON felt that a commentary was needed, and had considered saying that the provisions in question did not apply to civil war, but had come to the conclusion that it was preferable to draw up the text in such a way as to exclude insurrection and civil war, as was, in fact, done in the Charter by the use of the words "in their international relations" (Article 2, para. 4).

81. Mr. KERNO (Assistant Secretary-General) asked whether by saying "by a State . . . against another State" the definition could have been made to apply to the case to which the Security Council's resolution of 27 June 1950 concerning the events in Korea referred. That resolution was worded as follows: "The Security Council, having determined that the armed attack upon the Republic of Korea by force from North Korea, constitutes a breach of the peace" (S/PV.474, p. 4).

82. The operative part of the resolution adopted by the General Assembly on 1 February 1951 read as follows:

"1. Finds that the Central People's Government of the People's Republic of China, by giving direct aid and assistance to those who were already committing aggression in Korea and by engaging in hostilities against United Nations forces there, had itself engaged in aggression in Korea" (A/1771).

83. Mr. HUDSON found that question difficult to answer off-hand. Perhaps an opportunity would occur for Mr. Alfaro to revise his text to take account of the words appearing on page 10 of his memorandum: "In addition to other acts which the Organ of Consultation may characterise as aggression, the following shall be considered as such." The question raised by Mr. Kerno touched on a problem which it had been his intention to raise.

84. He proposed that the definition open with the wording: "The use of force . . . is an aggression". Account must be taken of the words used by the General Assembly and the Security Council in referring to the attack by the North Koreans on the South Koreans and the intervention of the Chinese communists.

85. The Commission might not wish to adopt an exclusive definition, it might prefer to allow for an enquiry into the meaning of the word "aggression".

86. He was anxious to avoid, as had been done at Rio, putting the international authority into the straitjacket of a definition.

87. Mr. HSU remarked that if the Rio Treaty gave an enumeration, the definition contained therein could not be adopted.

88. Mr. CORDOVA considered that the formula proposed by Mr. Hudson amounted to an enumeration and made it possible for the competent international authority to decide when aggression had taken place and, consequently, to determine the aggressor. The Commission should not revert to an enumerative definition. If it could not draw up an abstract definition, it should recognize that it could not define aggression.

89. Mr. HUDSON explained that he was trying to take due account of the terms employed by the General Assembly in its resolution of 1 February 1951 (A/1771). He was not urging the adoption of a definition by enumeration but was anxious that the international authority should not be prevented from going somewhat beyond the definition.

90. The CHAIRMAN observed that the Commission was trying to establish a definition which the Security Council could apply automatically, without having to undertake the work of legal interpretation. But that was a hopeless task. The Commission should rather try to establish a general text capable of interpretation by normal legal methods.

91. Mr. HUDSON repeated his proposal to say: "The use of force is aggression". He wished to avoid saying that aggression was one thing when, in fact, it might be something else. He was trying to improve on the actual text before the Commission, without clashing with the General Assembly's resolution of 1 February 1951.

92. The CHAIRMAN said that Mr. Hudson's proposal was very simple. It consisted in saying "The use of force is aggression" instead of "Aggression is the use of force".

93. Mr. CORDOVA asked whether Mr. Hudson only had one or two cases of aggression in mind.

94. Mr. HUDSON said he wanted a definition which would make it possible to say, in all cases of aggression, that it was aggression. He wished to avoid the possibility of its being said that such and such an act was not aggression.

95. Mr. ALFARO believed that Mr. Hudson had in mind a formula which would smooth away the difficulties which confronted those who believed that it was not possible to arrive at an abstract definition covering all cases. When examining that formula the Commission might consider whether there were any cases that it did not cover. If any were found a second clause might be added to the definition worded as follows: "What the Security Council shall declare to be aggression, shall constitute aggression".

96. Mr. HUDSON said that, while it was about it, the Commission should eliminate all cases not included in the definition; for instance it had been found that the definition did not apply to either civil war or insurrection. It was not possible, on the basis of the text under examination by the Commission, to give Mr. Kerno a satisfactory reply.

97. Mr. AMADO explained that that was the reason why he had proposed a definition which was not one; any definition of aggression that went beyond the bald statement that aggression was the use of armed force otherwise than in self-defence or coercive action by the United Nations, and mentioned territories or States, met with difficulties; if it referred to Governments and States, it met with other difficulties.

98. Mr. ALFARO proposed that the Commission say "against another State or Government", and await

Mr. Hudson's proposal for the elimination of the word "Government".

99. Mr. CORDOVA proposed the wording: "the use of force by a State against another State or the Government of another State"; that would show that the reference was to the Government of a nation other than that of the perpetrator of the aggression.

*Mr. el KHOURY's amendment to substitute the wording: "against another State or Government" was provisionally adopted.*

(d) "in any manner, by any methods"

100. Mr. ALFARO explained that the above words referred to the manner in which aggression was effected, whether by invasion, blockade, armed bands, etc. They would serve as a basis for discussion in the Security Council, which might decide that it was faced with a novel manner of committing aggression, but that it was aggression all the same. The expression covered what Mr. Hsu and Mr. Córdova meant by "direct or indirect". What was involved was a manner of employing force. If a more general expression could be found, he was quite ready to accept it.

101. The CHAIRMAN considered that the Commission might find an answer in the Resolution on Peace by Deeds (380 (V)) and say: "whatever the weapons used and whether the aggression be committed openly or otherwise."

102. Mr. ALFARO asked whether the Commission did not consider that the words which the Chairman proposed to insert were covered by "any methods".

103. The CHAIRMAN did not think that the words could be taken in that sense.

104. Mr. YEPES had always advocated the insertion of the words "direct and indirect". He did not believe that "in any manner" could be considered as including "direct and indirect", and, even if it could, it would be preferable to add the latter words.

105. Mr. HSU said that, in his opinion, the terms "in any manner" and "by any methods" were a makeshift to replace an enumeration. He considered that the Chairman's proposal was the best, although it was not perfect.

106. Mr. SANDSTRÖM supported the Chairman's proposal, but wondered whether it was advisable to say "whatever the weapons used" as that meant reverting to the question of armed forces. In his opinion "openly" was preferable to "direct".

107. Mr. HUDSON drew attention to the fact that those words were used in the General Assembly's resolution, in referring to the case of an aggression.

108. In paragraph 48 of his memorandum (A/CN.4/L.8) Mr. Alfaro had said that the words in question ("in any manner") referred to the various ways in which aggression might be started, i.e., invasion, crossing of frontiers, open armed attack, naval or land blockade etc. He did not approve of that commentary and considered that the Commission might say "whatever the weapons used".

109. He did not consider that it was possible to say "committed openly", in connexion with the use of force.

110. The CHAIRMAN agreed.

111. Mr. HUDSON proposed the wording: "whatever the weapons used, openly or otherwise".

112. Mr. ALFARO observed that the text would then read: "Aggression is the use of force by a State against another State whatever the weapons used, openly or otherwise".

113. Mr. HUDSON was in favour of deleting the words "by any methods", and of saying: "in any manner whatsoever, whatever the weapons used, openly or otherwise".

114. Mr. HSU asked whether it was intended to delete the reference to the fomenting of civil strife contained in paragraph 1 of the operative part of resolution 380 (V).

115. The CHAIRMAN was not in favour of inserting those words in the definition as that would be tantamount to reverting to an enumeration.

116. Mr. YEPES wished to know whether the definition would cover attacks by bands organized in one State against another State. Should that not be the case he would propose the addition of a separate paragraph to cover such attacks. He wished to know whether they were not covered by the words "in any manner".

117. Mr. HUDSON considered that if a State armed or encouraged armed bands such acts would be included under the above term, but if it was a case of activities in which the State did not participate, they would be excluded by the words "by a State".

118. The CHAIRMAN put to the vote Mr. Hudson's amendment for the substitution of the words "by any methods whatsoever, whatever the weapons used, openly or otherwise" for the proposed text.

*Mr. Hudson's amendment was adopted.*

(e) "for any reasons and for any purposes"

119. Mr. HUDSON proposed the deletion of the words "for any reasons and".

120. Mr. ALFARO was always in favour of conciseness. If the expression "for any purposes" sufficed he would accept it, but the words "for any reasons" were the outcome of lengthy discussions on the subject. Article III of the Convention on Definition of the Aggressor, signed in London in 1933, read: "No political, military, economic or other consideration may serve as an excuse or justification for the aggression referred to in Article II", and an annex to the Treaty declared that: "No act of aggression within the meaning of Article II of that Convention can be justified on either of the following grounds, among others" (A/CN.4/L.8, para. 17). The Litvinov-Politis formula contained a similar clause. Its object was to anticipate any attempt at justification. The words "for any purposes" referred to the purposes decided upon for the reason given.

121. He had used the words "for any reason" to cover the circumstances mentioned by Litvinov. He considered it wise to keep those words. They might be explained in the commentary.

122. Mr. AMADO pointed out that, if a State was attacked by armed forces, that was an objective fact,

to wit, armed aggression. For that reason he considered it pointless to insert those words, though he did not think they would do any actual harm. The "reason" invoked could not exclude aggression. Only in cases of self-defence or collective action was there no aggression.

123. The CHAIRMAN considered that the phrase "for any purposes" sufficed.

124. Mr. ALFARO did not wish to appear obstinate but felt he must press the point, as "for any reasons" did not mean the same thing as "for any purposes". The former words were intended to preclude an attempt at justification and enable the Security Council to reply that the perpetrator of the aggression had been wrong to attack.

125. The CHAIRMAN felt that the Security Council would say that the guilty party had attacked where it was not a case of self-defence or coercive action by the United Nations, and that its purpose was therefore illicit.

126. Mr. ALFARO considered that the definition might be strengthened by reference to the clause contained in the Litvinov Treaty: "No consideration may serve as an excuse or justification."

127. Mr. AMADO maintained that, in the case in question, there were no extenuating circumstances. If an act did not come within the category of self-defence or action by the United Nations, it constituted aggression.

128. Mr. YEPES did not believe that it was necessary to use the words "for any reasons".

129. Mr. EL KHOURY considered that the reason for an action was not the same thing as its purpose. The Soviet proposal stated the reasons for an attack. He considered it preferable to keep the word "reasons".

*The amendment to delete the words "for any reasons and" was rejected by 4 votes to 4.*

130. Mr. HUDSON proposed that the English text be amended to read: "for any reason or for any purpose".

131. Mr. ALFARO accepted that amendment.

(f) "*except individual or collective self-defence against armed attack*"

132. The CHAIRMAN asked Mr. Alfaro if he had any objection to the wording: "other than national or collective self-defence".

133. Mr. ALFARO preferred the words used in the Charter "individual or collective self-defence" even though the formula proposed by the Chairman had been adopted in the Code. It might be better to say "national" but he had taken the phrase as it appeared in the Charter.

134. Mr. HSU saw no objection to that final provision, but wondered whether it was really necessary. It would be sufficient to say: "Aggression is the illicit use of force" since that definition would include indirect as well as direct aggression.

135. The CHAIRMAN was of the opinion that the deletion of that phrase would leave a gap in the definition.

136. Mr. HUDSON was not very happy about the text.

He admitted that the words "against armed attack" were based on Article 51 of the Charter, but he wondered whether a State that was the victim of resort to force, but not armed force could claim the right of self-defence.

137. Mr. ALFARO thought it was inadvisable to say "armed forces" at the beginning of the definition, as the Charter only spoke of force. When speaking of the use of force by a State, all ways in which force could be employed should be taken into consideration. There might be cases where it was not a question of the use of armed force. To depart from the terms of the Charter was bound to create difficulties. Article 2, paragraph 4, mentioned only force, and there was therefore no reason for delving into motives for the use of such force. Supposing a nation were to mobilize 500,000 men without arms and then to send them into the territory of another country, where it would arm them, that would rightly be termed "force". The 500,000 men were a force, but, in order to justify self-defence, there had to be an armed attack. He had therefore been right to use the words "armed forces" at the end of his definition and the word "force" at the beginning.

138. The CHAIRMAN observed that, if Ethiopia had crossed the frontier into the Italian colonies at a time when Italy's intentions were perfectly clear, the definition would have made her an aggressor, which would have been monstrous. That would be the result of keeping the words "armed forces".

138a. He pointed out that the English text seemed to permit self-defence against coercive action by the United Nations. But that was simply a question of drafting.

139. Mr. AMADO explained that that was the reason why he had not included those words in his proposed definition. He recalled that defence should be proportionate to the attack. Self-defence was self-explanatory. That was why he preferred that it should not be defined.

140. Mr. HSU recalled that from the very start he had asked for the deletion of the word "except". Neither could he approve the words at the beginning of the first sentence of paragraph 35: "Self-defence in our day can only be the outcome of armed attack".

141. Mr. CORDOVA maintained that the Charter only recognized self-defence in the case of armed aggression (Article 51). It was an exceptional right given to States only in cases where the Security Council did not take the necessary measures. There could be no self-defence, except where there had been armed aggression. In his opinion, self-defence should be included in the text under the same conditions as in the Charter.

142. Mr. HSU did not believe that the Charter used those terms in order to restrict the right of self-defence. It merely specified one instance, without excluding others.

*By a majority of 5 it was decided to retain the word "individual".*

*By a majority of 8 it was decided to delete the words "against armed attack".*

(g) "*or coercive action by the United Nations*"

142a. The CHAIRMAN proposed the wording: "or

in execution of a decision by a competent organ of the United Nations ”.

143. Mr. HUDSON remarked that the use of the word “decision” without any amplification raised a difficulty. While the Security Council took decisions, the General Assembly made recommendations.

144. Mr. KERNO (Assistant Secretary-General) wondered whether it would not be better to say “in execution of a decision providing for the use of armed force” or “a decision to that effect”. It should not be suggested that all decisions authorized the use of force.

145. As regards the term “decision”, the Charter spoke of decisions and recommendations, but in actual fact, they were always resolutions. He had himself been embarrassed by the word “decision”, which did not include resolutions. The Security Council’s decision of 27 June 1950 stated that the Council “recommends”. He suggested the wording: “a resolution to that effect”.

146. Mr. HUDSON pointed out that it was not possible to execute a recommendation. The proper wording was “or in pursuance of a decision or recommendation by a competent organ of the United Nations”.

*Mr. Hudson’s amendment was adopted.*

The meeting rose at 6.20 p.m.

## 96th MEETING

*Tuesday, 5 June 1951, at 9.45 a.m.*

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*Chairman:* Mr. James L. BRIERLY  
*Rapporteur:* Mr. Roberto CORDOVA

#### *Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, 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.

**General Assembly resolution 378 B (V): Duties of States in the event of the outbreak of hostilities (item 3 of the agenda) (A/CN.4/44, chapter II: The possibility and desirability of defining aggression; A/CN.4/L.6; A/CN.4/L.11 and A/CN.4/L.13) (*continued*)**

#### DISCUSSION OF THE TEXT TENTATIVELY ADOPTED BY THE COMMISSION

1. The CHAIRMAN stated that the Commission had before it a text (A/CN.4/L.13) which it had tentatively adopted the previous day as a definition of aggression.<sup>1</sup> He added that the Commission needed to speed up its work.

2. Mr. HSU noted that Mr. Córdova proposed the wording “or Government of another State” instead of “or Government” in line 2. He himself would like to propose the wording “against a foreign State” instead of “against another State or Government”.

3. The insertion of the words “whatever the weapons used and whether openly or otherwise” was a great improvement. As a further amendment it might be possible to consider inserting, between “openly” and “or otherwise”, the words “by fomenting civil strife in the interest of a foreign State”. The definition could not possibly be interpreted as including that type of aggression of which there had been several cases during the last few years. Unless that course were followed the word “abstract” which had been used to qualify the definition would no longer be the opposite of concrete but would signify “abstruse”. The commentary might of course help to make the definition intelligible, but to rely on the commentary to do so was only a makeshift.

4. It would be well also to make it clear what was meant by “openly or otherwise”. If an atom bomb were dropped on the Empire State Building in New York, it would be used openly; but if a delayed action bomb were placed in the basement of that Building, it would be a secret use of the bomb. Hence it was not enough to say “openly or otherwise”; the text of General Assembly resolution 380 (V) must be followed in its entirety. If the amendment (A/CN.4/L.11) he was proposing were rejected, it would be a retrograde step.

5. Mr. SANDSTRÖM said that so far the Commission had made great efforts to arrive at a satisfactory definition. It remained now to be seen whether the definition really was satisfactory. He agreed with Mr. Hsu that the definition produced was “abstract”. An examination of the draft resolution submitted by the Soviet Union in the First Committee of the General Assembly (A/C.1/608) made it clear that its object was essentially a practical one and he was sure the Commission’s definition would not be acceptable to the Soviet Union, which had aimed at a definition which would make it possible to ascertain

<sup>1</sup> Document A/CN.4/L.13 read as follows:

“Aggression is the use of force by a State or Government against another State or Government\*, in any manner, whatever the weapons used and whether openly or otherwise, for any reason or for any purpose other than individual or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations.”

\* Mr. Córdova proposed to add here the words “of another State”.

automatically whether aggression had taken place. The definition before the Commission did not do that.

6. Indeed the definition took the word "aggression" in a very narrow sense. It excluded various types of aggression. The Commission, for example, had expressly voted in favour of omitting the threat to use force — which was one method of resorting to force. Hitler had made successful use of threats time and time again. He was convinced that there were other forms of aggression which were not included in the definition. Hence he would vote against its adoption, as it would serve no practical purpose.

7. Mr. HUDSON suggested that an attempt be made to verify the definition before deciding finally as to its usefulness.

8. The CHAIRMAN observed that if the Commission adopted the amendment proposed by Mr. Hsu, it would be drifting towards the enumerative method, and there would no longer be any reason for not mentioning volunteers as well.

9. Mr. HUDSON said that the trouble with Mr. Hsu's proposal was that it was not in keeping with the last part of the definition.

10. Mr. HSU said that that was why at the previous meeting (para. 134) he had proposed that the last part of the definition be deleted and replaced by the insertion in the first line of the word "illicit" before the word "use".

11. The CHAIRMAN pointed out that in that case what Mr. Hsu was proposing was to recast the whole definition and the Commission could not decide to do that.

12. Mr. HSU thought that the important thing was to produce something which would enhance the Commission's reputation.

13. The CHAIRMAN pointed out that the proposal to insert the word "illicit" in the first line of the definition had been rejected on the previous day.

14. Mr. HSU said that actually he had withdrawn his proposal.

15. Mr. AMADO maintained that the problem under consideration by the Commission was not likely to be solved at the present moment, and that one might go on for ever arguing about the question of aggression. Possibly the Commission might see its way to extending the proposed definition at a later date. The text before it constituted a small beginning. One must not bite off more than one could chew.

16. Mr. HSU said that nevertheless the Commission should make headway whenever it had a chance.

17. Mr. CORDOVA said he would vote against Mr. Hsu's proposal (A/CN.4/L.11) on the grounds that he was opposed to the enumerative method, which the Commission had already rejected.

*Mr. Hsu's amendment for the insertion of the words "by fomenting civil strife in the interests of a foreign State" was rejected.*

18. Mr. CORDOVA pointed out that Mr. Hudson's objection to Mr. Hsu's amendment also applied to the words "or otherwise", since the United Nations would

never order the secret use of force. He suggested that the desirability of keeping the words "openly or otherwise" be examined.

19. Mr. HUDSON thought Mr. Córdova's suggestion was perfectly logical. One could of course say "whether openly or not", but the same objection would arise. In practice, the use of the expression would not give rise to any difficulty.

20. Once the Commission had decided whether the words "openly or otherwise" were to be retained or deleted it might perhaps decide to put the words "is an act of aggression" at the end of the definition instead of "Aggression is" at the beginning. He was anxious to prevent the definition from being restrictive.

21. The CHAIRMAN too wondered whether there was any point in keeping the words "openly or otherwise".

22. Mr. ALFARO explained that the reason why he had not voted in favour of Mr. Hsu's proposal was not that he was opposed to Mr. Hsu's argument that aggression could take the form of fomenting civil war, but because he felt that fomenting civil war in another country did not invariably constitute aggression and might be no more than propaganda. It was for the Security Council to decide when aggression had taken place and it would do so on the basis of the words "openly or otherwise".

23. With regard to Mr. Hudson's suggestion that the words "is an act of aggression" be put at the end of the definition, he thought it would be grammatically awkward.

24. The Commission had to find a formula which covered every type of aggression. Perhaps he did not see clearly, but beyond the threat to use force, he could not envisage any form of aggression which was not included in the definition before the Commission. Mr. Sandström felt that the threat to use force constituted aggression and that the aims of aggression could be attained by threats. He personally thought that aggression was always accompanied by force. He referred to the example of a State mobilising 500,000 men and sending them into the territory of another State. That was an instance of the use of force.

25. Mr. CORDOVA explained that he was not submitting an amendment.

26. Mr. HUDSON asked whether the Commission would agree to the words "is aggression" or still better "is an act of aggression" being used at the end of the definition.

27. Mr. FRANÇOIS asserted that in that case the text would no longer be a definition. If the Commission were asked to describe the function of the United Nations and replied that codification was one of the functions of the United Nations, that would no longer be a definition. The Commission would then have to state, as Mr. Spiropoulos had stated, that it was impossible to give a definition.

28. Mr. HUDSON thought it might be better to relinquish the term "definition".

*Mr. Hudson's amendment was rejected.*

29. The CHAIRMAN asked the Commission whether

it preferred the wording "or Government of another State" as Mr. Córdova had suggested, or to adopt Mr. Hsu's amendment, namely "or against a foreign State" with a view to ensuring that the definition of aggression should not apply to civil war, the intention being to refer exclusively to international aggression.

30. Mr. HUDSON thought Mr. Córdova's proposal was an improvement on the text as it stood, but he would like to go still further and to delete the words "or Government" in the second line.

31. The CHAIRMAN was not sure that that proposal did go further than Mr. Córdova's. It was rather different.

32. Mr. HUDSON explained that if the words "or Government" were kept, it would be necessary to say "or foreign Government".

33. Mr. ALFARO thought that was asking for trouble, in view of the fact that the word "Government" was being kept in the first line. Supposing a State attacked Formosa or the Mao Tse-tung Government, that constituted an act of aggression. The best solution was that put forward by Mr. Hsu, namely to use the expression "or against a foreign State", which excluded civil war. He would vote in favour of that proposal.

*Mr. Hudson's amendment to delete the words "or Government" from the second line of the definition was adopted by 6 votes to 2.*

34. Mr. EL KHOURY could see no difference between the text which the Commission was examining and the first paragraph of article I of the draft Code.<sup>2</sup> As he had already stated,<sup>2a</sup> he was of the opinion that aggression should be included in the draft Code and the fact mentioned in the report to the General Assembly.

35. Article I, paragraph 1, spoke of "the employment or threat of employment". If the use of the word "threat" in the definition of aggression was not acceptable, a second paragraph could be devoted to it. Fundamentally the Commission was voting on a text similar to that of article I, paragraph 1. He wondered why it should spend so much time on what was already in the Code. It was not necessary to draw up a separate definition, and he could not see his way to voting for the proposed text.

36. Mr. HSU shared Mr. Sandström's view that the definition under consideration was incomplete and should include the mention of "threat". He was of course aware that that proposal had been rejected at the previous meeting (para. 45). It had then been argued that it was unnecessary to include "threat" in the definition, on the grounds that the meaning given to the word "weapons" included threat.

37. Mr. SANDSTRÖM thought the definition as at present worded should be put to the vote.

38. The CHAIRMAN pointed out that if the Commission rejected the definition before it, the implication would be that the formulation of a definition, even an abstract one, was not desirable.

39. Mr. HUDSON did not feel very happy about voting in favour of the text; it was a trap for the innocent and was calculated to put the United Nations organs into a straitjacket.

40. If the Commission had agreed to put the words "is an act of aggression" at the end of the text, he could have supported it. As it was, he was alarmed by the definition for the reasons given the previous day by Mr. Kerno.

41. Mr. CORDOVA suggested as an amendment the inclusion of "threat" in the definition; Mr. Sandström's objection to the definition seemed to lie in the fact that "threat" was not mentioned.

42. Mr. SANDSTRÖM replied that that was only one of the reasons why he was against it; even if mention of "threat" were made in the definition, he would still vote against the proposed text.

43. Mr. CORDOVA still thought that "threat" should be included.

44. Mr. HUDSON suggested that if Mr. Córdova's amendment were rejected, it might be stated in the commentary that "threat of force" amounted to "the use of force".

45. Mr. ALFARO modified Mr. Córdova's amendment in order to bring it into line with Article 2, paragraph 4 of the Charter, so that the text now read "aggression is the use, or threat of use, of force".

*Mr. Córdova's amendment, as modified by Mr. Alfaro, was adopted by 7 votes.*

46. Mr. SANDSTRÖM pointed out that there was a further type of aggression, namely infiltration, which was not included in the definition.

47. Mr. ALFARO, on a point of order, recalled that on the first day on which the Commission had discussed the question, it had decided that it should undertake to draw up a definition of "aggression", and that the definition should not be in the form of an enumeration. Was the Commission proposing to go back on that decision? If it decided not to adopt the formula before it, it should examine the formulas submitted by Mr. Hsu, Mr. Amado and Mr. Yepes.

48. The CHAIRMAN explained that the Commission had decided to attempt to draw up an abstract definition. It was at liberty to decide that it had not succeeded in doing so.

49. Mr. YEPES asked what was the Commission's opinion of the text. Did it consider that the use or threat of use of force were the only forms of aggression? If so, he could not vote for the text, since there were other and far more dangerous forms. It should be specified in the commentary that armed force was not the only form of aggression which had to be taken into account.

50. Mr. CORDOVA pointed out that the Commission had decided to include threat in the definition, and threat was not the use of armed force. It had thus accepted the idea that there could be aggression without the use of armed force.

51. Mr. KERNO (Assistant Secretary-General) referring to the question put by Mr. Yepes, said that the wording

<sup>2</sup> See A/CN.4/44, chapter I, D, II.

<sup>2a</sup> See summary record of the 94th meeting, paras. 32-36.

submitted to the Commission was an attempt at a definition which would cover all cases of aggression, and the advocates of that wording considered that it did so.

52. Mr. ALFARO drew the Chairman's attention to the fact that Mr. Scelle had submitted an extremely important amendment for the drafting of a second paragraph concerning the determination of the aggressor by the competent organ. He thought that proposal should be examined before the definition was voted on, since the latter would be incomplete without the paragraph — but not until all the members were present.

53. The CHAIRMAN asked whether, in Mr. Scelle's absence, any member of the Commission was willing to present the amendment Mr. Scelle had proposed.

54. Mr. EL KHOURY pointed out that he had been the first to suggest that a second article be added specifying the method of determining the aggressor, and he would present the amendment.

55. Mr. CORDOVA suggested the wording, "The competent organ of the United Nations would be empowered to determine the aggressor in accordance with the definition of aggression".

56. Mr. SPIROPOULOS, who, for reasons already made clear, had not taken part in the discussion, considered the suggested wording unsuitable. It was not for the Commission to tell United Nations organs what they should do. That was laid down in the Charter. The question was altogether outside the duties of the Commission.

57. The CHAIRMAN thought Mr. Spiropoulos was quite right; but if any member of the Commission asked for the proposal to be put to the vote, he would do so.

58. Mr. ALFARO said he was prepared to submit a proposal based on Mr. Scelle's idea and embodying a directive as to the method of determining the aggressor in accordance with the definition.<sup>3</sup> Then, if a given case of aggression did not come within the definition, the gap would be filled.

59. Mr. SANDSTRÖM asked whether it would not be better first of all to ascertain whether aggression could be defined. The definition of aggression was the Commission's primary task. If it did not define aggression, the secondary question was left in the air.

60. Mr. FRANÇOIS, after hearing Mr. Alfaro's explanation, found the proposal more risky than he had thought. It amounted to a statement that, whatever the tenor of the definition, the competent organs would be entitled to declare that there were other forms of aggression. His own view was that a definition should be produced to which the United Nations authorities would be bound to adhere. On the other hand, it was not for the Commission to state what those organs should do. He would oppose the amendment.

61. Mr. CORDOVA was in favour of an explanation along those lines, since several members of the Commission felt that the definition of aggression would tend to restrict the powers of United Nations organs and the International Court. In his opinion the definition should

be interpreted in the light of the circumstances in any given case. Account must be taken of the actual facts. That was the distinction made by Mr. Scelle between the definition of aggression and the determination of the aggressor. The determination of the aggressor was not the function of the Commission. It was not for the Commission to say when a United Nations organ was faced with a case of aggression. It was for the organ itself to decide, just as any judge decided, whether the facts came within the scope of the definition. That was self-evident, but it could be mentioned in the text or in the commentary if it were so desired.

62. Mr. KERNO (Assistant Secretary-General) did not quite see the point of Mr. Scelle's proposal which had been taken over by Mr. el Khoury and Mr. Alfaro. It could have several meanings. Obviously the application of the definition to any concrete case would come within the competence of the United Nations organs, but Mr. Scelle's proposal could also be interpreted as meaning: "We are supplying you with a definition, but you are at liberty to define other cases of aggression not included in our definition".

63. Mr. AMADO held the same view as Mr. François — there was no point in going out of one's way to look for further difficulties. Mr. Scelle had stated that the Commission should try to define aggression in abstract terms and then endeavour to determine the aggressor. That was going rather far. As long ago as 1921, Brazil had proposed to the League of Nations that the task of determining which party was the aggressor be left to the Permanent Court of International Justice.

64. Any attempt to go beyond the minimum already adopted might mean reopening the discussion, and there was no knowing where that would lead.

65. Mr. EL KHOURY said that the previous year the Commission had recommended the creation of an international criminal court. The Assembly had accepted the proposal and had set up a committee to make recommendations on the subject. The Code would be examined by the court. It had been stated that the Security Council would decide which party was the aggressor; but was not the proposed court competent to do so? Who was to decide, the Security Council, the General Assembly or the court? He thought the court was the proper authority to state who was the criminal in any given case. The Commission should state that the court was the authority competent to determine the aggressor.

66. The CHAIRMAN thought Mr. el Khoury was possibly going too fast. The Assembly had not yet decided to establish a court. All it had done was to set up a committee to prepare one or more preliminary draft conventions and proposals.

67. Mr. HUDSON suggested that the Commission might find its task less difficult if it had a definite text before it. He might then propose a slight amendment which would make the definition more flexible. With regard to Mr. Kern's suggestion, the Commission might state that "The application of this definition, in any situation which may arise, is to be determined by the competent organ of the United Nations".

<sup>3</sup> See summary record of the 95th meeting, para. 56.

68. Mr. ALFARO said that it was by reason of two paragraphs in the draft resolution on the definition of aggression submitted by the Soviet Union (A/C.1/608) that the question had come up before the Commission. He was thinking particularly of paragraph 1, which read as follows: "Considering it necessary, in the interests of general security and to facilitate agreement on the maximum reductions of armaments, to define the concept of aggression as accurately as possible, so as to forestall any pretext which might be used to justify it"; and paragraph 4: "Considering it necessary to formulate essential directives for such international organs as may be called upon to determine which party is guilty of attack". The text drawn up by Mr. Hudson was in keeping with those two aims of the Soviet Union proposal. He would vote in favour of that text and would not attempt to interpret what Mr. Scelle had in mind.

69. The CHAIRMAN pointed out that Mr. Hudson had merely suggested a wording.

70. Mr. ALFARO said that in that case he would propose the text. Some of the members of the Commission considered that none of the texts was satisfactory. Others, including himself, felt that the definition before them, adopted tentatively after amendments had been made to it, embraced every conceivable form of aggression. Infiltration for example was covered by the words "or otherwise". There might possibly be other acts which had not occurred to him, but they were all included in the definition, since it was a flexible one. It had been argued that the competent organ of the United Nations would be the final judge; but he could not see how any case of aggression could arise to which one part or the other of the definition did not apply.

71. Mr. HUDSON pointed out that Mr. Alfaro was using, in support of the text which he (Mr. Hudson) had drawn up, an argument at variance with what had been in his mind when he prepared it. His intention had been to state that there were cases not provided for, and that the competent organ should endeavour to apply the definition to them.

*It was decided by 5 votes to 4, not to insert the text drawn up by Mr. Hudson and proposed by Mr. Alfaro.*

72. Mr. SPIROPOULOS intimated that he had voted because the question was completely independent of the definition. He had abstained from voting on the previous occasions.

73. The CHAIRMAN put to the vote Mr. Sandström's proposal that a vote be taken on the definition before the Commission, which ran as follows:

"Aggression is the threat or use of force by a State or Government against another State, in any manner, whatever the weapons used and whether openly or otherwise, for any reason or for any purpose other than individual or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations."

At the request of Mr. Córdova, *the vote was taken by roll call*; votes were:

*In favour:* Mr. Alfaro, Mr. Córdova and Mr. François;

*Against:* The Chairman, Mr. Amado, Mr. Hsu, Mr. el Khoury, Mr. Sandström, Mr. Spiropoulos and Mr. Yepes;

*Abstained:* Mr. Hudson;

*Absent:* Mr. Scelle.

*The text of the definition of aggression was thus rejected by 7 votes to 3, with 1 abstention.*

74. Mr. YEPES said that while he was in favour of the establishment of a definition, and felt it both desirable and feasible, he had voted against the proposed text as it did not include aggression which took the form of unlawful intervention in the affairs of another State which the aggressor was anxious to subjugate; that was the form of aggression of which Czechoslovakia had been the victim in 1938 and 1939.

75. Mr. AMADO said that his vote need not surprise anyone. In the memorandum (A/CN.4/L.6) he had submitted, he had expressed his doubts. He had argued that it was impossible to define aggression, but that a minimum definition was feasible, and by "minimum" he meant "general". Since the Commission had got bogged down in that difficulty, he saw no reason why he should be a hypocrite and vote in favour of the definition, which was a meagre contribution to international law.

76. Mr. EL KHOURY explained that the reason why he had voted against the definition was that it seemed to him pointless in view of the fact that Article I, paragraph 1 of the draft code had been adopted unanimously and that the "threat" factor had been added to the definition of aggression, making the two texts virtually identical.

77. Mr. HSU said he had voted against the proposed text not because of any technical defect but because it was inadequate to achieve the end in view. Moreover, in view of the definition of the crime in article I, paragraph 1 of the draft code, and the General Assembly resolution entitled "Peace through Deeds" (380 (V)), it had no point.

78. Mr. HUDSON said that the reason he had abstained was that he was very doubtful whether the Commission had been asked by the General Assembly to undertake to draft a definition of aggression. He had done his best to suggest improvements to the text, and if it had been so cast as to cover all cases he would have voted for it. But in view of the vague terms in which it was worded, he had felt that its usefulness was questionable.

79. Mr. ALFARO again recalled that the Commission had decided by a large majority to try to produce a formula for a definition of aggression. Now that it had rejected the version produced as a result of a great deal of effort, he thought it should either try to find another, or else decide that it was useless to make the attempt. He suggested examining in turn the draft definitions submitted by Mr. Amado, Mr. Hsu and Mr. Yepes, to see whether they would fill the bill. He suggested taking Mr. Amado's text first, unless Mr. Amado wished to withdraw it.

80. Mr. HUDSON pointed out that there was also Mr. el Khoury's suggestion (see *supra*, para. 34) that the definition given in article I, paragraph 1 of the draft

Code be brought into line with the Commission's conception of what constituted aggression.

81. The CHAIRMAN said that if the Commission decided not to produce a definition, it should consider what reply was to be given to the General Assembly.

82. Mr. SPIROPOULOS thought the Commission should explain what had happened in the course of its discussions. He had submitted a report; then four proposals had been submitted, and an attempt had been made to find an abstract formula; but unfortunately the conclusion reached had been that the formula produced was not satisfactory.

83. The CHAIRMAN said that the Commission should decide whether to declare that the study of the definition of aggression was completed or to follow Mr. Alfaro's suggestion and examine the other draft definitions submitted to it.

84. Mr. HSU thought that, in view of the long discussions already devoted to the proposals in question, the Commission should be able to complete the examination rapidly.

85. Since it had not succeeded in drafting an abstract definition, the Commission might evolve a concrete definition. Any such definition must not be in the form of an enumeration, since the Commission had voted against that; but it could include examples. It was at any rate an attempt worth making.

86. A vote was taken by roll call to ascertain whether the Commission wished to continue the search for a definition of aggression by examining one by one the various proposals before it. Votes were:

*In favour:* Mr. Alfaro, Mr. Córdova, Mr. Hsu, Mr. Yepes;

*Against:* The Chairman, Mr. Amado, Mr. François, Mr. Hudson, Mr. el Khoury, Mr. Sandström;

*Abstained:* Mr. Spiropoulos.

*It was decided by 6 votes to 4 with 1 abstention not to continue the search for a definition of aggression.*

87. Mr. EL KHOURY explained his vote. The Commission had devoted almost a week to examining Mr. Alfaro's draft definition. It was to be feared that it would take as long again to exhaust each of the other four proposals submitted. Hence he had voted against the proposal in order to spare the Commission what was likely to be an unduly lengthy task. He was content with article I, paragraph 1 of the draft Code.

88. The CHAIRMAN observed that the Commission had still to give the rapporteur directives for the drafting of his report. In the first instance, the report would be prepared by the special rapporteur. The general rapporteur would then have the task of incorporating it in the Commission's report on its third session.

89. Mr. CORDOVA thought that the functions of the two rapporteurs should be carefully defined.

90. Mr. SPIROPOULOS agreed to prepare a report on those lines for submission to the General Assembly, provided the Secretariat could assist him. Once the report had been accepted by the Commission, the general rapporteur would include the gist of it in the report on

the third session to be examined by the General Assembly's Sixth Committee. The special report was a matter for the First Committee.

91. The CHAIRMAN pointed out that the Commission reported to the General Assembly without knowing in advance to which of the Assembly's main Committees the study of the reports would be referred.

92. Mr. SPIROPOULOS said that the Chairman's remark was quite correct, but that the special report referring to the definition of the aggressor was presumably a matter for the First Committee.

93. Mr. KERNO (Assistant Secretary-General) said that the International Law Commission had found itself in a similar situation on a previous occasion. In connexion with the draft Declaration on the rights and duties of States and the formulation of the Nürnberg principles, it had incorporated in its reports on its sessions sections specially devoted to those topics. It was for the Assembly's General Committee to apportion the study of the various sections of the Commission's report among the main Committees of the Assembly as it thought fit.

94. In the present instance, the question of the definition of aggression might occupy one section of the general report to be prepared by the rapporteur and the general rapporteur in collaboration.

95. Mr. SPIROPOULOS agreed to Mr. Kern's suggestion. He was prepared to collaborate with Mr. Córdova in the drafting of the special section of the general report dealing with the definition of aggression.

96. Mr. CORDOVA pointed out that the Commission had not yet decided whether the draft Code of Offences should be sent to governments or to the General Assembly. If it were to be sent to governments, did the Commission propose to send them a special report or the general report in which the arguments on the draft Code would be inserted?

97. Mr. SPIROPOULOS thought that, by the terms of article 16 (g) of its Statute, the Commission was called upon to submit to governments a special report on the draft code, along with the relevant documents. The text of the draft code might also be given in the general report, in the section in which the Commission reported on the progress of its work, or in an annex.

98. Replying to a remark by Mr. CORDOVA to the effect that the adoption of such a course would presuppose that the Commission had decided in favour of transmitting its report on the draft code to governments, Mr. HUDSON and the CHAIRMAN considered that the Commission should postpone its decision on that point until the final reading of the draft code.

*It was so decided.*

99. The CHAIRMAN asked Mr. Spiropoulos what he considered should be included in the report. In particular, how much space should be given in the report to the historical background of the question, which Mr. Spiropoulos had gone into at great length in his own report (A/CN.4/44).

100. Mr. SPIROPOULOS thought the report should intimate that the Commission had first of all ruled out

the possibility of evolving a definition by enumeration, giving the reasons for that decision; it should then list the various proposals; and finally it should indicate that the Commission had endeavoured to draw up an abstract definition, and state that the attempt had been unsuccessful.

101. Mr. CORDOVA asked Mr. Spiropoulos whether, in the special report, he was in favour of keeping some of the material in the dogmatic part of his report.

102. Mr. SPIROPOULOS saw no reason why that should not be done. But he thought the passages in the special report devoted to the rapporteur's report should be brief.

103. Mr. ALFARO was anxious that the question of the definition of the aggressor should not be treated lightly. A careful account must be given of the Commission's decisions, with the underlying reasons. The special report should borrow any necessary material from the rapporteur's report.

104. Mr. HUDSON thought that the part dealing with the historical background of the definition should be summarized, with a reference to the detailed account given in chapter II of Mr. Spiropoulos' second report (A/CN.4/44); whereas the sections devoted to the course of the Commission's debates should be given in full detail.

105. The Commission instructed the rapporteur to prepare the special report on the question of the definition of aggression, bearing in mind the directives resulting from the discussions.

106. Mr. HUDSON observed that, in resolution 378 B (V), the General Assembly had instructed the Commission to examine the question of the definition of aggression in conjunction with the question of the draft Code of Offences. Hence he would like to know whether the Commission proposed to take up the question again when the draft code was given its final reading.

107. The CHAIRMAN thought that the Commission might indicate in its report that when it drew up the draft code it had borne in mind resolution 378 B (V).

108. Mr. SANDSTRÖM did not think the definition given in article I, paragraph 1 of the draft code embodied everything the Commission would wish to insert in a definition of aggression. Paragraph 3 (incursion by armed bands) and paragraph 4 (fomenting of civil strife) were matters which should have a place in such a definition.

109. The CHAIRMAN thought that problem might be examined later.<sup>3a</sup>

**General Assembly resolution 484 (V): Review by the International Law Commission of its Statute with the object of recommending revision thereof to the General Assembly (item 1 of the agenda) (resumed from the 83rd meeting)**

110. The CHAIRMAN invited Mr. el Khoury and Mr. Hudson, who had been absent during the general discussion on that item of the agenda, to submit their comments.

111. Mr. EL KHOURY said that he had been Chairman of the Sixth Committee when it had drawn up the Statute of the International Law Commission. Since then, article 13 of the Statute had been amended, and could possibly be amended still further.

112. As there was now an opportunity of revising the Statute, it might be advisable to insert, following paragraph 1 of article 1, a statement that the Commission itself might also, when appropriate, propose some principles of a legislative character. It might see fit to do so when international practice was not clear on any given point. Its task should not be confined to the mere recording of existing law; it should be empowered to propose the adoption of principles presenting certain new features, but based of course on cognate principles already established.

113. Replying to a question put by the Chairman, Mr. EL KHOURY said that if the Commission's sole function was to record existing law, an annual session of two months would be enough. There seemed no reason to ask its members to give up all their time to it.

114. Mr. HUDSON thought that the General Assembly's invitation to the Commission to revise its Statute gave it an opportunity to consider what was the most appropriate procedure from the point of view of international law. It was hardly likely that the permanent nature of the Commission would be questioned by the General Assembly, even if the work it was accomplishing were not all that could be desired.

115. It could hardly be expected that the Commission would achieve rapid results. The study of important issues demanded a great deal of time. However, the present arrangement, based on a two months' session every year, was not satisfactory. At the end of fifteen years under that system, by which time the members of the Commission would have been replaced twice, the progress achieved would still be very meagre.

116. At the eighty-third meeting of the Commission, various members, including Mr. Spiropoulos, had expressed the opinion that the Commission should sit all the year round. Obviously, if that course were adopted, it would have financial implications. To minimize them, the possibility might be considered of reducing the membership of the Commission. A working session of nine to ten months a year might produce excellent results. Of course, members would not then be able to carry on other occupations which called for a great deal of work. Men would have to be found whose working methods and competence would ensure efficiency.

117. Possibly such men could not be found under the electoral system. For example, it was purely by chance that he himself had been nominated by the United States Government as a candidate, when other men of equal ability might just as well have been proposed. With regard to election by the General Assembly, the fact of being able to muster a majority of votes was not necessarily the best guarantee of efficiency.

118. The Commission might look around for some other method of appointment, e.g. the list of candidates might be drawn up by the President of the International

<sup>3a</sup> See summary record of the 108th meeting, para. 115.

Court of Justice following consultation with the judges of the Court, and others. The choice would be governed by concern to put forward candidates likely to make a real contribution to the Commission's work. The list could be either a list of candidates to be voted on by the General Assembly, or, if the General Assembly consented, a list of appointments.

119. At a time when so much research was going on in other fields, research work in international law should be carried on energetically and competently. For that reason, Mr. Spiropoulos' suggestion, to which he had just referred, merited careful consideration by the Commission.

120. The Commission's Statute established a very sharp distinction between the development of international law and its codification. But in practice, there could be no codification without development. He would be in favour of minimizing the distinction by adopting the same procedure for both. In the United States, in the course of the research work concerning the development and codification of law, carried out under his direction at Harvard University, a great deal of time had been taken up unnecessarily over the question whether that type of research came under the heading of development of law or codification. A sub-committee might perhaps be set up to see how far it was possible to combine the two aspects of the Commission's task by making the distinction less rigid.

121. Mr. EL KHOURY said that, when the statute was drawn up, he had suggested to the Sixth Committee that it should not establish a special commission to promote the development of international law, but should hand over the task to the International Court at the Hague.<sup>4</sup> The Court consisted of fifteen judges whose time was not entirely taken up by their judicial functions and who would have more than two months at their disposal to deal with the development of international law. They were recognized jurists with all the necessary qualifications in respect of competence and integrity. Such a solution would save money.

122. The CHAIRMAN having pointed out that the Commission was not empowered to propose amendments to the Statute of the International Court of Justice, Mr. EL KHOURY considered that the Court could take over the functions of the Commission without any change in its terms of reference. The Commission's functions were not legislative in character, and in any case, as it was, the Court did give advisory opinions.

123. Mr. SPIROPOULOS said that Mr. el Khoury's proposal would involve the amendment of the Charter, of which the Court's Statute formed an integral part. The Commission had no authority to propose any such amendment. In any case, he was very much against Mr. el Khoury's proposal.

124. Mr. CORDOVA also considered that the amendment of the Court's Statute did not come within the province of the Commission. During the discussions at which the proposals leading to the adoption of General

Assembly resolution 484 (V) had been put forward, no such possibility had even been contemplated.

125. Mr. HUDSON said that for as long as the Permanent Court of International Justice and the International Court of Justice had been in existence, the constant endeavour had been to make their functions strictly judicial. Even the Court's "opinions" were in the nature of actual judgments. A few years after it had been established, there had been suggestions that the Court's opinions should not be published. One such proposal had been rejected on the grounds that it would have weakened the judicial nature of the opinions. If the Court went outside its purely judicial functions, its entire character would be changed for the worse.

126. The CHAIRMAN observed that the notion put forward by Mr. el Khoury had found little support in the Commission.

127. Mr. ALFARO said he had been greatly impressed by the soundness of Mr. Hudson's arguments, and he would be grateful if Mr. Hudson could embody them in a written proposal which might serve as a basis for drawing up a scheme for the revision of the statute.

128. Mr. HUDSON thought it would be better for the Commission to formulate a series of directives to be given to a sub-committee with instructions to produce a text for subsequent examination. The directives in question might be as follows: (a) the minimizing of the distinction between the development of international law and its codification, and (b) a change in the Commission's structure to enable its members to serve on a full-time basis, as previously suggested by Mr. Spiropoulos.

129. Mr. HSU agreed with Mr. Hudson that it would be a good thing to minimize the distinction between the two types of functions given to the Commission under its Statute, by making certain changes which would bring the procedure proposed for each of them into line.

130. With regard to the other point, namely the suggestion that the members of the Commission should serve on a full-time basis, he was willing to support the underlying principle; but he did not think it feasible to waive the procedure of election of members by the General Assembly. The procedure was similar to that followed for the appointment of the members of the International Court of Justice. The General Assembly would not give a favourable reception to a proposal to change it. Moreover, it was important that the various legal systems of the world should be represented on the Commission, that it should not consist exclusively of spokesmen of the western legal system, and furthermore, that its various members should belong to different professional groups — professors of law faculties, high government officials and practising lawyers. That professional distribution was not actually laid down in the statute, but it was the practice followed within the framework of the statute.

131. Hence it was important to maintain in the Commission representation of the various legal systems of the world and a sufficiently wide professional distribution.

132. He mentioned that he had been joint author with Mr. Jessup, the United States representative, of a proposal

<sup>4</sup> *Official Records of the General Assembly, Second Session, Sixth Committee, 37th meeting, p. 5.*

(A/AC.10/33) submitted to the so-called Codification Committee in 1947. The proposal had been used as a basis for that Committee's discussions and for its report. The gist of it was that the members of the proposed Law Commission should be appointed on a full-time basis.

133. That method of organizing the Commission's work would be satisfactory from one point of view, since it would not affect the representation of the various legal systems; but it would affect the representation of the different professions. If members drawn from official circles or who were practising lawyers were to devote their whole time for five years to the work of the Commission, they would tend to lose touch with the every-day realities of legal life, and their work might take on a more academic character.

134. While he was not in principle opposed to such a system, he suggested that the Commission might consider another. The length of the sessions would remain as at present, but the Secretariat would play a more direct part in the Commission's work. In recruiting members of the Secretariat, as the considerations to be borne in mind would not be the same, the choice would be freer. The work of the Commission would be expedited if the decisions to be taken by it were drafted by the Secretariat in such a way as to prevent waste of time. Without being an optimist by nature, he thought that if the Secretariat were made responsible for drawing up reports, the loss of time would be considerably reduced.

135. What took up most of the time during sessions were the replies and rejoinders and the successive proposals for amendments. If a reinforced Secretariat submitted for the Commission's attention on a given subject a series of proposals, indicating that such and such a proposal was sounder juridically, another more in line with tradition etc., the Commission could quickly make a choice between the various versions. At its second session, when the question of an international criminal jurisdiction was being discussed, the Commission had found itself faced with two reports based on opposite points of view, and had thus been able to reach a decision very quickly. The Secretariat could be instructed to present a series of variants. Obviously a rapporteur selected from the members of the Commission itself could not be expected to do that.

136. The CHAIRMAN thought the Commission should set up a sub-committee to avoid turning the plenary meetings into a drafting committee. The sub-committee should be given directives.

137. Mr. SPIROPOULOS agreed that a sub-committee should be set up. Its directives should include in particular the transformation of the Commission into a body whose members would be appointed on a full-time basis. At the eighty-third meeting he had pointed out that it was the duty of the United Nations to present to the world a comprehensive code of international law within a definite period, say ten years. The only way of doing that quickly was to spread the work of the Commission over the whole year.

138. The Commission's directives might also include the following points: it should be laid down in the

Statute that the Commission's documents and the summary records of its proceedings should be printed. There was too little knowledge of the work done by the Commission. All that the average jurist knew was that it existed and who were its members. Publication of all the documents, and especially of the summary records, would be a useful contribution to the development of international law and to the Commission's prestige. The moment seemed opportune to insert a provision to that effect in the statute. The expense would not be heavy, and the Sixth Committee of the General Assembly would not be averse to giving its consent. On the other hand, if the suggestion were put in the form of a separate concrete proposal, it would meet with opposition in the Fifth Committee, where it would normally come up.

139. The General Assembly had had occasion to refer to the Commission questions such as, for example, that of the definition of the aggressor, which required a speedy and even immediate answer. In the case in point, as the question was bound up with that of the draft code, a rapporteur had already been nominated and there had been no difficulty. But if there were no rapporteur, none could be appointed until the following session, so that two years might go by before the reply asked for by the General Assembly was forthcoming. To prevent any such delay, the Statute should give the Chairman the right, subject to approval by a number of members to be specified, to nominate a rapporteur in special cases.

140. It would be a good thing for the Commission to be represented at the General Assembly by its special rapporteurs. The previous year, the formulation of the Nürnberg Principles by the Commission had been strongly criticized by the Assembly. As he had been present at the discussions, he had been able to exert pressure to prevent the Sixth Committee from referring the question back to the Commission, a course which would have been harmful to the Commission's prestige.

141. Hence, another provision in the Statute might stipulate that the Commission's special rapporteurs should attend, in that capacity, the meetings of the General Assembly at which the subjects on which they had reported were dealt with, with instructions to defend the Commission's attitude. It was important that the Commission's work, which at times give rise to a great deal of criticism, should be vindicated by its rapporteurs.

142. As the Commission's Statute stood at present, the Secretary-General's approval was required if the Commission wished to choose a meeting-place outside New York (article 12 of the Statute). It was desirable that that article should be replaced by a provision authorizing the Commission to hold each of its sessions at whatever place it chose. However, he would not press that point, lest it be thought that the members of the Commission preferred Geneva to New York.

143. In the interval between its sessions, generally speaking, the Chairman should, where necessary — and there again subject to the approval of a considerable number of the members of the Commission, say two-thirds — be given the powers granted *in jure* to the Commission under article 12 of its Statute in connexion with change of meeting place.

144. He felt that there should be no interference with the geographical distribution of the Commission and the method of election of its members. The General Assembly would always want itself to appoint the members of the Commission and would invariably bear in mind the question of geographical distribution. It would be quite easy for the Latin-American countries and the Arab States or other groups by voting in a body to obtain a majority, if the necessity for ensuring representation of the various legal systems were not borne in mind.

145. A suggestion put forward at the eighty-third meeting had advocated simplification of the Commission's procedure, and had urged that reports should cease to be sent to governments. But after all, governments did want to be consulted, even if they had no intention of submitting comments. That had been seen when the Commission's reports on the rights and duties of States and on the formulation of the Nürnberg Principles had been sent direct to the General Assembly. The various delegations had urged that their governments be consulted. The fact that they did not offer any comments was in itself an argument which the Commission could use if governments subsequently raised objections.

146. The CHAIRMAN was not in favour of the proposal that the summary records be printed. It would make it possible for anyone on the look-out for such things to find in statements taken out of their context or outstripped by new developments, remarks which would make the speakers appear to contradict themselves.

147. Mr. HUDSON thought that to print the summary records would deprive the discussions of one essential feature: they would no longer be free exchanges of views.

148. On the CHAIRMAN's proposal, *it was decided to set up a sub-committee*. After some discussion, *it was decided that the sub-committee consists of three members, namely: Mr. Hudson, Mr. Córdova and Mr. Sandström*.

149. Mr. CORDOVA said he had noted nine items which the sub-committee should take up, namely: the membership of the Commission; procedure for elections; organization of the work to enable the members of the Commission to devote their whole time to it; minimizing the distinction between development of international law and its codification; printing of the Commission's documents and summary records; right of the Chairman to appoint a rapporteur in case of emergency; right of the Chairman to change the meeting place during the interval between sessions; assignment of members of the Commission to the General Assembly to defend reports; and the question of communication of the Commission's reports to governments.

150. The Commission should make known its wishes in regard to each of those items before the sub-committee set to work.

151. Mr. EL KHOURY requested the addition to the list of the Commission's right to put forward suggestions on principles of a legislative nature.

152. After some discussion in which the CHAIRMAN, Mr. HUDSON and Mr. CORDOVA took part, Mr. HSU pointed out that Mr. el Khoury's suggestion was tanta-

mount to giving the Commission the right to propose fresh topics for study.

153. The CHAIRMAN asked the Commission to decide first of all whether the members should serve on a full-time basis, or more accurately, whether it was desirable to recommend that solution to the General Assembly.

*The proposal was adopted by 8 votes.*

154. Mr. FRANÇOIS pointed out that, at the eighty-third meeting, it had been suggested that only some members of the Commission should be appointed on a full-time basis, while the remainder would continue to serve as at present.

155. The CHAIRMAN thought that question had been sufficiently discussed and could be settled without further debate.

156. Replying to a question by Mr. HUDSON, he said he thought that, if the occasion arose, the General Assembly was the body which would have to appoint members serving on a full-time basis.

157. Mr. CORDOVA pointed out that, as a matter of fact, the special rapporteurs already gave up a considerable part of their time to the Commission.

*The suggestion revived by Mr. François was unanimously rejected.*

The meeting rose at 1.0 p.m.

## 97th MEETING

Wednesday, 6 June 1951, at 9.45 a.m.

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*Chairman:* Mr. James L. BRIERLY

*Rapporteur:* Mr. Roberto CORDOVA

*Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, 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.

**General Assembly resolution 484 (V): Review by the International Law Commission of its Statute with the object of recommending revision thereof to the General Assembly (item 1 of the agenda) (continued)**

1. The CHAIRMAN asked the Commission to proceed with the elaboration of directives for the sub-committee it had decided to set up at its previous meeting (para. 148).
2. Mr. HUDSON had reflected on the problems that would arise if it were decided that the Commission should sit full time.
3. The term of office of its members should be studied. If they had to forego their professional activities, it would be very difficult to persuade men occupying a public office, the chair of a university, or who were practising a profession, to give up their work in exchange for a short-term appointment.
4. Another difficult question concerned the seat of the Commission. He himself did not see how the Commission could be set up anywhere else than at United Nations headquarters. If it wished to have the assistance of the Secretariat that solution was almost, though not absolutely, unavoidable.
5. It was also necessary to settle the question of members' salaries and of their pensions on retirement.
6. The number of the Commission's members had also to be determined. If appropriate salaries were provided and provision made for retirement, it might be advisable, in the interests of economy, to reduce their number. Again, it might be impossible to find fifteen persons with the necessary qualifications who were ready to forego their other activities.
7. As regards the method of electing the members, which Mr. Spiropoulos had considered sacrosanct, being of the opinion that the Sixth Committee would refuse to alter it, he felt that the Commission should put forward the proposal which in its opinion was in the best interests of international law. The General Assembly would then be free to adopt or reject it.
8. While leaving to the General Assembly the appointment of members by election, it might be suggested that the list of candidates should be drawn up by the President of the International Court of Justice. By providing for co-option in the case of a casual vacancy, article 11 of the Commission's Statute already departed in one particular instance from the principle of election by the General Assembly.
9. By referring to those various problems he had wished to show that a decision that the Commission should sit full time would have important implications which should be studied.
10. Mr. SPIROPOULOS recalled that, during the discussions in the Sixth Committee in connexion with the preparation of the Commission's Statute, a number

of proposals had been submitted for filling casual vacancies.<sup>1</sup> One was that the Commission's members should be elected by the Court, but, as the result of a proposal he had submitted, the Sixth Committee had decided in favour of co-option. That was the system adopted by law faculties and it constituted the most practical solution.

11. Mr. HSU remarked that, at that time, it had been proposed to give the Commission a temporary character and that, furthermore, the members' term of office had then been three years. The problem of the appointment of new members to fill vacancies had therefore been of less importance.

*(a) Question of the Commission's seat*

12. Mr. SPIROPOULOS pointed out that, administratively, the Commission was a subsidiary organ of the General Assembly, to which it was subordinate. It was all the more necessary to maintain that relationship, as the Charter specifically made the General Assembly responsible for encouraging the progressive development of international law and its codification (Article 13, para. 1 a).

13. In view of the ties that bound it to the General Assembly, it might be considered that the Commission should sit in New York, where the Secretary-General and the Director of the Division for the Development and Codification of International Law and their staff were to be found. However, a special branch of the Secretariat might be attached to the Commission and follow it to any place where it might ultimately decide to sit.

14. The question of a seat need not be settled immediately. It was first of all necessary to know whether the General Assembly agreed to the Commission becoming a full-time body. To that end, it should be pointed out to it in general terms that if it desired the codification of international law to be completed within a reasonable period, say 10-15 years, a full-time organization was required. The General Assembly would weigh the matter with due regard to the expenditure entailed by such a change. It was preferable not to subordinate that proposal to other conditions, which would complicate the Assembly's choice. It should, however, be recommended that the members' remuneration should be the same as that of members of the International Court of Justice.

15. Mr. HUDSON hoped that for the time being members would confine their remarks to the question of where the Commission was to sit.

16. Mr. SPIROPOULOS said that, in his opinion, the Commission should not touch on that question in its report to the General Assembly.

17. Mr. HUDSON, on the contrary, felt that it was necessary to draw the General Assembly's attention to the implications of a decision in favour of a full-time Commission. The question of where it was to sit was very important. It should be stated that the Commission worked better at Geneva than in New York.

<sup>1</sup> See report of the Sixth Committee, *Official Records of the General Assembly, Second Session, Sixth Committee, Annexes*, document A/C.6/193, para. 8.

18. Mr. ALFARO recalled that, at its previous meeting, the Commission had heard a statement from Mr. Hudson on the amendments to be made to the Statute. It would appear that the nine points propounded in that statement had been generally acceptable to the Commission.

19. He expressly asked the Chairman to put up those various points for discussion in turn, so that the Commission might express its opinion on them and thus supply the sub-committee with directives for the preparation of a draft revision of the Statute, a report, or both.

20. Mr. CORDOVA read out the above-mentioned nine points which had already been enumerated at the previous meeting.<sup>2</sup>

21. Mr. HSU considered that the Commission should, at an appropriate moment, decide on the form of its report, since the course of the discussion might be affected by the choice. Did the Commission intend to submit its recommendations in the form of amendments to the Statute or otherwise?

22. The idea of converting the Commission into a full-time body had been accepted. That was a fundamental change which would involve others.

23. If, during the discussion, some members might consider that that was not the best solution, the Commission could submit alternatives in its report. It would then say that if the Commission were to work full time there would be difficulties in regard to where it was to sit, since it was so closely linked to the Legal Department, and that financial problems would arise, as it would need larger credits. Finally the Commission would say that it was making alternative suggestions, in case the solution of full-time work were not approved by the General Assembly.

24. It was from that point of view that the question of the form to be given to the report arose.

25. The CHAIRMAN felt that the question of form might be left to the discretion of the sub-committee, which would necessarily have to point out the advantages and disadvantages of a full-time Commission. It would certainly be premature to draw up a complete draft Statute, based on such a change, so long as it had not been approved by the General Assembly. Pending that decision the Commission could prepare a partial revision that could be adopted immediately.

*It was so decided.*

26. Mr. KERNO (Assistant Secretary-General) remarked that transformation of the Commission into a full-time body would raise budgetary, administrative and other problems. It would be the first time that the General Assembly had given such a form to one of its subsidiary bodies, and it was doubtful whether it would give a favourable reception to such a proposal.

27. In the circumstances the Commission should, in addition to the above proposal, draw up draft recommendations for amendments and improvements that could usefully be introduced into the Statute, without changing the Commission's essential character.

28. As regards the Commission's place of meeting, the

longer its sessions lasted the greater would be the necessity for it to meet at United Nations headquarters.

29. It was not only a question of the Secretariat, but also of the indispensable contact with the daily life of the United Nations. A full-time Commission established elsewhere would progressively and rapidly acquire a different mentality from that of the organization.

30. In the Codification Committee of 1947, the idea of a full-time Commission had been opposed for two reasons. It had been argued, on the one hand, that it would not be possible to secure the participation of men of the highest calibre (the answer to that was of course that they could be found if the financial inducement were sufficient) and, on the other that the Commission's members must keep in touch with real life, and that, if they sat full-time, they would gradually get out of touch and become just a group of specialists living in an ivory tower. Those were the arguments that had been employed at the time the Commission was established.<sup>3</sup>

31. Mr. FRANÇOIS considered that the work of codification could only be efficiently accomplished by a full-time Commission. The facts spoke for themselves: so far the results obtained had not been satisfactory. If the Assembly wanted a really efficacious solution, it must ask the members to devote their whole time to the work of the Commission. Naturally that course would involve expense. The members' emoluments should be roughly the same as those of the judges of the International Court of Justice. If the expense were considered too heavy, the solution of a full-time Commission would have to be abandoned and, with it, the hope of carrying out the codification.

32. The success of the Commission would depend on its prestige in the world and on the ability of its members. If it remained simply a commission of experts there would be no codification.

33. He did not share Mr. Kerno's opinion as regards the seat. The Commission should not be set up in one of the world's political centres. The arguments that had led to the establishment of the Court away from the large centres, also applied against the establishment of the Commission at New York. In his opinion, the seat of the Commission should be The Hague or Geneva: Geneva, because the European Office of the United Nations was located there; at The Hague, because of the possibilities of contact with the judges of the Court and of access to the Peace Palace Library.

34. If it worked full-time, the Commission would need its own secretariat. It could not be satisfied, as it was at present, during its two-months' sessions, to call on members of the general Secretariat. Just as the Court had its Registry, so the Commission should have its secretariat.

35. The members' term of office might be nine years, as in the case of the judges of the Court. The Court

<sup>3</sup> See *inter alia*, *Report of the Committee on the Progressive Development of International Law and its Codification* (A/AC.10/51), para. 6; see also A/AC.10/SR.11, A/AC.10/SR.23 and A/AC.10/SR. 24.

<sup>2</sup> See summary record of the 96th meeting, para. 149.

was composed of jurists of the first rank, who could be re-elected. Their term of office of nine years gave them sufficient security of tenure, and, as they were not appointed for life, they did not lose contact with the outside world. Why should members of the Commission lose such contact under the same conditions? Why should a system that was suitable for the Court be unacceptable for the Commission?

36. The CHAIRMAN earnestly requested members not to allow themselves to be drawn into another general discussion. They should endeavour to formulate directives for the sub-committee.

37. Mr. AMADO said that, so far as he was concerned, Mr. François' statement had been very helpful. In discussing a question, it was often very difficult to keep scrupulously to a narrow theme.

38. He was entirely in agreement with Mr. François. How could it be said that if the Commission sat full time its members would lose contact with real life? What human being could, at the present day, remain aloof from life?

39. Mr. SANDSTRÖM also approved the general trend of Mr. François' remarks.

40. The CHAIRMAN wondered whether it would not be sufficient to point out to the General Assembly that, if the Commission were to sit as a full-time body, the question of its seat was bound to arise.

41. Mr. HUDSON considered that the Commission should submit precise and alternative solutions to the Assembly. By its resolution 484 (V) the General Assembly had asked the Commission to make recommendations.

42. As a member of the sub-committee, he had asked for directives on certain points. Mr. François had just added another: the question of a special secretariat.

43. He noted that some members considered it essential that the Commission should be established at United Nations headquarters. Others, on the contrary, considered that its seat should be in Europe.

44. The CHAIRMAN was of the opinion that the question of the Commission's seat, if it were to sit as a full-time body, had been sufficiently discussed. He proposed to take a vote.

45. Mr. SPIROPOULOS was afraid the Commission was about to make a mistake. It should confine itself to explaining the implications of the possible transformation of the Commission into a full-time body. The choice of a seat was not bound up with that change and there was, therefore, no need to vote on the question. It would be better to await the Assembly's decision.

46. Mr. HUDSON remarked that the candidates for a post on the Commission should know in advance where they would be called upon to reside.

47. The CHAIRMAN put to the vote the question whether, in the event of the Commission's becoming a full-time body, its seat should or should not be in New York.

*As there were 5 votes in favour of New York and 5 votes against with 1 abstention, the question was not settled.*

48. Mr. SCALLE, in explanation of his vote, said that in his opinion New York was the last place where the Commission should sit. If it were in New York it would be entirely engrossed in the debates of the political organs of the United Nations. After a very short time it would assume a purely political mentality, whereas the desired aim was the exact opposite.

49. The only possible criticism of the International Court of Justice was that it showed too strong a tendency to associate itself with political events. It was even more inevitable, if the Commission were to sit at New York, that its work should rapidly lose its scientific and purely objective character. To a lesser degree all the other big capital cities would have similar disadvantages.

(b) *Members' term of office*

50. Mr. HUDSON recalled that he had been in favour of continuing the present term of office of five years, whereas Mr. François had advocated nine years, by analogy with the system adopted for the Court.

51. The CHAIRMAN asked whether it would not be enough to say that a short term of office would not provide future members with sufficient security of tenure and would not permit of their recruitment under satisfactory conditions.

52. Mr. HUDSON considered that it would be preferable to submit a definite proposal to the Assembly. In his opinion a term of seven years might be suggested. It was not advisable to copy the Court's system too closely.

53. After a discussion in which Mr. ALFARO took a prominent part, the CHAIRMAN proposed that the Commission recommend to the General Assembly that the term of office of the members of the Commission be not less than seven years.

*The recommendation was adopted by 7 votes.*

(c) *Number of members*

54. Mr. HUDSON considered that the number of members ought to be sufficient to enable the work to proceed satisfactorily whatever the method of appointment. He noted that so far the whole of the 15 members of the Commission had never been present at the same time. A reduction in the number of members would lessen the additional financial burden resulting from possible reorganization. He proposed a membership of 11.

55. Mr. EL KHOURY proposed a membership of five. In his opinion five highly competent experts would, by themselves, do better than a larger body.

56. Mr. HSU pointed out that 15 had been the number decided on to ensure that all legal systems were represented.

57. Mr. HUDSON pointed out that a membership of five could not be adopted for that reason.

58. Mr. SPIROPOULOS was of the opinion that the number of the Commission's members should remain unchanged. He recalled that, during the discussions on the establishment of the Commission, the United Kingdom delegation had proposed a membership of nine.<sup>4</sup> As a fact it was very difficult to reduce the number matter

<sup>4</sup> See A/AC.10/SR.11 and A/AC.10/SR.23.

of members, since the five great Powers would insist on their legal system being represented by one of their own nationals, while the Latin American countries would ask for three or four representatives, and the Arab countries for one or two more. That already made a fairly high total, and any number less than 15 would not therefore leave much room for the representatives of European legal systems.

59. Moreover, the members of the Commission could be divided into three working parties of five for the separate examination of a rapporteur's conclusions, and that would speed up the work.

60. Mr. HUDSON pointed out that Mr. Spiropoulos had made no mention of budgetary considerations.

61. Mr. CORDOVA said that, according to Mr. Spiropoulos, the Big Powers would necessarily be represented on the Commission. Nevertheless the concept underlying its composition was that of a harmonious balance and integrated work. When neither the Soviet Union nor any other eastern European countries were represented on the Commission, the four Big Powers whose nationals were present could easily control its decisions.

62. Mr. SANDSTRÖM considered that the Commission could avoid taking a final stand by saying in its report that, should it be necessary to reduce the number of members, the total should not be less than 11.

63. Mr. EL KHOURY had proposed a membership of five because he considered that the work would be done better and more quickly by a smaller Commission. It was not necessary that all legal systems should be represented, since the Commission was only an advisory body and did not take final decisions. It was the Assembly where all the members of the United Nations were represented that had the last word. The Commission was merely doing the work of experts and only submitted draft recommendations.

64. Mr. ALFARO considered that the report should state that the Commission advocated the retention of a membership of 15, which could be divided into working parties, for the sake of greater efficiency; but that if, for budgetary reasons, the Assembly decided to reduce the membership the Commission recommended that it should not be smaller than 11.

65. The CHAIRMAN put to the vote the question whether the existing number of members should be maintained.

*The recommendation was adopted by a majority of 7.*

66. The CHAIRMAN explained that he had voted in favour not because 15 seemed to him the best number — actually he considered it too large — but because, looking at the matter realistically, he knew that the General Assembly would not approve a smaller number.

67. Mr. HSU and Mr. AMADO explained their votes in the same way.

68. After the CHAIRMAN had asked whether reference should be made in the report to the number of members, Mr. AMADO formally proposed that the possibility of a reduction in the membership be not mentioned in the report.

69. Mr. HUDSON was of the opinion that the question would necessarily be brought up in the General Assembly. After advocating the maintenance of the existing number of members, the Commission might say that should the General Assembly for budgetary reasons consider it necessary to reduce that number, it should not fall below 11.

70. After a discussion in which Mr. EL KHOURY and Mr. SPIROPOULOS took part, the CHAIRMAN put to the vote Mr. Amado's proposal not to refer to the number of members in the report.

*Mr. Amado's proposal was adopted by 7 votes.*

#### (d) *Incompatibilities*

71. Mr. HUDSON asked whether, in the event of the commission becoming a full-time body, a provision should be adopted similar to that in article 16, paragraph 1 of the Statute of the Court, defining incompatibility in the case of judges.

72. The CHAIRMAN considered that in such an eventuality, the incompatibility of the functions of a member of the Commission with any other professional activity would be almost a matter of course.

73. Mr. SPIROPOULOS remarked that, though a plurality of professions was inadmissible in the case of a judge, it was a rather different matter for members of a codification commission. In his opinion the latter could quite well take part in the work of some of the United Nations organs, or accept the role of arbitrator.

74. Mr. HUDSON recalled that, during the first years of the Permanent Court's existence, one of the judges, a United States national, had continued to be very active in his profession as a lawyer. It was to prevent the recurrence of such a state of affairs that a provision regarding incompatibility had been inserted in the Statute of the Court. It had not become final until 1936.

75. It appeared to be essential that the revised Statute should expressly prohibit pluralism.

76. Mr. YEPES considered that there should be complete incompatibility between the functions of a member of the Commission and those of a Government official. Those two posts could not be held simultaneously.

77. Mr. SANDSTRÖM was also of the opinion that, if the Commission were to work full time, the incompatibility of the functions of its members with the holding of any other office should be laid down. A single exception might perhaps be made in regard to arbitration.

*The principle of incompatibility was adopted.*

#### (e) *Emoluments*

78. Mr. HUDSON asked whether the report should refer to the salaries of judges of the Court.

79. In reply to a question by Mr. Alfaro, Mr. HUDSON said that the pension he had in mind was, as in the case of the members of the Court, a retirement pension, payable in the event of the non-re-election or voluntary retirement of a member.

80. Mr. KERNO (Assistant Secretary-General) suggested that the Commission refrain from going into too much detail and, for instance, simply recommend to the General

Assembly that members of the Commission working full time should be adequately remunerated.

81. Mr. SPIROPOULOS considered that the words "under the same conditions as the Court" should be added.

82. After a discussion in which the Chairman and Mr. Córdova took part, Mr. AMADO remarked that the report should draw the General Assembly's attention to the fact that, if it desired a codification of international law, it should not overlook the fact that men capable of doing the work should be adequately paid. The matter should be presented clearly and eloquently, so as to carry conviction.

83. Mr. ALFARO would vote against any reference to the emoluments of the judges of the Court. In his opinion it would be sufficient to speak of appropriate remuneration. He considered it preferable not to stress the question of a pension. That was a factor that might give pause to the General Assembly.

84. Mr. CORDOVA stated that, in voting for the recommendation regarding full-time work for the members of the Commission, he had been under the impression that the method of remuneration would be the same as that laid down in the Statute of the Court. If he had known that that would not be so, he would have voted against the recommendation.

85. Mr. EL KHOURY had voted against the recommendation for a full-time Commission and would vote against any reference to remuneration whatsoever.

86. The CHAIRMAN put to the vote the question whether the report should merely contain a general recommendation to the effect that the members of the Commission should receive an adequate salary.

*The proposal was rejected by 6 votes to 5.*

87. The CHAIRMAN asked whether the report should state that the remuneration of members should be the same as that of judges of the Court.

88. Mr. ALFARO proposed that the Commission recommend to the General Assembly that, when determining the emoluments of the Commission's members, it should take into consideration the conditions of remuneration applicable to the Court.

89. Mr. HUDSON pointed out that it was a question of drafting which might be left to the sub-committee.

*It was so decided.*

90. Mr. HUDSON stressed the importance of the pension question. It had not been settled when the Permanent Court of International Justice was established, but had been, in 1945, in the case of the International Court of Justice. It was desirable that a candidate should know in advance both what his obligations and also what his rights would be, especially as he could not exercise other functions.

91. Mr. SANDSTRÖM thought the question of a pension was included in the concept of adequate remuneration, and it was therefore unnecessary to mention it separately.

*It was so decided.*

(f) *Method of election*

92. The CHAIRMAN asked whether that question was bound up with that of the possible transformation of the Commission into a full-time body.

93. Mr. HUDSON remarked that it might be considered a separate question, but that it would take on greater importance should the Commission sit full time. He asked what the Commission thought of his suggestion that the President of the Court should appoint the members.

94. Mr. ALFARO considered it very dangerous to leave the choice of the members of the Commission to a single individual. Moreover, the General Assembly would not lightly abandon its right of election, together with its complement, the observance of a balanced geographical distribution.

95. Mr. YEPES was entirely of Mr. Alfaro's opinion. The election of members by the General Assembly was in consonance with the spirit of the Charter which, in Article 13, had entrusted to the Assembly the task of encouraging the development and codification of international law.

96. Mr. SPIROPOULOS was also of the opinion that no change should be made in the method of election. As the Commission took its orders from the General Assembly, it was natural that the latter should determine its composition.

*It was unanimously decided not to propose any change in the method of electing members.*

(g) *Nomination of candidates*

97. Mr. HUDSON thought that the President of the Court should be made responsible for drawing up a list of names, two for each seat to be filled. Under the existing system, it was doubtful whether a sufficient number of individuals with the necessary qualifications could be found for a full-time Commission.

98. From the moment the Commission sat full time, its character would be changed and a greater intrinsic importance would attach to the personal qualifications of its members.

99. The President of the Court enjoyed considerable prestige and took his decisions after consulting the other judges. Similar functions were entrusted to him in a number of treaties and agreements.

100. Mr. SANDSTRÖM wondered whether such a course would make any real difference to the procedure. Would not the President consult governments?

101. Mr. HSU was of the opinion that no change could be made in the method of nominating candidates, if the existing method of election were adhered to.

102. Mr. SCALLE considered that it would be doing the President of the Court a disservice to make him responsible for choosing the members of the Commission.

103. Mr. SPIROPOULOS proposed a compromise solution, whereby half the list would be drawn up by governments and the other half by the national groups of the Permanent Court of Arbitration, which already nominated candidates for election as members of the Court.

104. Mr. EL KHOURY thought that article 4 of the Statute could be amended. Instead of four, each State Member of the United Nations should nominate not more than two candidates, of whom one might be a national of the State concerned and the other of another State. Actually, under article 9, paragraph 2 of the Statute there could not be more than one member of any given nationality.

105. Mr. HSU considered that all States should be able to nominate candidates. In practice, a region might comprise a considerable number of countries and each of them should have the right to nominate a candidate, even though it might know that he would not be elected.

106. Mr. HUDSON feared that nomination by the national groups of the Permanent Court of Arbitration would not give very different results from nomination by States.

107. Mr. SCELLE was in favour of nomination by the International Court of Justice, should the latter be prepared to undertake that task. It might nominate twice as many candidates as there were seats to be filled.

108. The CHAIRMAN pointed out that the question only arose if the Commission was not satisfied with the existing system. Possibly the majority of the members were in favour of maintaining the *status quo*.

109. Mr. CORDOVA wished to know whether the International Court of Justice or any other authority entrusted with the nomination of candidates would be under the necessity of nominating one from each country or whether it would have a free hand in the matter. That was a very important point.

110. Mr. HUDSON was of the opinion that freedom of choice should be restricted.

111. Mr. EL KHOURY proposed the retention of the existing system.

*It was decided by a majority of 10 to recommend the retention of the existing system.*

#### (h) *Special Secretariat*

112. Mr. HUDSON did not believe that the Commission would need a special secretariat even if it were turned into a full-time body. It would be sufficient if some members of the general Secretariat were attached to it.

113. Mr. KERNO (Assistant Secretary-General) stated that he had had occasion to discuss the question with Mr. François. The Registry of the International Court of Justice was an independent body, but was the only case of its kind; with that exception, the Secretariat was one and indivisible. Naturally, should the General Assembly decide that the Commission was to work full time and that its seat should not be in New York, the Secretary-General would take the necessary measures, probably by seconding members of the Secretariat to the Commission's headquarters.

114. Mr. ALFARO considered that the matter should be left until the Assembly had taken a decision on the main question.

115. Mr. HUDSON added that, if the Commission were to sit full time, it would need a much larger secre-

tariat, but he supposed it was unnecessary to mention the fact.

*It was so decided.*

#### (i) *Division of the Commission into working parties*

116. The CHAIRMAN remarked that such division was a matter of internal organization.

117. Mr. ALFARO thought that budgetary considerations would come into it. If the Commission were to sit full time, it would not continue to work as at present. Better results would be obtained if it were divided into working parties, and, should the Assembly decide that the members were to work full time, that was what the Commission intended to do.

118. Mr. YEPES said that the matter was best dealt with under the Commission's rules of procedure.

119. Mr. CORDOVA felt that, if the matter were bound up with the question of amendments to the Statute, it should be given consideration, otherwise it could be left until later.

120. The CHAIRMAN thought that the question was connected with the problem the Commission was studying.

121. Mr. AMADO pointed out that, if the Commission worked full time, its members would become officials and that the Head of their Department would require their presence. They would therefore no longer have the independence they enjoyed at present, but it was too early to discuss that question.

122. Mr. EL KHOURY thought that it would be sufficient to state in the Statute that the Commission would establish its rules of procedure.

*It was decided to leave in abeyance the question of the division of the Commission into working parties.*

#### (j) *Possible course of action to be taken by the General Assembly*

123. Mr. SPIROPOULOS proposed that the Commission forthwith appoint a rapporteur who, in the event of the General Assembly deciding that the Commission should sit full time, could, at the next session, submit a report on the amendments to the Statute necessitated by that decision; otherwise a year would be lost.

124. The CHAIRMAN thought that the General Assembly would itself appoint a commission to examine that question.

125. Mr. HSU suggested that the Commission should take into account the possibility that the General Assembly might refuse to make the Commission a full-time body; otherwise their discussions would have been in vain. The idea of a full-time Commission had been rejected in 1947, owing to the expense involved. It could not be said that the world economic situation had improved since that date. That being so, he very much doubted whether the proposal would find acceptance at the present time. The Sixth Committee would probably be in favour, but the Fifth Committee would reject it.

126. He recalled that the Commission's Statute had been based on the assumption that it would work full time. When a contrary decision was taken, the Statute had not been changed. That was why difficulties had arisen.

Without pressing the point, he would like to see suggestions put forward for certain amendments to the rules, on the assumption that the Commission would continue to sit in sessions.

127. Mr. CORDOVA said that the General Assembly would not, of course, be obliged to adopt all the Commission's proposals. Some of them might be rejected for budgetary reasons. The General Assembly might decide to allow the Commission to work full time, but state at the same time that it was unable to provide the credits the Commission asked for.

128. The CHAIRMAN said that if the General Assembly were to take such a decision, it would find that it was unable to recruit properly qualified persons to serve on the Commission.

129. Mr. HUDSON pointed out that new elections would be held in 1953 and that, in consequence, when the Commission met in 1952 and 1953, its membership would be the same as at present. He thought it would be possible to put the question of principle to the General Assembly. Once that had been decided the General Assembly might prefer to revise the Statute itself. He therefore suggested that some questions of principle be put to it. When it had replied or, in the event of its instructing the Commission to submit draft proposals for the revision of the Statute, a rapporteur might submit a report at the Commission's fourth session, which would enable the latter to submit its own report at the seventh session of the General Assembly in 1952. Any amendments should be adopted before June 1953, so that the candidates nominated could be informed of the conditions under which they would be required to serve before intimating whether they were prepared to accept election as a member of the Commission.

130. The Commission could authorize the Chairman to appoint a rapporteur as soon as the Assembly had taken its decision.

131. The CHAIRMAN preferred Mr. Hudson's proposal to that of Mr. Spiropoulos.

132. Mr. SPIROPOULOS said that revision could not be effected by improvisation, and that somebody should be made responsible for paving the way for the Commission's work. It would therefore be wise to decide that, in the event of the Assembly's adopting the Commission's proposal, the Chairman should appoint a rapporteur. In his opinion that rapporteur should be Mr. Hudson.

*It was decided to leave to the Chairman the appointment of a rapporteur.*

(k) *Distinction between the progressive development and the codification of international law*

133. Mr. HUDSON wanted the drafting committee to be given directives on that point also. The day before, he had suggested that it was desirable to try to minimize the existing distinction between the progressive development and the codification of international law. He did not himself believe that it was necessary to have a Part A dealing with progressive development and a Part B with codification. A single procedure would suffice. That would avoid the Commission's having to decide in each

case whether the subject dealt with was progressive development or codification.

134. Mr. KERNO (Assistant Secretary-General) said that whatever suggestions might be made for a full-time Commission, it would still be necessary to consider amendments to the Statute that would hold good in both eventualities. The question of bringing the two procedures laid down, the one for progressive development and the other for codification, more into line with each other was not new, but possibly constituted the most important problem with which the Commission had to deal. It would also be necessary to consider how the above procedures could be made more flexible. The existing procedure was perhaps too rigid in certain cases.

135. The fundamental difference between progressive development and codification was that, in the case of the former the initiative lay with the General Assembly alone, while in regard to the latter it was shared with the Commission.

136. While studying that question, the Commission could also examine the problem raised by Mr. el Khoury, who wanted it to be in a position to put forward proposals for legislation. The Commission could say whether it wished to be allowed a measure of initiative in regard to progressive development also.

137. Mr. SCALLE was entirely in agreement with what the preceding speakers had said. From a legal standpoint it was very difficult to differentiate between progressive development and codification. Codification represented a step forward. It was an act of legislation by means of which existing provisions were systemized and very often amended. When the French Civil Code was drawn up the existing norms had been retained, but had been rearranged and amended. No useful purpose would be served by submitting proposals for codification if such proposals did not constitute a legislative advance. In his opinion the Statute should be amended so that the Commission would not be held up by doubts as to whether it was dealing with progressive development or of codification.

138. Mr. LIANG (Secretary to the Commission) explained that the existing system was the result of the work of an *ad hoc* committee, of which Mr. Briery had been the rapporteur, and of the examination of the question by the Sixth Committee in 1947. At that time the main preoccupation had been to avoid holding a codification conference, like that of 1930, or having necessarily to prepare conventions for the adoption of the proposed texts. In the end a distinction had been made, although it was hardly defensible scientifically. The method of concluding conventions had been laid down for the progressive development of international law, but, as regards codification, there were various possibilities.

139. He saw no objection to a change of system, especially since, during the past few years, there had been little or no occasion to apply the part of the Statute relating to progressive development. It had been assumed that other organs might ask the Commission to study special questions in that field, but few problems had in

fact been submitted to it. The Commission had been mainly concerned with codification.

140. He wished to emphasize that article 23, which had been adopted in 1947, after lengthy and detailed discussion, was the keystone of the Statute. The intention had been to make the procedure flexible, and to avoid the necessity of convening a conference or adopting a convention. He repeated that the article had been the result of mature reflection, and it should not be deleted without due consideration of the work that had gone to its preparation.

141. Mr. FRANÇOIS felt that the Commission should not lose sight of the fact that the distinction between progressive development and codification was based on weighty considerations. There was more reason to consult Governments in regard to new laws than when it was a question of codification. The practice of the preliminary consultation of Governments had been a failure in 1930. An attempt had therefore been made to restrict such consultations, particularly as regards codification. If the distinction between progressive development and codification were removed and if, in selecting one or other of the two procedures laid down in the Statute, the choice should fall on the one applicable to progressive development, all the difficulties involved in consultation with Governments would recur.

142. The prestige enjoyed by members of the Commission would give their decisions greater authority than was attached to the work of committees of experts. He did not share Mr. el Khoury's view that the Commission was only an advisory body. It was proposed that the Commission be composed of such eminent personalities that Members of the United Nations would be forced to accept their decisions, even against their will. Prior consultation with Governments should not be pushed too far, since that might mean courting failure.

143. He considered that the procedure laid down for codification should be adopted, as it offered adequate guarantees to Governments, while possibly reducing the formalities laid down for preliminary consultation.

144. Mr. EL KHOURY read out article 1, paragraph 1 of the Commission's Statute: "The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification." It would be seen that those were the terms used in Article 13 of the Charter. Did the words "promotion of the progressive development of international law and its codification" mean that the Commission had the right to encourage the progressive development of international law by establishing new principles, or was its role merely to watch over such progressive development and record it? If it were considered that its duty was merely to record, its powers were limited. He proposed that the existing text be clarified.

145. In a study submitted by the Secretariat, it was stated that encouraging the progressive development of international law and its codification meant that the Commission was entitled to submit new proposals. That was not clear from article 1 of the Statute. Codifying did not mean adopting new provisions. In order to

render the work of the Commission more fruitful he would propose the following text: "The Commission may discuss and submit to the General Assembly proposals of a legislative character".

146. If the Commission had the power to do that it would achieve better results.

147. Mr. YEPES was entirely in favour of the proposal that the distinction between progressive development and codification should be made more flexible. It was often very difficult and at times impossible to draw a hard and fast line between them.

148. As regards Mr. el Khoury's proposal, he also believed that the Commission's field of activity should be enlarged by enabling it to submit to the General Assembly proposals calculated to promote the development of law.

149. The CHAIRMAN noted that, generally speaking, and with the possible exception of Mr. François, the members of the Commission were of the opinion that the distinction between progressive development and codification should be minimized or attenuated.

150. Mr. HUDSON was in favour of having only one procedure in the Statute.

151. Mr. SPIROPOULOS took a different view from most of his colleagues. He considered that the distinction between progressive development and codification should be maintained, as they were two totally different things. The object of codification was to establish a text embodying existing law and filling some gaps. Progressive development consisted in the establishment of new rules. There was a fundamental distinction between the two subjects. As regards codification, the General Assembly had left the initiative to the Commission and, in his opinion, had been right in so doing. In respect of progressive development, the Assembly alone had the initiative and that again, in his view, was justified. Actually it was for the General Assembly, which was a political body, to instruct the Commission to prepare a legislative text for its use. However, he agreed with Mr. el Khoury that the Commission should be in a position to submit suggestions to the General Assembly. But it was not the distinction in question, which had hardly been applied, that had hampered the Commission's work hitherto. The disadvantage of the system was its rigidity. He considered that article 16 should be expanded to read:

"When the General Assembly refers to the Commission a proposal for the progressive development of international law, the Commission shall, failing a decision on its part to the contrary, follow a procedure on the following lines:"

152. Mr. HSU was always in favour of making the Statute more flexible and simplifying procedures. He therefore supported Mr. Hudson's suggestion to combine or modify the two procedures. In his opinion the distinction between progressive development and codification was artificial. To codify was to develop, and development implied codification. However, as Mr. Liang and Mr. François had pointed out, a distinction had been drawn for practical reasons. The procedure

should be made more flexible so as not to stultify part of the Commission's work by making it necessary to have recourse to the method of conventions.

153. Mr. SANDSTRÖM recalled that Mr. el Khoury had proposed that the Commission be given the right to submit proposals of a legislative nature, and that Mr. Spiropoulos had supported that proposal. He wished to know whether that power would be given to the Commission in all cases, or only in regard to codification.

154. Mr. LIANG (Secretary to the Commission) considered that Mr. el Khoury's notion was already expressed in article 15 of the Statute, which was a key article, like article 23. The beginning of that article read as follows :

"In the following articles the expression 'progressive development of international law' is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States."

155. As regards legislative principles, if no change were made in the general structure of the Statute and it was merely a question of simplifying the prescribed procedures, Mr. el Khoury's point might be met by a reference to article 15. If, however, a specific provision was contemplated, an addition should be made to article 17 to the effect that the Commission could submit drafts to the General Assembly ; that would be the procedural solution.

156. He pointed out that, as Mr. François, Mr. Spiropoulos and Mr. Hsu had already stated, the system might not be scientifically perfect, but it had been adopted after two and a half months of reflection, and its adoption had been the only means of obtaining Mr. Koretsky's support, as the latter had viewed the matter from a different angle and advocated the preparation of conventions in all cases. His views on the matter had been met in Part I, relating to progressive development. As regards codification, Mr. Koretsky had been induced to give way to the extent of agreeing to the adoption of the scientific procedure, among others, as codification was not essentially a legislative task. That was how the present text of the Statute, which laid down several procedures for codification, had been arrived at.

157. He suggested that the Commission confine itself to simplifying the part of the Statute having reference to procedure.

158. Mr. AMADO remarked on the difference between the mentality of those who had taken part in the preparation of the Statute and the outlook of the other members of the Commission. Mr. Hudson had an untrammelled mind, which was lacking in the authors of the Statute. He recalled the obduracy of the Swedish representative, who had been unwilling to accept any procedure other than that of conventions. The compromise solution had only been reached with the greatest difficulty. Mr. Liang had summarized the situation very accurately. Reforms were necessary, but they had to be made slowly.

159. The CHAIRMAN recalled that he had been a member of the Committee. It was a delicate question

and he considered that the distinction should be maintained, but that the Statute should be improved by making the procedure laid down for the two cases more flexible. He suggested that points of detail be left to the sub-committee.

160. Mr. CORDOVA asked that the Commission be consulted with regard to Mr. Spiropoulos' proposal to add a phrase to article 16, and again as regards amendments to be made to the procedure laid down. Should only one be retained, or should both be amended?

161. The CHAIRMAN thought it was unnecessary to go into details of the directives given to the sub-committee.

162. Mr. HUDSON asked why the Commission should not merely submit the question of principle to the General Assembly.

163. The CHAIRMAN replied that the question did not take quite the same form as the preceding one.

164. Mr. CORDOVA remarked that the procedure had, in any case, to be amended. The reform should therefore be examined in detail.

165. Mr. KERNO (Assistant Secretary-General) said that the most expeditious procedure might be to leave points of detail to the sub-committee. There were various ways of making the procedure more flexible. Should the Commission decide to amend article 16, as proposed by Mr. Spiropoulos, the two procedures could be left practically unaltered, as the Commission would be free to decide in each individual case what it wished to do. Moreover, as regards codification, the Statute was already very flexible. Article 19, which was liable to be overlooked provided that: "The Commission shall adopt a plan of work appropriate to each case".

166. Should the Commission decide that the procedure laid down in its Statute should be made more flexible, it might leave it to the sub-committee to decide how that should be done.

167. As regards progressive development, should the Commission wish to take up Mr. el Khoury's proposal and say that it could submit suggestions to the Assembly, it would have to adopt a new text. Perhaps the Commission might be consulted on that point.

168. Mr. SPIROPOULOS thought that, even without a text, there was certainly nothing to prevent the Commission from informing the General Assembly that it considered it advisable to take up the study of such and such a question.

169. Mr. HUDSON said that, supposing the Commission was examining a concrete case, that of the continental shelf, for instance, and decided that legislation was necessary. Would it have to obtain the General Assembly's consent before preparing its draft?

170. Mr. SPIROPOULOS thought that that was so, and rightly, since the Commission was not a legislative organ. The point at issue was that the Commission should be allowed to take the initiative in requesting the General Assembly to authorize it to establish legislation.

171. The CHAIRMAN did not share that view. Actually the subject came under the régime of the high seas.

172. Mr. CORDOVA pointed out that, in that particular

case, it was a question of new legislation and not only of codification. To fill gaps was to legislate.

173. Mr. LIANG (Secretary to the Commission) said there could be no question but that the work of legislation and of codification overlapped. The continental shelf, for instance, came under the régime of the high seas. The latter might be codified, and should the Commission consider that practical measures regarding the continental shelf were not sufficient and wish to submit a report to the General Assembly on the provisions to be adopted, it would be a matter of international legislation. As, moreover according to the positivist doctrine, the consent of States was necessary, the draft would have to take the form of a convention.

174. As regards other questions already covered to a large extent by existing law and of which only a small part remained to be regulated, the Commission could decide in what form it would submit its conclusions to the General Assembly.

175. Mr. HSU again called the Commission's attention to article 23 of the Statute, which was very important. He considered that, in matters of codification, it was necessary to fill in the gaps. The Commission could terminate its work without consulting the General Assembly, and then ask the latter whether it considered that the draft could be adopted without convening a conference. Should the General Assembly reply that the Commission's draft contained new material, it might be wise to recommend recourse to a convention. Article 23 was the keystone of the system.

176. Mr. CORDOVA did not consider that there was much difference between the respective procedures for progressive development and codification. It was in regard to the organ initiating draft proposals that a distinction could be made.

177. Mr. HUDSON noted that the Commission was of the opinion that the complete amalgamation of the two procedures was undesirable.

178. The CHAIRMAN gathered that the Commission considered the procedure should be made more flexible in both cases. It might therefore direct the sub-committee to simplify the procedure, possibly in both cases, while maintaining a not too sharp distinction.

179. Mr. ALFARO considered that that would be very difficult. The distinction was impossible from a scientific standpoint and could only be observed in practice.

180. Mr. CORDOVA remarked that if the two procedures were identified there would no longer be any difficulty. The provision of two procedures reflected the manner in which the Statute had been drafted. It did not say anything about the material distinction between codification and progressive development and confined itself to setting out the two heads.

181. Mr. AMADO said that there was a *jus conditum*, corresponding to the practice of States, and a *jus condendum*, with which the members of the Commission were concerned. The question was whether, in the case of the

latter, the Assembly's authorization had to be requested. The problem should be solved, without abolishing that distinction. The practice of States was a concrete fact, and that was why article 15 had been drafted in such a way as to make it clear that it was for the sake of convenience that the expressions, "progressive development of international law and codification of international law", had been used to cover the cases in question.

182. The CHAIRMAN considered that the Commission should retain certain discretionary powers in the matter. That was what the Statute had attempted to give it. There was always a proportion of *lex ferenda* and of *lex lata*.

183. Mr. CORDOVA thought that the Commission might leave it to the sub-committee to study the question and see whether the procedures could be unified.

184. Mr. KERNO (Assistant Secretary-General) recalled that some members of the Sixth Committee had been in favour of restricting the right given to other organs under article 17 to entrust the International Law Commission with the examination of special drafts. He said that paragraph 2 of that article allowed the Commission a certain measure of discretion but not complete freedom. The Commission might say that it had received certain requests, but had not taken any action because they were not timely, or because the question was not ripe. It could not, however, say that it had not had time to examine them. The Drafting Committee should study the matter.

185. Mr. HUDSON pointed out that some of the Statute's provisions no longer had any justification. That applied in particular to paragraph 1 of article 18, seeing that the search for appropriate topics for codification had been completed; and to paragraph 3 of article 26, on General Assembly resolutions concerning Franco Spain which had been withdrawn. The sub-committee should consider them as such.

186. In his opinion the Committee should confine itself to submitting suggestions in fields where quick results could be obtained. He did not think that it should examine all the questions in every detail. The day's discussion had done a great deal to enlighten the Committee.

187. Mr. SANDSTRÖM drew attention to the matter of the special report to the General Assembly.

188. Mr. CORDOVA pointed out that the Commission had not discussed the printing of its summary records, the powers of the Chairman to appoint a rapporteur, the powers of the Commission and of the Chairman to change its meeting place or, finally, the representation of the Commission at the General Assembly.

189. The CHAIRMAN considered that those matters should be left to the Committee. He declared the discussion on the Statute closed.

The meeting rose at 1.05 p.m.

## 98th MEETING

Thursday, 7 June 1951, at 9.45 a.m.

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*Chairman:* Mr. James L. BRIERLY

*Rapporteur:* Mr. Roberto CORDOVA

*Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilbert AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, 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.

**Law of treaties: report by Mr. Brierly (item 4 (a) of the agenda) (A/CN.4/23) (resumed from the 88th meeting)**

ARTICLES 3 TO 5 OF DOCUMENT A/CN.4/23: CAPACITY TO MAKE TREATIES

1. The CHAIRMAN recalled that, the previous year, articles 3, 4 and 5 of the draft Convention on the Law of Treaties, which he had submitted in his report on that subject (A/CN.4/23), had been discussed at length by the Commission but no final conclusion had been reached.<sup>1</sup> He would like the Commission to adopt the suggestion put forward the previous year by Mr. Hudson, and supported by other members of the Commission, that it should leave aside, for the moment, the question of the capacity of international organizations to make treaties, that it should draft the articles with reference to States only and that it should examine later whether they could be applied to international organizations as they stood or whether they required modification.

*It was so decided.*

2. Mr. KERNO (Assistant Secretary-General) was anxious that the decision should not be interpreted as casting doubt on the capacity of certain international organizations to make treaties. Some of them, and foremost among them the United Nations, undoubtedly possessed that capacity. The Commission had accepted that view without any objection at its second session.<sup>2</sup>

<sup>1</sup> See summary record of the 52nd meeting, and of the 78th meeting, paras. 78-92. For document A/CN.4/23 see *Yearbook of the International Law Commission*, 1950, vol. II.

<sup>2</sup> See summary record of the 52nd meeting, para. 72.

## ARTICLE 3: CAPACITY IN GENERAL

3. Mr. FRANÇOIS proposed that the article be deleted. He could not see that any useful purpose would be served by including in the draft a stipulation which did not indicate by whom and in what manner the treaty-making capacity of some States might be limited. In any case, it was the capacity of all States that could be limited.

4. Mr. YEPES shared Mr. François' opinion. The article was lacking in clarity. Was it by virtue of international law or by virtue of its own constitution that the capacity of a State to make treaties might be limited?

5. He thought that reference should be made, at least in the commentary, to Article 103 of the Charter which he took as limiting the capacity of States. Article 103 provided that: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and the obligations under any other international agreement, their obligations under the present Charter shall prevail". The significance of that article was that the treaty-making capacity of States was limited by international law itself. In ratifying the Charter, States had relinquished part of their sovereignty.

6. A passage should be inserted, either in the text of the article itself or in the commentary, to indicate that the treaty-making capacity of States was limited by the United Nations Charter, since the latter was a constitution of States and took precedence over treaties concluded between individual States.

7. The CHAIRMAN suggested considering the two points separately and beginning with the proposal by Mr. François to delete the article.

8. Mr. SPIROPOULOS found the article satisfactory. A civil code, for instance, referred to the capacity of persons. In the same way, the first part of the article laid down the principle of international law that all States have capacity to make treaties. In teaching international law, one began by saying that every State had the general capacity to make treaties and then went on to explain that there were limitations to that capacity, for example in the case of confederations of States or of States not enjoying full independence. It was to such situations that the second part of the article referred. In Switzerland, the cantons could not make treaties with foreign States. If a State was independent, its capacity was subject to no limitation.

9. Mr. SCELLE objected that Article 103 of the Charter did limit that capacity.

10. Mr. SPIROPOULOS replied that the United Nations was a union of States and that clearly the constitution of a union of States could provide for limitations. What Mr. Yepes had in mind was covered by the second part of the article: "but the capacity of some States to enter into certain treaties may be limited". The Charter provided for limitations which were binding. The same provision applied to federal States such as pre-Hitler Germany or Switzerland.

11. In his opinion, the article was sound in principle and he saw no reason for its deletion.

12. Mr. ALFARO thought that Mr. François was, to

a certain extent, right but that all the articles were supposed to be an expression of international life. The power to make treaties was a consequence of sovereignty. He thought that the article should be retained.

13. Mr. SCELLE noted that, in the general opinion of the members of the Commission, the article was the expression of a primary truth. Who should, in fact, establish the law of treaties if not States? Any State might negotiate treaties within the limits of its competence, a word which he preferred to the term "capacity" usually employed in connexion with private persons. It was certain that the more treaties States made, the more they limited their competence. All the States Members of the United Nations had done so in ratifying the Charter of the United Nations. The majority of international law manuals were of that opinion.

14. Mr. FRANÇOIS emphasized that it was not the capacity of some States, but that of all States which might be made subject to restrictions.

15. Mr. SCELLE explained that there were certain States whose status differed from that of independent States, namely protected States, the capacity of which was limited in international law. As a general rule, their competence was not entire. They were sometimes called semi-sovereign States. That was the category of States which the article was designed to cover.

16. Mr. LIANG (Secretary to the Commission) remarked that the article was ambiguous. To take the last words of it, "may be limited", they could be interpreted as meaning, "lends itself to limitation" or "is limited". Both in the text of the Harvard draft Convention on the Law of Treaties, which ran as follows: "Capacity to enter into treaties is possessed by all States, but the capacity of a State to enter into certain treaties may be limited", and in the text of the report, it was, he thought, a question of noting, or of describing, a phenomenon of international law, namely, that there were States whose capacity to enter into treaties was limited.

17. The Swiss Civil Code distinguished between *Rechtsfähigkeit* and *Handlungsfähigkeit*. The limitation of capacity referred to in article 3 related to *Rechtsfähigkeit*. The text noted the fact that in present-day international society there were non-competent States, States whose capacity to make treaties was limited. If the purpose of the article was to describe that *de facto* situation it might be of value; otherwise, it was not.

18. Mr. EL KHOURY said that, in chapter II, which dealt with capacity to make treaties, it was clear that the purpose of article 3 was to indicate who might make treaties. It established a fact. The second part of the article should be redrafted to show by whom and in what manner the capacity of States might be limited, since the question was not referred to in the articles which followed.

19. Mr. SPIROPOULOS said he must beg the members' pardon. When speaking, he had had the text of the Harvard draft before him. That text was in the following terms: "The capacity of a State to enter into certain treaties may be limited." He found that text perfect and did not see why Mr. Brierly's draft referred only to

the limitation of the capacity of some States. He was accordingly in complete agreement with Mr. François, and proposed saying "The capacity of a State". He did not approve of the word "competence".

20. The CHAIRMAN recalled that Mr. François was in favour of deleting the article entirely.

21. Mr. FRANÇOIS said it might be desirable to note that the Harvard text was quite different. He had no objections to the latter text.

22. Mr. SANDSTRÖM was also dissatisfied with the drafting of the article. He noted that the commentary on the article, in paragraph 42 of the report, stated: "As respects States, whilst, in general, international law imposes no limitations upon their treaty-making capacity, the capacity of a particular State to enter into any category or all categories of treaties may be limited by reason of its qualified status or its existing treaty obligations".

23. If the comment was made with reference to the second part of the article, the article would need to be changed, since the comment did not speak of the limitation of the capacity of some States only. Article 3 should therefore also mention that the capacity of any State might be limited. The article in its existing form corresponded only to that part of the comment which said that the capacity of a particular State might be limited by reason of its qualified status.

24. Mr. HUDSON had no doubt that the first part of the article served a useful purpose. He conceived of international law as the law of the entire community of States. A State living within that community must possess the competence to make treaties, i.e., to regulate its relations with another State. There might, however, be a hybrid type of State which, while claiming to be a State, declared that it had not the necessary competence to make treaties. The reason why the question of competence in the matter of concluding treaties was stressed was in order to emphasize that each State lived in the community of States as a member of that community and, as such, possessed competence to conclude treaties. He would like to keep the first part of the article, but thought it should be worded as follows: "Each State has competence to make treaties".

25. He preferred the term "competence" suggested by Mr. Scelle. The article could then go on to say: "but the exercise of that competence may be limited".

26. Reading out Article 103 of the Charter, he observed that account must be taken of a fact which he thought Mr. Yepes had not mentioned, namely, that there were 18 States in the world who were not Members of the United Nations.

26a. Article 103 stated that "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter, and their obligations under any other international agreement", i.e., under any pre-existing agreement, "their obligations under the present Charter shall prevail".

26b. Article 20 of the League of Nations Covenant laid down, with regard to the obligations arising out of treaties concluded by Member States with non-Member States, that:

"2. In case any member of the League shall, before becoming a member of the League, have undertaken obligations inconsistent with the terms of this Covenant, it shall be the duty of such member to take immediate steps to procure its release from such obligations."

26c. The first paragraph of Article 20 of the Covenant stipulated that: "The members of the League severally agree that this Covenant is accepted as abrogating all obligations or undertakings *inter se* which are inconsistent with the terms thereof...". Prior undertakings were hence abrogated. The paragraph continued "and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof". Such a provision was preferable to that of Article 103 of the Charter which said that: "their obligations under the present Charter shall prevail". The effect of the article of the Covenant was that States would not exercise their general competence to make treaties.

27. If a State A made a treaty with a State B, undertaking not to alienate any part of its territory and then made a treaty with a State C, under which it ceded part of its territory to the latter, it would be exceeding its competence, since it had already subjected it to a limitation. The fact that such situations did occur must be taken into account. It was, in his opinion, of great importance to specify that each State possessed competence to make treaties but that such competence could be limited. If that were said, he saw no objection to the article.

28. The CHAIRMAN noted that the formula proposed by Mr. Hudson permitted the limitation of the exercise of competence but that the competence itself remained entire. He wondered whether, in the case of Switzerland, it was only the exercise of competence which was limited by neutrality.

29. Mr. KERNO (Assistant Secretary-General) suggested that the discussion might gain in clarity if they drew the distinction, which everyone felt but no one had so far expressed, between the right to conclude treaties and certain limitations, or prohibitions, imposed by law or by other treaties, on entering into certain contractual undertakings. In civil law, it was said that every individual possessed the capacity to enter into undertakings. Yet, as they were aware, in Roman law not all individuals enjoyed that capacity. Even in modern civil law, minors were only allowed a limited capacity. That was the primary notion. The second notion was that certain types of contract were forbidden by law or other contractual undertakings. Even though in western society every person of full age enjoyed absolute capacity, he or she could not contract a marriage while still bound by another marriage.

30. What Mr. Yepes had said on the subject of Article 103 of the Charter was correct but was independent of the question of capacity. The article in question did not place States in the position of minors. The limitation arising therefrom belonged to the second notion which he had defined. Mr. Hudson had spoken of the limitation on the exercise of the competence of States; that was, however, not quite the same thing. The capacity itself

might also be affected. There were, in fact, States in the position of minors.

31. Mr. YEPES was pleased to note that the interpretation he had given of Article 103 of the Charter, namely that the latter was the constitution that all members of the international community must respect, had been accepted by Mr. Hudson. He proposed that the article as a whole be worded as follows: "All States have competence to make treaties. Such competence may be limited by general international law or by the status proper to each State." He thus provided for two sources of limitation: on the one hand, international law and Article 103 of the Charter, which, he would repeat, made the Charter the binding minimum constitution governing the competence of States Members of the United Nations and, secondly, the status proper to each State. The limitation in question was one voluntarily accepted, for instance, on entering into an alliance. Both limitations were comprised in the second sentence of the article he proposed.

32. Mr. HUDSON thought that the old doctrine of the equality of States should be preserved. He did not like the expression "status" of a State.

33. The CHAIRMAN pointed out that the article under examination applied to sovereign States.

34. Mr. CORDOVA did not share the view of Mr. Yepes that reference should be made to Article 103 of the Charter. He also noted that Mr. Kerno thought that the capacity of States could be limited by a treaty. He himself considered that it could be limited only by international law.

35. He was stressing the point because the commentary in the report said: "by reason of its qualified status or its existing treaty obligations" (A/CN.4/23, para. 42), and he could not accept that passage.

36. The CHAIRMAN replied that he would change that passage.

37. Mr. AMADO had been under the impression that Mr. François considered the article superfluous. When he himself had first read the text, he had thought that the problem of capacity had been included to enable the formula to cover the capacity of international organizations. In manuals of international law, the question of capacity was considered from another angle. Such manuals only mentioned capacity in order to speak of the competence of State organs, except in the cases of States whose limitation of capacity was structural as, for example, States under trusteeship, Egypt in its relations with the United Kingdom, or the Dominions under the former régime. The capacity of sovereign States was so natural a thing that he did not see any reason for referring to it in the draft. As Mr. Liang had said, the article noted a phenomenon. He did not think that the Commission should do that sort of thing in a codification. He was opposed to the article.

38. If the object of the article was to specify that "all States have the necessary capacity to make treaties" in order then to point out that international organizations are endowed with a similar capacity, he would vote in favour of it.

39. Mr. SCELLE said that the Commission had just heard a number of truths. It seemed to him however that the members of the Commission were not very well agreed on the method to be followed. Mr. Kerno had said something which was quite correct; and Mr. Hudson too. For his part, he thought that there were several questions. All States had competence to make treaties. That competence could only be diminished by an act of their will. There were, however, certain categories of States whose capacity was diminished in advance, just as in the case of minors. He had in mind neutral States, protectorates, States members of a confederation, and federated States. In all such cases, he did not think that it was the protectorate treaty, the declaration of neutrality or the treaty of association, the place of which was very often taken by the constitution, that limited the competence of the State. It was the fact that the State voluntarily placed itself in a certain category of States that brought about the diminution of its competence. The fact which determined the competence of Tunisia was neither the Treaty of Bardo of 12 May 1881 nor the Convention of La Marsa of 8 June 1883; it was the fact that Tunisia had more or less voluntarily placed itself under that régime. He would point out that the 48 States of the United States of America had perhaps not all been entirely prepared to abandon their competence. It was therefore, he would repeat, the fact of placing itself in a particular category which diminished the competence of a State. It then no longer possessed the full right to make treaties. In general, a federal State had the right to make treaties but federated States no longer possessed it.

40. The second question was as follows: it seemed to him that in talking in the same breath of Article 103 of the Charter and Articles 20 and 21 of the League of Nations Covenant, the members of the Commission had confused two very different problems. Competence to make treaties and a conflict between successive treaties were two different questions. The articles quoted dealt with the second question. A State did not relinquish one jot of its competence by signing contradictory treaties. In signing the Covenant, which was a treaty, States had subscribed to an obligation which might prove to be in conflict with previous treaties. The question was to determine what was the effect of the Covenant on treaties concluded perhaps with third States, who, according to the classical doctrine, had the right to insist on observance of those treaties. The conflict between successive treaties had not been settled by Articles 20 and 21 of the Covenant. The latter, indeed, went no further than to tell States to do everything in their power to procure their release from obligations inconsistent with the terms of the Covenant. Article 103 of the Charter, on the other hand, said that such treaties no longer counted, either in relations with other Members or in relations with non-Member States. That, from the point of view of classical doctrine, was disposing of the rights of strangers. Incidentally, he would like to mention that he approved of that provision. Article 103 abolished contractual undertakings by going over the heads of the strangers concerned. That was such a provision as one might find in a Constitution, but for adherents of classic international law, was hard to accept.

41. He suggested that provisionally the question be left on one side. The point with which the article before the Commission seemed to be concerned was that there were certain States whose competence was diminished by international law. There were treaties which they could not make, any more than an heir could sell property before he had reached his majority. The rules were the same whatever the type of legal machinery.

42. Mr. LIANG (Secretary to the Commission) reminded the Commission that it had heard all those arguments the year before. At that time, he had had occasion to point out<sup>3</sup> that Article 103 related to the validity of treaties and not to the capacity to make them. If the Article were compared with Article 20 of the Covenant, it could be seen that the former was, to a certain extent, the more important one. From another standpoint, however, Article 20 of the Covenant involved a more forcible obligation. No prohibition on concluding treaties inconsistent with the Charter was contained in Article 103, which simply specified that the obligations under the Charter should prevail over obligations under any other international agreement. In the Harvard draft, the reply to the questions raised by Article 20 of the Covenant was of the type of those uttered by the oracles.<sup>4</sup> He would repeat, it was advisable to leave Article 103 out of account when studying the question of capacity.

43. In his opinion, it was pointless to endeavour to describe international facts and record them in the text. Certain facts had changed since 1936, when the Harvard draft was produced. China and India had acquired full competence and the same had occurred in the case of other States. Moreover, the Charter stressed the need for promoting the advance of the peoples towards independence. It would therefore be an anachronism to give official countenance in the text to the idea that there were non-competent States. The article should be formulated differently.

44. Mr. HUDSON thought that two things would be better left out of the discussion. The first was the analogy drawn by Mr. Kerno with private law. For his part, he considered that nothing was more dangerous than an attempt to draw analogies between the two types of law such as that which had just led Mr. Scelle into making a few rather venturesome statements. The discussion should keep to matters of public international law.

45. Mention had been made of protectorates. There were, however, certain categories of States not covered by the text; for example, the Malay States, which had lost their competence to make treaties. Those States should also be excluded which were members of a federal union. The States forming the United States of America were not States under international law. The Constitution of the United States stipulated that a State, say, for instance, New York, could make treaties only with the consent of the Federal Government, and then only as representative of the United States of America. In the case of Switzerland, the existence of a treaty on dual taxation between the canton of St. Gallen and Austria

<sup>3</sup> See summary record of the 52nd meeting, para. 66.

<sup>4</sup> *American Journal of International Law*, vol. 29 (1935), Supplement, p. 708.

had been pointed out to him by the observer of the International Red Cross. Like any treaty concluded by a canton with a foreign State, however, it had been submitted for the approval of the Federal Council. Protectorates and States members of a union should, as he had said before, be left out of account.

46. The question to be considered was the competence of States which were definitely States — there were 80 of them in the world — and not that of Tunisia or Morocco, for example.

47. The CHAIRMAN enquired whether, in Mr. Hudson's opinion, there would be anything left to put in the second part of the article.

48. Mr. HUDSON said he approved of certain parts of Mr. Liang's analysis of Article 103 of the Charter and Articles 20 and 21 of the League of Nations Covenant. Article 20 said: "and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof". The same provision was not to be found in Article 103. It was a question of fixing a limit to the exercise of competence.

49. Mr. HSU considered that the tendency of the community of nations to promote the establishment of independent States was worthy of approval. States which were not independent had limited competence in certain cases. There were, in fact, two questions: first, the limitation of capacity itself and, secondly, the limitation of the exercise of capacity. When a really independent State agreed to refrain from doing certain things, its capacity was limited to that extent. He proposed saying:

"All States have capacity to make treaties, but the capacity of some States, and the exercise of such capacity by all States, may be limited."

50. Mr. SANDSTRÖM said that Mr. Hudson had got in before him; he had been going to say the same thing. He would, however, add that certain points had been clarified by Mr. Kernö and Mr. Scelle.

51. The Commission had not defined what it understood by a "State". Did it refer to entirely independent States only? In that case, treaty-making was within their competence and to speak of limitations of their capacity was contrary to such a definition of the State. So long as the Commission was not clear what notion of a State it had in mind, there would continue to be a lack of clarity.

52. Mr. SPIROPOULOS explained that he had remained silent since his first remarks because he had wanted to hear the opinions of his colleagues. He would not conceal the fact that he had found everything which had been said very interesting but had the impression that a great deal of confusion prevailed, because a large number of questions were being dealt with at the same time and the various speakers were basing themselves on different premises. Mr. Sandström had said that it was essential to know what constituted a State. Mr. Hudson had considered that the Swiss cantons and States Members of confederations should be left out of account. Should the Commission endeavour to agree on what it called a State? It seemed to him that, if it began with a discussion, it would never come to any conclusion.

The civil code did not define Man. There were some things which had to be accepted without a definition. He felt bound, to his great regret, to say that the remarks of Mr. Yepes were inopportune. They bore on a special question of specific law, whereas the Commission was studying the codification of general international law.

53. He thought that the Commission should first vote on Mr. François' proposal, which was the furthest removed from the text of the draft article, and was on the question as to whether an article on capacity in general was required or not. It could then vote on Mr. Hudson's amendment which he himself entirely accepted. If Mr. Hudson's amendment were rejected, the Commission would have to return to the text of the draft.

54. Mr. FRANÇOIS pointed out that he had voiced an objection to the article in the draft but not to any and every such article.

*It was decided that an article on the point be included.*

55. The CHAIRMAN put to the Commission the first clause of the article of the draft: "All States have capacity to make treaties", and Mr. Hudson's amendment: "Each State has competence to make treaties". He himself was prepared to accept either text.

56. Mr. SPIROPOULOS proposed that they consider Mr. Yepes' proposal first, as the furthest removed from the text of the draft.

57. Mr. YEPES said he proposed for the first part of the article the wording: "Every State has competence to make treaties". There was therefore no difference between his text and Mr. Hudson's, except that he said "Every" instead of "Each". He was thus in agreement with Mr. Hudson.

58. Mr. ALFARO noted that it was proposed to make two modifications to the text of the draft article in the report, namely to say "each" instead of "all" and "competence" instead of "capacity".

*It was decided by 5 votes to 3 to retain the wording "All States".*

*It was decided by 6 votes to 4 to adopt the term "competence".*

59. The CHAIRMAN requested the Commission to take a decision on the retention or deletion of the second clause in article 3.

60. Mr. SPIROPOULOS considered that the adoption of the first part of the text would not be justified unless the second part were retained.

61. Mr. AMADO said he was against the article as a whole for the reasons he had already outlined.

62. Mr. SCELLE said he would vote in favour of the retention of a text which recognized the possibility of limiting State competence.

63. The CHAIRMAN noted that the Commission as a whole was in favour of preserving a reference in article 3 to possible limitation. The next step was to decide on a text. To that end, Mr. Yepes had proposed the following formula:

"such competence may be limited by general international law or by the status proper to each State".

Personally, he considered such a wording open to objection.

64. Mr. YEPES explained that, in using the expression "status proper" he had in mind the case of neutral States. The condition of neutrality was a limitation on the capacity of States. There were certain treaties into which they were unable to enter. Another word could, however, be used instead of the term "status".

65. In order to understand the opening words of the formula he had suggested, it was necessary to refer to Article 103 of the Charter, which accorded priority to obligations arising out of the Charter over obligations States had contracted under any other international agreement.

66. The CHAIRMAN thought that Article 103 had no bearing on the question of competence.

67. Mr. SPIROPOULOS proposed that a vote be taken on the wording suggested by Mr. Yepes.

*Mr. Yepes' amendment was rejected by a large majority.*

68. The CHAIRMAN read out Mr. Hudson's amendment:

"but the exercise of such competence may be subjected to limitation"

and Mr. el Khoury's amendment:

"the exercise of this capacity may, in some cases, be limited or suspended by virtue of international provisions to that effect".

The second text limited the exercise of competence only and not competence itself.

69. Mr. EL KHOURY explained that, in his draft amendment, he had tried to cover the case of States, the exercise of whose competence was suspended by the fact of their being protectorates. Their competence continued to exist but the exercise of it was suspended by a protectorate treaty, or a trusteeship agreement. It was suspended until further notice and could be re-assumed when the limitations to which it was subjected ceased to exist. Such limitations might equally result from the constitution of the State itself.

70. The CHAIRMAN asked the Commission to vote on the question whether it was sufficient for the article in question to deal with limitations on the exercise of competence, without referring to limitations on competence itself.

*It was decided, by 6 votes to 4, that the article should refer to limitations on competence itself.*

71. The CHAIRMAN pointed out that, as a result of the vote, the amendments submitted were no longer acceptable without the addition of other provisions.

72. Mr. HSU put before the Commission the text of an amendment which he had previously outlined in general terms. It was as follows:

"but the competence of some States, and the exercise of such competence by all States, may be subjected to limitation".

73. Mr. SANDSTRÖM thought that it would be simpler to say: "this competence or its exercise may be limited".

74. Mr. LIANG (Secretary to the Commission) observed that if the draft Convention contained both the term "competence" and the term "exercise", it would be necessary to give examples in the comment to enable them to be distinguished.

75. Mr. KERNO (Assistant Secretary-General) noted that certain members were prepared to support Mr. Hsu's amendment, while others were in favour of the formula suggested by Mr. Sandström. All were accordingly in favour of referring both to limitations on competence and limitation on the exercise of competence. Any differences were only on a question of drafting. The authors of the two amendments might perhaps draw up a joint proposal.

76. Mr. SCELLE did not think that it would be sufficient to say that competence could be limited and the exercise of competence could too. It would be necessary to state by what they were limited. Competence was limited by international law itself. The exercise of competence could be limited by obligations under treaties. The exercise of competence might even be limited by treaties not in accordance with international law, as for example the "treaties of inequality" concluded with China under threat of force, or the treaties made with Turkey entailing relinquishment of administrative rights. The latter treaties were, by the way, not necessarily contrary to international law.

77. A State could relinquish the exercise of its competence, but could not relinquish its competence. The competence of a protectorate or a State member of a confederation was limited by international law. The State concerned could not resume its full competence. Turkey, under a private treaty with Austria-Hungary, had relinquished the exercise of its competence in Bosnia and Herzegovina.<sup>5</sup> In law, the competence of Turkey remained intact, only the exercise of its competence being limited.

78. Mr. HUDSON remarked that a further example could be quoted of the limitation of the exercise of State competence, namely, the Treaty of 1902 between Panama and the United States of America. Under that Treaty, Panama recognized that the United States had certain powers over the Canal Zone which remained under Panamanian sovereignty. Panama undertook not to exercise its jurisdiction over that territory. Its capacity to make treaties remained entire, but the exercise of that capacity was subject to limitations in so far as the Canal Zone was concerned. Such an example brought out the distinction clearly.

79. Mr. ALFARO pointed out that the provisions inserted in the constitution of Cuba, by virtue of the Platt amendment,<sup>6</sup> also furnished an example of limitation of the exercise of competence.

80. Mr. SCELLE considered the neutrality of Switzerland a limitation of its competence. Switzerland had, by a general decision of the international community

<sup>5</sup> Cf. Treaty of Berlin of 13 June 1878, article XXV, para. 1: "The provinces of Bosnia and of Herzegovina shall be occupied and administered by Austria-Hungary."

<sup>6</sup> Voted by the United States Congress on 2 March 1901, and incorporated in the Cuban Constitution of the same year.

at the Congress of Vienna in 1815, been declared neutral for reasons of common interest. It was a limitation which it was not in the power of Switzerland to abolish. When the question of the admission of Switzerland to the League of Nations had arisen, special intervention by the international community had been necessary to make it possible.

81. Mr. SPIROPOULOS thought that the divergences of opinion arose from the fact that the Commission had ruled out the word "capacity" and was trying to give the word "competence" the connotation of the word "capacity".

82. Mr. SCELLE pointed out that sovereignty was often defined in German by the expression *Kompetenz-Kompetenz* (the right of a State itself to define its own competence.) However, rules of international law governing the competence of States were necessary. Some States enjoyed major competence, others, such as neutral States and States members of a confederation, were endowed with a lesser competence, whose limitations arose out of international law.

83. The CHAIRMAN requested the members of the Commission to avoid too theoretical disquisitions not indispensable to the discussion of the text under study.

84. Mr. SANDSTRÖM suggested that the Commission refer only to limitation of competence, and leave aside the limitation of the exercise of competence, which might be considered as a matter of course.

85. Mr. HSU recognized that, in essence, his draft amendment and Mr. Sandström's formula came to much the same thing. The differences would not be clear to the uninformed reader and were consequently not essential. The Commission could therefore choose quickly between the two texts.

86. The CHAIRMAN put to the vote the question whether, quite apart from limitations of competence, it was advisable to make reference also to limitation of the exercise of competence.

*It was decided by 7 votes to none with 3 abstentions to refer to both notions in the draft Convention.*

87. The CHAIRMAN put Mr. Hsu's amendment to the vote.

*Mr. Hsu's amendment was adopted by 6 votes to 4, Mr. Sandström's formula being thereby rejected.*

#### ARTICLE 4: CONSTITUTIONAL PROVISIONS AS TO THE EXERCISE OF CAPACITY TO MAKE TREATIES

##### *Paragraph 1*

88. Mr. HUDSON doubted whether the Commission should deal with that question. The extent to which a State negotiating with another State should take account of the latter's constitution was a matter of debate. In the case of Eastern Greenland, the Permanent Court of International Justice had come to a negative conclusion.<sup>7</sup> It had held that the statements of a Foreign Minister — in the case in point, Mr. Ihlen, Norwegian Foreign Minister — made on behalf of his Government and on

a matter within his competence, were binding on his country, whatever its constitution might be.

89. The CHAIRMAN recalled that the Commission had already discussed the case.<sup>8</sup> Personally, he had not approved that part of the Court's judgment. Mr. François, on the other hand, had supported the view of the Court.<sup>9</sup> The Commission, by a majority, had adopted the opposite view, which was applied in the text of article 2 of the draft Convention on the Law of Treaties provisionally adopted by the Commission at its 88th meeting (see footnote 15 in the summary record of the 88th meeting).

90. Mr. HUDSON pointed out that the judgments of the Court were accepted as authoritative.

91. The CHAIRMAN, on an observation by Mr. Scelle, proposed that the words "may be exercised" be replaced by the words "is exercised".

*It was so agreed.*

The Chairman put to the vote article 4, paragraph 1, thus amended.

*Paragraph 1 was adopted as amended by 9 votes to none with 1 abstention.*

92. Mr. SPIROPOULOS said that he had abstained because he did not accept the use of the word "competence".

##### *Paragraph 2*

93. Mr. HUDSON proposed that the last words of the paragraph be replaced by the phrase "is exercised by the Head of that State", thus repeating the expression adopted in the preceding paragraph.

94. Mr. SANDSTRÖM and Mr. AMADO considered that it would be better to leave the words "is deemed to reside in" as they were, while Mr. SCELLE saw no objection to the text.

95. Mr. HUDSON recalled the fact that the Constitution of Saudi Arabia,<sup>10</sup> for example, did not specify who had the power to pledge the State.

96. Mr. EL KHOURY pointed out that the effect of the formula used in paragraph 2 was tantamount to identifying the State with the Head of the State. It was almost an echo of the famous remark: "L'Etat, c'est moi". In his opinion, it was unacceptable.

97. Mr. HUDSON thought that the text under consideration simply indicated that the capacity to make treaties was exercised by the Head of the State, unless the Constitution provided otherwise.

98. The CHAIRMAN put the text of paragraph 2 to the vote.

*Paragraph 2 was adopted by 6 votes to 4.*

*Pursuant to the decision to set aside for the moment the question of the capacity of international organizations, paragraph 3 was automatically omitted.*

<sup>8</sup> See summary record of the 52nd meeting, para. 81.

<sup>9</sup> *Ibid.*, para. 77.

<sup>10</sup> Constitution of the Kingdom of the Hejaz, 29 August 1926.

## ARTICLE 5: EXERCISE OF CAPACITY TO MAKE TREATIES

99. Mr. HUDSON considered that the whole question of the delegation of competence with regard to treaties was entirely a matter of domestic law. The Commission was not called upon to deal with it from the international standpoint.

100. Mr. LIANG (Secretary to the Commission) likewise considered that the article served no purpose. Furthermore, it raised a problem of terminology: it was impossible to say that a plenipotentiary had delegated to him the capacity to make a treaty.

101. Mr. HUDSON recalled that the United States Constitution gave the President the power to make treaties. There was no provision explicitly forbidding him to delegate such power, but American public opinion would be shocked if it learned that such delegation had been made.

102. Mr. SCELLE declared that, in France, delegation of power in the matter of treaties was not admitted.

103. Mr. AMADO recalled that article 5, as it appeared in Mr. Briery's report, was the outcome of a previous formulation in which exchanges of notes had been assimilated to treaties. It was a specific application of that doctrinal attitude. Executive agreements made as between Ministers, quite apart from the question of whether they were desirable or not, were a natural step in the development of international life. There was, however, no need to deal with delegation of powers in the draft Convention.

*It was decided to delete article 5.<sup>11</sup>*

#### Press comment on the work of the Commission

104. Mr. HUDSON pointed out that an incorrect report had been given in a newspaper of the deliberations of the Commission on the question of defining aggression. The article in question contained unpleasant references to some members of the Commission. He considered that there was no occasion to give publicity to the work of the Commission, so long as it had not come to any final decisions. The Commission should decide whether it was desirable to issue press releases.

<sup>11</sup> The text of the articles tentatively adopted by the Commission at the present meeting read as follows (document A/CN.4/L.17):

“ Chapter II

“ Competence to Make Treaties

“ Article 3

“ All States have competence to make treaties, but the competence of some States and the exercise of such competence by all States may be subjected to limitation.

“ Article 4

“ (1) The competence of a State to make treaties is exercised by whatever organ or organs of that State its Constitution may provide.

“ (2) In the absence of provision in its Constitution to the contrary, the competence of a State to make treaties is deemed to reside in the Head of that State.

“ Article 5

(deleted) ”.

105. Mr. KERNO (Assistant Secretary-General) said that he had read the article in question in the Paris edition of the *New York Herald Tribune*. The information used in that article had not been supplied by the Secretariat of the Commission. The fact that the meetings were held in public explained the appearance of such reports.

106. The Journal of the United Nations, published in New York, received and issued each day a short summary of the Commission's meetings. Only that summary, which was communicated by the Secretariat, was official. Under a general rule, an account had to be sent to the *Journal* of the work of all the Commissions of the United Nations. Nothing in such reports could have been used by the newspaper in question as a basis for its comments, but it was conceivable that journalists might misinterpret them.

107. Mr. HUDSON was strongly of the impression that a fuller statement had been issued to the Press. He doubted whether it was wise to issue such press releases.

108. Mr. KERNO (Assistant Secretary-General) recalled that, at its previous session, the Commission had decided not to issue official press releases. The press releases issued by the New York or Geneva Information Centres were not official.

109. Mr. CORDOVA thought that a certain amount of publicity was inevitable, since the meetings of the Commission were public. It was a good thing, generally speaking, to keep the public informed of the Commission's work.

110. Mr. HUDSON, after examining the press release issued by the Geneva Information Centre, declared that it was accurate and beyond reproach.

111. Mr. CORDOVA asked that the members of the Commission should be supplied regularly with copies of the press releases relating to the Commission issued to the Press by the Information Centre.

112. Mr. KERNO (Assistant Secretary-General) said he would see that that was done.

The meeting rose at 1 p.m.

## 99th MEETING

Friday, 8 June 1951, at 9.45 a.m.

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*Chairman:* Mr. James L. BRIERLY  
*Rapporteur:* Mr. Roberto CORDOVA

*Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, 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.

**Law of treaties: report by Mr. Briery (item 4 (a) of the agenda) (A/CN.4/23, A/CN.4/L.5, A/CN.4/L.16)**  
*(continued)*

(a) FURTHER ACTION IN RESPECT OF THE TENTATIVE DECISIONS ADOPTED BY THE COMMISSION DURING ITS THIRD SESSION

1. Mr. HUDSON felt that the Commission ought to decide what further action should be taken in respect of the decisions it was reaching on the various articles of the draft Convention.

2. At the previous meeting the Commission had transformed itself into nothing more nor less than a drafting committee. Many of the decisions taken had reflected the views of only a small majority. He personally had had to vote hastily on a number of occasions. He wondered whether the procedure that was being followed in drawing up the text of the draft Convention was really the best. It was in his opinion the Rapporteur's role to submit to the Commission the ideas that he had elaborated and to ask it for simple directives which would enable him to prepare a draft that reflected the views of the members as a whole.

3. On several occasions it had seemed to him that he was inadequately informed and needed detailed comments. It was inevitable that the members of the Commission could not keep all the different aspects of the questions under discussion before their minds. Many ideas had been suggested to him by the statements of other members, but he had not had the time to ponder them, particularly those in favour of substituting the word "competence" for the word "capacity" in the articles of chapter II of the Rapporteur's draft (A/CN.4/23).

4. He hoped therefore that the Commission did not regard the decisions it was taking as final and that it would request the Rapporteur himself to make a choice, in the light of the debates, between the variants suggested. He also hoped that the Commission would not submit its draft Convention to the General Assembly immediately after the present session. It should wait until the draft was complete.

5. The CHAIRMAN, speaking as Special Rapporteur, said that, although the Commission's debates on the draft Convention had led up to decisions, those decisions were in his view still tentative. The comments would

have to be completely re-written as a result of the changes which had been and which would be made to his draft by virtue of the Commission's decisions. Work on the draft Convention would not be completed until the comments had been drafted and approved, but it would be difficult to draft them without knowing the nature of the articles themselves.

6. Mr. HUDSON pointed out that, in addition to explaining the articles of the draft Convention, the comments should sketch in the historical background and describe the practice followed by States.

7. The CHAIRMAN stated that the comments he had included in his reports (A/CN.4/23 and A/CN.4/43) were intended for the Commission rather than for States, and would have to be entirely re-written.

8. Mr. SPIROPOULOS shared Mr. Hudson's doubts regarding the Commission's method of work. Its debates bore in part upon the substance of the questions, in part upon the drafting of the articles. Confusion was sometimes inevitable.

9. He would repeat that he regretted the decision to substitute the word "competence" for the word "capacity" in the articles of chapter II.

10. The tentative decisions so far reached had resulted in draft articles which it would be necessary to re-consider at a second, or even a third, reading in order to ensure concordance of terminology.

11. Mr. HUDSON said that he hoped it was clearly understood that it would be left to the Rapporteur to make amendments of form.

12. Mr. SPIROPOULOS recalled that at the second session, when the Commission had examined the text of the draft Code of Offences against the Peace and Security of Mankind drawn up by a sub-committee after an initial reading of the draft Code he himself had prepared, he had been authorized to submit to the following session a modified, or even a new, text.<sup>1</sup>

13. He agreed that the comments accompanying the draft Convention on the Law of Treaties were apparently intended to assist the Commission to understand the text. For governments, new comments would have to be drafted and submitted to the Commission during the next session.

14. Mr. SCELLE observed that he would not wish to appear to Mr. Hudson to be irrevocably committed by the word "competence". Many French-speaking lawyers, however, would be shocked by the use of the word "capacity", which was traditionally reserved for private law cases. If the word "competence" was really distasteful to the Commission, he would agree to its deletion provided that, whatever word was used, there was no possible doubt as to its meaning.

15. Mr. KERNO (Assistant Secretary-General) said he understood from the discussion that the Commission as a whole considered that work on the draft Convention on the Law of Treaties was still unfinished. A practical question then arose namely, whether it could be completed during the present session. Most speakers had seemed to

<sup>1</sup> See summary record of the 75th meeting, para. 102.

envisage the necessity of continuing it during the session to be held in 1952.

16. The CHAIRMAN thought that the draft Convention could not be submitted to governments without the comments which clearly could not be ready before 1952.

17. In response to an observation by Mr. CORDOVA, Mr. SPIROPOULOS recalled that, at its second session, the Commission had tentatively adopted a draft Code of Offences against the Peace and Security of Mankind. After discussing the matter, it had decided not to submit that tentative draft to the General Assembly, in order to retain the possibility of altering it, if need be substantially. For the same reason, the draft Convention at present under consideration should not yet be submitted to the General Assembly. The Commission's authority must not be cheapened. It would be sufficient to inform the General Assembly that the Commission had tentatively adopted the substance of a number of articles, but without giving the text. In that way the Commission would remain free to change its mind.

18. The CHAIRMAN pointed out that members of the General Assembly who were curious to know the tentative decisions of the Commission would be able to consult the summary records of its meetings.

19. Mr. LIANG (Secretary to the Commission) recalled that in its report to the General Assembly on its second session, the Commission had reported on the progress made with each of the questions still on its programme. The report contained fairly detailed information on the question of arbitral procedure, but briefer information on the questions of the regime of the high seas and the law of treaties.

20. When the report had come before the General Assembly, the USSR delegation had requested the Sixth Committee not to discuss the substance of questions which the Commission was still engaged in studying. That wise proposal had met with the approval of a large number of representatives and had been adopted.<sup>2</sup>

21. From the Commission's point of view, it seemed that articles unaccompanied by comments would appear unscientific and might give rise to false interpretations. The work done to date on the draft Convention on the Law of Treaties was still fragmentary.

22. He therefore suggested that the Commission act as it had done the previous year and omit from its report on its third session the text of the articles that had been only tentatively adopted.

23. The CHAIRMAN asked whether that suggestion met with the general approval of the Commission.

*It was so agreed.*

(b) CONSIDERATION OF A DRAFT ARTICLE ON THE ACCEPTANCE OF TREATIES (A/CN.4/L.16)<sup>3</sup>

24. The CHAIRMAN recalled that, in article 2 of the draft Convention on the Law of Treaties as adopted

<sup>2</sup> *Official Records of the General Assembly Fifth Session, Sixth Committee*, 225th meeting, para. 53, and 245th meeting, para. 33 and 37-63.

<sup>3</sup> Doc. A/CN.4/L.16 read as follows:

*"Acceptance of treaties*

at the 88th meeting (A/CN.4/L.5),<sup>4</sup> the question of acceptance had been reserved. Article 2 read as follows: "A treaty becomes legally binding in relation to a State when that State undertakes a final obligation under the treaty whether by signature, ratification, accession or any other means of expressing the will of the State, in accordance with its constitutional law and practice through an organ competent for that purpose." It was the words "or any other means of expressing the will of the State" which related to acceptance.

25. In the draft article prepared by Mr. Liang at the request of the Special Rapporteur on the acceptance of treaties (A/CN.4/L.16), the words "in accordance with its constitutional law and practice" seemed to be unnecessary as they already appeared in article 2 which he had quoted, and enunciated a general principle governing the provisions which followed. The Commission had decided not to repeat them in connexion either with ratification (article 3) or with accession (article 8).

26. Replying to a question by Mr. SCELLE, the CHAIRMAN added that he would see no objection to including that explanation in the comment accompanying the draft Convention.

27. Mr. HUDSON wondered whether it was wise to give acceptance a place apart. He saw no difference, from the point of view of international law, between acceptance and ratification, which were two words for one and the same thing. Under international law there was no need whatsoever for ratification to be made in any one given way. Moreover, the Commission itself, in defining ratification (article 3 (1)), said that it was the act by which a State "confirms and accepts a treaty". It therefore used the word "accepts" in respect of ratification.

28. He was not unaware that at the request of certain countries, and in order to get round constitutional ratification procedure, in certain conventions setting up international agencies recourse had been had to acceptance as a means of bringing those conventions into force. But that means, which was practicable only for conventions setting up international agencies, had not been used, for example, in the conventions signed at Geneva in August 1949 or in the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950.<sup>5</sup>

29. In his view, article 2 of the draft Convention (E/CN.4/L.5) was incorrectly headed "Application of treaties" and was purely tautological. All it amounted to was that a treaty became legally binding in relation to States which recognized its legally binding character. Article 7, "Entry into force of treaties", was sufficient and made it possible to delete article 2.

30. Mr. LIANG (Secretary to the Commission)<sup>3</sup> denied trying to impose on the Commission an article embodying a new idea. As the Commission had previously been

<sup>4</sup> "Where the treaty itself so provides, a State may, in lieu of signature or ratification or both, undertake a final obligation under the treaty, in accordance with its constitutional law and practice, by depositing an instrument of acceptance."

<sup>5</sup> See summary record of the 88th meeting, footnote 15.

<sup>6</sup> E/CN.4/554.

reminded<sup>6</sup>, acceptance procedure was provided, for instance, in the Constitutions of the World Health Organization and the International Refugee Organization and in the Bretton Woods Agreements.

31. Mr. HUDSON pointed out that all those instruments related to the creation of international agencies. Intrinsicly the word "acceptance" entailed nothing new. It was only a new form for facilitating the entry of treaties into force.

32. Mr. LIANG (Secretary to the Commission) observed that in the article which he had drafted, he had endeavoured to relegate acceptance to a secondary place, after the traditional methods of signature, ratification and accession. It was with that end in view that the draft article began with the words, "Where the treaty itself so provides", which clearly showed that such procedure could only be followed if it was explicitly provided for. Recourse to it was therefore to be regarded as unusual.

33. He might have stated in the draft article that acceptance was a supplementary procedure for enabling treaties to enter into force, over and above signature without reservation as to acceptance and signature subject to acceptance followed by acceptance, but he had found that representatives were often nonplussed by such a formula, which was obscure and at first sight incomprehensible.

34. It was also to allay any anxieties on the part of those who were unfamiliar with the new procedure that he had added the clause "in accordance with its constitutional law and practice". He agreed with the Chairman, however, that those words were unnecessary now that they were included in article 2, and he was prepared to accept their deletion.

35. Another way of mentioning acceptance in the draft Convention would be to include the references to it in the text of article 2 itself instead of in a separate article. That would be possible, but acceptance, which, though little employed in latter years, was a particularly flexible procedure for ensuring the entry of treaties into force, would appear to merit a separate article explicit enough in itself but which would, of course, be followed by a full comment.

36. Mr. FRANÇOIS shared Mr. Hudson's point of view on the uselessness of acceptance procedure. Once that new procedure had been admitted, however, it became necessary to take it into account. The definitions of ratification and of acceptance that would appear in the draft Convention would have to establish a clear distinction between the two procedures. At present they were interchangeable. The fault did not lie with the new draft article. It was article 3 (1) which was incomplete; as at present drafted, it appeared to define acceptance and it must be altered to show that ratification was a solemn act by the Head of the State. He did not wish, however, to enter into detailed points of drafting in connexion with that paragraph.

37. Mr. HUDSON believed that it was wrong to say that "acceptance" was a new word; it would doubtless

be found in a number of agreements dating from the 19th century. The United States Government had used it in the instrument in which it had stated that it subscribed to the constitution of the International Labour Organisation.

38. Mr. François had expressed the view that ratification implied an instrument of a special type. Even if that were so in practice, no solemn form of ratification was prescribed by international law, and a treaty could be ratified merely by saying "I ratify" or even "I accept".

39. To attach such importance to acceptance was to serve up an old dish as new.

40. Mr. AMADO observed that Mr. Hudson's remarks did not contradict what had been said by Mr. Liang in a recent study.<sup>7</sup>

41. He personally viewed with sympathy the efforts of the United Nations Secretariat to consecrate, as it were, the term in question.

42. Acceptance procedure would present advantages to Brazil. Under the Brazilian constitution, the Head of the State was obliged to submit treaties to Parliament and the approval of Parliament would be sought before acceptance. He saw no objections to the word "acceptance" or to what it signified.

43. Replying to a question by Mr. HUDSON, Mr. AMADO explained that in the case of treaties providing for the normal entry-into-force procedure, the Brazilian Parliament was consulted after signature, but that in the case of conventions whose entry into force was conditional upon their acceptance, Parliamentary approval was sought before they were accepted.

44. Mr. HUDSON saw no difference in practice between the two procedures.

45. Mr. KERNO (Assistant Secretary-General) agreed with Mr. Hudson that from the technical point of view there was no great difference between them and that there would be no necessity on that account to give acceptance a special place in the draft Convention. There were two practical reasons, however, for doing so.

46. In the first place, many delegations had pointed out that in their countries ratification was traditionally a very solemn act, and one which took time, and that the entry into force of multilateral conventions could only be speeded up if a more simple procedure were adopted, such as acceptance by virtue merely of a declaration by the head of the government or the Minister for Foreign Affairs.

47. The other advantage of such a procedure was that it made the signature ceremony unnecessary and combined in one and the same operation signature followed by ratification, and accession.

48. Under the traditional procedure it would be difficult for a single convention to be simply signed by some States and ratified by others. With acceptance procedure, States whose constitutions did not make ratification

<sup>7</sup> See *American Journal of International Law*, vol. 44 (1950), pp. 342-349. Compare also extracts from this article contained in the summary record of the 88th meeting, paras. 71-72.

<sup>6</sup> Summary record of the 88th meeting, paras. 60, 69 *et seq.*

subject to parliamentary approval could bind themselves at once, whereas the others could sign subject to acceptance.

49. In short, acceptance did away with certain formalities, combined the various traditional methods and made the entry into force of treaties a more flexible and speedy process.

50. Mr. EL KHOURY considered that the word "ratification" was universally known, whereas the word "acceptance" was not. He was still not convinced that it would not be better to keep to a word which was familiar to everybody. Moreover, the Law of Treaties laid down no special procedure for ratification, but allowed all procedures provided for in the constitutions of the various countries, inclusive, therefore, of those which were covered by "acceptance", as it had been defined.

51. The CHAIRMAN pointed out that it was the practice of States which had led to the introduction of acceptance procedure. There would be no innovation in referring to it.

52. Mr. SCELLE agreed with Mr. Kerno. Acceptance pure and simple could be distinguished from ratification and from accession. It could take place without the solemnity and without the action by the Head of the State which were, by definition, entailed in ratification and in accession — which was only ratification by States which had not collaborated in drawing up the convention.

53. The idea of acceptance was related to that of the "conventions in simplified form" referred to by Charles Rousseau in his *Principes généraux de droit international public*<sup>8</sup> and which were simply concluded by the administrative authorities of a country.

54. Mr. LIANG, Secretary to the Commission, said that acceptance was not quite the same thing as the "simplified convention". In most cases it was indistinguishable from ratification; in others it was indistinguishable from accession; in still others it made unwieldy procedure and parliamentary action unnecessary.

55. The best example of that was provided by the agreements setting up the International Monetary Fund and the International Bank (the Bretton Woods agreements), which, in articles XX and XI respectively, provided for acceptance procedure.<sup>9</sup>

56. By virtue of that procedure the United States of America had been able to become a party to those agreements by depositing an instrument of acceptance as soon as the two houses of Congress had approved the necessary appropriations. The United States Government had not had to seek the approval of a two-thirds majority of the Senate, because ratification was unnecessary.

57. Mr. HUDSON explained that the United States constitution conferred upon the President the power to make treaties after obtaining the approval of the Senate, expressed by a two-thirds majority vote. It could happen

that the United States Government was not confident of obtaining a two-thirds majority in the Senate, but thought that it could obtain a simple majority in each house. In such a case it submitted to the two houses the financial commitments arising out of a convention, and when the House of Representatives and the Senate had approved those commitments by a simple majority, the President enacted an instrument by which he recognized the entry of the convention into force. In such cases, for psychological reasons and in order to avoid the necessity of obtaining a two-thirds majority in the Senate, the word "ratification" was not used.

58. That was the procedure which had been followed in 1934 to subscribe to the constitution of the International Labour Organisation. In that case acceptance by the President of the United States had been equivalent to accession. Acceptance had subsequently been explicitly provided for in a number of conventions setting up international specialized agencies.

59. From the point of view of international law, it did not matter much whether the word "acceptance" or the word "ratification" was used in those conventions. Basically, the procedure was that of ratification.

60. Mr. SCELLE asked whether such procedure was correct under constitutional law.

61. Mr. HUDSON replied that the practice was well established in the United States of America.

62. Mr. ALFARO considered that ratification and acceptance were two different procedures. As regarded the substance, he accepted the formula proposed by Mr. Liang. However, Mr. François' remarks concerning the need to make a greater distinction between the definitions of ratification and acceptance merited the Commission's serious attention. In article 3 (1) of the draft Convention, the word "solemn" might be added before the word "act" and the word "accepts" might be replaced by "declares", or alternatively the sentence might read: "... confirms a treaty and declares it to be binding on that State". In the new draft article on acceptance, the words "undertake a final obligation" might be replaced by "finally bind itself".

63. Mr. HUDSON pointed out that a number of treaties, such as, in particular, the Convention on the Privileges and Immunities of the United Nations, only provided for accession. In such cases accession and acceptance were one and the same.

64. Mr. CORDOVA said that he saw no difference between acceptance and accession as defined in article 8 of the draft Convention. In both cases States bound themselves without signature or ratification.

65. Mr. LIANG (Secretary to the Commission) considered that acceptance did not amount to the same as accession, except when, as in the example that had been quoted, the treaty provided for accession as the sole means of becoming a party thereto. In general, however, accession was reserved for States which had not signed the treaty and had not taken part in its drafting.

66. To revert to the example of the Bretton Woods Agreements, he pointed out that they made immediate entry into force possible and provided for one single

<sup>8</sup> Paris, 1944, pp. 249-262.

<sup>9</sup> "Each government on whose behalf this Agreement is signed shall deposit with the Government of the United States of America an instrument setting forth that it has accepted this Agreement in accordance with its law and has taken all steps necessary to enable it to carry out all of its obligations..."

method of entry into force, both for the Contracting States, which had drafted the Agreements, and for those States which had not taken part in the negotiations.

67. Moreover, acceptance enabled States whose constitutional practice so permitted to depart from the constitutional ratification procedure. In several countries, such as the United States of America, the practice of "executive agreements" existed, under which the President could by his own action bind the government. That was an established constitutional practice.

68. It was not the only virtue of acceptance that it made unnecessary the unwieldy ratification procedures laid down in constitutions; it afforded a flexible means of declaring treaties legally binding without violating the constitution.

69. Mr. KERNO (Assistant Secretary-General) repeated that, even if theoretically acceptance was indistinguishable from the traditional procedure, one of its main practical advantages was that it enabled treaties to enter into force rapidly. If a treaty provided for acceptance, the States whose constitutions did not preclude that procedure could become parties to it immediately, while States whose constitutions did preclude it would have to follow ratification procedure; in the case, however, of treaties which provided only for signature and ratification, all States would have to follow the traditional procedure. Mention of acceptance procedure would therefore be of real value, and the formula proposed contained no dangers.

70. Mr. HUDSON said he knew of large numbers of treaties which said in effect: "The present treaty shall enter into force either upon signature or upon signature followed by ratification." In such cases it was for each signatory to say whether or not his signature was subject to ratification. Those examples showed that there was no need for a new word to cover such an eventuality. It was not necessary to speak of acceptance.

71. Mr. SANDSTRÖM considered that a reader new to the question would have great difficulty in understanding the difference between ratification, accession and acceptance. Even in the light of the debate which had just taken place, the distinction remained a little obscure.

72. Like Mr. Hudson, he stressed the need for a strict sequence in the articles of the draft Convention. Ratification was defined in article 3 (1), accession in article 8. The new article on acceptance, unlike the other two, was not drafted as a definition. It did not bring out clearly the special features of acceptance, which appeared to overlap both ratification and accession. The article should explain clearly what was meant by acceptance.

73. Mr. SPIROPOULOS said that the discussion, which had been devoted at first to consideration of a new draft article on acceptance, had been gradually widened until it now embraced the whole draft Convention.

74. He thought the Commission should vote upon the article, on the understanding that its decision would only be a tentative one.

75. The CHAIRMAN asked the Commission to decide whether it wished to include an article dealing with acceptance.

76. Mr. HUDSON pointed out that the choice was not between having an article on acceptance and leaving that question aside, but between devoting a separate article to it and dealing with it along with the other, traditional procedures. He suggested that the latter solution be adopted and that the word "acceptance" be added after the word "accession" in article 2 (A/CN.4/L.5).

77. Mr. SPIROPOULOS recalled that in article 2 the words "or any other means . . ." referred to acceptance.

78. Mr. CORDOVA explained that the words "or any other means . . ." had been inserted in article 2 because the meaning of acceptance had not then been under discussion. The Commission must determine whether acceptance was a new method of becoming a party to a treaty.

79. Mr. KERNO (Assistant Secretary-General) recalled that the question had been the subject of very thorough discussion, the summary records of which could suffice to enlighten those members of the Commission who had not participated in it. He had at that time pointed out that if acceptance was to be mentioned, it must be mentioned alongside signature, ratification and accession. The Commission had decided, however, that that would be too complicated and that it would be preferable to give the article a simple form. That question should now be posed once again.

80. Mr. ALFARO thought that if the Commission decided to mention acceptance, it must define it as it had done in the case of accession. He would propose a text.

81. Mr. CORDOVA and Mr. HUDSON thought that, if the word "acceptance" were substituted for the words "or any other means . . .", acceptance must be defined in the same way as ratification and accession had been defined.

82. Mr. SANDSTRÖM wondered whether there was any contradiction between the Chairman's proposal and that of Mr. Hudson and Mr. Córdova.

83. The CHAIRMAN said that the question was indeed whether or not the Commission wished to devote a special article to acceptance. If so, it would consider Mr. Hudson's proposal for drafting the articles defining the three procedures in exactly parallel terms.

84. Mr. FRANÇOIS said that, in his opinion, an affirmative vote would not mean approval of acceptance procedure, but only recognition of the need for defining it because it was a procedure which was being used. The comments should show the views of the members of the Commission on it.

85. Mr. SCALLE said he was in favour of a special article, but could not accept the text proposed by Mr. Liang as it stood. He thought it had been very useful to follow up the explanations that had been given.

*It was decided by 9 votes to include in the draft Convention an article relating to acceptance.*

86. The CHAIRMAN said that now that it was decided in principle to have an article on acceptance, its wording must next be considered.

87. Mr. ALFARO believed that, in accordance with the suggestion that had been made in that respect, ratification and acceptance should be defined in parallel terms. On the basis of the draft article prepared by Mr. Liang, he had drafted a definition reading as follows:

“Acceptance of a treaty is an act by which a State, in lieu of signature or ratification or both, deposits an instrument declaring that it undertakes finally to assume the obligations of the treaty in accordance with its constitutional law and practice.”

88. In drafting that parallel definition he had tried to bring out clearly the difference between each of the concepts.

89. Mr. KERNO (Assistant Secretary-General) drew Mr. Alfaro's attention to the fact that acceptance did not always take the form of a formal instrument, but was often effected simply by signature.

90. The CHAIRMAN and Mr. HUDSON suggested that the text read: “an act by which a State . . . declares”, and Mr. ALFARO accepted that suggestion.

91. The CHAIRMAN pointed out that the essential difference between Mr. Alfaro's and Mr. Liang's proposals was that the former was in the form of a definition. He personally had no objection to that form. He proposed the following text: “A State may, in lieu of signature or ratification or accession . . .”

92. Mr. HUDSON preferred Mr. Alfaro's formula because it defined acceptance in parallel terms to those used for ratification and accession.

93. He proposed that the words “subject to the treaty entering into force” be added to the article. The same words would have to be included in various other places in the articles. He also proposed that the word “finally” be omitted because a State could withdraw its acceptance before a treaty entered into force.

94. He considered the words “in accordance with its constitutional law and practice” superfluous, as they already appeared in article 2.

95. Mr. SANDSTRÖM suggested that Mr. Alfaro's draft article and the amendments to it be referred to the Special Rapporteur for him to draft the text.

96. The CHAIRMAN thought that, as the Commission had very clear views on the question, it should itself draft the text. He thought that the wording proposed by Mr. Alfaro might be used if amended to read: “Acceptance of a treaty is an act by which a State, in lieu of signature or ratification or accession or any of these procedures, . . .”, or else “. . . or all of these procedures . . .”.

97. Mr. KERNO (Assistant Secretary-General) said that there was one thing which was worrying him. The proposed wording read: “A State . . . declares that it undertakes finally to assume the obligations”; but a treaty comprised rights as well as obligations. He suggested that the words used should be “becomes a Contracting Party,” or else “accepts a treaty as binding upon that State”. That would cover rights as well as obligations.

98. The phrase relating to constitutional requirements

and the entry into force of the treaty must either appear in all the definitions or in none of them.

99. The CHAIRMAN suggested that Mr. Hudson's point would be met by saying “declares its willingness to be bound by the treaty”. That would make addition of the words “subject to the treaty entering into force” superfluous.

100. Mr. HUDSON fully approved the Chairman's suggestion. He pointed out that, in the majority of cases, a treaty would contain a protocol clause which provided that a certain number of accessions would be necessary for it to enter into force. A State then accepted the treaty on condition that there was the necessary number of ratifications or accessions, and before the treaty entered into force it could withdraw its acceptance.

101. Mr. SPIROPOULOS thought it was preferable to say “considers that the treaty is binding upon that State”. The various formulae amounted to the same thing. The usual formula was that a State accepted the treaty as binding upon it, but there was no one formula which was used to the exclusion of all others. The Commission was splitting hairs, however, and the text which had been proposed seemed satisfactory to him.

102. Mr. AMADO, recalling that it had been at his suggestion that the words “as binding” had been included in article 3 (A/CN.4/L.5), said he agreed with what Mr. Spiropoulos had just said.

103. The wording proposed by Mr. Liang corresponded to the new trend towards securing the final conclusion of treaties at conferences. Signature could then make ratification unnecessary provided States were authorized by their parliaments to proceed in that way. To look at the question of accession from another point of view, it was obvious that accession was only possible where a treaty was already in force. He had been about to accept the new wording, but if different shades of meaning were introduced into it he would abstain or vote against it.

104. The CHAIRMAN pointed out that article 2 (A/CN.4/L.5) already contained the words “in accordance with its constitutional law and practice” and that those words covered every case. It was therefore as unnecessary to repeat them in connexion with acceptance as in connexion with ratification and accession.

105. Mr. SCELLE said that if the article were prefaced by the words “Where the treaty itself so provides,” the words “in accordance with its constitutional law and practice” must be added so as to avoid implying that the treaty could of itself authorize a State to adopt the procedure of acceptance; but if the former words were deleted the latter became superfluous.

106. After an exchange of views between the CHAIRMAN, Mr. ALFARO, Mr. HUDSON, Mr. SCELLE and Mr. SPIROPOULOS on the choice of a term to indicate that the State did not give the undertaking in question unless the treaty entered into force, *the following wording was adopted by 9 votes:*

“Acceptance of a treaty is an act by which a State, in lieu of signature or ratification or accession or all of these procedures, declares its willingness to be bound by the treaty.”

*It was also decided that the same expression "declares its willingness to be bound" would be used in the articles relating to ratification and accession.*

(c) CONSIDERATION OF ARTICLE 3 TENTATIVELY ADOPTED BY THE COMMISSION AT ITS 88TH MEETING (A/CN.4/L.5)<sup>10</sup>

107. Mr. ALFARO proposed that paragraph (1) be reworded as follows: "Ratification is a solemn act by which a State, in a written instrument, confirms a treaty and recognizes it as binding on that State."

108. Mr. HUDSON suggested that the Special Rapporteur be made responsible for co-ordinating the articles on ratification, accession and acceptance.

*It was so agreed.*

(d) CONSIDERATION OF THE TEXT OF THE ARTICLES TENTATIVELY ADOPTED BY THE COMMISSION AT ITS 98TH MEETING (A/CN.4/L.17)<sup>11</sup>

109. The CHAIRMAN stated that the articles adopted at the previous meeting (A/CN.4/L.17) should be inserted in document A/CN.4/L.5. He suggested that the Commission look again at the text of article 3 in document A/CN.4/L.17.

### Article 3

*It was decided to substitute the word "capacity" for the word "competence".*

110. Mr. EL KHOURY agreed that it was preferable to use the word "capacity" instead of the word "competence", as the convention would have to be published in all languages and in Arabic the word "competence" referred to the powers specially conferred upon an organ while "capacity" referred to natural aptitudes. Capacity was something that was innate in States.

111. Mr. SCELLE wished to emphasize that he had abstained in the vote that had just been taken, and Mr. AMADO that he had voted against.

112. Mr. SCELLE asked that it be made clear that the capacity of certain States could be modified by international law and that the exercise, of that capacity could be modified by a convention concluded between States. He believed that the enjoyment of their capacity by States could, in fact, only be modified by international law.

113. The CHAIRMAN was not sure whether that was true.

114. Mr. AMADO said that when, by virtue of its status as a permanently neutral State, Switzerland forwent the conclusion of treaties of alliance, it was the community of nations which so decided. It was still, however, a question of international treaty law, and it was not correct to speak simply of "international law".

115. Mr. SCELLE added that international customary law also came into play. The existence of semi-sovereign States had never yet been questioned; in the Middle Ages

there had been vassal States and at the present time there were dependent States.

116. The CHAIRMAN, supported by Mr. CORDOVA, said that even if Mr. Scelle were correct in saying that capacity could only be limited by international law, it was not necessary in the draft Convention to indicate by what or by whom it could be limited.

117. Mr. YEPES said he was in favour of the proposed article. The present text, however, was very vague and did not make clear by what or by whom capacity could be limited. He would support the wording proposed by Mr. Scelle.

118. Mr. SCELLE stated that every legal system itself determined what constituted capacity and that no-one could alter it in the slightest. Besides capacity, there was, however, the exercise of capacity, and a person could limit the exercise of his capacity. China was still a sovereign State, and neither it nor anybody else could place it in the category of dependent States or in that of neutral States or in that of confederated States; it could, however, give up its right of administration. Turkey, which had always been declared a sovereign State, could not simply decide to cease to be one, but it had been able to give up to Austria the administration of Bosnia and Herzegovina. Everything depended on the distinction between enjoyment and exercise of capacity. At the law faculty in Paris, one was taught that capacity was determined by law. The age of majority was reached at 21, whether one wished it or no. In that case it was a question of the enjoyment of capacity, *scilicet* the possession of capacity. Its exercise one could delegate to anybody. Why should not the same be true in international law? It was the same rule, and the Commission would run no risk in adopting it.

119. Mr. SPIROPOULOS said that in his opinion the text before the Commission was a legal monstrosity. At the previous meeting Mr. Hudson had proposed a very simple formula: "Each State has the capacity to make treaties, but the exercise of that capacity may be limited." That formula seemed to cover all aspects of the question, and was simple and logical.

120. Mr. KERNO (Assistant Secretary-General) recalled that the Commission had already discussed the question at the previous meeting and agreed to leave to the Rapporteur the responsibility for improving the style of the article in the light of the Commission's decision. All States had the capacity to make treaties, but that capacity and its exercise could be limited.

121. Mr. AMADO, supported by Mr. SPIROPOULOS, pointed out that most of the "monstrosities" that had been brought into the text arose from the fact that the Commission had departed from the Harvard draft, article 3 of which read as follows:

"Capacity to enter into treaties is possessed by all States, but the capacity of a State to enter into certain treaties may be limited" (A/CN.4/23, appendix A). That was the wording that should be adopted.

*It was decided to adopt the wording of article 3 of the Harvard draft.*

<sup>10</sup> See summary record of the 88th meeting, footnote 15.

<sup>11</sup> See summary record of the 98th meeting, footnote 11.

## Article 4

## Paragraph (1)

122. By Mr. AMADO's asking why the expression used in the Harvard draft should not be retained in article 4 also and the words "to enter into treaties" substituted for "to make treaties", the CHAIRMAN accepted those amendments.

123. Mr. HUDSON suggested that the paragraph read:  
"The capacity of a State to enter into treaties is exercised by the organ or the organs of that State competent for that purpose under its constitution."

124. The CHAIRMAN thought that the words "for that purpose" were superfluous.

## Paragraph (2)

124. Mr. HUDSON said he would prefer the paragraph to read:

"The Head of the State is competent to exercise the State's capacity to enter into treaties."

126. Mr. SPIROPOULOS wondered whether, even if all the members of the Commission were agreed to use the word "capacity" instead of "competence", the form should be used in all the articles. Would it not be better in the paragraph under discussion to use the expression "treaty-making power"? Even in civil law a person was not said to have the capacity to do something, he was said to have the right to do it.

127. Mr. HUDSON, supported by the CHAIRMAN and by Mr. ALFARO, objected to Mr. Spiropoulos' suggestion on the grounds that it was a matter of principle always to use the same term in a legal text to denote the same thing. Otherwise there was a risk of its being inferred that something different was meant.

128. Mr. SPIROPOULOS wondered whether it was exactly the same thing. Capacity denoted a situation before the law, and the exercise of capacity was treaty-making power. Naturally he agreed that the same term must always be used to denote the same thing.

129. The CHAIRMAN read out the text of paragraph (2) amended to read:

"In the absence of provision in the constitution to the contrary, the Head of the State is competent to exercise treaty-making power."

130. Mr. AMADO preferred the wording adopted at the previous meeting. He thought that the Commission should not go back too often on what it had already decided.

131. Mr. LIANG (Secretary to the Commission) agreed with Mr. Spiropoulos, in his opinion it was not capacity that was referred to in the paragraph under discussion, but the exercise of treaty-making power, which was a quite different thing. Capacity resided in the State. In saying that the Head of the State was competent to enter into treaties, it was assumed that the constitution granted him the exercise of that power.

132. Mr. SANDSTRÖM said that the capacity to enter into treaties, referred to in article 3, and the capacity of organs of the State to enter into treaties, referred to in article 4, meant two different things.

133. The CHAIRMAN proposed that the two paragraphs be combined to read: ". . . by whatever organ or organs of that State its constitution may provide, or, in the absence of provision in its constitution, by the Head of that State".

134. Mr. EL KHOURY suggested that the second paragraph be deleted. Why indeed should one bestow that power upon a man on whom his people did not wish to bestow it?

135. Mr. HUDSON pointed out that article 4 referred to the constitution of a State, but that its constitution might be silent on that point. It was possible that it was the law of the country which determined it.

136. Mr. SPIROPOULOS suggested using the expression "its constitutional law in general".

137. Mr. HUDSON recalled that in article 1 of the Rio de Janeiro draft (A/CN.4/23, Appendix F) the words "internal law" were used. In the United States of America, only the President could enter into treaties, but postal conventions had for a long time past been concluded by the Postmaster-General.

138. Mr. SPIROPOULOS remarked that the same was true in many States.

139. The CHAIRMAN stated that he would choose between the two expressions "internal law" and "constitutional law and practice".

The meeting rose at 1. p.m.

## 100th MEETING

Monday, 11 June 1951, at 3 p.m.

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*Chairman:* Mr. James L. BRIERLY

*Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, 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.

**Law of treaties: report by Mr. Brierly (item 4 (a) of the agenda) (A/CN.4/23, A/CN.4/L.5, A/CN.4/L.17)**  
(continued)

(a) CONSIDERATION OF ARTICLES TENTATIVELY ADOPTED BY THE COMMISSION AT ITS 88TH MEETING (A/CN.4/L.5)<sup>1</sup>

*Article 1: Authentication of texts of treaties*

1. Mr. HUDSON said that it was hardly necessary to consider the question of authentication of texts of treaties. The term "authentication" was only used when a treaty was drawn up in several languages. It was a practice which went back to the Treaty of Versailles, where it had been stated that the various versions of the text were authentic.
2. He seriously doubted whether signature and initialling should be placed on the same footing. He knew of no case in which a treaty that had merely been initialled had been submitted for ratification. It would be difficult to find a treaty which had been made final, in the sense of "brought into force" by mere initialling. If the question of initialling were to be considered, it should be treated as definitely subordinate to the question of signature, which was the preliminary expression of the fact that the negotiators of a treaty were satisfied with the text arrived at. United States representatives at international conferences never signed any text before having received express authority to do so, and that was only given at the last moment. The signature of multilateral treaties had a definite significance for experts. The League of Nations had made a practice of publishing the list of signatories of such instruments, whether they had ratified them or not. The fact of signing a convention indicated that the State concerned was prepared to assume obligations.
3. In general, he was entirely opposed to the text of article 1. In sub-paragraph (a), signature was not given sufficient importance and he thought that the provision regarding initialling should, at the most, be included in that part of the text which dealt with the formalities usually preceding signature.
4. In his opinion, sub-paragraph (b) was hardly more satisfactory. He was aware that the texts of conventions were frequently incorporated in the final act of a conference, but he considered that a bad practice. He realized, however, that the chief drafters at The Hague Conference of 1907, including Renault, had followed that practice and that at the Conference of American States held at Havana in 1928 the treaties and conventions had been incorporated in the final act, which alone had been signed. Nevertheless, each treaty included the usual formula "signed this day" etc. That practice was considered more expeditious.
5. He thought that the case referred to in sub-paragraph (c) rarely arose. He could of course cite various examples, but would hesitate to place that procedure on the same level as signature. Incorporation in a resolution following a majority vote was of secondary importance.
6. He found the provision contained in sub-paragraph

(d) unsatisfactory. In fact, it meant that authentication was effected by the text itself. But he did not usually read a text before knowing whether it was authentic; that would be placing the cart before the horse.

7. He therefore proposed omitting the reference to authentication and giving the question of signature a certain importance.
8. The CHAIRMAN explained that the purpose of the article was merely to lay down the procedure for establishing the final text of treaties. There was no question of the effect of signature, of entry into force etc. Signature was one of the ways of establishing the text; the question of signature of treaties would be considered later.
9. Mr. HUDSON had never heard it said that signature was one of the ways of authenticating the texts of treaties. He had never heard of a formula worded as follows: "I hereby declare this to be the authentic text of the treaty". He repeated that it was unnecessary to devote an article to authentication.
10. Mr. KERNO (Assistant Secretary-General) pointed out that the Commission had held a long discussion on article 1 of Mr. Brierly's second draft (A/CN.4/43) and that, of course, article 1 had originally had a different purpose. It had concerned the conclusion of treaties. The long discussion held by the Commission had shown that it was extremely difficult to define conclusion. It was in those circumstances that the Commission had left aside the legal effects of certain acts preceding ratification and had reverted to article 6 of the first draft (A/CN.4/23), which dealt solely with the authentication of texts of treaties.<sup>2</sup>
11. The CHAIRMAN thought that the Commission might be asked whether it wished to reconsider its decision or preferred to keep the article in its present form.
12. Mr. SPIROPOULOS observed that the difficulty was due to the fact that Mr. Hudson had not heard the Commission's discussions on that question. It had been difficult to arrive at a text expressing the Commission's views. Finally, it had been considered that the draft of the article in question was the best that could be produced. If Mr. Hudson had followed that discussion he would not consider the text so bad. He must have an opportunity to express his opinion but, on the other hand, the Commission could not go back.
13. Mr. HUDSON regretted that he had not been present during the discussion at which the question had been clarified. In his opinion the proposed text would be very badly received by scholars.
14. Mr. YEPES said that he was most impressed by Mr. Hudson's remarks, but was not in favour of re-opening the discussion. He did not think that the word "authentication" was quite what the Commission meant.
15. The CHAIRMAN asked whether the word "establishment" would not be better.
16. Mr. HUDSON suggested following the International Labour conventions. From the outset it had been the

<sup>1</sup> See text in summary record of the 88th meeting, footnote 15.

<sup>2</sup> See summary records of the 84th meeting, paras. 4-66, and of the 88th meeting, paras. 3-32.

practice to authenticate the texts of those conventions by the signatures of the President of the Conference and the Director-General of the International Labour Office. The ILO still attached a certificate of authentication to the texts of conventions it sent to governments.

17. The Treaty of Versailles of 1919 had been authenticated in the following manner: the text transmitted to Governments had been accompanied by a certificate of authentication issued by the French Foreign Minister with whom the Treaty was deposited. He had a certified text of the Treaty of Versailles before him and it showed that the United States Secretary of State declared that the authenticity of the text had been certified to him by the Minister for Foreign Affairs of the French Republic.

18. If the question of the authentication of treaties was to be considered, it would be advisable to ask Mr. François what was the practice.

19. The CHAIRMAN thought that the word "authentication" was somewhat ambiguous and that Mr. Hudson had taken it in a sense different from that intended by the Commission. When a treaty was drawn up, there came a time when the negotiators did not wish to make any further amendment. The article under consideration did not settle the question of proof of authenticity of a treaty. He therefore proposed using the word "establishment".

20. Mr. FRANÇOIS fully agreed with the Chairman on that point.

21. Mr. ALFARO thought that the article should be kept. The code which the United Nations wished to draft would serve as a text for future students. It should therefore be the expression of international law and should not contain mandatory provisions only. It should also show how international affairs were conducted; for instance, how the text of a treaty was authenticated. It should therefore be stated that a treaty was authenticated by signature or initialling *ne varietur*.

22. With regard to the word "authentication", he did not know how far that term was open to objection in English. In Spanish it was perfectly acceptable. On the other hand, the word "*establecimiento*" could not be used; the proper term would be "*fijación*".

23. Mr. SANDSTRÖM asked whether the text could not be slightly modified to meet the argument used by Mr. Scelle during the discussions on that question, namely, that the purpose of signature was to establish the text of a treaty in final form. For instance, the following wording might be used: "but the text of a treaty is finally established by such and such means". That would be a better way to bring out the effect of signature, which made the text final.

24. The CHAIRMAN asked if that was not what the article already said: "The establishment of the text may be effected by". It might also be said that "the text of a treaty becomes definitive".

25. Mr. SPIROPOULOS did not think that formula was entirely in conformity with the Commission's intention. He believed that the text already adopted was better.

26. Mr. ALFARO explained that the text of a treaty became definitive when the parties had finally agreed on it

and initialled it *ne varietur*. The agreement was put in writing and then authenticated.

27. Mr. HUDSON thought that the text was definitive before being attested by signature.

28. Mr. SPIROPOULOS reminded the Commission that it had wished to avoid reference to the conclusion of treaties and had said that the text was established. He did not think the Commission should split hairs.

29. Mr. HUDSON replied that others would do so.

30. He asked why the words "text or texts" had been included in the first line of the article. It had been the practice of the Permanent Court of International Justice to state that a treaty was drawn up in French and Spanish, for instance, when there was a French version and a Spanish version, which were merely two versions of one and the same text. The Commission should not adopt the careless habits of certain treaty drafters. Incidentally he thought it reprehensible to use the French formula according to which both texts: "*sont également authentiques*"; the proper wording was "*font également foi*".

31. The CHAIRMAN agreed to the deletion of the words "or texts".

32. With regard to sub-paragraph (c), Mr. HUDSON thought that that provision did not take sufficient account of the procedure followed in the International Labour conventions. Besides, the instrument in question might not be a resolution. He preferred the word "decision".

33. Mr. SPIROPOULOS also proposed using the word "decision", which was a general term. He thought that the term used should be as general as possible.

34. The CHAIRMAN thought that the word "resolution" was much more general.

35. With regard to sub-paragraph (d), Mr. HUDSON observed that he had never seen a text of a treaty which prescribed formal means for its authentication. What he had seen was a provision to the effect that the text of the treaty should be communicated to certain governments by a certain Minister for Foreign Affairs.

36. Mr. SPIROPOULOS attached great importance to Mr. Hudson's remarks and was inclined to believe that a treaty could not say anything about the establishment of its text. The sub-paragraph in question should be deleted or replaced by the words "by such means as the signatories may decide".

37. The CHAIRMAN proposed the words: "by other formal means prescribed by the negotiating States".

*The text of article 1 was adopted by 9 votes, with the following amendments:*

For the word "authentication" substitute the word "establishment", delete the words "or texts", and for sub-paragraph (d) substitute the following: "By other formal means prescribed by the negotiating States".

*Article 2: Application of treaties*

38. The CHAIRMAN pointed out that that article had been adopted after a long discussion, in which Mr. François had encountered heavy opposition.<sup>3</sup>

<sup>3</sup> See summary record of the 88th meeting, paras. 34-74.

39. In connexion with the title of the article, Mr. HUDSON observed that it was not a question of the application of treaties. Application meant carrying out a treaty in accordance with the obligations it laid down. Article 2 dealt with a subject which required much fuller treatment and was, moreover, dealt with in article 7. He had never been able to see any difference between "becoming legally binding" and "entry into force".
40. The CHAIRMAN agreed that the title of the article was unsuitable.
41. Mr. AMADO observed that the article declared that a treaty was binding when it was binding.
42. Mr. HUDSON did not see why the same idea was repeated in two different forms, and would prefer the question to be dealt with in article 7. He proposed the following wording:  
 "A treaty becomes legally binding in relation to a State by signature, ratification, accession or any other means of expressing the will of the State."
43. Mr. SPIROPOULOS considered that there was a fundamental difference between article 7 and article 2. The latter showed when a treaty became binding in relation to a State namely, when that State had signed, ratified or acceded to it or, it might even be added, had accepted it. That meant that a treaty was binding when one of those acts had been performed.
44. Article 7 provided that a treaty entered into force when it had been ratified by 20 signatories, for instance. That did not mean that it was binding on all the signatories; the treaty entered into force when it had been ratified by 20 States, but each State was bound only after ratification. When 20 States had ratified the treaty it would enter into force and become legally binding at the same time as far as they were concerned.
45. Mr. ALFARO explained that article 2 determined the time when a treaty became binding in relation to a State and article 7 showed how a treaty came into force in each of the cases stated in article 2.
46. The title of article 2 might be unsuitable, but he believed that the substance should be retained.
47. Mr. HUDSON then proposed the following text: "A treaty may become binding" (he saw no need for the word "legally") "in relation to a State by signature, ratification, accession or any other means of expressing the will of the State through an organ competent for that purpose."
48. The CHAIRMAN added that the word "acceptance" would be inserted when the Commission had taken a decision on that procedure.
49. Mr. HUDSON thought that even if the word "acceptance" were added, the words "or any other means" should be kept.
50. In order to avoid the same difficulties, Mr. ALFARO suggested the words "or any other means of expressing the definite will of the State".
51. The CHAIRMAN thought that if signature, ratification, accession and acceptance were mentioned, there was no need to add the words "or any other means."
52. Mr. SPIROPOULOS thought it preferable to keep those words, since some new means might be introduced.
53. The CHAIRMAN noted that the word "approval" was, in fact, also used.
54. Mr. HUDSON recalled that in recent years negotiations between States had resulted in agreements without signature, ratification, accession or acceptance.
55. Mr. SPIROPOULOS said that those were not treaties in the sense of the text under consideration. In addition to treaties, there were, of course, many other ways of binding a State.
56. The CHAIRMAN read out the beginning of the text proposed by Mr. Hudson: "A treaty may become binding".
57. Mr. SPIROPOULOS asked why the words "may become" should be used.
58. Mr. AMADO and Mr. SCALLE also opposed that expression.
59. Mr. YEPES thought that the addition of the word "may" introduced some doubt, and that it might be asked whether there were not some other means; the word should be omitted.
60. The CHAIRMAN said that he had acted in a spirit of compromise, though he himself did not see the advantage of that wording.
61. Mr. YEPES said that in that particular case there should be no compromise. No dubious expressions should be introduced into the text.
62. Mr. HUDSON asked if the text meant that a treaty became binding on signature.
63. The CHAIRMAN replied that that might be so.
64. Mr. HUDSON noted that the words "in accordance with its constitutional law and practice" were contrary to the view taken by Anzilotti in the Eastern Greenland Case, since they provided that reference must be made to the constitution of a State before concluding a treaty with it.
65. He appreciated Anzilotti's view. If he were asked to negotiate a treaty with the United Kingdom and the representative of that country asked him to consult the United States constitution, he would reply that to ascertain the sense of that very short text drafted in 1777 it was necessary to consult the 350 odd volumes containing the interpretation of the constitution by the Supreme Court.
66. The CHAIRMAN pointed out that the Commission had decided by 8 votes to 1 to adopt the opinion expressed in the article in question<sup>4</sup> and he did not believe that Mr. Hudson's view, added to that of Mr. François<sup>5</sup>, could change the Commission's decision.
- 66a. The Commission was familiar with the views of Mr. Hudson, who had explained them the previous year<sup>6</sup> and a large majority of members had chosen that solution,

<sup>4</sup> Decision on article 5 of Mr. Briery's second draft (A/CN.4/43) taken at the 86th meeting; para. 61 of the summary record.

<sup>5</sup> See the summary record of the 86th meeting, paras. 53-54 and the summary record of the 88th meeting, paras. 36-38.

<sup>6</sup> See summary record of the 52nd meeting, paras. 75 *et seq.*

realising that it raised fewer difficulties than the alternative one.

67. Mr. SPIROPOULOS said that since the text had been adopted, he had again examined international practice. Certain writers held that if one contracting party had no means of finding out that another contracting party was acting contrary to its constitution, the latter would be bound by the treaty. The article might be slightly amended to facilitate existing international practice. He thought it advisable to consider that important point with a view to making some concession to the theory of Anzilotti. Something should be done to protect States which acted in good faith.

68. Mr. AMADO wondered what would happen if Sir Benegal Rau took his seat in the Commission and said that he did not approve of the articles; would members of the Commission have to re-consider the sacrifices they had made? He himself had made concessions in respect of the articles. He had favoured the more conservative line of stating that a treaty was a solemn instrument in writing concluded in good and due form, in order to distinguish it from an executive agreement. The Commission had adopted the text in order to reach a solution. That was why he had not yet intervened in the discussion. He proposed that the text should be adopted with the very clear and undoubtedly valuable amendments proposed, otherwise he would be uncertain whether he had been right in voting as he had. His view was that the Commission's decision should stand.

69. Mr. HUDSON asked his colleagues to forgive him but he had a further slight amendment to propose. He thought that in that article the Commission intended to stress the words "in accordance with its constitutional law and practice". Hence the article might be drafted as follows:

"A treaty becomes legally binding in relation to a State when that State has expressed its will to be found in accordance with its constitutional law and practice."

70. He did not think the purpose of the article was to enumerate the means of expressing its will at the disposal of a State.

71. The CHAIRMAN explained that the article had that purpose also. It was necessary to say that whatever method was used to express the will, it must be in accordance with the constitutional law and practice of the State concerned, otherwise the treaty was not binding.

72. Mr. SPIROPOULOS considered that article 2 was the most important of all.

73. Mr. AMADO pointed out that in certain South American republics, such as Brazil, the constitution provided that treaties signed by a *de facto* government would not be recognized.

*It was decided, by 9 votes, to retain article 2, last recorded as follows:*

"A treaty becomes binding in relation to a State by signature, ratification, accession or any other means of expressing the will of the State in accordance with its constitutional law and practice through an organ competent for that purpose."

74. Mr. SCALLE hoped that the title of the article would be changed.

75. The CHAIRMAN agreed, and suggested that a general title be used, such as "Formation of Treaties". Mr. Spiropoulos suggested "Assumption of legal obligations by a State"; that question might be left to the Rapporteur.

76. Mr. HUDSON proposed the title: "Assumption of treaty obligations".

*Mr. Hudson's proposal was adopted.*

*Article 3: Ratification of treaties*

77. The CHAIRMAN reminded the Commission that it had decided to delete the words "and accepts" in paragraph (1), and to delete paragraph (2) as suggested by Mr. Kerno.

78. Mr. Hudson proposed the deletion of the word "finally".

79. The CHAIRMAN thought that it was not, in fact, of any great importance.

*Paragraph (1) was adopted in the following form:*

"Ratification is an act by which a State, in a written instrument, confirms a treaty as binding on that State."

*Paragraph (2) was deleted.*

*Article 4: Ratification of treaties*

80. Mr. HUDSON thought the first paragraph should either be deleted or replaced by the following text:

"A State may undertake an obligation under a treaty by reason of its signature of the treaty if the treaty so provides or if the form of the treaty and the attendant circumstances indicate an intention that signature should be sufficient."

81. He pointed out that the United States had concluded about 500 executive agreements, which had been merely signed and brought into force, without any ratification.

82. The CHAIRMAN explained that the idea underlying the article was that ratification was the normal method.

83. Mr. HUDSON questioned that view; he considered that, on the contrary, the opposite method was the normal one.

84. Mr. YEPES observed that the Commission was considering treaties, not executive agreements.

85. Mr. KERNO (Assistant Secretary-General) agreed with Mr. Hudson that in practice many treaties were simply signed, always provided that the constitutions of the States concerned permitted. Nevertheless, the Commission had intended to stress the importance of ratification.

86. Mr. SCALLE pointed out that the text had been included because it had been realised that it was dangerous to entrust the fate of a State to the executive. In practice, ratification was a safeguard of political freedom. The text could, of course, be drafted otherwise. Mr. Hudson and Mr. Kerno were right in saying that executive agreements were very common; the State could in fact be bound by an instrument merely signed by a minister or

by a director of the ministry. But that practice might lead to abuses.

87. Mr. HUDSON pointed out that in certain countries the participation of parliament was not required.

88. Mr. SCELLE replied that in Switzerland, on the other hand, a referendum was necessary. If the door were left open for executive agreements, there would be no more treaties.

89. Mr. SPIROPOULOS asked what purpose was served by discussing that point. The Commission was not going to change the practice of governments. He agreed with Mr. Scelle; in his opinion the article adopted by the Commission and that proposed by Mr. Hudson said the same thing, but the Commission's text established a presumption of the necessity for ratification. When there was no doubt as to whether ratification was required or not, the effect of the two texts would be the same.

90. Mr. YEPES said that he would vote in favour of keeping the text of article 4 as it stood in the document before them. The formula proposed by Mr. Hudson contained an element of danger.

91. The words "if the treaty so provides" would enable the drafters of a treaty to evade the constitutional provisions of the States for whose signature it was open or, at least, make it possible to interpret the text as authorizing a State whose constitution required treaties to be submitted for ratification in the traditional manner, to cite a contrary provision of the treaty to show that signature alone was binding.

92. The CHAIRMAN observed that Mr. Hudson's formula only differed from the draft article in its form of words.

93. Mr. HUDSON said that he had wished to group the ideas expressed in the draft of article 4 in a single paragraph, so as to make them less vulnerable. The draft article laid down a rule in paragraph (1), but stated in paragraph (2) that that rule was not correct.

94. Following a discussion opened by Mr. AMADO, various members of the Commission concluded that the draft of article 4 could be more closely adhered to, but that the two paragraphs should be connected by some such words as "provided, however".

*It was provisionally so decided.*

95. Mr. SANDSTRÖM thought that the draft articles should be more thoroughly overhauled. Article 2 listed the different means by which a treaty became legally binding. It should be followed by provisions successively defining those different means, namely, signature, ratification and accession. That being so, and as Mr. Hudson had suggested, article 4, paragraph (2) relating to signature should come first, then article 3 on ratification and so on.

96. The CHAIRMAN and Mr. HUDSON agreed that that view was justified.

97. Mr. HUDSON proposed that it be left to the Special Rapporteur to make those amendments to the draft Convention.

*It was so decided.*

#### *Article 5: Ratification of treaties*

98. Mr. HUDSON pointed out that the draft of article 5 was identical with article 8 of the Harvard draft; he thought that the first sentence of the comment accompanying that text in the Harvard draft<sup>7</sup> contained an idea which should be incorporated in the article to make it self-explanatory. It should be shown that the article referred to a treaty subject to ratification, by adding at the beginning of the draft article the words "If a treaty is subject to ratification."

99. Article 5 might thus read as follows:

"If a treaty is subject to ratification, its signature on behalf of a State does not create for that State any obligation to ratify the treaty."

100. Mr. YEPES thought that such a text was dangerous. States might regard it as an indirect invitation not to ratify; it seemed to show particular indulgence towards States which did not do so.

101. In his opinion it was necessary to show that signature created a "kind of obligation" for signatories (though not, strictly speaking, a legal obligation). When a treaty was signed, it was with the intention of ratifying it.

102. Mr. HUDSON explained that the text under consideration had been inserted in the Harvard draft for specific reasons. In the past, the prevailing opinion had been that the king must ratify treaties signed by his representatives within the limits of their powers. In 1920, the President of the United States had not ratified the Treaty of Versailles which had been signed on behalf of that country, although ratification was expressly provided for under the terms of the Treaty. It had therefore appeared advisable to state that when a treaty provided for ratification, the mere fact of signature did not oblige a State to ratify it.

103. With regard to the effects of signature and the "kind of obligation" referred to by Mr. Yepes, that question should rather be considered in connexion with article 6.

104. The CHAIRMAN observed that members of the Commission had already made similar comments at the first reading.

105. Mr. SANDSTRÖM thought that the Commission could satisfy Mr. Yepes by considering his comment in connexion with article 6.

*Article 5 was provisionally adopted in the form proposed by Mr. Hudson.*

#### *Article 6: Ratification of treaties*

106. The CHAIRMAN recalled that that article had been added to the draft on first reading, at the request of Mr. Yepes.<sup>8</sup>

107. Mr. HUDSON considered that the text in question tended to introduce into international law, provisions similar to those on the same subject contained in the

<sup>7</sup> *American Journal of International Law*, vol. 29 (1935), Supplement, p. 769.

<sup>8</sup> See summary record of the 86th meeting, para. 145; summary record of the 87th meeting, paras. 1-43; summary record of the 88th meeting, paras. 89-117.

Constitution of the International Labour Organisation (ILO). Under that constitution, when the ILO Conference adopted a convention, Members undertook to "bring the Convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action".<sup>9</sup>

108. When two countries signed a treaty, however, it often happened that one of them subsequently found that the treaty would not be practicable and for that reason did not submit it to ratification procedure. He did not approve of the draft of article 6.

109. The CHAIRMAN asked Mr. Hudson whether the draft of article 6 would compel the President of the United States to submit all treaties signed on his behalf to the Senate, even if the Executive did not desire the treaty to enter into force.

110. Mr. HUDSON said that that would certainly be the case. Such a provision would cause a sensation in the United States.

111. Mr. YEPES explained that the draft of article 6 would certainly necessitate the submission of any treaties signed to the senate, but would not deprive the President of his power to suggest their rejection by the legislature.

112. It often happened that, in accordance with the wish or even the demands of public opinion, a treaty was signed by a reactionary government which had no intention of submitting it to parliament. Such situations must be prevented.

113. Mr. HUDSON did not think it any part of the Commission's functions to draw up rules for the exercise by a State of its capacity to make treaties under domestic law.

114. Mr. ALFARO thought it advisable to recall that treaties were not signed for pleasure or for pigeon-holing.

115. If a government signed a treaty in good faith, convinced that it would be to the country's advantage, it should submit that treaty to the test of public opinion. The number of treaties signed, but not ratified, was enormous. That was a cause for grave anxiety where multilateral conventions were concerned. Respect for democratic principles demanded that any treaty signed should be submitted for ratification.

116. The other signatory States also had an interest in a treaty's entry into force. Hence it was not a purely domestic question.

117. The CHAIRMAN asked members to refrain from repeating comments already made at the first reading.

118. Mr. HUDSON pointed out that the Declaration of London of 1909, which had been signed by a large number of States, had not been ratified by any of them. They had not even initiated ratification procedure. In the United States, however, the Senate had been consulted and had given its consent; but the President was not bound by a favourable vote of the Senate, since the Constitution provided that he was responsible for ratification, after the Senate had given its approval. The President of the United States had not ratified the Declaration. Similarly, the Geneva Protocol of 1924

had been a complete failure. States should remain free to reconsider their decision, even after signature.

119. Mr. AMADO said that he would vote against the retention of article 6 for the reasons he had explained at the first reading.

*It was decided, by 5 votes to 3, to delete article 6.*

120. Mr. EL KHOURY explained that he had voted in favour because he believed that the text in question did not require a State to act in an unconstitutional manner.

#### *Article 7: Entry into force of Treaties*

*Paragraphs (a) and (b) were adopted without comment.*

#### *Paragraph (c)*

121. Mr. HUDSON considered that notification of ratification was not sufficient. In his opinion the instrument of ratification must be communicated to the other signatories. An instrument of ratification drawn up by a State, but remaining in its archives, would not be a true ratification.

122. The Treaty of Versailles had accepted notification in the case of distant countries, but had not released them from the obligation subsequently to transmit the instrument of ratification.<sup>10</sup>

123. He also observed that, by analogy with paragraph (a), the beginning of paragraph (c) might read: "A treaty subject to ratification but containing no provision . . ."

124. Following a discussion in which Mr. YEPES, Mr. SPIROPOULOS and Mr. AMADO took part, *paragraph (c) was provisionally adopted, with the amendments proposed above.*

#### *Article 8: Accession to Treaties*

#### *Paragraph (1)*

125. The CHAIRMAN suggested that in the English text the words "accepts it . . . as binding;" be replaced by the words "declares . . . that the treaty is binding."

126. Mr. HUDSON having observed that in the English text the words "formally and in accordance with its terms" could equally well be taken as referring to the words "signed or ratified" as to the word "accepts", the CHAIRMAN proposed that the paragraph be drafted as follows:

"Accession to a treaty is an act by which a State which has not signed or ratified the treaty, formally declares, in a written instrument, that the treaty is binding on that State."

127. He pointed out that the words "in accordance with its terms" could be deleted since paragraph (2) already contained the clause "when that treaty contains provisions enabling it to do so."

*Paragraph (1) was provisionally adopted, as amended.*

<sup>10</sup> Treaty of Versailles of 28 June 1919, final article: "Powers of which the seat of the Government is outside Europe will be entitled merely to inform the Government of the French Republic through their diplomatic representative at Paris that their ratification has been given; in that case they must transmit the instrument of ratification as soon as possible."

<sup>9</sup> Constitution of the ILO, article 19, para. 5 (b).

*Paragraph (2)*

128. Mr. HUDSON wondered whether the Commission should not take account of the procedure followed in certain conventions, such as the General Act of 26 September 1928 or the Convention on the Privileges and Immunities of the United Nations, under which accession was the only means of becoming a party.

129. He proposed that in the English text the word "enabling" be replaced by the word "allowing," and that a comma be inserted after the words "to do so."

130. Mr. KERNO (Assistant Secretary-General) read out a passage from General Assembly resolution 268 (III) of 28 April 1949 on the revision of the General Act, giving the text to be substituted for the former article 46, concerning the entry into force of that convention.

*Paragraph (2) was adopted with the amendments proposed by Mr. Hudson.*

*Paragraph (3)*

131. Mr. HUDSON proposed that, in the English text, the word "itself" be deleted and replaced by a comma, and that the word "only" be transferred to before the word "after."

*Paragraph (3) was provisionally adopted as amended.*

132. Mr. HUDSON reminded the Chairman that in his capacity as rapporteur, he had agreed, at Mr. Sandström's request, to submit successive provisions on signature, ratification, accession and acceptance, to follow Article 2.

(b) CONSIDERATION OF ARTICLES TENTATIVELY ADOPTED BY THE COMMISSION AT ITS 98TH MEETING (A/CN.4/L.17)<sup>11</sup>

*Articles 3 and 4: Competence to make treaties*

133. Mr. HUDSON and Mr. SPIROPOULOS observed that the draft articles on competence to make treaties had only passed a first reading. The Commission had very quickly decided provisionally to adopt article 3 of the Harvard draft. Article 4 had not been provisionally adopted.

134. Mr. SPIROPOULOS pointed out that the Commission had adopted Article 3 of the Harvard draft<sup>12</sup> at the request of Mr. Amado. He himself would prefer to delete both that article and article 4. The Commission would remember the difficulty it had had in drafting those articles and how it had hesitated between the words "capacity" and "competence". Moreover article 3 remained incomplete, since there were States which had absolutely no capacity to make treaties: for instance, the States of a Federation, such as those forming the United States of America, or, under the Weimar Constitution, certain German States such as Bavaria, though France had long maintained a diplomatic representative there.

135. Mr. HUDSON and the CHAIRMAN considered that such entities were not States in the international sense of the word.

136. Mr. SPIROPOULOS said that article 4 created a presumption of competence in favour of the Head of the

State, which was not necessary. It was constitutions which determined the organs of a State competent to make treaties.

137. At the first reading, he had approved article 3 (article 3 of the Harvard draft) because he believed that an introductory article was useful by analogy with the practice of civil codes. But a provision on capacity was necessary in a civil code because in the past there had been persons with no capacity. With States, it was otherwise. On further consideration he thought both the articles of chapter II unnecessary.

138. Mr. AMADO pointed out that it was as a last resort that he had proposed reverting to the Harvard text. But he had never approved of the article.

139. He took the opportunity of saying that in his view there were no States lacking the capacity of States. If the Commission were asked to vote again, he would vote against the two articles of chapter II.

140. Mr. EL KHOURY reminded the Commission that he had proposed the deletion of the second paragraph of article 4.<sup>13</sup> All the constitutions of the world contained provisions on treaty-making procedure. It was usually the Heads of States that enjoyed that prerogative. In his opinion it would be sufficient to say that the competence of a State to make treaties was exercised by whatever organs or persons were recognized by its constitution as having that competence. The Commission should not introduce unconstitutional provisions into the law of treaties; far from promoting the progress of international law, that would be a retrograde step.

141. If a State had no constitution, it should be encouraged to adopt one. Constitutions were an essential element of democratic life. It would, however, be dictatorial to impose the adoption of any particular rule on a State in advance.

142. Mr. FRANÇOIS was in favour of deleting paragraph (2) for reasons rather different from those advanced by Mr. el Khoury. Even if their constitutions contained no provision on competence to make treaties, all States had a well-established constitutional practice in that matter, which made paragraph (2) superfluous. Article 2 (A/CN.4/L.5) was sufficient.

143. The CHAIRMAN announced that he would have no objection to the deletion of the text under consideration

144. Mr. HUDSON asked for separate votes on the two articles. In his opinion, the article 2 previously adopted was not an adequate substitute for article 3 and article 4, paragraph (2), which the Commission was considering.

145. Mr. YEPES was in favour of retaining article 3. Even if the idea it contained was self-evident, it was in conformity with the regular practice of all countries, while in codifying the principles of international law it could not be omitted without leaving a gap. It must be stated who was competent to make treaties.

*It was decided, by 7 votes to 3, to retain article 3.*

146. Mr. HUDSON observed that article 2 (A/CN.4/L.5), considered at the beginning of the meeting, and article 4, paragraph (1) (A/CN.4/L.17), related to the

<sup>11</sup> See text in footnote 11 of summary record of 98th meeting.

<sup>12</sup> Summary record of the 99th meeting, para. 121.

<sup>13</sup> See summary record of the 99th meeting, para. 134.

same question. He suggested that the rapporteur reconsider those texts in the light of their similarities.

147. The CHAIRMAN, speaking as rapporteur, said that if he were free to do so he would delete article 4, paragraph (1).

148. Mr. YEPES was in favour of keeping article 4 for the same reasons as article 3.

*It was decided, by 7 votes, to delete article 4, paragraph (1).*

149. The CHAIRMAN asked whether it was necessary to keep article 4, paragraph (2), which assumed that in the absence of constitutional provisions the Head of the State was competent.

150. Mr. SANDSTRÖM, relying on the previous comments of Mr. Spiropoulos, pointed out the connexion between the text of that paragraph and article 2 of the draft examined at the beginning of the meeting. He thought that those texts should be examined in conjunction and proposed deferring their drafting till the next session.

151. Mr. HUDSON pointed out that in article 2 (A/CN.4/L.5) the words "through an organ competent for that purpose" introduced an idea which was not the essential one. Those words could be transferred, in a different form, to article 4, paragraph (2). The Special Rapporteur could make the necessary changes.

152. Mr. SPIROPOULOS, recalling that he would have preferred to delete both articles of chapter II, said that he was quite willing to adopt Mr. Hudson's suggestion if article 3 were kept.

153. Mr. KERNO (Assistant Secretary-General) explained that the two texts in question did not relate to the same problem. Article 4 related to the competence of State to make treaties, whereas article 2, which had been previously discussed, related to the assumption of treaty obligations by States.

*It was decided to entrust the Chairman, in his capacity as Special Rapporteur, with the preparation of a new draft for article 4.*

154. Mr. KERNO (Assistant Secretary-General) thought that for the current session, the Commission had practically finished examining the report on the Law of Treaties. At its next session it would be advisable for the Commission finally to settle the question of the Law of Treaties. In his first report (A/CN.4/23), para. 1 the Special Rapporteur had mentioned his intention of adding further chapters dealing with the interpretation of treaties and with their termination and possibly also with the obligation or effect of treaties.

155. The CHAIRMAN confirmed that it was his intention to submit at the 1952 session a complete draft covering the whole problem of treaties.

**General Assembly resolution 478 (V) of 16 November 1950:  
Reservations to multilateral conventions (item 4 (b) of  
the agenda) (A/CN.4/L.18)**

DISCUSSION OF MR. BRIERLY'S DRAFT REPORT

156. The CHAIRMAN presented his draft report, explaining that he had not wished to pre-judge any

solutions that might be arrived at in debate and was submitting it merely as a working paper.

157. The researches he had made, in particular the study of the General Assembly's discussions and of the Advisory Opinion of the International Court of Justice of 28 May, had shown him that the question of reservations was extremely complex.<sup>14</sup> The conclusions he had reached in his second report were somewhat different from those contained in the first. The development of his views would explain any differences between them.

The meeting rose at 6.10 p.m.

## 101st MEETING

Tuesday, 12 June 1951, at 9.45 a.m.

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*Chairman:* Mr. James L. BRIERLY  
*Rapporteur:* Mr. Roberto CORDOVA

*Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, 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.

**General Assembly resolution 478 (V) of 16 November 1950:  
Reservations to multilateral conventions (item 4 (b) of  
the agenda) (A/CN.4/L.18)<sup>1</sup> (continued)**

DISCUSSION OF MR. BRIERLY'S DRAFT REPORT (A/CN.4/  
L.18) (continued)

GENERAL REMARKS

1. The CHAIRMAN, after recalling that the Commission had already embarked on a general discussion of the

<sup>14</sup> See "Reservations to the Convention on Genocide, Advisory Opinion", *I.C.J. Reports 1951*, p. 15.

<sup>1</sup> Mimeographed document only, the text of which corresponds with drafting changes to Chapter II of the *Report of the International*

question of reservations at its second session<sup>2</sup>, suggested that the Commission now examine, paragraph by paragraph, the draft report he had prepared.

2. Mr. YEPES wished to submit some observations of a general character. He praised the report prepared by the Chairman and if he differed from its conclusions on certain points, it was only with deep regret and after considerable hesitation. He did not underestimate the great difficulties inherent in the problem.

3. However worthy of respect the opinion expressed by the International Court of Justice on the question of reservations to the Convention on Genocide,<sup>3</sup> he himself considered that, in the case in question, the Court's conclusions were not well-founded. They were based on the inadmissible concept of multilateral treaties, considered as a series of bilateral treaties. The opinion delivered by the Court would, in practice, considerably complicate the task of the depositary. Though well aware of the seriousness of such a decision, he considered, as did the Rapporteur himself, that the Commission could not adopt the Court's opinion.

4. To consider the question from another angle, the General Assembly, which, in its resolution 478 (V) of 16 November 1950, invited the International Law Commission "to report on the matter, especially as regards multilateral conventions of which the Secretary-General is the depositary", did not forbid the Commission to concern itself with reservations to bilateral treaties. Such reservations obtained, and provision should be made for them.

5. Similarly, the draft report did not contain any definition of a reservation. Admittedly, it was difficult to provide a definition, but, if the Commission did not say what a reservation was, all its work in that connexion would be useless.

6. Many of the formulae accompanying the ratification of treaties, and formally described as reservations, were not reservations in the strict sense of the word. The prospective definition should exclude them.

7. That was the case, for instance, in regard to the formula by which a ratifying State declared that such and such an article of the treaty could not be interpreted in such an such a way. That sort of formula constituted an interpretative clause. It was not a reservation, as it did not limit the application of the treaty.

8. Again, the formula "subject to subsequent ratification", which was at times attached to the signature, was not a reservation in the strict sense of the word. It did not limit the scope of the treaty; it was a suspensory condition.

9. Yet again, when, in ratifying a treaty, the Head of a State stipulated that the exchange of instruments of

ratification should not take place before the intentions of the signatory States were known or, alternatively, before the acceding States had taken certain legislative or other domestic measures in their respective countries, that did not constitute a real reservation. Such formulae did not limit the effects of the treaty; they were merely suspensory conditions.

10. Similarly, in the case of a treaty concluded between neighbouring States to regulate the admission of travellers and goods into their respective territories, if one of the parties stipulated that it excluded one of its ports from the application of the treaty, it did not make a real reservation, but merely withdrew a part of its national territory from the application of the treaty's provisions.

11. The Commission should, therefore, begin by defining a reservation. In that connexion he had himself drawn up two formulae for submission to the Commission, which were largely based on the definition contained in the Harvard draft (article 13)<sup>4</sup>. Those formulae were as follows:

(a) "A reservation is a formal declaration by a State party to a treaty, when signing, ratifying or acceding to the said treaty, whereby it limits the effect of certain clauses of the treaty, in so far as they apply to the relations between the State formulating the reservation and the other States parties to the said treaty".

(b) "A reservation is a formal declaration by a State party to a treaty, when signing, ratifying or acceding to the said treaty, whereby, while accepting the treaty as a whole, it excludes from its acceptance certain specified clauses of the said treaty, in respect of which it does not consider itself bound to the other States parties to the said treaty".

12. He also wished to make some further remarks on the way in which the Rapporteur had rejected the Pan-American Union solution of the question of reservations. He was a supporter of the practice followed by the Pan-American Union, and not of that advocated by the Rapporteur. Actually, the Pan-American Union's practice facilitated both the ratification of multilateral treaties and the making of reservations.

13. According to United Nations practice, it was necessary, for a reservation to be valid, that it be expressly accepted by all the States parties to the treaty, i.e. that it receive their unanimous consent. According to Pan-American practice, on the other hand, a reservation by a State was considered as tacitly accepted by the other parties, with the exception of those specifically objecting thereto. In such cases the treaty did not come into force between the State making the reservation, and the State which had announced that it did not accept the said reservation.

14. The United Nations had introduced an undesirable practice into the conclusion of treaties. It conferred on the parties to a treaty a veritable right of veto in a field in which, as it came within the sphere of the General Assembly, the veto was not applicable. There might be, for instance, a multilateral treaty concluded between all

*Law Commission covering the work of its third session.* (See vol. II of the present publication.) The drafting changes are indicated in the summary records of the 101st to 106th meetings. However, the "Annex" to doc. A/CN.4/L.18, which was not retained in the final text, was reproduced as a separate document in vol. II of the present publication.

<sup>2</sup> See summary record of the 53rd meeting.

<sup>3</sup> *Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951 p. 15.*

<sup>4</sup> See A/CN.4/23, Appendix A.

the States Members of the United Nations where one of those States made a reservation of secondary importance, (referring, for instance, to time limits), which did not affect the purpose of the treaty. That reservation was communicated to all the other members, and it was only when they had all accepted it that the State making the reservation became a party to the treaty. If a single one of those States objected, that would prevent the State making the reservation from becoming a party to the treaty.

15. He did not know whether the Commission had decided to endorse that right of veto, but, in his opinion, such a practice made it almost impossible for multi-lateral conventions to come into force, and, in any event, delayed them considerably. That had been clearly seen, for instance, in the case of the Convention on Genocide.

16. The draft report maintained that the practice of the Pan-American Union (which was the most scientific and the most democratic, and which, moreover, facilitated the codification of international law) was invented to meet the requirements of the American continent. That was not correct. Other conventions, concluded in the past, between countries in other parts of the world, some under the auspices of the United Nations, had followed that practice, perhaps without being aware of it. It was not, therefore, merely of regional interest.

17. In 1935, the Soviet Union wished to accede to a League of Nations convention for facilitating the International Circulation of Films of an Educational Character (Geneva, 11 October 1933) and made a reservation to which Chile objected. In a Note to the Secretary-General of the League of Nations, the Government of the Soviet Union made the proposal that the Convention should not be applicable in the relations of the USSR with Chile. That was tantamount to proposing the Pan-American system. The Chilean Government accepted the arrangement and Mr. Litvinov addressed a communication to the Secretary-General of the League of Nations in which he stated that, in his opinion, should no other signatory oppose the reservation, it might be considered as accepted by all, except Chile.

18. In 1912, that was to say, before the foundation of the League of Nations, the International Radio-Telegraph Convention, signed at London, appointed the British Government to act as depositary. When ratifying, the United States made a reservation. The British Government accepted that reservation and communicated it to all the other signatories. In reply to the Government of the United States the head of the Foreign Office, at that time Sir Edward Grey, stated that cognizance had been taken of the reservation which had been communicated to all parties. By so doing, the British Government adopted the Pan-American system in advance of its establishment.

19. The Belgian Government, as depositary for ratifications of the International Convention for the Unification of Certain Rules relating to Bills of Lading for the Carriage of Goods by sea, signed at Brussels in 1924, had taken the same course in regard to the reservation which accompanied the United States ratification. It

had accepted that reservation and communicated it to all the governments.

20. Mr. AMADO remarked that an important point was, whether the conventions in question contained any provisions regarding reservations.

21. In reply to a question by Mr. SPIROPOULOS, Mr. YEPES said that, in the above instances, the effect of the reservation was that the signatory formulating the reservation at the time of ratification became a party to the agreement. It was assumed that, failing a declaration on their part to the contrary, the other parties tacitly approved the reservation.

22. Mr. AMADO remarked that nobody denied that a State could make reservations. It was the juridical effect of the reservation that was in question.

23. Mr. KERNO (Assistant Secretary-General) pointed out that Mr. Yepes had said in his statement that the Secretary-General of the United Nations was not aware of the practice of tacitly accepting reservations. That statement was not correct. The United Nations was aware of, and applied the practice of tacitly accepting reservations. In that connexion, he would refer to the written statement addressed to the International Court of Justice by the Secretary-General, dealing with that very Convention on Genocide.<sup>5</sup>

24. Mr. YEPES felt that the report on the question of reservations, (A/1372) submitted to the General Assembly by the Secretary-General in 1950, was not altogether objective. It described the United Nations practice, but not that of the Pan-American Union. As a result the Assembly had not been able to study the structure, procedure or consequences of the Pan-American system.

25. The case of the Convention on the Declaration of Death of Missing Persons, signed on 6 April 1950, showed that the Pan-American system had been applied by the United Nations. That instance, and the others quoted above, showed that the Pan-American practice was not an invention, peculiar to one particular area of the world, but had been used by the United Kingdom, Belgium, the Soviet Union and even, in 1950, by the United Nations.

26. Only brief reference was made in the Chairman's draft report to the system adopted for conventions prepared by the International Labour Conference. It was true that those were very special conventions of a pronounced legislative character, bearing on special problems and approved not only by the representatives of States, but by employers' and workers' representatives as well. However that might be, reservations to those conventions were not admitted. That prohibition, which was to be recommended in the case of treaty laws, had enabled the depositing of more than a thousand ratifications. It therefore facilitated them. Some countries, such as India, Peru and Cuba, had attached reservations to their instruments of ratification, but the Director-General of the International Labour Office had drawn their attention to the above prohibition and, in most cases, those countries had withdrawn their reservations. The

<sup>5</sup> I.C.J., *Reservations to the Convention on the prevention and punishment of the crime of genocide. Pleadings and oral arguments*, pp. 97-103.

entry into force of those conventions had been facilitated and the development of labour law accelerated thereby.

27. The Commission might perhaps suggest to the General Assembly that it consider the banning of reservations accompanying the ratification of treaty laws. Most States would, doubtless, accept such a regulation and withdraw any reservations other than those of an essential nature that they might be tempted to make, rather than see themselves excluded from a convention which, from the point of view of international law, represented a step forward.

28. In paragraph 12 of the Chairman's draft report (A/CN.4/L.18), it was suggested that the Pan-American Union's practice, though well adapted to the relations between States within a defined geographical area, was not equally suited to the requirements of conventions concluded under the auspices of the United Nations. But more than a hundred conventions of all kinds, often in no way of a regional character, to which 21 States were parties, had been ratified in accordance with that practice. The American Treaty on Pacific Settlement (Bogota, 1948) for instance, was of immense importance and scope. Ecuador had made reservations to the Inter-American Treaty of Reciprocal Assistance (Rio de Janeiro, 1947), which had served as a prototype for the North Atlantic Pact but had nevertheless become a party to that treaty. Other treaties concluded in conformity with that practice were those concerned with Maritime Neutrality (Havana, 1928) and the Rights and Duties of States (Montevideo, 1933).

29. In all the above instances, the State ratifying with reservations had become a party to the treaty, but the treaty did not come into force as between it and the States which had signified their formal opposition to the said reservations. States that did not do so were considered as having tacitly accepted the reservation and were bound by the treaty.

30. The above all went to show the importance of the problem and how necessary it was for the Commission to study it exhaustively and to weigh the responsibility it would assume in adopting a decision contrary to the opinion of the International Court of Justice. The Pan-American practice should be extended, wherever possible, to conventions adopted by the General Assembly. It would not be the first time that a South American legal provision had found world-wide acceptance, and the experience gained since 1890, or even since 1826, (first Pan-American Conference at Panama, convoked by Bolivar) would prove of great value for the development of international law.

31. The CHAIRMAN considered that the Commission might give further consideration to Mr. Yepes' observations, and to those regarding the Pan-American Union's practice in particular, when examining the draft report. Two questions should, however, in his opinion, be settled first: the one concerned the definition of a reservation, and the other the possible extension of the Commission's study to reservations to bilateral treaties. In his opinion, those two questions did not fall within the Commission's competence and were foreign to the

mandate conferred on it by General Assembly resolution No. 478 (V).

32. As regards definition, that was superfluous; the General Assembly was aware of the point at issue, while reservations to bilateral treaties would appear to be excluded by General Assembly resolution 478 (V).

33. Mr. YEPES argued that the use of the words "especially as regards" in paragraph 2, sub-paragraph (a), of the resolution, gave the Commission a great deal of latitude. On the other hand, reservations to bilateral conventions were current practice. The treaty between Colombia and the United States for the settlement of difficulties arising out of the independence of Panama, had been ratified by the United States with reservations.<sup>6</sup>

34. The CHAIRMAN pointed out that a careful perusal of the paragraph in question would show that the only question which the International Law Commission was invited to study was the question of reservations to multilateral conventions.

35. Mr. SPIROPOULOS felt that the problem of reservations did not arise in the case of bilateral treaties. If one of the States made a reservation, either the other accepted it, in which case there would be a new treaty, or it did not accept it, in which case there would be no treaty at all.

36. Mr. AMADO wished to avoid a theoretical discussion on a matter which the Commission had already considered at its second session. He did not wish to recall the shades of thought which divided his views on the practice of the Pan-American Union in regard to reservations from those of Mr. Yepes, but only to make the point that his silence did not denote full consent. He proposed that the Commission proceed to examine the draft report by studying the various paragraphs in turn. Examination of the draft, which had been very carefully prepared, would not prevent the members from putting forward, at the appropriate point, suggestions that might be of interest to the Commission.

37. Mr. SPIROPOULOS would have preferred the Commission to begin with the conclusions to the draft report.

38. The CHAIRMAN and Mr. HUDSON supported Mr. Amado's suggestion.

*It was decided to examine the draft report paragraph by paragraph.*

39. Mr. KERNO (Assistant Secretary-General) recalled that the Secretary-General had been responsible for drawing the General Assembly's attention to the serious difficulties to which reservations, and objections to reservations, gave rise, and that it had been the Assembly's decision to submit the matter to the expert knowledge of the International Court of Justice and of the Commission.

40. In order that the position should be quite clear, he himself had concluded a verbal statement before the International Court of Justice by saying: "The Secretary-General seeks only to be the faithful, conscientious and impartial servant of all those concerned. His sincere

<sup>6</sup> Treaty of 6 April 1914; see Fauchille, *Traité de droit international public*, vol. 1, part 2, 1925, para. 513 (16), pp. 363-364.

desire is to be able to perform his depositary functions to the satisfaction of all. To do this, however, he needs a rule which is clear, universally accepted and easy to apply in practice.”

PARAGRAPHS 1-5 (*Paragraphs 12-16 of the “Report”*)

There was no comment on paragraphs 1-5.

PARAGRAPH 6 (*paragraph 17 of the “Report”*)

41. Mr. KERNO (Assistant Secretary-General) remarked that the first two lines of paragraph 6 were of a historical nature and might well be included in paragraph 5

42. Mr. HUDSON proposed that the first two sentences of paragraph 6 be included in paragraph 5, and that paragraph 6 start with the words: “The Commission noted” (“however” being deleted).

*The amendment was adopted.*

43. Mr. HUDSON thought that the extract from the Court’s opinion, quoted in the middle of the paragraph should be supplemented by the following further quotation from the Court’s opinion: “The solution of these problems must be found in the special characteristics of the Genocide Convention”.<sup>7</sup> That reference, which was intended to limit the application of the opinion, would make it easier for the Commission to justify the divergent conclusions it proposed to adopt as regards the question in general.

*It was so decided.*

44. As the result of a discussion on the sentence beginning with the words “In the second place”, in which the CHAIRMAN, Mr. HUDSON, Mr. CORDOVA and Mr. SPIROPOULOS took part, *it was decided* to redraft the sentence to read as follows: “In the second place the Court, naturally, gave its advisory opinion on the basis of its interpretation of the existing law.”<sup>8</sup>

45. Mr. YEPES suggested that the Commission mention in its report that the question of reservations to bilateral treaties had been raised in the course of discussion but had not been pursued.

46. Mr. HUDSON pointed out that the summary records provided details of the discussion. In his opinion, the study with which the Commission had been entrusted was limited by General Assembly Resolution 478 (V) strictly to the question of reservations to multilateral conventions.

*Mr. Yepes’ suggestion was rejected.*

PARAGRAPH 7<sup>9</sup>

*It was decided to redraft the paragraph and examine it at a later date.*

<sup>7</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951, p. 23.*

<sup>8</sup> The original sentence read as follows: “In the second place, the Court was asked to give its advisory opinion on the law as it existed”. (See also summary record of the 133rd meeting, paras. 42-43.)

<sup>9</sup> That paragraph read as follows: “The Commission considered the question of reservations to conventions at its... meetings, from... to... (Here add gist of discussions on salient points)”. It was later modified by the Special Rapporteur and embodied in para. 2 of doc. A/CN.4/L.22. See also summary record of the 125th meeting, para. 102.

PARAGRAPH 8 (*paragraph 18 of the “Report”*)<sup>10</sup>

47. Mr. HUDSON wondered whether the reference in the first line of the paragraph was to the practice adopted by the Secretariat of the League of Nations, or to that of the League of Nations itself.

48. The CHAIRMAN said that the reference was to the practice of the Secretariat, which had been approved by the Council of the League of Nations.

49. Mr. HUDSON proposed, if that were the case, to make the fact quite clear by amending the last phrase of the paragraph to read: “was approved by the Council of the League of Nations on 17 June 1927” (not 1922 as erroneously stated in document A/CN.4/L.18). He pointed out further that, as the practice of the League of Nations ante-dated the establishment of the Committee of Experts, the words “recommended by the Committee of Experts” were not accurate.

50. The CHAIRMAN proposed the substitution of “reviewed and endorsed” for “recommended.”

51. Mr. SPIROPOULOS, supported by Mr. HUDSON, considered that the Commission should ascertain what the Committee of Experts had done and reproduce the expressions it had used. Had it actually formulated a recommendation?

52. Mr. SCALLE considered that it would be desirable to ascertain whether the Assembly of the League of Nations had not also itself approved the practice in question.

53. After a discussion, in which the CHAIRMAN, Mr. HUDSON, Mr. YEPES and Mr. KERNO took part, Mr. SCALLE expressed the opinion that such approval had probably been given. All that was required was, therefore, to consult the Council’s Annual Report to the Assembly at its September 1927 session.

PARAGRAPH 9 (*paragraph 19 of the “Report”*)<sup>11</sup>

54. Mr. YEPES again recalled the case of the Convention on the Declaration of Death of Missing Persons, the provisions of which constituted an exception to the rule stated in the first sentence of paragraph 9, which was not therefore entirely accurate.

55. Mr. KERNO (Assistant Secretary-General) remarked that the Secretary-General had followed the practice referred to in paragraph 9 by omitting any reference to the subject in the Convention. It was not to be inferred therefrom that some other system could not have been expressly provided for. When, as in the case of the convention mentioned by Mr. Yepes, the conven-

<sup>10</sup> Paragraph 8 read as follows:

“It is noted that, according to the practice of the League of Nations, ‘in order that any reservation whatever may be validly made in regard to a clause of the treaty, it is essential that this reservation should be accepted by all the contracting parties, as would have been the case if it had been put forward in the course of the negotiations. If not, the reservation, like the signature to which it is attached, is null and void’. (League of Nations document C.357.M.130.1927.V.) This practice, recommended by the Committee of Experts for the Progressive Codification of International Law, was approved by the League of Nations on 17 June 1922.”

<sup>11</sup> Paragraph 9 ended with the words “could properly be assumed.”

tion contained express provisions on the question of reservations, the Secretary-General applied them. If there were none, he adopted the practice described in paragraph 9. That was quite clear from the first few words of paragraph 5 of the Secretary-General's report, quoted in paragraph 9 of Mr. Brierly's draft report.

56. Mr. HUDSON proposed the substitution of "has followed" for "follows". In that way the solution finally adopted would not be prejudiced.

*Paragraph 9 was approved subject to the above amendment.*

PARAGRAPH 10 (paragraph 21 of the "Report")<sup>12</sup>

57. The CHAIRMAN explained that he had tried, in that paragraph of his report, to describe the Pan-American Union's practice. He wished to know whether the first two lines of the paragraph correctly described that organization.

58. Mr. ALFARO stated that the title Pan-American Union had been given to the Secretariat of the Organization of American States. He had opposed that decision at Bogota, as he had desired that name to continue to apply to the organization as a whole. The description given at the beginning of the paragraph was correct.

59. Mr. HUDSON proposed the wording: "The Pan-American Union, which is the general Secretariat of the Organization of American States, follows a different system."

60. Mr. LIANG (Secretary to the Commission) thought that the word "reservation" should be used in the English text (line 4), not "reservations".

61. Mr. HUDSON read out the following paragraph from the dissenting opinion presented by Mr. Guerrero, Sir Arnold McNair, Mr. Read and Mr. Hsu: "What is important to note is that the Pan-American Union procedure rests upon rules adopted by the Governing Body of the Union, as approved by the International Conference of American States held at Lima in 1938; that is to say, it depends on the prior agreement of the contracting parties."<sup>13</sup>

62. The CHAIRMAN considered that reference should be made in the report to the paragraph from the dissenting opinion, which Mr. Hudson had read. He proposed to mention, but not quote it.

63. Mr. SPIROPOULOS considered the paragraph to be very important and asked whether the American members of the Commission concurred with that passage in the dissenting opinion.

<sup>12</sup> Paragraph 10 read as follows:

"10. The Pan American Union, which is now the central organ and general secretariat of the organization of American States, adopts a different system: the reserving State may become a party to a convention notwithstanding the refusal of one or more States to consent to the reservations proposed. The only juridical consequence of the rejection of a reservation is that the convention fails to enter into force between the parties immediately concerned, namely, between the reserving and the rejecting States. This legal effect was defined by the Governing Board of the Pan American Union in a resolution adopted on 4 May 1932:

"With respect . . ."

<sup>13</sup> *I.C.J. Reports 1951*, p. 37.

64. Mr. HUDSON recalled that the President, Mr. Guerrero, had been one of those presenting the opinion.

65. Mr. SANDSTRÖM asked whether the decision of the Governing Body, referred to in the Court's opinion, was the same as that quoted in Mr. Brierly's report. A good many years had elapsed between the decision and the Conference.

66. The CHAIRMAN explained that the question had been examined on two occasions.

67. In reply to an observation by Mr. Sandström, Mr. KERNO (Assistant Secretary-General) read out a passage from a memorandum submitted by the Pan-American Union:

"At the Eighth International Conference of American States, held at Lima, Peru, in 1938, a resolution (XXIX) was adopted on 'methods of preparation of multilateral treaties', in accordance with which the Conference approved the six rules of procedure adopted by the Governing Board of the Pan-American Union in its Resolution of May 4, 1932, together with other rules adopted in 1934 and 1936 dealing with measures to be taken to promote the ratification of treaties. Paragraph 2 of the resolution introduces a new procedure of delaying the ratification of a treaty with reservations until inquiry can be made as to the attitude of the other signatories with respect to the proposed reservation. Paragraph 2 reads as follows:

'In the event of adherence or ratification with reservations the adhering or ratifying State shall transmit to the Pan-American Union, prior to the deposit of the respective instrument, the text of the reservation which it proposes to formulate, so that the Pan-American Union may inform the signatory States thereof and ascertain whether they accept it or not. The State which proposes to adhere to or ratify the treaty, may do it or not, taking into account the observations which may be made with regard to its reservations by the signatory States.'<sup>14</sup>

68. Mr. YEPES explained that it was at the eighth Pan-American Conference that the rules provisionally accepted by the Governing Board had been finally adopted. The quotation in the report was incomplete. There were not only those three rules. Some rules, which Mr. Kernó had not read, were also to be found on page 14 of the Pan-American Union's memorandum. The decision taken should be quoted in its entirety. It was an excellent text and should be studied. It showed, for instance, amongst other things, that a reservation could be withdrawn by the State formulating it.

69. The CHAIRMAN said that he would complete the reference to the advisory opinion on page 37, by adding the text of the 1938 resolution.

70. Mr. HUDSON considered that Mr. Yepes was quite right in emphasizing the importance of that provision. He recalled that it had been held that a certain proposal by the United States constituted a reservation, and the American States had been consulting each other in the

<sup>14</sup> *I.C.J. Reservations to the Convention on the prevention and punishment of the crime of Genocide, Pleadings and oral arguments*, p. 18.

matter for months. In due course they would send a reply to the United States, which would then consider whether it should maintain its reservation.

71. Mr. AMADO considered that the provision took on even greater importance when its origin was taken into consideration. It had resulted from a controversy on the effect of reservations formulated in regard to the Washington Economic Convention. The question had been referred to the Committee of Jurists at Rio, which had not yet presented its report. There had also been a controversy on the effect of the reservations formulated in regard to the Bogota Economic Convention (1948). There was still, therefore, a considerable divergence of opinion on the matter and complete agreement had not, as yet, been attained.

72. Mr. YEPES observed that it could be seen that the Pan-American system was still in course of evolution and should therefore be treated in greater detail. In his opinion it was taking the matter rather too casually merely to say: "the only juridical consequence of the rejection of a reservation is that the convention fails to enter into force between the parties immediately concerned, namely, between the reserving and the rejecting States". That was only one of its juridical effects. The wording went too far.

73. The CHAIRMAN agreed to delete the word "only".

74. Mr. HUDSON proposed the deletion of the words: "between the parties immediately concerned, namely". They were superfluous.

75. The CHAIRMAN agreed to delete them.

#### PARAGRAPH 11 (*paragraph 23 of the "Report"*)<sup>15</sup>

76. Mr. HUDSON did not like the phrase: "applied yet another rule" and suggested: "adopted another criterion". It had adopted the criterion that any reservation must be compatible with the object and purpose of the convention. It was incumbent on each individual State to decide for itself whether the reservation formulated was, or was not, compatible with the object and purpose of the convention.

77. He pointed out that the quotation at the end of the paragraph was already included in paragraph 5 of the report. It would perhaps be sufficient to refer to that paragraph, or alternatively to delete paragraph 11 altogether. The latter course would have the advantage that paragraph 12, which again referred to the Pan-American Union, would come immediately after paragraph 10.

78. Mr. SANDSTRÖM, on the contrary, considered that the paragraph should be retained. Actually, the beginning of paragraph 13 read: "Nor does the Commission believe that the criterion of the compatibility of a reservation with the object and purpose of a convention", and paragraph 13 was some way away from paragraph 5. It should, however, be amended in the sense indicated by Mr. Hudson.

79. The CHAIRMAN remarked that, for the reader's purposes, paragraph 13 was not so very far away from paragraph 5.

<sup>15</sup> Paragraph 11 ended with the phrase "otherwise, that State cannot be regarded as being a party to the Convention."

80. Mr. ALFARO thought that the paragraph contributed to the clarity of the report, even if it did involve a repetition. Moreover, that itself was an advantage, as it called attention to the matter once more.

81. Mr. CORDOVA and Mr. HUDSON proposed that paragraphs 11 and 12 be transposed.

*It was so decided.*

82. After an exchange of views on an alternative wording for "applied yet another rule", in which the CHAIRMAN, Mr. YEPES, Mr. SPIROPOULOS, Mr. HUDSON and Mr. SCELLE took part, *the following wording was adopted:*

"The International Court of Justice however adopted . . . the criterion of the compatibility of reservation with the 'object and purpose' of the Convention."

83. Mr. SPIROPOULOS did not consider the wording adopted very satisfactory; he would come back to the point at the second reading.

84. The CHAIRMAN asked whether any useful purpose was served by retaining the quotation at the end of the paragraph.

85. Mr. HUDSON considered that, instead of the passage quoted in the paragraph under discussion, taken from the reply to question I, sub-paragraph (a) of the Court's reply to question 2 should be included instead. That sub-paragraph read: "that if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention". The words "which it considers to be incompatible" were very important, as they meant that any State could judge for itself whether a certain reservation was or was not compatible with the object and purpose of the convention.

86. He proposed that, as sub-paragraph (b) of the reply to question II also spoke of compatibility with the object and purpose of the convention, the whole of the reply to that question be included, with no mention of question I. He would repeat that the criterion was to be applied by each State for itself.

87. Mr. LIANG (Secretary to the Commission) pointed out that paragraph 13 constituted a criticism of the Court's reply to question I. Consequently if the reply to question II were inserted in the paragraph under discussion, the wording of paragraph 13 would have to be changed.

88. Mr. KERNO (Assistant Secretary-General) wondered whether the reply to question I was really at variance with that to question II. He believed that, in question I, the Court had wished to give an objective opinion on the criterion of compatibility, and that in its reply to question II it had said that "in fact" the criterion would be applied. The words "in fact" were very important. Briefly, the onus of replying was, in the first instance, placed on the parties. In his opinion, if the paragraph in question was to include any quotation, it should quote the replies to both question I and question II.

89. The CHAIRMAN, supported by Mr. Alfaro, said that he had no intention of quoting the whole of the

replies. He suggested that it would be sufficient to paraphrase them and that the matter might be left to the Rapporteur.

PARAGRAPH 12 (*paragraph 22 of the "Report"*)<sup>16</sup>

90. Mr. HUDSON did not like the phrase "the practice of the Pan-American Union may be well adapted". He would prefer to tone it down and say, for instance "while the practice of the Pan-American Union as related in paragraph 10 may meet the requirements of a regional organization". It would be better to word the sentence in that way, as the Commission did not consider that the Union's practice met the requirements of multilateral conventions in general.

91. Mr. HSU was not very satisfied with the wording of the paragraph. While he considered that it did not do justice to the Pan-American Union, that did not mean that he advocated the adoption of the Union's system by the United Nations. Moreover, in the Sixth Committee he had voted to refer the question to the International Law Commission, which proved that he had not yet formed his opinion.

92. The term "regional organization" implied that the system had only been applied in a region, which was not very satisfactory as the American region was extremely vast. Further, the wording of the paragraph gave the impression that, if the Pan-American system had not been adopted by one area only, it would be acceptable for world-wide Conventions. It would be preferable to say: "States of that area" instead of "States within a defined geographic area".

93. The real objection to the universal adoption of the Pan-American system was that, although the American region was a vast one, the interests represented therein were not very different. International rivalries were not strongly marked. There were hardly any between the United States and Latin America, while, as between the Latin countries themselves, conflicts of interests were not pronounced. On the other hand, at a world level, there were so many conflicting interests that clashes between them were apt to be severe, and, if translated into reservations, would stultify conventions. That was the reason why he was opposed to the adoption of the Pan-American system.

94. He would like to amend the last sentence of the paragraph, as it did not take account of the fact that the framers of the Pan-American conventions hoped that they would become world-wide. He proposed that the end of the paragraph be re-drafted to read: "Such conventions often have a world-wide character and have to take into consideration the conflicts of varied interests which would

weaken any convention if permitted to take the form of a reservation."

95. The CHAIRMAN did not see how the passage in question from his report could be considered as a criticism of the Pan-American Union.

96. Mr. YEPES wanted the whole paragraph redrafted. It gave the impression that its purpose was to disparage the Pan-American Union. The Commission should not adopt a text which presented the Pan-American Union in an unfavourable light. It could not be disputed that the practice followed by the Pan-American Union met the requirements of a regional organization, seeing that hundreds of conventions had been adopted under the Union's auspices.

97. He proposed that the first two lines of the paragraph be amended to read, "The Commission recognizes . . . is perfectly suitable" and to continue "and believes that it may be successfully applied to multilateral conventions in general and to those drawn up under the auspices of the United Nations in particular; in fact the Pan-American system has been applied by the United Nations".

98. The CHAIRMAN said that, before considering any possible amendments, the Commission ought to decide whether or not it proposed to retain the paragraph.

99. Mr. CORDOVA did not believe that the paragraph under discussion was intended as a criticism of the Pan-American Union. It was perhaps going too far to say that the system was suitable. Should the Commission accept the paragraph, it might say that the system was suited to the requirements of the American States. In his opinion, the conventions concluded under the auspices of the Pan-American Union were just as multilateral as those established under the aegis of the United Nations. Further, he did not think that any solution could be based on the number of States parties to a convention. It would be better to avoid saying that the Pan-American Union system was not suited to conventions concluded under the auspices of the United Nations for the reason that such conventions were of more universal application. All the conventions in question were multilateral.

100. Mr. EL KHOURY did not see why the Commission should give its reasons for not following either the Pan-American system or the opinion of the Court.

101. It had been argued that the system of the Pan-American Union could not be adopted, as it was a regional organization adapted to the needs of States in a defined geographical area. Failure to adopt the Court's opinion had been excused on the grounds that it only bore on the Convention on Genocide. That was a dangerous proceeding. The Commission should state the question in general terms, delete paragraphs 12 and 13, and say that it was dealing with a special question for the United Nations and did not need to follow other systems. The Pan-American Union system was not, in any case, the only one. There was also the system adopted by the World Health Organization, which had been described in that Organization's long report to the Court, and the system of the International Labour Organization.

102. There should be a new paragraph of rules on reservations, adapted to world-wide requirements.

<sup>16</sup> Paragraph 12 read as follows:

"12. The Commission, while recognizing that the practice of the Pan American Union, as related in paragraph 10, may be well adapted to the needs of a regional agency and to the close relations existing between States within a defined geographic area, does not believe that it is equally suited for the purpose of multilateral conventions in general, and to those drawn up under the auspices of the United Nations in particular. Such conventions often have a world-wide character; they are multilateral not only in form and in manner of adherence but in their purpose and essential juridical effect."

103. Mr. AMADO read out an extract from the memorandum on the question of reservations to the Bogotá Economic Convention, submitted to the Inter-American Economic and Social Council by the Brazilian delegation on 22 March 1950. That document, which was presented under the signature of Mr. Accioly, said :

“ The documents contained in the two volumes of documentation on the question of reservations, circulated by the Inter-American Economic and Social Council, reveal a considerable divergence of opinion on the concept of a reservation and on the compulsory character of such reservations. The divergence of opinion on this point started with a memorandum by the United States delegation, dated 25 June 1948, which expounded two opinions on the question, one of which was that a reservation, in order to be effective, must be accepted by all the contracting parties, whereas the other maintained that reservations were applicable in regard to the relations of formulating governments with the signatory States accepting them . . . On 19 August 1948 the Government of Mexico maintained, through its representative, that the dominant principle in the matter was that contained in the last part of article 6 of the Havana Convention on Treaties, according to which, in the case of international treaties, concluded between several States, any reservation in the instrument of ratification made by one State only bore on the application of the clause to which it referred, in the relations of the State formulating the reservation with the other contracting States . . . The United States, subsequently, went back on its original position. On 23 September 1948, Chile stated that there was no established international criterion for determining which of the various theses as to the scope of reservations to multilateral treaties should prevail. On 15 October 1948 the Colombian representative stated that he could not approve the thesis based on the last part of article 6 of the Havana Convention.”

Mr. Accioly concluded his memorandum of 22 March 1950 by saying that the question was so complicated that it should be submitted to the Inter-American Council of Jurists for the purpose of reaching an agreed view.

104. Mr. SPIROPOULOS said that the Commission was engaged in the discussion of the most important part of the whole question. He was not very satisfied with the drafting of paragraph 12 and had been impressed by Mr. Córdova's and Mr. el Khoury's remarks. He did not believe that it was by means of the reasons put forward in the paragraph that the thesis could be upheld. In his opinion both systems were good. The Pan-American Union was an organization covering a whole continent, and Mr. Yepes had quoted conventions in which the American system had been applied. That meant that it could be applied, even outside the American continent. If it should be necessary to look elsewhere for a system to recommend, the reason did not lie in the fact that the Latin American countries formed a region, but that the system which the Commission would propose must be based on existing international law. In the case of a convention concluded between the United States and some European and some Asiatic countries, for instance,

it would be necessary to establish a rule on reservations acceptable to all the States. It was, therefore, necessary that the system conform to international law, as understood by the Commission. Should the Commission consider that it had to justify the solution it adopted — which, as Mr. el Khoury had said, was not, perhaps, necessary — it would suffice to point to the above rule. In that case, however, it should either give the real reason for the adoption of that rule, namely, that it considered it to be the law in force, or else give some other reasonable and positive explanation.

105. Mr. AMADO observed that the result of that course would be to reopen the whole question of American versus European international law. So far as the Pan-American Union was concerned, American international law was in force.

106. Mr. SPIROPOULOS replied that it was in force, but only in America. The Commission was dealing with general international law, and that was why he had, previously, put forward the case of a convention concluded between the United States, and European and Asiatic countries.

107. Mr. AMADO was of the opinion that paragraph 12 was perfectly accurate. It could not be denied that agreement between the Latin American countries was facilitated by cultural unity and the absence of historical antagonisms. Was it better to advance such material considerations, or look for a juridical justification. That was another matter. It was not possible to refer to the law, as applied by the League of Nations, as there had been too great a lapse of time. He did not quite see how to re-draft paragraph 12.

108. Mr. CORDOVA considered that the Commission should first decide whether it proposed to adopt the paragraph on Pan-American practice. If it did not, alternative texts could be suggested.

109. Mr. ALFARO considered that there was a great deal of truth in what Mr. Amado had said. As regards the fears expressed by Mr. Hsu and Mr. Córdova he was of the opinion that everything should be discarded that might be considered as a criticism of the Pan-American Union's system. But he also felt that any inhabitant of the American continent would be prepared to admit that so-called American international law was the application of universal international law to the particular problems arising in America, and that the way in which they had been solved did not afford any guidance for the solution of world-wide problems. The decision not to adopt the Pan-American Union's system might be based on the existence of very close relations between the twenty-one republics of the western hemisphere. He suggested that the paragraph be re-drafted to read : “ The Commission, while recognizing that the practice of the Pan-American Union, as related in paragraph 10, may be well adapted to the needs of a regional agency and to the close relations existing between the American States, believes that in the case of a community of world-wide interests different rules would be required ”.

110. The CHAIRMAN repeated that he did not see any criticism of the Pan-American Union in the wording of

the paragraph as it stood, and did not understand how some of his colleagues could have gained that false impression.

111. Mr. YEPES asked whether it was the intention of the report to discard the Pan-American system entirely.

112. Mr. HUDSON said that the report did not discard it. It left room for its application, as was shown by the alternative proposals in Part 4 of the annex to the draft report.

113. The CHAIRMAN observed that Mr. Yepes wished the Commission to recommend the application of the Pan American Union's practice in all cases where the parties had not expressed in the text of the treaty their wishes in regard to reservations.

114. Mr. YEPES said that it was one of the systems that could be applied in such cases.

115. The CHAIRMAN replied that, where the treaty made no reference to the matter, only one system could be recommended.

116. Mr. CORDOVA felt that, if the so-called Pan-American practice was a good one, it could be applied universally, but that if it were bad, it could not be good for America. An explanation should be provided as to why a juridical solution, valid for one quarter of the world, should have to be changed when applied to States in other continents.

117. The CHAIRMAN considered that the Pan-American Union system was applied in America because the States of that continent considered it to be suitable for their purposes.

118. Mr. HUDSON felt that it was desirable to state the fundamental problem, which was, on the one hand, the relative importance to be attached to universality and, on the other, the integrity of the text and its uniform application. In some cases the integrity of the text and its uniform application outweighed the desire for universality, and in others universality was of greater importance than uniform application.

119. It was not for the Commission to render an appreciation of the practice followed by the Pan-American Union. It had simply to say whether it wished that system to be applied generally.

120. The Rapporteur was right in saying that no one rule was applicable in all cases. (A/CN.4/L.18, Annex), and that the integrity of the instrument must be preserved.

121. The CHAIRMAN considered that the Commission had to decide whether to recommend that, where a Treaty contained no special provisions in the matter, the Pan-American rule should be applicable.

122. Mr. CORDOVA proposed that the vote be postponed until the following day.

*It was so decided.*

The meeting rose at 1 p.m.

## 102nd MEETING

Wednesday, 13 June 1951, at 9.45 a.m.

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*Chairman:* Mr. James L. BRIERLY

*Rapporteur:* Mr. Roberto CORDOVA

#### *Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, 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.

#### **Law of Treaties: General Assembly resolution 478 (V) of 16 November 1950: Reservations to multilateral conventions (item 4 (b) of the agenda) (A/CN.4/L.18) (*continued*)**

#### DISCUSSION OF MR. BRIERLY'S DRAFT REPORT (A/CN.4/L.18)<sup>1</sup>

#### PARAGRAPH 12 (*paragraph 22 of the "Report"*) (continued)

1. The CHAIRMAN observed that the Commission had before it a proposal by Mr. Yepes that if the parties to a treaty had not inserted in the text of the treaty provisions covering possible reservations, the procedure to be followed should be that of the Pan-American Union.<sup>2</sup>

2. Mr. YEPES explained that the reason why he had proposed the adoption of that procedure was that, after examining the matter closely, he had come to the conclusion that the procedure recommended in the report was not acceptable.

3. His proposal was to be regarded as a basis for discussion. If good reasons were put forward for rejecting the Pan-American Union practice and adopting the course recommended, he would be quite willing to accept them. The drawbacks to the former procedure and the advantages of the latter ought to be clearly established before any decision were taken. The Commission should not commit itself in advance or yield to argument just because the weight of authority was behind it. Not a single

<sup>1</sup> See summary record of the 101st meeting, footnote 1.

<sup>2</sup> *Ibid.*, para. 97.

example had been given to justify rejecting the Pan-American Union practice, whereas he himself had mentioned that, in one particular instance, the United Nations had followed that practice.

4. He was willing to withdraw his proposal if sound arguments against it were forthcoming.

5. The CHAIRMAN and Mr. HUDSON pointed out that the alternative suggestion was the outcome of a prolonged study of the question.

6. At Mr. ALFARO's request, Mr. LIANG (Secretary to the Commission) read out the following text, proposed by Mr. Yepes at the preceding meeting to replace the text of the latter part of paragraph 12 of the draft report :

“The Commission believes also that the Pan-American system may be successfully applied to multilateral conventions in general and to those drawn up under the auspices of the United Nations in particular. In fact, the Pan-American system has been applied by the United Nations.”

7. Mr. CORDOVA said that, as he had already argued, the text of paragraph 12 did not give sufficiently convincing arguments. The reasons which justified rejection of the Pan-American practice should be included. Mr. Yepes might be willing to support the text if it were rounded off in that way.

8. The CHAIRMAN suggested that, pending distribution of a revised draft he himself had worked out to replace paragraph 12,<sup>3</sup> the Commission pass on to the examination of paragraph 13.

*It was so decided.*

#### PARAGRAPH 13 (*paragraph 24 of the “ Report ”*)

9. The CHAIRMAN said that paragraph 13 explained why the method recommended by the International Court of Justice in its advisory opinion of 28 May 1951<sup>4</sup> was not suitable for wholesale application to multilateral conventions.

10. Mr. YEPES thought that, after hearing the paragraph read out, the Commission could vote on it as a whole.

11. Following an observation by Mr. AMADO, Mr. YEPES said he would not press his proposal.

12. The CHAIRMAN asked the Commission to examine the sentences of the paragraph in question one by one.

#### *First sentence*

13. Mr. EL KHOURY asked whether the sentence meant that the Commission believed that the criterion adopted by the International Court of Justice was justified in respect of the implementation of the Convention on Genocide.

14. The CHAIRMAN replied that the sentence meant that the Commission did not commit itself to stating whether the Court's procedure was appropriate to that convention or not.

<sup>3</sup> See paras. 103–104 below and summary record of the 103rd meeting, paras. 1–118.

<sup>4</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951, p. 15.*

15. Mr. EL KHOURY suggested that paragraph 13 be deleted entirely, since it implied criticism of the Court's opinion.

16. The CHAIRMAN did not see how it was possible to avoid criticizing that opinion.

17. Mr. SPIROPOULOS thought that if the Commission made no mention of the Court's opinion, its very silence would be tantamount to criticism.

18. Mr. YEPES suggested deleting the two words “in general” at the end of the sentence. They implied that the Court's method of procedure might be suitable for certain types of convention.

19. The CHAIRMAN, supported by Mr. SANDSTRÖM, said that his intention had been to leave the question open. He had made an assertion in respect of the majority of conventions only, and had wished to remind the reader that the Court's opinion referred only to the Convention on Genocide.

20. Mr. SPIROPOULOS suggested adding the words “or otherwise” after the word “compatibility”.

21. Mr. HUDSON and the CHAIRMAN thought the addition would not in any way alter the sense of the text.

22. Mr. HUDSON, supported by the CHAIRMAN, suggested replacing the words “is suitable” by “is the most appropriate”.

23. Mr. SCELLE, supported by Mr. AMADO, Mr. EL KHOURY and Mr. YEPES, was in favour of keeping the words “is suitable”, and the equivalent wording in French, namely, “*puisse être retenu*”. The expression needed to be strengthened rather than weakened. The Court's procedure was not in any way “appropriate”.

*It was decided to keep the expression “is suitable”.*

24. Mr. HUDSON, referring to the English text, suggested inserting a comma after the word “convention” in the second line, and deleting the word “as”; and inserting a comma after the word “Genocide” in the third line.

*It was so decided.*

25. Mr. EL KHOURY found fault with the text under discussion for not stating precisely why the Commission did not believe that the Court's criterion was applicable generally. The Commission appeared to be making an arbitrary decision. It should be made clear what difference there was between the Convention on Genocide and other multilateral conventions, so that the Commission's opinion would be backed by sound arguments.

26. Actually, the matter raised so many difficulties that he would prefer to delete the whole passage.

27. The CHAIRMAN said that the reasons for the Commission's opinion were given further on. On the whole, the members of the Commission wanted the Commission's report to include an examination of the Court's opinion.

28. Mr. HUDSON suggested referring in the paragraph to a passage from the Court's opinion, which, incidentally, following a decision at the previous meeting, was to appear in paragraph 6 of the report,<sup>5</sup> by adding the

<sup>5</sup> Summary record of the 101st meeting, para. 43.

words "because of its special characteristics" after the words "Convention on Genocide". The Commission would thus avoid the necessity for discussing the soundness of the Court's opinion.

29. Mr. SANDSTRÖM thought the question was more than a matter of the wording of a mere sentence. At the previous meeting, Mr. Spiropoulos had put a question which had not received the attention it deserved.<sup>6</sup> He had suggested that the Commission base its opinion primarily on current international law. That notion was all the more justified in that the Court likewise based its opinion on international legal precedent; on page 21 of its opinion, for example, it stated:

"It is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto."

Then, on the basis of that notion, which the opinion described as "of undisputed value as a principle" the Court had considered that in the case of the Convention on Genocide a series of circumstances must be taken into account which would lead to a more flexible application of that principle. The Commission in its conclusions should refer to that argument.<sup>7</sup>

30. Mr. SPIROPOULOS said that the essence of Mr. Sandström's remarks was that the Court had recognized the general principle that reservations should be approved by all the contracting parties. On that point, except for Judge Alvarez, both the majority and the minority groups had been in agreement. By virtue of that principle, the Court had tried to discover the will of the parties, their contractual intent. The attempt had led a majority of the members to the conclusion that, in the specific instance of the Convention on Genocide, the general principle did not apply.

31. Mr. Sandström's point was a very sound one. It was a most interesting interpretation of the opinion.

32. Mr. SANDSTRÖM pointed out that, if the Commission wished to take that interpretation into account, the wording of paragraph 13 would be still further complicated.

33. Mr. HUDSON felt that the way in which the opinion went on weakened Mr. Sandström's argument somewhat. The Court spoke of "a more flexible application" of the general principle. The exceptions recognized were themselves very general, and were not confined to the Convention on Genocide.<sup>8</sup>

34. Mr. SPIROPOULOS pointed out that, by making very general exceptions to the general principle, the Court seemed at first sight to be rather contradicting itself.

35. The CHAIRMAN said that that was the kind of reflection which had led him to the conviction that the opinion was not clear.

36. Mr. CORDOVA said that, in the eyes of the Court, the flexible application of the general rule was justified by its anxiety to have the Convention on Genocide

adopted universally; that meant making certain concessions over the integrity of its text.

37. Mr. HUDSON said that the Court indicated that quite clearly on page 23 of the opinion, where it stated "the Genocide Convention was therefore intended . . . to be definitely universal in scope".

38. Mr. SPIROPOULOS thought the Court had apparently been anxious that the Convention on Genocide should enter into force even in respect of States which had made reservations. That was a very natural concern. To that end, it had sought to find in the intention of the parties demands which would enable it to recommend a practice making for universal application of the Convention. It was not the only occasion on which the Court had kept practical considerations very much in the foreground.

39. However, the majority and minority opinions in the Court, with the exception of a single judge, had considered the general principle that in its treaty relations a State could not be bound without its consent, as being inviolable. That principle was touched upon in the opinion, and was an important point.

40. Mr. SANDSTRÖM, in support of his interpretation of the opinion, quoted the following sentence from it:

"The Court recognizes that an understanding was reached within the General Assembly on the faculty to make reservations to the Genocide Convention and that it is permitted to conclude therefrom that States becoming parties to the Convention gave their assent thereto"<sup>9</sup>

41. Mr. SPIROPOULOS thought that, at the point where the Court's decision was mentioned in paragraph 13, some expression like "failing any intention to the contrary by the parties" should be inserted. The intention of the parties might of course be tacit. Caution must be exercised in expounding the rule.

42. The CHAIRMAN considered that the arguments just put forward should be urged again when the Commission came to discuss the passage in the draft report in which it expounded the rule it was recommending.

43. Mr. SPIROPOULOS pointed out that precautions of that kind would help to smoothe over the differences between the Commission and the Court.

#### *Second Sentence*

44. Mr. FRANÇOIS considered that the sentence was not altogether correct. It might perhaps be true if reservations invariably involved the rejection of an entire article. But sometimes their purpose was merely to modify an article, to give it a particular interpretation, or to replace it by the provisions of some domestic law. In many instances reservations, without depreciating the importance of the articles to which they referred, simply formulated a somewhat different procedure. In the case of mere modification, there could no longer be any question of a classification of provisions into two categories.

45. The distinction to be established was between reservations themselves and not between the provisions

<sup>6</sup> *Ibid.*, para. 104.

<sup>7</sup> See summary record of the 106th meeting, paras. 74-75.

<sup>8</sup> See Advisory Opinion, *I.C.J. Reports 1951*, pp. 21-22.

<sup>9</sup> *Ibid.*, pp. 22-23.

to which the reservations referred. That was the only conclusion to be drawn from the opinion, which, in its replies to questions I and II, definitely spoke of the reservations compatible (or incompatible) with the object and purpose of the Convention.

46. Mr. SPIROPOULOS felt on second thoughts that it would be better, as Mr. el Khoury had proposed, to make no reference to the practice recommended in the Court's opinion. The Commission might simply state that it had considered the opinion.

47. The CHAIRMAN, supported by Mr. François, considered that to remain silent in that way would show the greatest lack of respect for the Court's opinion.

48. Mr. AMADO was anxious that the Commission should not follow the path of absolute perfection, otherwise it might lose its way. No text could stand up to microscopic examination. It was beyond question that the Court had considered that a convention could contain two categories of provisions. In the text under consideration, all the Commission was doing was to point out with the utmost precision the distinction established by the Court between normative rules and contractual rules. With all due respect to the subtle arguments put forward in the Commission, he thought that too great a concern for perfection would lead nowhere.

49. The CHAIRMAN pointed out that the second sentence was taken from the actual commentary given in the joint dissenting opinion.<sup>10</sup>

50. Mr. FRANÇOIS thought that on that point the opinion was incorrect, and the argument used was fallacious. A distinction was necessary between reservations, but not between the provisions of the convention.

51. Mr. SCELLE pointed out that there were three categories of provisions rather than two, namely provisions referring directly to the object and purpose of the convention, provisions referring indirectly to such object and purpose, and provisions for rendering the convention operative (procedural provisions pure and simple).

52. He approved the entire paragraph. The account it gave of the Court's opinion was first-rate. The paragraph must not be scrutinized too minutely. The Commission might remember that when Byzantium was taken by the Turks in 1453 the local theologians in the Basilica of S. Sophia were arguing about the sex of angels! The Commission must beware of following their example.

53. To him the meaning of the opinion was not altogether clear. In certain cases the Court appeared to advocate the old notion that conventions were contractual in character; in other passages it seemed to favour universality. The opinion might be said to furnish anything you looked for. He was particularly in favour of the passage in the middle of paragraph 13 which stated that the distinction made by the Court could not be other than subjective.

54. Mr. YEPES said that it was with a view to sparing the Commission the difficulties it was now encountering that he had proposed a vote on the paragraph as a whole. While he had very reluctantly had to criticize certain parts

of the draft report, he approved paragraph 13 in its entirety as being drafted with great discretion and great respect for the Court. He therefore proposed that paragraph 13 be accepted in its entirety.

55. Mr. SPIROPOULOS said he was more and more convinced that the Court's opinion should not be scrutinized. The Commission would come up against serious obstacles, as it might have to admit that there were a number of contradictions. The Commission should avoid criticizing the Court's opinion. It had every reason to try to enhance the prestige of that body.

56. In any case, the Commission was not asked for any such criticism. It was asked to make concrete proposals. It should state simply what its proposals were, basing its statement on the current law, and there was no reason to depart from that since both the majority and minority views in the Court had quoted the rules of the current law.

57. The CHAIRMAN put to the vote Mr. Spiropoulos' proposal that the Commission should not state the reasons why it did not extend to multilateral conventions generally the procedure advocated by the Court in the case of the Convention on Genocide.

*The proposal was rejected by 10 votes to 2.*

58. Mr. YEPES asked the Commission to take up his proposal for a vote on paragraph 13 as a whole.

59. Mr. HUDSON thought that the wording of each sentence was important.

60. The CHAIRMAN said that, to meet both points of view, he would first of all read the complete text, and then put each sentence in turn before the Commission for approval. He read out the whole paragraph.

61. Mr. AMADO considered that the text was entirely satisfactory.

62. Mr. EL KHOURY agreed that it was extremely accurate in substance, but thought that it could be improved in form, and he proposed the following wording: "As to the opinion of the International Court of Justice on the procedure to be applied in the case of reservations to the Convention on Genocide, the Commission noted that the opinion of the Court is restricted to one special case having special characteristics and not intended by the Court to be applicable to all other cases of reservations to multilateral conventions in general, which is the task that the Commission is asked by the General Assembly to accomplish".

63. The wording, he thought, explained clearly the limited scope of the Court's opinion.

64. The CHAIRMAN pointed out that the same idea was already expressed in paragraph 6 of his draft report. He asked the Commission to get back to the second sentence of the paragraph.

65. Mr. FRANÇOIS thought that one part of the paragraph might be deleted, namely, from "It involves a classification..." to "...intrinsically possible to draw", so that the text would then read as follows: "...to multilateral conventions in general. The Commission does not see how...". Unlike Mr. Scelle, he thought the Commission should put everything under the microscope. It was not accepting the opinion of the

<sup>10</sup> *Ibid.*, p. 42.

Court; consequently every statement it made would be gone through with a fine-tooth comb, and it would be adversely criticized if it produced a text which was not juridically flawless.

66. The CHAIRMAN said he would be sorry to see the passage omitted, as it would weaken the Commission's argument.

67. Mr. SCHELLE suggested the following wording: "The adoption of the Court's criterion involves a classification of the provisions of conventions into several categories, a special distinction being made between those provisions forming part of the object and purpose of the convention and all other provisions". A sentence on those lines might perhaps meet the particular objection raised by Mr. François, while allowing one of the Commission's essential arguments to stand, namely, the argument that once the Court left it to each State to assess whether such and such a provision of a convention formed part of its object and purpose, it was making its criterion subjective, and a subjective criterion was no criterion at all.

68. The CHAIRMAN pointed out that a change on those lines did not meet Mr. François' objection.

69. He put to the vote Mr. François' suggestion for the deletion of the passage in paragraph 13.

70. *It was decided by 8 votes to 2 to retain the passage in substance.*

71. Mr. HUDSON proposed that the end of the second sentence be recast as follows: "... which they did not regard as contributing to effect its objects and purposes".<sup>11</sup>

72. He also suggested that the Commission was not paying sufficient attention to protocol provisions to which a State was at liberty to make reservations. Since, however, it did not seem likely that other States would object to such reservations, he would not press the point.

*The second sentence was adopted as thus amended.*

#### *Third sentence*

73. Mr. HUDSON suggested substituting the wording "It seems reasonable" for "It is reasonable" and "may be deemed to" for "must".

74. The CHAIRMAN saw no objection to the changes.

*The third sentence was adopted as thus amended.*

#### *Fourth sentence*

75. Following an exchange of views with the CHAIRMAN, Mr. HUDSON suggested recasting the end of the sentence to read: "the Commission does not see how the distinction can be drawn otherwise than subjectively".<sup>12</sup>

*The fourth sentence was adopted as thus amended*

#### *Fifth sentence*

76. Mr. HUDSON proposed that the words "purports to make" be replaced by the word "offers".

77. Mr. KERNO (Assistant Secretary-General) said that what the Commission had in mind was a dispute between,

<sup>11</sup> The original sentence read "which they do not regard as forming part of, or at the least contributing to make effective, its object and purpose."

<sup>12</sup> Instead of "can be other than subjective."

say, State A (making a reservation) and State B (objecting to the reservation). According to the Court, a dispute might equally arise between State B (objecting to a reservation) and State C (accepting the reservation). When the Court stated that a dispute could be brought on to the jurisdictional plane, it had in mind not only the dispute between States A and B, but also that between States B and C.

78. In the case of the Bulgarian reservation to the Convention on Genocide, against which Australia had raised an objection, the Court could not take cognizance of a dispute between Bulgaria (State A) and Australia (State B), because Bulgaria's reservation referred to article IX of the Convention, under which disputes as to the interpretation or application of the Convention were to be submitted to the Court. On the other hand, a dispute between Australia (State B) and a State which had accepted the Bulgarian reservation (State C) would come within the jurisdiction of the Court.

79. One had to be very alert to follow all the twists and turns of the various situations. He read out the following message from the Court's opinion:

"It may be . . . that certain Parties who consider that the assent given by other Parties to a reservation is incompatible with the purpose of the Convention will decide to adopt a position on the jurisdictional plane in respect of this divergence and to settle the dispute which thus arises, either by special agreement or by the procedure laid down in article IX of the Convention."<sup>13</sup>

80. According to his interpretation, the Court in that sentence meant to cover disputes between States which raised objections to reservations — and thus considered that the State formulating them was not a party to the Convention — and States accepting such reservations, and thus considering the State which had formulated them as party to the Convention.

81. The CHAIRMAN suggested inserting, after the word "incompatible", the words "but State C regards as compatible".

82. Mr. CORDOVA, having listened to Mr. Kerno's explanation, was in favour of adopting the CHAIRMAN's proposal as strengthening the Commission's argument.

*The fifth sentence was adopted with the above amendments.*

#### *Sixth sentence*

83. Mr. HUDSON compared the last part of the sentence ("... it cannot be known whether it has or has not become a party to the convention") with the substance of the opinion's reply to question II<sup>14</sup> and suggested substituting the following: "... it cannot be known for certain how far it has or has not become a party to the convention".

84. The CHAIRMAN thought the end of the sentence might be deleted.

85. Mr. YEPES, Mr. CORDOVA and Mr. ALFARO were in favour of allowing it to stand, with the amendment proposed by Mr. HUDSON.

<sup>13</sup> *I.C.J. Reports 1951*, p. 27.

<sup>14</sup> *Ibid.*, p. 29.

86. Mr. HUDSON said that, after a certain time had elapsed, it was possible to ascertain the position of a State which had made reservations. It was clear once all the States had indicated their attitude. From that time onwards, nothing could change the position of a State which had made reservations.

87. The CHAIRMAN and Mr. SPIROPOULOS did not agree. The Court might decide that certain States or even all the States had been in the wrong.

88. Mr. AMADO urged the Commission to take a vote on the paragraph. So far, no vital modification had been made to it. Its great virtue was that it said more than it appeared to say. The part of the sentence under discussion was excellent.

89. The CHAIRMAN put to the vote the question whether the latter part of the sentence as amended by Mr. Hudson should be kept.

*The amended phrase was adopted by 6 votes.*

*The sixth sentence was adopted.*

*Seventh sentence*<sup>15</sup>

90. Mr. HUDSON asked what were the circumstances in which the termination of a convention would depend on the number of States parties.

91. Mr. KERNO (Assistant Secretary-General) cited the case of the Convention on Genocide, article XV of which provided that: "If, as a result of denunciations, the number of Parties to the present Convention should become less than 16, the Convention shall cease to be in force as from the date on which the last of these denunciations shall become effective". In the same way, article XVII provided that "the Secretary-General of the United Nations shall notify all Members of the United Nations, and the non-member States contemplated in article XI, of the following: ". . . (e) the abrogation of the Convention in accordance with article XV". Thus, if out of the 16 States there was one which made reservations and was regarded as a contracting party, the convention would remain in force. If it were not regarded as a contracting party, the convention would no longer apply.

92. Mr. HUDSON still felt that the text was not sufficiently explicit. He would prefer to say "States ratifying and not denouncing the convention".

93. The CHAIRMAN pointed out that ratification might not be the only way of bringing a convention into force; accession or acceptance might be other methods. He considered the passage sufficiently clear.

94. Mr. HUDSON replied it was only after Mr. KERNO had given the explanation in regard to denunciation that he had understood the sense of the passage.

95. Mr. LIANG (Secretary to the Commission) wondered whether the words or both "after" or the termination" were appropriate.

*It was agreed that the words be deleted.*

96. The CHAIRMAN observed that Mr. HUDSON suggested adding the following sentence at the end of paragraph 13:

" . . . and where a convention confers jurisdiction on the International Court of Justice over disputes concerning the interpretation or application of its provisions, and such jurisdiction is invoked by a party, difficulty might arise in determining which are the parties to the convention entitled to intervene under article 63 of the Court's statute".

97. Mr. HUDSON said that the sentence cleared up one particular point which was of the utmost importance in the case of conventions where some article referred the issue to the International Court of Justice. It might happen that State A had made reservations which were not accepted by State B but were accepted by States C and D. If State B brought an action before the Court against State C, and State A expressed its intention to intervene, State B might reply that, as it was not a party to the convention it was not entitled to intervene. Hence it was for the Court to decide whether Article 63 of its statute was applicable or not. That raised a difficulty in regard to the exercise of the Court's jurisdiction.

98. Mr. CORDOVA pointed out that it was the Court itself which had created that difficulty.

99. Mr. KERNO (Assistant Secretary-General) wondered therefore whether the sentence should be included.

100. Mr. SANDSTRÖM thought the notion was already expressed in the words at the end of paragraph 13: "the status of the convention itself may be thrown into doubt".

101. The CHAIRMAN agreed that though it was already expressed, the addition proposed by Mr. HUDSON made it clearer.

*It was decided by 8 votes to add the sentence to the end of paragraph 13.*<sup>16</sup>

102. Mr. EL KHOURY explained that the reason why he had abstained from voting was that the vote referred to paragraph 13 with which he did not agree.

PARAGRAPH 12 (*resumed from the beginning of the meeting*)

103. The CHAIRMAN said he had redrafted paragraph 12 in order to meet certain criticisms of the text he had proposed in document A/CN.4/L.18 and which he had felt to be justified.

104. Mr. YEPES thanked the Chairman for taking into account various observations he had made. He would be glad to have time to study the text, as it concerned a very important point in American law. He requested the adjournment of the discussion until the following day.

105. The CHAIRMAN saw no reason why that should not be done.

*It was so decided.*

PARAGRAPH 14 (*paragraph 26 of the "Report"*)

*First sentence*<sup>17</sup>

106. Mr. HUDSON questioned whether the assertion was really true as a general rule. It was possible for a

<sup>16</sup> However, in the final text, that sentence was inserted before the last sentence of paragraph 13.

<sup>17</sup> It read as follows: "It is certainly desirable that multilateral conventions should have the widest possible application."

<sup>15</sup> Last sentence of paragraph 24 of the "Report".

multilateral convention, e.g. the North Atlantic Pact, to be open for signature by certain States only. He would prefer to see the word "often" added.

107. Mr. YEPES thought that the expression "in general" would meet the objection.

108. The CHAIRMAN was not sure that those words would fully meet the situation. The objection was that certain conventions were not open to all States.

109. Mr. AMADO asked whether there was anything against the expression "certainly desirable", as used in the text, since the Commission's task was to develop international law.

110. The CHAIRMAN thought that if the first sentence were read in conjunction with the paragraph as a whole, there was no further room for misunderstanding. He read out the rest of the paragraph.

111. After a general exchange of views as to the best way of expressing the idea that it was desirable for all States to become parties to multilateral conventions framed for universal application, or at the very least all those States whose participation would help to bring about the objects of conventions in which universal application was neither possible nor desirable, the Commission left it to the rapporteur to redraft the first sentence.

112. Mr. LIANG (Secretary to the Commission) was doubtful about the word "application". There were two notions involved: application in the sense of acceptance — and obviously it was desirable for as many States as possible to become parties — and application in the technical sense, which might equally well be the sense in which the word was used in the first sentence.

113. The CHAIRMAN said he was prepared to use the word "acceptance".

#### *Second and third sentences*

114. Mr. HUDSON, referring to the second sentence<sup>18</sup> of the paragraph, pointed out that bilateral treaties too settled matters of international importance. He suggested the term "of wide international concern". He was not happy about the third sentence. He asked what the word "price" referred to.

115. The CHAIRMAN explained that the "price" was the fragmentation of the convention into bilateral conventions, in other words the destruction of the integrity of the text.

116. Mr. HUDSON suggested the wording: "and it may often be more important to maintain the integrity of the convention than to aim at acceptance of it" — cutting out the words "whatever the price may be" and ending the sentence with "... even at the price of possibly limiting the number of States which may become parties".

117. Mr. ALFARO suggested the following version: "It may be more important to maintain the integrity of a convention than to secure a large number of acceptances".

118. Actually, the Pan-American practice had the advantage of ensuring a great number of ratifications, though the system recommended in the report allowed the integrity of the text to be maintained. It would be well to specify which system was advocated, otherwise it would not be clear what was meant by "whatever the price may be".

119. Mr. CORDOVA thought an explanation was necessary, since it was not entirely clear from the text as it stood.

120. Mr. HUDSON thought that if the integrity of the text were maintained, there would be no fragmentation. One might use the expression: "... more important to maintain the integrity of a convention, whatever the price may be, than to aim...".

121. Mr. YEPES found that, reading the French text, the expression "*à tout prix*" would be better left alone. The French version was beyond reproach.

122. The CHAIRMAN said he would change the English text to "at any price".

123. Mr. HUDSON suggested "at the price of fragmentation of the convention".

124. Mr. EL KHOURY considered that everything else must be sacrificed to integrity.

125. Mr. ALFARO quoted the example of the Inter-American Arbitration Treaty which made arbitration compulsory in respect of a large number of issues. The treaty had been ratified by 16 States, 8 of which had made reservations, mostly aimed at limiting considerably the scope of the treaty and making arbitration optional. The question was whether it was preferable to have a treaty ratified by 8 States and introducing the notion of compulsory arbitration or a treaty ratified by 16 States, 8 of which were opposed to compulsory arbitration.

126. Mr. HUDSON said that the Commission was making its preference clear.

127. Mr. SANDSTRÖM wondered whether the expression "a reasonable degree of uniformity" was satisfactory. He thought a stronger expression should be used, e.g. "it is essential to maintain uniformity".

128. The CHAIRMAN agreed to delete the words "a reasonable degree of".

*The second and third sentences were adopted as thus amended.*

*The remaining two sentences of the paragraph were adopted without comment.*

#### PARAGRAPH 15 (paragraph 25 of the "Report")<sup>19</sup>

129. Mr. SANDSTRÖM suggested that the Commission say merely: "it is impressed by the complexity...".

<sup>19</sup> Paragraph 15 read as follows:

"15. The Commission has been asked to pay special attention to conventions of which the Secretary-General is the depositary. As regards these it is impressed by the immense complexity of the task which the Secretary-General would be required to undertake if reserving States can become parties to a multilateral convention despite the objections of some of the parties to the reservations they have put forward. Not only would he be required to keep account of the manifold bilateral relationships which might result from this freedom, but in the event of a dispute he would have

<sup>18</sup> The second sentence read as follows: "The very fact that they are multilateral implies that they deal with subjects of international concern, that is to say, with matters which are not only susceptible of international regulation but regarding which it is desirable..."

130. The CHAIRMAN agreed to delete the word "immense".

131. Mr. HUDSON suggested deleting the words "as the Commission believes it is" at the end of the paragraph.

*It was so decided.*

132. Mr. HUDSON suggested replacing the final sentence of the paragraph by the following: "The Secretary-General is already the depositary of many multilateral conventions and certainly will become the depositary of many more; hence . . .".

133. Mr. YEPES found the French text very satisfactory.

134. The CHAIRMAN suggested an English text based on the French text.

135. Mr. HUDSON read out the following paragraph from the opinion of the Court: "Such being the situation, the task of the Secretary-General would be simplified and would be confined to receiving reservations and objections and notifying them".<sup>20</sup> He did not share the Court's optimism.

136. The CHAIRMAN hoped that the Commission would not change the sentence in his draft report to make it tally with the wording used by the Court. The Court did not appear to have realized the burden it was placing on the Secretary-General.

137. Mr. CORDOVA thought the Sixth Committee would consult the Secretary-General.

138. Mr. KERNO (Assistant Secretary-General), with the help of Mr. HUDSON and Mr. ALFARO, explained that the problem of the complexity of the Secretary-General's task was affected not only by its character but by its scope. Obviously, if it were a case of only one convention, as with the Court, the task was less onerous than if it applied to all conventions.

139. The CHAIRMAN asked the Commission to allow him to draft a sentence on those lines, to be placed after the second sentence, or possibly after the first, and stating something to the effect that for a single convention the task was simpler, but that the Secretary-General was already the depositary of a large number of conventions (the actual number to be given) and that it was likely that the number would be considerably greater in the future.

140. Mr. KERNO (Assistant Secretary-General) said that the Secretary-General was already the depositary of more than 100 multilateral conventions, about 60 of them recent and about 40 dating from League of Nations days.

141. Mr. SPIROPOULOS said that, though he had not asked to speak at the beginning of the discussion on the paragraph in question, he was opposed to it in its entirety as having nothing to do with the question put to the Commission. That could be seen by reading General Assembly resolution 478 (V). There was no connexion

between duties of the depositary and the system advocated by the Commission.

142. What led the Commission to adopt the system was its anxiety to maintain the integrity of conventions. The facilitating of the depositary's task was an altogether separate question.

143. The CHAIRMAN pointed out that the resolution stated: "especially as regards multilateral conventions of which the Secretary-General is the depositary".

144. Mr. SPIROPOULOS maintained that the resolution stressed the convention's rather than the Secretary-General's task. The Commission's duty was not to examine whether such and such a principle made the Secretary-General's task heavier; its decisions should be based on concern for maintaining the integrity of conventions.

145. Mr. LIANG (Secretary to the Commission) observed that, if the text of the resolution were examined along with the first sentence of paragraph 15, it could be argued that the Commission was asked to give special attention to the conventions of which the Secretary-General was the depositary; but to confine itself to submitting proposals for the codification and progressive development of the law, which was the crux of the problem. However, paragraph 15 dealt with one particular aspect of the Secretary-General's functions as depositary. He thought it was desirable to indicate the Secretary-General's positive functions as an introduction to the sentences which were to follow. He agreed that there was some truth in what Mr. Spiropoulos had said.

146. Referring to Mr. Hudson's comment, he wondered whether the Commission really wished to state, as would appear from the second sentence, that even if it involved no more than the procedure for one single convention, the Secretary-General's task might already be unduly complex.

147. Mr. HUDSON also felt that it would be well to add something following the first sentence, for example, a redrafted version of the final sentence. With regard to the second point raised by Mr. Liang, all that was needed was to put the word "convention" in the second sentence into the plural. It might be a good idea to ascertain exactly what resolution 478 (V) expected of the Commission.

148. Mr. KERNO (Assistant Secretary-General) pointed out that it was not merely a question of the administrative burden placed on the Secretary-General, since after all an administrative task could always be accomplished with adequate staff. It was a question rather of the proper performance of his task by the depositary. That must be referred to. It was in fact because the Secretary-General found it difficult to discharge his functions that he had appealed to the General Assembly.

149. Mr. HUDSON said that there were undoubtedly cases where the depositary had to take a stand. He had to decide whether a reservation had or had not been made, and it was often extremely difficult to arrive at any conclusion on that point, for example, in the case of the United States, where owing to the competence of the Senate in respect of ratification of treaties, it was the

no means of determining the admissibility of a reservation tendered. For so large a depositary of major multilateral conventions as the Secretary-General may be expected to become, the resulting administrative burden would be very great, even if the task is not one which it would be impossible for him properly to discharge, as the Commission believes it is."

See also summary record of the 104th meeting, para. 27.

<sup>20</sup> *I.C.J. Reports 1951*, p. 27.

custom to use the expression: "It is our understanding that...". That point had to be settled before the Secretary-General could set in motion the administrative procedure relating to reservations.

150. Mr. SANDSTRÖM said he had been about to make the same comment as Mr. Kernó. The Commission's problem was to deal with the difficulties likely to confront the Secretary-General, not with the amount of work given him.

151. The CHAIRMAN, supported by Mr. Hudson, observed that the Secretary-General would invariably have to decide whether a reservation had or had not been made, whatever system were adopted.

152. Mr. YEPES remarked that the exchange of views indicated the desirability of adopting his proposal for a definition of reservations. Otherwise the Secretary-General had no formula he could apply. He asked whether Mr. Spiropoulos was proposing the deletion of the whole of paragraph 15.

153. Mr. SPIROPOULOS said that what he was proposing was the deletion of the part referring to the Secretary-General's task.

154. Mr. YEPES supported the proposal. The Commission's task was to examine reservations. The Assembly had asked the Commission "in the course of its work on the codification of the law of treaties, to study the question of reservations to multilateral conventions both from the point of view of codification and from that of the progressive development of international law".

155. The resolution stipulated that priority was to be given to that study. As the Assistant Secretary-General had stated, it was not for the Commission to examine the Secretary-General's task and decide whether it was easy or difficult; what it had to do was to state whether the system it advocated for reservations was a contribution to the codification and development of international law.

156. Mr. CORDOVA thought it was desirable to discover what the Sixth Committee meant by the expression "especially as regards reservations to multilateral conventions of which the Secretary-General is the depositary". In his opinion the Commission should also go into the question of the Secretary-General's task.

157. Mr. KERNÓ (Assistant Secretary-General) thought the answer to the questions was quite simple. The Secretary-General had put before the General Assembly certain difficulties he had experienced, with a request for directives. The Assembly had decided to consult the Court in respect of the Convention on Genocide, and the Commission for an opinion *de lege lata* and *de lege ferenda* before issuing those directives.

158. The General Assembly had considered that, in the case of multilateral conventions negotiated under the auspices of the United Nations, the Secretary-General should be given certain directives, but that the opinion of

the International Law Commission was necessary before that was done.

159. Mr. SPIROPOULOS was not altogether sure that Mr. Kernó's view was correct. The difficulty had been to ascertain what method to adopt. If the method were laid down in full detail, the Secretary-General's task became eminently simple. He thought the General Assembly had wished to have the Commission's opinion on the implications of reservations.

160. Mr. HUDSON observed that Mr. Yepes had drawn the Commission's attention to its instructions. He doubted very much whether the General Assembly had known precisely what it did want. Obviously there was no question of codification in the present instance, since the existing law was inadequate. On the other hand, it would be very useful for the progressive development of international law to find a solution. However, the General Assembly had asked for a report to be submitted to it at its sixth session. Since it was clear that the Commission could not complete its task in regard to the development of international law within a matter of months, it did look as if the Assembly had had something more limited in mind.

161. The General Assembly wanted advice from the Commission to enable it to formulate directives for the benefit of the Secretary-General. The Commission should endeavour to comply by envisaging two viewpoints: first of all, administrative difficulties, and secondly, the satisfactory exercise of the Secretary-General's functions as depositary.

162. Mr. AMADO remarked that the Assembly had been so worried by the ambiguity of the text of paragraph (a) that it had added paragraph (b).

163. The question had arisen out of the differences of opinion which had come to light. There were three systems: the League of Nations system, the Pan-American practice and the Russian system of a majority and a minority of States. The Sixth Committee had decided to remove the issue from the political plane and to give the International Law Commission an opportunity of discussing the problem.

164. Mr. SCALLE considered that the question covered both the codification and the development of the law. It was a task which might possibly have its legislative aspect. Supposing the situation could arise within any particular State, the question would be, say, whether a notary was to follow this or that special procedure. The question of procedure might be extremely important. He did not think the Commission was going beyond its instructions in stating how the registration of reservations was to be performed.

165. Mr. SANDSTRÖM observed that in its conclusions the report referred frequently to the functions of the depositary. He thought the Commission should also assess the difficulties presented by the several systems.

The meeting rose at 1 p.m.

## 103rd MEETING

Thursday, 14 June 1951, at 9.45 a.m.

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*Chairman:* Mr. James L. BRIERLY

*Rapporteur:* Mr. Roberto CORDOVA

#### *Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

*Secretariat:* Jr. 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.

#### **Law of treaties: General Assembly resolution 478 (V) of 16 November 1950: Reservations to multilateral conventions (item 4 (b) of the agenda) (A/CN.4/L.18) (continued)**

#### DISCUSSION OF MR. BRIERLY'S DRAFT REPORT (A/CN.4/L.18)<sup>1</sup> (continued)

#### PARAGRAPH 12 (paragraph 22 of the "Report") (resumed from the preceding meeting)

1. The CHAIRMAN, speaking as Special Rapporteur, submitted the following text to replace paragraph 12 of the draft report:

"The members of the Organization of American States are in a special position. Their common historical traditions and their close cultural links with one another have no counterpart in the relations of the general body of States, and a procedure which is suited to their special needs is not necessarily the most appropriate for application to multilateral conventions in general. The Pan-American Union procedure, as described in paragraph 10, is well designed to secure the ratification of multilateral conventions by as many States as possible, and in some multilateral conventions this may well be the most important consideration. When this is the case it is always possible for States to adopt this procedure by inserting a suitable provision to this effect in the convention. But there are other multilateral conventions where the integrity and uniform application of the convention is a more important consideration than its universality, and the Commission believes that

this is especially likely to be the case with conventions drawn up under the auspices of the United Nations. These conventions are often of a law-making type in which each State accepts limitations on its own freedom of action on the understanding that the other participating States will accept the same limitations on a basis of equality. The Commission therefore does not recommend that the Pan-American procedure should be adopted as the procedure to be followed generally when the parties have themselves failed to indicate their intentions."

2. Mr. HSU supported the new draft, which did away with all the difficulties. The second sentence was exactly what the Commission had had in mind in referring to the regional character of the Organization of American States; it was not necessary to speak of regions, and it was even preferable to avoid doing so. The Balkans, for example, were only part of a region, and were the seat of continual conflicts.

3. Later in the new draft it was said: "But there are other multilateral conventions where the integrity and uniform application of the convention is a more important consideration than its universality"; that expressed exactly what the report brought out. The penultimate sentence was also very clear. With the changes which had been made, the paragraph was now perfect.

4. It was most satisfactory that the Rapporteur had been able to draft such a paragraph, for paragraph 12 was one of the most important in the report. It might be necessary to bear in mind that paragraph 13 of the draft report (A/CN.4/L.18) would be scrutinized by seven judges of the International Court of Justice, but paragraph 12 would be scrutinized just as keenly by twenty-one sovereign States.

5. Mr. SCELLE also expressed his unqualified support for the drafting of paragraph 12. He felt some hesitation however, about the word "special" in the first sentence. Any group of States was in fact in the same position, and the same considerations could apply to the Arab League. He wondered if there was any point in giving a special place to the Pan-American Union, since in fact the Organization of American States had no special characteristics. It was one system and it was the one into which the American States freely entered, but it was not the only system that could be conceived. He would like to hear the views of the Chairman and of the Commission as to whether a continental or regional organization had any special features. He would not wish the Pan-American system to be regarded as well-suited to the Pan-American Union only, as it might also suit other organizations.

6. He proposed that before the words "are in a special position: "the following words be inserted "and the same may apply to any other regional or continental organization."

7. He approved the redraft, which was otherwise excellent, particularly the passage relating to conventions of a law-making type. He did not ask the Commission to define what it meant by conventions of a law-making type, but proposed that it say that such conventions are "always" of a law-making type.

<sup>1</sup> See summary record of the 101st meeting, footnote 1.

8. Mr. YEPES thanked the Special Rapporteur for having taken into account certain criticisms he had made of the first draft relating to the procedure used by the Organization of American States in respect of reservations. However, he feared that the redraft was not satisfactory.

9. If the various statements were considered separately, they were true. The second sentence expressed an absolute truth, but the conclusions drawn from it were feeble in the extreme; it was said that the procedure used by the American States would not be suited to a world organization. He believed that a system of individual exceptions presented far greater difficulties in a group united by historical ties than in a loosely-knit organization like the United Nations. If a method such as that used by the Pan-American Union had proved itself adaptable to a regional organization, it was *a fortiori* adaptable to an organization which would put less strain upon it.

10. It had been said that the conventions to which the Pan-American method applied were very different from those concluded under United Nations auspices. In point of fact the former were much more markedly law-making than the latter. Leaving the United Nations Charter aside, he defied anyone to find in the history of the League of Nations, or of the United Nations, a convention which went further than the Charter of American States. He would refer also to the Bogotá Pact of 1948 and the Rio de Janeiro Treaty of 1947, the latter of which was an extremely important law-making convention, which had served as a basis for the North Atlantic Treaty. The two arguments invoked in paragraph 12, namely, the close cultural links between countries of Latin America and the difference in character between conventions drawn up under United Nations auspices and conventions drawn up by the Pan-American Union, recoiled against the main thesis of the report. If the Pan-American procedure was suited to a close association of States, it would be even better suited to the United Nations.

11. The question had become somewhat distasteful to him as he had had to adopt a combative attitude which he did not like. The view seemed to be held, however, that the only satisfactory method was that envisaged in the biased report presented to the General Assembly by the Secretary-General,<sup>2</sup> which was a piece of *pro domo* pleading designed to show that there was only one procedure for reservations.

12. It had been said that the Pan-American method was unacceptable, but it was as well founded in law as the other, and it was moreover the least bad — he used that term because all reservations were bad in themselves — in that it facilitated the ratification of conventions and their entry into force.

13. In his statement, he was merely trying to provide information; he was not advocating one particular system because it made reservations easier. The ideal system would be to do away with reservations altogether, but that was impossible because they were a necessary evil.

14. The two methods pre-supposed the absolute necessity

of reservations being tacitly or expressly accepted by the other Parties to a treaty in order for those reservations to have effect so far as those Parties were concerned, and on that point there was no difference between them. He hoped that that satisfied Mr. Scelle in that respect; in his memorandum on reservations to multilateral conventions (A/CN.4/L.14, para. 14, or p. 7 of the English mimeographed text), Mr. Scelle stated: "No reservation can take effect after signature, unless of course it is unanimously accepted by all the signatories and parties, in which case it amounts to a modification of the treaty." It would be seen that the American States did not impose upon the other contracting parties the inadmissible obligation to accept reservations; their system differed from the Russian system of reservations which took effect at the wish of a single State, and was, in fact, a condemnation of it.

15. The American States could not accept the method used by the League of Nations and the United Nations, for all that the Secretary-General had given an enthusiastic description of it. Although the effect of reservations *vis-à-vis* the contracting parties as a whole was the same in the two methods, there were differences between them which militated in favour of the Pan-American system. In the first place there was a difference of procedure. Under the League of Nations system, the depositary of a multilateral convention could not accept deposit of a ratification subject to reservation, unless he had the prior agreement of the other parties. Under the Pan-American method, the depositary entered into communication with the State which had formulated the reservation, whose comments it transmitted to the other interested States; if subsequently the State which had ratified subject to reservation still maintained that reservation, the depositary accepted deposit of the ratification coupled with the reservation, and the State in question became a party to the convention.

16. There was clearly a world of difference between that system, the League of Nations system and the Russian system, under which the depositary was bound to accept the reservation without transmitting it to the other States and without entering into further communication with the State in question. In America, the depositary received the reservation but pointed out to the State that was formulating it that it might perhaps prejudice the implementation of the convention etc. Then, even if the State in question still maintained its point of view, the reservation was deposited and the State was not excluded from the convention as it was under the League of Nations method. The consequences were therefore different.

17. The fundamental difference between those systems was that under the Pan-American system the State which formulated a reservation became a party to the convention regardless of any objections made to its reservation. The only States affected were the State which made the reservation and the State which lodged an objection to it. If, for example, Colombia objected to a reservation made by Brazil, that did not mean that Brazil would be excluded from the convention. It was only relations between Brazil and Colombia that would be affected. In that way the door was left wide open for the ratification of treaties.

<sup>2</sup> A/1372.

Relations between Brazil and France, for example, would not be changed in any way.

18. Under the League of Nations system, on the other hand, if a single State made an objection to a reservation, the State which had made the reservation could not become a party to the convention, and the depositary of the convention could not accept its ratification. Thus the objection of a single State led to another State's being excluded from the benefits of the convention. That was exercise of the right of veto. If a State abused its sovereign powers and, for reasons that it would not or could not avow, opposed a reservation, the State which had made the reservation would be excluded from the convention.

19. Examples from contemporary history would illustrate the juridical grotesqueness of the solution proposed. The Convention relative to the Protection of Civilian Persons in Time of War, signed at Geneva on 12 August 1949, had an enormous importance which there was no need to stress. The United Kingdom delegation had taken a considerable part in drafting the convention—it amounted to a code — but had been obliged to formulate a reservation with regard to article 68. The consequence was that, if a single State objected to that reservation, the United Kingdom would be excluded from the convention. Did that appear just? Was it democratic? In 1947 the Rio de Janeiro Treaty had been signed by all American States, including the United States of America, with the sole exception of Ecuador, which had not signed for reasons of domestic politics, its Government at that time being a *de facto* government. When Ecuador had subsequently signed the treaty subject to a reservation, one State had objected to that reservation. Despite its reservation, Ecuador had entered the system called into existence by the 1947 Treaty, and was now a part of that system. That was the way to encourage the conclusion of international conventions which contributed to the progressive development of law. If the United Nations method had been used, Ecuador would have been excluded from the Treaty merely because one State had objected to it and without that State being called on to give the reasons for its objection. Those two examples brought out clearly the superiority of the Pan-American method over the United Nations method.

20. He would next show that the Pan-American system represented existing law, which was what the Commission was instructed to codify. The other system did not constitute existing law, but was a product of the imagination. In paragraph 10 of Mr. Brierly's report (A/CN.4/41) occurred the following passage: "The second question is whether State practice gives such a clear guide that any rules of law can be said to exist in the matter of reservations. A body of practice can be cited for the rule that if a State or States signatory to a treaty object to a reservation made by another signatory or a State subsequently attempting to become a party, the latter must either withdraw the reservation or refrain from signing or ratifying". That text did not correspond to legal practice, which was rather in favour of the Pan-American formula. The United Kingdom and Belgian Governments, who were respectively depositaries of the International Telegraph Convention and the International Convention for

the Unification of Certain Rules relating to Bills of Lading, had accepted without objection the reservation which the United States of America had made to each of those Conventions.

21. The Pan-American formula corresponded to the practice of a great number of countries. It was therefore a part of customary law, the binding character of which was indisputable. There were constantly recurring instances of the same kind, and there was the conviction of the States in question that they were exercising a right. The Pan-American formula had therefore both the necessary legal and the necessary practical foundation.

22. Sixty reservations had been made at the Hague Conferences of 1899 and 1907. The Netherlands Government, which was depositary of the conventions drawn up at those Conferences, had received ratifications subject to reservation and had accepted them. It was not therefore legal practice to make a State withdraw a reservation or to have it accepted by the other States.

23. As regards the Convention for the Pacific Settlement of International Disputes, dated 18 October 1907, ten States had deposited their instruments of ratification in 1909, and one of them, the United States, had made an important reservation. The *procès-verbal* of deposit of ratifications, which had been drawn up by the Netherlands Government, the depositary of the Convention, contained the following sentence word for word: "All instruments of ratification are in good and due form". That meant that the United States reservation did not prevent it from joining the system brought into being by the 1907 Conference. Could it be said that the contrary practice, under which a State had to withdraw its reservation if it wished to become a party to the system that had been brought into being, represented existing law? The United States of America had formulated a reservation and the Netherlands Government had accepted the deposit of ratification. That was how the custom had been started. Thus there were three major depositary countries, the United Kingdom, Belgium and the Netherlands, which accepted that system.

24. To quote other cases where the same system had been applied, Russia had ratified the International Sanitary Convention of 21 June, 1926, and the International Convention for the Suppression of Counterfeiting Currency of 20 April, 1929, subject to reservations. So there was another important country which constantly used the Pan-American method.

25. Mr. SPIROPOULOS noted Mr. Yepes' statement that a great power made a reservation to a convention and that the reservation was accepted by the depositary of the convention. But the effect of the reservation was not known. If the other contracting States made no objection, it might be said that they tacitly accepted the reservation; in that case it was the traditional method, and Mr. Yepes' argument fell to the ground.

26. Mr. YEPES recalled that it had been said that when a State deposited its ratification subject to a reservation, it was not considered as being a party to the convention until all the contracting States had accepted the reservation.

27. Mr. SPIROPOULOS pointed out that the examples

quoted by Mr. Yepes threw no light on that point. The other parties to the conventions had been notified of the ratification subject to reservation, but Mr. Yepes did not say what their replies had been.

28. Mr. YEPES said that under the Pan-American method the State which was depositary of a convention had accepted the reserving State as party to that convention, without taking objections into account, whereas under the method which was now advocated, if a single State applied its veto, the reserving State would be excluded from the benefits of the convention.

29. It had been said that the Latin-American countries were not unanimously in favour of the Pan-American system. He could declare that all the Latin-American delegations to the fifth session of the United Nations General Assembly, with the sole and regrettable exception of Mr. Amado, had supported the Pan-American system in their speeches before the Sixth Committee.<sup>3</sup> He could quote two explicit statements by the Colombian representative acknowledging that the Pan-American system was the best. The Mexican representative, speaking on behalf of all the South American delegations, apart from Brazil, had said that that system appeared to him to be the best. That was the true position of the Latin-American countries. All of them, including Brazil, were of that view — he purposely said “including Brazil”, because that country was one of the most faithful champions of Pan-American institutions, and the day a real debate took place upon that question, the Brazilian representative would be found alongside the other States of Latin-America.

30. Mr. AMADO said that that would certainly be the case whenever the point at issue was the application of the Pan-American system to the American continent.

31. Mr. YEPES, resuming, said that Brazil was the State which was most faithful to Pan-American institutions, and he could not therefore imagine Brazil voting against a proposal to extend the Pan-American system. He could also quote the case of the United States of America, whose representative, Mr. Tate, had defended the Pan-American method; of Syria, whose representative had explicitly supported it; and of Turkey as well. Finally, the whole Soviet group, the USSR, Czechoslovakia, Poland, etc., had expressed their support for the Pan-American system. It was not the Russian system, but they had accepted it. To draw a balance, therefore, it would be seen that 21 American States, the Soviet group, the Arab group and Turkey, together far more than half the Member States of the United Nations, would vote in favour of that system. And yet he was told that that system was not existing law!

32. The system followed by the League of Nations and the United Nations gave greater scope to the power of veto. It was an anti-democratic system, which delayed ratification and hampered the progress of international law.

33. He had given this exposition for the purpose of enabling members of the Commission to make up their minds about the scheme with full knowledge of the facts.

<sup>3</sup> See *Official records of the General Assembly, Fifth session, Sixth Committee*, 217th and 225th meetings.

34. The CHAIRMAN noted that Mr. Yepes wanted the Commission to recommend that the Pan-American system be applied generally. If it was the Commission's intention to make that recommendation, it was useless for it to study his draft report in detail.

35. Mr. EL KHOURY recalled that at the previous meeting Mr. Yepes had said that it was not his wish that the Commission adopt the Pan-American system, and he had submitted no proposal.

36. Mr. YEPES said he had wished to give the Commission the necessary information to enable it to vote with full knowledge of the facts. He would accept a compromise solution.

37. The CHAIRMAN thought that the question must be settled, whether or not Mr. Yepes submitted a proposal.

38. Mr. CORDOVA asked if the Chairman would have to put the same question in the case of the system advocated by the International Court of Justice.

39. The CHAIRMAN pointed out that no-one had proposed that that system be adopted.

40. Mr. CORDOVA had thought that the idea behind the excellent wording proposed for paragraph 12<sup>4</sup> had been that the Commission would accept the system recommended in the report, namely the system based on unanimous acceptance. If the Commission approved the report, there would be no need to vote against the Pan-American system.

41. The CHAIRMAN accordingly asked whether the Commission accepted the last sentence of the redraft of paragraph 12.

42. Mr. EL KHOURY thought it was not necessary to give an affirmative or a negative answer to that question.

43. The CHAIRMAN retorted that it was useless to continue detailed examination of the report unless that principle were accepted.

44. Mr. CORDOVA said he was prepared to accept the last sentence of the redraft of paragraph 12 because he was prepared to accept the whole paragraph. However, if a vote were taken on the last sentence only the Commission would not be expressing its views on the remainder of the paragraph.

45. The CHAIRMAN put before the Commission the following text, proposed by Mr. Yepes, to be substituted for paragraph 12 of the draft report on reservations to multilateral conventions (A/CN.4/L.18):

“The Commission recognizes that the practice of the Pan-American Union, as described in paragraph 10, is well adapted to the needs of a regional agency and to the close relations existing between states within a defined geographic area, and believes too that that practice can be applied successfully to multilateral conventions in general, and to those drawn up under the auspices of the United Nations in particular. Actually, the system adopted by the Pan-American Union has been applied by the United Nations.”

46. Mr. YEPES found it extraordinary, and the scientific world would find it so too, that a solution other than the

<sup>4</sup> See para. 1 above.

Pan-American formula should be proposed, for that actually represented existing law. He was, however, quite prepared to listen to any arguments to the contrary.

47. Mr. AMADO said that, having been personally taken to task, he would like to reply. He could counter Mr. Yepes' extremely brilliant theoretical arguments with the views of Mr. Accioly.

48. In his *Tratado di direito internacional publico*, published in 1934, Mr. Accioly had written (p. 443): "Be that as it may, the general principle which is universally accepted is that ratification cannot be made subject to reservations, whether by the ratifying authority, or by the organ competent to authorize ratification, unless the other Contracting Parties agree to these reservations, or provision is made in the treaty itself for reservations."<sup>5</sup> Another author, Podesta Costa, on page 189 of his *Manual de derecho internacional publico* (1947) stated: "The presentation of a reserve is tantamount to a new proposal made to the other party. If the latter accepts it, a consensus of opinion exists and a new clause is embodied in the treaty; if the latter does not accept it, there is only a unilateral expression of intention, which cannot constitute a series of obligations. This is the basic rule which governs the matter."<sup>6</sup>

49. Those were authorities who in respect of American law, could bear comparison with any. He would ask Mr. Yepes if he had read the following paragraph of the dissenting opinion:

"What is important to note is that the Pan-American Union procedure rests upon rules adopted by the governing body of the Union, as approved by the International Conference of American States held at Lima in 1938; that is to say, it depends on the prior agreement of the Contracting Parties."<sup>7</sup>

In his memorandum on reservations to multilateral conventions (A/CN.4/L.9, para. 23, or p. 11 of the mimeographed English text), he (Mr. Amado) had pointed out: "The practice of American States regarding reservations is, moreover, far from uniform." He referred to his statement at the 101st meeting.<sup>8</sup>

50. There were further arguments which could be brought against what had been said by Mr. Yepes. He must point out that the Brazilian delegation had never taken the attitude that Mr. Yepes had suggested. Brazil did not question the value of the system it faithfully followed; it fully accepted the Pan-American system for the American continent. But the question before them was different; it was whether the Pan-American system could be applied generally. It was on that point only that he did not share Mr. Yepes' opinion.

51. It was Mr. Yepes' desire to place those who did not share his view in a bad light that raised an awkward problem. The text before the Commission was clear and gave rise to no difficulties.

<sup>5</sup> Cited in *Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports 1951*, p. 33.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*, p. 37.

<sup>8</sup> Summary record of the 101st meeting, para. 103.

52. Mr. SCËLLE supported the eminently sensible remarks that Mr. Amado had just made. The Commission was considering whether, if the signatories did not adopt some special system, the procedure which preserved the integrity of the treaty should or should not be applied. The General Assembly had instructed the Commission to consider the question from the point of view of existing law, but also from that of the progress of law. The Commission had to decide not whether the Pan-American system was preferable, or even whether it corresponded to existing law, but whether it was better to preserve the principle of the integrity of conventions or to allow them to split up into a multiplicity of bilateral agreements. It was not a question of adopting one system or another. It was for that reason that, in the amendment that he had submitted, he had intentionally used the wording "as may be the case with any other regional or continental organization".

53. That question, of the integrity *versus* the divisibility of treaties, should not give rise to any discussion at all. The reason he had ventured to suggest the above-mentioned addition was because, in some other part of the world, there might perhaps be some advantage in adopting a system similar to the Pan-American system; there was no question of prohibiting that system, for all States were sovereign. To take the North Atlantic Treaty, which might become a matter of life and death to Europe, could reservations to it be accepted? In the event of admission of the Mediterranean States being considered, it might be necessary to accept reservations in accordance with the Pan-American system.

54. The Commission was entering upon an extremely liberal path. States were free to do as they wished, but if they failed to state the system they wished to have followed, the principle of international law must be determined that would then become applicable. Would it be the principle of little conventions, a principle destructive of any normative integrity, or would it be the principle of integrity? There could be no hesitation as to the answer; the progressive principle was that of integrity. The idea that must gain approval was that the norm of international law must be one. It was true that political considerations might lead States to adopt another solution; in that case one could only leave them to do so.

55. The CHAIRMAN proposed to put to the vote the text proposed by Mr. Yepes.

56. Mr. EL KHOURY, on a point of order, said that at the previous meeting Mr. Yepes had stated that he did not want his text to be voted on.

57. Mr. YEPES said that he now wished his text to be voted on.

58. Mr. ALFARO asked for the text to be voted on in parts. He could not accept the second part, beginning with the words "and believes too", but he could not vote against the first part, down to the words "definite geographic area".

59. Mr. HUDSON suggested that the words "is well adapted" be replaced by the words "may be adapted".

60. Mr. YEPES said that he could not accept that amendment.

61. Mr. HUDSON said he would vote against the words "is well adapted", as he doubted whether they were true.

62. Mr. CORDOVA suggested that the Commission vote upon Mr. Hudson's amendment, with which he associated himself.

*It was decided, by 8 votes, to substitute the words "may be adapted" for the words "is well adapted".*

63. Mr. SANDSTRÖM said that he had abstained because he did not think it was for the Commission to take a decision on that question.

*The first part of Mr. Yepes' text was adopted by 10 votes in favour.*

*The second part of Mr. Yepes' text was rejected by 8 votes to 2 with 2 abstentions.*

64. Mr. SPIROPOULOS explained that he had voted in favour of the second part of Mr. Yepes' text because he believed that what it said was correct, and yet it made no recommendation.

65. Mr. ALFARO explained that he had abstained from voting on the second part of Mr. Yepes' text, firstly because he had serious doubts whether the so-called Pan-American system was entirely satisfactory even for States of the American continent, and secondly because he did not think that it was the system which lent itself most readily to general application. Experience of the Pan-American treaties did not suggest that liberal treatment as regards reservations had encouraged ratifications. The present situation as regards the major American conventions — particularly those drawn up at the Havana Conference of 1928 — as it appeared from a publication of the legal division of the Pan-American Union, entitled *Status of the Pan-American Treaties and Conventions* (edition of 1 March 1951), was as follows:

(a) As regards the convention on the Status of Aliens, fourteen ratifications had been deposited by 1 March 1951, two of them subject to reservations. Seven other States had signed the convention, one with reservations, but had not ratified it.

(b) As regards the Convention on Asylum, fourteen unconditional ratifications had been deposited by the same date. One other State had ratified but had not yet deposited its instrument of ratification. Six other States had signed, one with reservations, but not ratified;

(c) As regards the Convention on Diplomatic Officers, fourteen States had deposited their ratifications, two with reservations, and seven States had signed without reservations, but had not ratified;

(d) As regards the Convention on Maritime Neutrality, eight States had deposited their ratifications, one with reservations, and thirteen other States had signed, two with reservations, but not ratified.

66. Mr. HUDSON pointed out that that particular Convention had been drawn up as many as 23 years ago.

67. Mr. ALFARO continued his enumeration:

(e) As regards the Convention on the Rights and Duties of States in the Event of Civil Strife, seventeen States had deposited their ratifications by the date in question, one with reservations. Four others had signed but not ratified;

(f) As regards the Convention on Treaties, which was of particular significance, since it was article 6 of that Convention that laid down the procedure followed by the Pan-American Union in the matter of reservations, seven States had deposited their unconditional ratifications by the date in question, while thirteen other States had signed but not ratified, two of them with reservations. One State had not signed at all.

(g) As regards the Convention on Private International Law, the so-called Bustamante Code, fifteen States had deposited their ratifications, nine with reservations. Nine States had signed, four with reservations, but not ratified. One State, the United States of America, had not signed at all.

(h) As regards the highly important Convention on Nationality, concluded at Montevideo in 1933, six States had deposited their ratifications or had acceded, four with reservations. One State had signed but not ratified, while fourteen States had not signed at all.

(i) As regards the Convention on Political Asylum, which had also been drawn up at Montevideo in 1933 and formed a complement to the convention on the same subject drawn up at Havana in 1928, eleven States had deposited their ratifications, one had ratified but not deposited its instrument of ratification while five had signed but not ratified. Four States had not signed at all. No reservations had been made. Those figures showed that the thesis that the Pan-American practice in the matter of reservations facilitated and encouraged ratifications was untenable.

68. Mr. HUDSON said that in his opinion there was nothing to prove that a procedure which destroyed the integrity of conventions encouraged their universal adoption.

69. Mr. ALFARO considered that a sentimental attachment to regionalism was an insufficient recommendation for the general application of a system, the results of which were not easy to assess. The traditional method, on the other hand, seemed to him to have definite advantages.

70. Mr. AMADO requested the Chairman's permission to ask why Mr. Alfaro had abstained in the vote that had just taken place.

71. Mr. ALFARO replied that he had thought that a number of representatives might approach the question from a sentimental angle and that he had not wanted to cast a vote which might be interpreted, however erroneously, as disparaging to Pan-Americanism, for which he had worked all his life.

72. Mr. AMADO requested that Mr. Alfaro's statement appear in the summary record of the meeting.

73. The CHAIRMAN thought it was inadmissible to criticize a member's vote. He could not permit a debate on that question.

74. Mr. HUDSON thanked Mr. Alfaro for the information he had supplied to the Commission. He wished to stress the fact that the United States was a member of the Organization of American States, but that he had nonetheless voted against the second part of Mr. Yepes' text, just as Mr. Amado had done.

75. Mr. YEPES said that the arguments adduced by Mr. Alfaro with regard to the Pan-American conventions could also be used to show the weaknesses of the system used by the League of Nations and the United Nations for conventions drawn up under their auspices. The Convention for the Prevention and Punishment of Terrorism, of 16 November 1937, for example, had been ratified by only one State.

76. The CHAIRMAN, speaking as Special Rapporteur, submitted the following text, which he had drafted in collaboration with Mr. Hudson to be substituted for the first two sentences of the redraft of paragraph 12 previously submitted to the Commission :

“The members of a regional or continental organization may be in a special position, by reason of their common historical traditions and their close cultural bonds, which have no counterpart in the relations of the general body of States. The members of the Organization of American States have adopted a procedure which they regard as suited to their needs.”

77. He stated that Mr. Scelle, who had proposed another text at the beginning of the meeting, also approved the text he had read out.

*The above text was approved without comment.*

78. The CHAIRMAN submitted the third sentence of his redraft, which read as follows :

“The Pan-American Union procedure, as described in paragraph 10, is well designed to secure the ratification of multilateral conventions by as many States as possible.”

79. Mr. HUDSON proposed the deletion of the word “well”.

*It was so agreed.*

*The sentence was approved as amended.*

80. The CHAIRMAN submitted a text prepared by Mr. Hudson for insertion in paragraph 12, just after the sentence which had just been approved. The text, which took into account the observations of Mr. Alfaro, was as follows :

“Yet an examination of the history of the conventions adopted by the Conferences of American States over the past 25 years has failed to convince the Commission that an approach to universality is necessarily assured or promoted by permitting a State which offers a reservation to which objection is taken to become a Party *vis-à-vis* non-objecting States.”

81. Mr. CORDOVA thought Mr. Alfaro's analysis of the Pan-American conventions was not very convincing. The figures did not show the reasons why States had not ratified. Failure to ratify was in no way connected with Pan-American procedure in the matter of reservations.

82. The CHAIRMAN and Mr. HUDSON thought the wording proposed was perfectly compatible with Mr. Córdova's remark. The use of the negative form was very prudent.

83. Mr. ALFARO recalled that he had quoted the figures for ratifications of the various American conventions to refute the assertion that the main virtue of the Pan-American procedure was that it encouraged

ratifications. The figures did not support the contention that ratifications were encouraged by that procedure; actually there had been a large number of ratifications not subject to reservations.

84. If reservations to ratifications were numerous and bore on the same point, as in the case of the 1929 Convention on Inter-American Arbitration (Washington) where the purpose of the reservations of eight States had been either to substitute optional arbitration for compulsory arbitration or to restrict the categories of disputes to which the convention should apply, the convention was to some extent replaced by a series of bilateral agreements.

85. Mr. SPIROPOULOS said he would vote against the proposed text. It was not for the Commission to say whether the Pan-American procedure encouraged progress towards universality or not. In point of fact it did encourage it, because a State which was prepared to adopt most of the provisions of a convention, but objected to one particular clause, could become a party to the convention while making reservations in respect of the obligations it did not wish to assume. He was therefore convinced that the approach to universality was encouraged by the Pan-American procedure. In the case of the 1929 Arbitration Convention which had been quoted, eight States had been able, thanks to the Pan-American procedure, to become parties to the Convention subject to reservations; under the traditional system the acceptance of all the other Contracting Parties would have been required for those eight States to become parties to the Convention.

86. In that way universality was attained at least in respect of the clauses which all the Contracting States accepted.

87. Mr. CORDOVA pointed out that there was no reason to assume that a different system would have resulted in fewer ratifications. The Pan-American system neither encouraged nor discouraged ratifications. A State ratified a convention or did not ratify it according to whether it considered it useful or not.

88. Mr. YEPES said that, although he had voted for the first sentence of the paragraph, he could not accept the wording under consideration and would vote against it. Failure to ratify could be explained either by the fact that a convention appeared unacceptable, or because ratification procedure in Latin America was very complicated and, in most countries, required the approval of a majority of both Houses, just as with an ordinary law.

89. The text under consideration was a one-sided statement, which appeared to link the number of ratifications to practice in the matter of reservations.

*Mr. Hudson's amendment was adopted by 7 votes to 4.*

90. Mr. HSU thought the Commission had made a mistake in adopting Mr. Hudson's amendment.

91. Mr. YEPES proposed the addition of the following sentence: “The Commission believes, however, that the reasons for non-ratification may be found elsewhere, as for instance in the difficulties of ratification or in the contents of the treaty itself”.

92. Mr. HUDSON, supported by the CHAIRMAN,

thought that that went without saying and that there was no need to include it in the report.

93. Mr. AMADO and Mr. CORDOVA said they would vote against the additional sentence proposed, which they interpreted as an adverse criticism of the ratification procedure of the Latin American countries.

*Mr. Yepes' amendment was overwhelmingly rejected.*

94. The CHAIRMAN requested the Commission to consider the remainder of the redraft of paragraph 12.<sup>9</sup>

95. After an exchange of views with Mr. HUDSON, the CHAIRMAN suggested that the next sentence might be slightly modified to read: "In some multilateral conventions, the securing of universality may be the most important consideration and . . .".

*The sentence was adopted with the above amendment.*

96. At the suggestion of Mr. YEPES, and after a discussion in which Mr. HUDSON, the CHAIRMAN, Mr. ALFARO and Mr. AMADO took part, Mr. CORDOVA proposed that the words "it is always possible" be replaced by the words "it would be advisable".

*The amendment was rejected by 5 votes to 3.*

97. The CHAIRMAN submitted to the Commission the sentence in his redraft, beginning, "But there are . . .", and the following sentence beginning, "These conventions are often . . .".

*The above two sentences were adopted without comment.*

98. The CHAIRMAN submitted a proposal by Mr. François for the insertion of the following sentence after the sentence which had just been adopted:

"The system has the effect of stimulating the formulation of reservations; the diversity of these reservations, and the divergent attitudes of States towards them, leads to the 'fragmentation' of conventions, that is to say, to the replacement of the multilateral convention by a series of divergent bilateral conventions, thereby diminishing its effect."

99. Mr. FRANÇOIS, in support of his proposal, stated that he had been impressed by Mr. Alfaro's remarks on the possible fragmentation of conventions as a result of the Pan-American system.

100. In reply to a remark by the CHAIRMAN, Mr. FRANÇOIS agreed that his proposal ought perhaps to be inserted at some other point in the report.

101. Mr. HUDSON thought that the first clause in Mr. François's proposal was too absolute. Doubtless there were cases where States only made reservations because they knew that those reservations would not prevent their becoming parties to the convention, and where they would not formulate them if they were going to result in their being prevented from becoming contracting parties. To that extent, the assertion in the first clause of Mr. François's proposal was in accordance with facts. It should however be toned down a little, so as to read, for example: "The Pan-American system may have the effect of stimulating . . .".

102. Mr. FRANÇOIS accepted that suggestion.

103. The CHAIRMAN thought that the Commission should not criticize the Pan-American system.

104. Mr. YEPES said he did not understand the reasons for such an amendment, which was a direct criticism of the Pan-American Union's practice. The Commission had refrained from criticizing the opinion of the Court and for the same reasons should refrain from criticizing the practice of the Pan-American Union.

105. Mr. HUDSON thought that, far from criticizing the Pan-American practice, the proposed text stated an obvious fact.

106. Mr. AMADO shared Mr. Hudson's view and pointed out that at the previous meeting Mr. Yepes had protested against excessive recourse to reservations. The text proposed by Mr. François should therefore be retained, if need be in a modified form. All members of the Commission deplored the proliferation of reservations. The ideal, as Mr. Scelle had remarked, would be for States to refrain from reservations completely.

107. Mr. CORDOVA approved the amendment proposed by Mr. François. The Commission should state the legal arguments on which it based its rejection of the Pan-American procedure as a general principle in respect of reservations.

108. Mr. SPIROPOULOS thought that the sentence under discussion constituted the one and only legal argument which could be invoked against the Pan-American practice. At the same time, however, he must remind the Commission that he declined to admit that that practice did not encourage ratifications.

109. The CHAIRMAN put Mr. François' amendment to the vote, subject to possible drafting changes.

*The amendment was adopted by 10 votes.*

110. Mr. AMADO thought that that decision was one of the wisest that the Commission had taken.

111. After some discussion *it was agreed* that the Chairman, as Special Rapporteur, be responsible for deciding at what point the amendment just adopted should be inserted in the report.

112. The CHAIRMAN submitted to the Commission the last sentence of the redraft, beginning with the words "The Commission therefore . . .". Mr. François had proposed the deletion of the last words of that sentence, namely, the clause beginning "when the parties have themselves . . .".

113. Mr. FRANÇOIS in support of his amendment, said that the effect of the Special Rapporteur's redraft was to restrict the Commission's task, which, in his view, was not only to recommend the procedure to be followed when conventions were silent on the point under consideration, but also to afford guidance to the authors of new conventions.

114. Mr. HUDSON preferred the Special Rapporteur's text. The Commission would give guidance regarding new conventions in the following paragraphs of its report.

115. After an exchange of views between Mr. SPIROPOULOS, Mr. ALFARO and the CHAIRMAN, Mr. HUDSON again pointed out that the paragraphs under consideration dealt only with the procedure to be followed

<sup>9</sup> See para. 1 above.

in respect of reservations where conventions were silent on that point. That should be clearly stated, more than once even, so that there might be no misunderstanding.

116. Mr. SCALLE thought the last clause should be deleted.

*The proposal to delete the last clause was rejected by a majority vote.*

117. Mr. HUDSON proposed that, in the English text only, the word "Union" be added after the word "Pan-American" and that the words "their intentions" be replaced by the words "a procedure in the text".

*The above amendments were adopted.*

118. The CHAIRMAN observed that the paragraph which the Commission had just adopted sentence by sentence would be numbered 11 in the report to the General Assembly.

PARAGRAPH 15 (*paragraph 25 of the "Report"*) (resumed from the previous meeting)<sup>10</sup>

119. The CHAIRMAN read out a text which he proposed be inserted after paragraph 15 of his draft report. The text read as follows:

"The Commission believes that these considerations have a special pertinence to multilateral conventions of which the Secretary-General of the United Nations is the depositary, and it is impressed with the complexity of the task which he would be required to discharge if reserving States can become parties to multilateral conventions despite the objection of some of the parties to their reservations. It would be his duty to keep account of the manifold bilateral relationships into which this freedom would tend to split a multilateral convention, and he would have no power of determining any difference that might arise as to the admissibility of a reservation tendered. The Secretary-General is already the depositary of more than one hundred multilateral conventions, and may be expected to become the depositary of many more."

120. Mr. HUDSON thought that the more logical place for the last sentence would be in the first few lines.

121. Mr. KERNO (Assistant Secretary-General) recalled that the sole anxiety of the depositary of United Nations conventions was to give satisfaction in an orderly manner.

122. The fact that multilateral conventions were open to signature and ratification made his task more complex than that of governments depositaries of conventions, who only had to receive ratifications, since in such cases the conventions were signed at the close of the conferences that drew them up.

123. In the case of the Convention on Genocide, article XIII of which provided that it should enter into force only after twenty instruments of ratification had been deposited, in order to avoid the difficulties that might have been caused by the ratifications subject to reservations by Bulgaria and the Philippines, they had managed to collect five instruments of ratification in one day with the result that the number of such instruments deposited had risen overnight from eighteen to twenty-three.

124. But other embarrassing cases could occur. A note by the Secretary-General (A/C.6/L.122 and Add.1) had drawn the Sixth Committee's attention to a number of other multilateral conventions, the conditions for whose entry into force were much the same. Those conventions were the Havana Charter (24 March 1948), the Convention on the Inter-Governmental Maritime Consultative Organization (Geneva, 6 March 1948), the Convention on Road Traffic (Geneva, 19 September 1949), the Protocol on Road Signs and Signals (Geneva, 19 September 1949), the Agreement for Facilitating the International Circulation of Visual and Auditory Material of an Educational, Scientific and Cultural Character (Lake Success, 15 July 1949) and the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (Lake Success, 21 March 1950).

125. All those various conventions made entry into force dependent on the deposit of a specified number of instruments of ratification. When that number was reached, it was for the Secretary-General to declare that the convention was in force. If one of the instruments of ratification included in the necessary ten or twenty was accompanied by a reservation, who could say whether the convention was in force, and if objections were raised to that reservation by other parties, who would decide? Under the Pan-American system ratifications with reservations were valid *vis-à-vis* some of the parties, but not valid *vis-à-vis* others; under the system advocated by the Court, the same applied. Under the traditional method, a ratification subject to reservations was not valid until all the contracting parties had accepted the reservation.

126. At a particular juncture the depositary had to do certain things. Unless there was a well-established rule, he might find himself in a dilemma, and to that the Commission's eyes should be wide-open.

127. Mr. LIANG (Secretary to the Commission) said that he wished to make two comments on the sentence beginning "It would be his duty to keep account" in the text which the Chairman proposed be added after paragraph 13. In the first place he thought that the order of the two clauses should be reversed. The main point to bring out was that the Secretary-General had no power of determining differences; expression of the Commission's concern at the immensity of the task was secondary.

128. It was difficult to see the grammatical connexion between the words "this freedom" and the phrases which preceded it.

129. Bearing those two points in mind, he suggested that the sentence read as follows: "The Secretary-General has no power of determining any difference that might arise as to the admissibility of a reservation tendered. It would also be his duty to keep account of manifold bilateral relationships if the system of reservations tends to split multilateral conventions".

130. Mr. HUDSON and Mr. SPIROPOULOS thought that if a State made a reservation under the guise of an interpretation, the Secretary-General would be faced with another difficulty in deciding whether or not that "interpretation" was in fact a reservation.

<sup>10</sup> See paras. 129-165.

131. The CHAIRMAN pointed out that the same difficulty would arise whatever procedure were followed in respect of reservations. At the present stage the Commission was merely endeavouring to determine the difficulties that would result from the solution recommended by the Court in its Advisory Opinion.

132. Mr. HUDSON drew the Commission's attention to a passage in the written statement of the Government of the United States of America to the International Court of Justice, advocating the system which the Court had adopted in its opinion. The passage in question stated that that method would simplify the role played by the depositary, who would be relieved of the necessity of taking any initiative and whose actions, it was argued, would be completely automatic.<sup>11</sup>

133. Mr. LIANG (Secretary to the Commission) pointed out that the depositary would in any event have to decide what effects reservations had on the entry into force of the treaty, and so on.

134. The CHAIRMAN suggested that the words "legal effect" be substituted for the word "admissibility".

135. Mr. HUDSON thought the words suggested by the Chairman were much to be preferred.

The meeting rose at 1.5 p.m.

## 104th MEETING

Friday, 15 June 1951, at 9.45 a.m.

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*Chairman:* Mr. James L. BRIERLY

*Rapporteur:* Mr. Roberto CORDOVA

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, 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.

### Closing date of the third session and arrangements for the fourth session

#### Closing date

It was decided to fix 27 July as the closing date of the third session.

#### Place and date of the fourth session

It was decided by 10 votes to 2 to recommend that the fourth session of the Commission be held in Geneva.

### Law of treaties: General Assembly resolution 478 (V) of 16 November 1950: Reservations to multilateral conventions (item 4 (b) of the agenda) (A/CN.4/L.18) (continued)

#### DISCUSSION OF MR. BRIERLY'S DRAFT REPORT (A/CN.4/L.18)<sup>1</sup> (continued)

#### PARAGRAPH 15 (paragraph 25 of the "Report") (continued)

27. The CHAIRMAN stated that he had redrafted the text which he had suggested should be added after paragraph 13, in order to take into account the various comments made towards the end of the previous meeting, particularly those of Mr. Liang. His redraft, which would be substituted for paragraph 15 of document A/CN.4/L.18, read as follows:

"The Commission believes that these considerations have a special pertinence to multilateral conventions of which the Secretary-General of the United Nations is the depositary. The Secretary-General is already the depositary of more than a hundred such conventions, and may be expected to become the depositary of many more. The Commission is impressed with the complexity of the task which he would be required to discharge if reserving States can become parties to multilateral conventions despite the objections of some of the parties to this reservation. He would have no power of determining any difference that might arise as to the legal effect of a reservation tendered, and it would be his duty to keep account of the manifold bilateral relationships into which such a rule would tend to split a multilateral convention."

He requested the Commission to consider that new text sentence by sentence.

#### First sentence

28. Mr. HUDSON suggested that the words "to which the Commission paid special attention" be added after the words "these considerations", so as to reflect the fact that the Commission had had in mind the instructions it had received from the General Assembly in resolution 478 (V).

<sup>1</sup> See summary record of the 101st meeting, footnote 1.

<sup>11</sup> I.C.J., *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Pleading, oral arguments, documents*, written statement of the U.S.A., p. 43.

29. The CHAIRMAN thought the sentence would be less cumbersome if it ran:

“The Commission has been asked to pay particular attention to multilateral conventions of which the Secretary-General of the United Nations is the depositary, and it believes that these considerations have a special pertinence to such conventions.”

*The first sentence was adopted in the form read out by the Chairman, subject to any minor drafting changes.*

*Second sentence*

30. Mr. ALFARO pointed out that the second sentence merely stated an undeniable fact.

*The second sentence was adopted.*

*Third sentence*

31. Mr. YEPES asked that the English word “impressed” should not be rendered in French by “*impressionné*” or in Spanish by “*impresionado*” both of which would be too strong.

32. Mr. CORDOVA suggested that the words “is impressed with” be replaced by the words “is aware of”, and Mr. ALFARO suggested that they be replaced by the word “realizes”.

33. The CHAIRMAN urged that the present text be maintained, but that Mr. Yepes’s observation be borne in mind when it came to translating it.<sup>2</sup>

*It was so agreed.*

*Last sentence*

34. Mr. HUDSON asked that the word “yet” be inserted after the word “and”.

35. Mr. SCELLE approved the idea expressed in the last sentence. He thought it should be pointed out that in certain extreme cases the question would arise whether a convention was or was not in force. That would happen when, in connexion with a convention which provided for possible reservations, a difference of opinion arose as to whether a reservation tendered was or was not in accordance with those provisions of the convention that related to reservations. Similarly, real deadlocks might occur if the ratifications which made up the number necessary for a convention to enter into force included ratifications subject to reservations, to which objection was taken by some of the other States that had ratified.

36. He personally did not believe that such difficulties could be avoided.

37. Mr. HUDSON wondered whether it was really the depositary’s responsibility to keep account of the manifold bilateral relationships which reservations would tend to bring about. He did not think it was the Secretary-General’s duty to keep an up-to-date list of the commitments between individual States. As the United States Government had declared in its statement to the International Court of Justice on the question of reservations to the Convention on Genocide, those functions did not belong to the Secretary-General.

38. Mr. KERNO (Assistant Secretary-General) agreed that the word “duty” was too strong, as the depositary had no legal obligations in that respect. There was no doubt, however, that the Secretary-General would in fact keep account of the various situations that arose, since he considered himself to be the trustee of the parties to the convention and of the other Member States. He wished to be in a position to reply to their enquiries and he knew that he was the only one who could do so.

39. Mr. HUDSON proposed that the words “it would be his duty” be replaced by the words “he would be expected”.

40. Mr. ALFARO considered that the important point was to enable interested governments to obtain information from the Secretary-General on request, and he suggested that the beginning of the second part of the last sentence be reworded as follows: “and the inquiries from interested quarters would compel him to undertake the task of keeping account . . .”.

41. Mr. HUDSON thought that, supposing State A made a reservation, it would be submitted by the Secretary-General to certain other States — exactly to whom was not yet settled. In reply, State B sent a note which was not clear, and the Secretary-General asked for clarification. The second note from State B was still open to two possible interpretations. Had the Secretary-General then to say whether or not State B had rejected the reservation, or had he to leave it to the parties to the convention to decide?

42. Mr. KERNO (Assistant Secretary-General) thought that in that particular case the Secretary-General could rest content, if need be, with an ambiguous reply. In practice, he would endeavour to obtain clarification, and in point of fact usually succeeded, but there could be no doubt about the fact that the final decision rested with the State which was the author of the reply in question.

43. With reference to the first part of the last sentence, Mr. SANDSTRÖM recalled that difficulties regarding the legal effect of reservations could arise even under the practice hitherto followed, though to a lesser degree than under the system recommended by the majority of the judges of the International Court of Justice. There was, therefore, no difference of kind between the operations the Secretary-General would have to carry out under the two systems.

44. The CHAIRMAN agreed that it was only a difference of degree. In his text he had emphasized the complexity of the Secretary-General’s task.

45. Mr. SANDSTRÖM thought the new text would have to repeat Mr. Scelle’s remarks with regard to deadlock resulting in certain extreme cases.

46. The CHAIRMAN pointed out that the complications which could arise from the fact that a convention made entry into force dependent on the deposit of a certain number of ratifications, were already referred to in the last sentence of paragraph 13 of the draft report. He saw no point in repetition.

47. Mr. SANDSTRÖM thought that the idea should be referred to again in connexion with the Secretary-General’s functions as depositary.

<sup>2</sup> It was translated in French by “*frappé*”, en in Spanish by “*se ha dado cuenta cabal*”.

48. Mr. SCELLE, reverting to what could be called deadlocks, put forward the hypothesis that a State tendered a reservation to a convention which explicitly provided for reservations, under certain conditions, and that another State party to the convention was of the opinion that the State which had made the reservation had had no power to do so. In such a case, would the Secretary-General accept or refuse the reservation? To leave it to him to choose would be to ask him to discharge a duty which was not his. In order to avoid imposing that duty upon him, could the Commission not transfer it to the International Court of Justice by laying down that, when the Secretary-General was caught between the divergent opinions of two States, he would have the power to ask the Court for an advisory opinion?

49. Mr. KERNO (Assistant Secretary-General) pointed out that the Secretary-General had not that power. The General Assembly could, however, authorize him to ask for advisory opinions under Article 96, paragraph 2, of the Charter.

50. Mr. SCELLE thought that, under Article 96, it would be necessary to propose to the General Assembly that it formally recognize the Secretary-General's right to ask the Court for advisory opinions. In the case of a conflict between two parties, one of which had made a reservation that it believed to be permitted under the convention whereas the other did not accept that reservation as valid, what authority was to settle the question? If it were the Secretary-General, he would be exercising judicial functions. It was therefore better to allow him to ask the judicial organ for advice.

51. The CHAIRMAN pointed out that the same difficulty arose whatever the procedure followed in respect of ratifications, under the Pan-American system, under that recommended by the Court, or under the traditional system. It arose whenever a convention contained ambiguous clauses relating to reservations.

52. Mr. HUDSON thought that Mr. Scelle's point would be met if the following words were used in the first part of the last sentence: "Situations may arise in which he would have to take a position concerning a difference as to the legal effects of a reservation tendered." Administratively the Secretary-General was bound to take a position. His position could, however, be challenged by the General Assembly or by a State, and the two States in question could also bring the question before the International Court of Justice under article 36, paragraph 2, of the Statute of the Court.

53. In using the words "take a position", he was in no sense recognizing the Secretary-General's duty to take a final decision.

54. Mr. SCELLE observed that, under the text proposed by Mr. Hudson, the depositary would be able to bring a convention into force or not.

55. Mr. HUDSON pointed out that the depositary's decision in such a case could be subsequently overruled.

56. Mr. SPIROPOULOS thought that the Secretary-General was not empowered to settle a difference of opinion on the legal effect of a reservation, and that he could go no further than take a position. When the

twentieth ratification of a convention, whose entry into force in fact depended on twenty ratification instruments being deposited, was deposited subject to a reservation, the Secretary-General had, of course, to take a position, but final settlement of the question lay outside his powers. Moreover, his discretionary powers only came into play when he was called on to give a ruling on a convention's entry into force. In every case, the depositary's duty was confined to communicating to the other parties any reservations or objections he received, without stating an opinion on the question.

57. The text under consideration was not clear and might be interpreted as preventing the Secretary-General from taking even a provisional administrative decision.

58. Mr. SANDSTRÖM thought it should be stated more clearly that it was desirable to allow the Secretary-General to reply, in delicate cases, to the two questions: Who is party to the Convention? and Is the Convention in force?

59. The CHAIRMAN referred to the words which Mr. Hudson had proposed with that end in view.<sup>3</sup>

60. Mr. EL KHOURY proposed that the words "provisionally at least" be added after the words "it would be his duty".

61. Mr. HUDSON accepted that suggestion.

62. Mr. KERNO (Assistant Secretary-General) said that the Secretariat regularly published complete information about the status of the conventions concluded under the auspices of the United Nations. The Secretary-General must therefore be allowed to decide what details should be included in those lists.

63. Mr. HUDSON submitted the following case: Under article 36, paragraph 2, of the statute of the International Court of Justice, Paraguay made a declaration recognizing, for an unspecified period, the jurisdiction of the Court as legally binding; it subsequently announced that it withdrew that undertaking, and no objection was made to that new decision.

64. In its annual report, the Court included Paraguay among the States which recognized its jurisdiction as binding, but it added a footnote explaining the special features of the case. On the other hand, he himself, in drawing up the list of States which recognized the jurisdiction of the Court, for his *World Court Reports* and for his annual articles in the *American Journal of International Law*, did not include Paraguay, but explained the special situation of that country in a note. In that way, both he and the Court took positions, neither of which was final.

65. Mr. SCELLE agreed that the depositary should be authorized to take a position, provided it was clearly understood that it was not regarded as a final decision.

66. The CHAIRMAN proposed that the first part of the last sentence of his new text be replaced by the wording suggested by Mr. Hudson.

67. Mr. EL KHOURY thought that it was addition rather than substitution that was called for. The first part of the last sentence of the redraft would remain, and

<sup>3</sup> See para. 52 above.

would be followed by the words proposed by Mr. Hudson, preceded by the word "but".

68. Mr. HUDSON said he had no objection to that being done, but would prefer that the words "He would have no power" should not be used.

69. The CHAIRMAN said he too would prefer substitution to addition.

70. Mr. SANDSTRÖM suggested that the word "easily" or the word "often" be inserted before the word "arise" in the wording proposed by Mr. Hudson.

71. Mr. Hudson thought that the word "easily" could be used. The sentence would then read as follows: "Situations may easily arise...".

72. He drew attention to the practice of the Universal Postal Union. The Bureau exercised very broad discretionary powers in respect of conventions, and was constantly taking amazingly bold decisions. No objections was ever made, however, to those decisions, all of which were tacitly endorsed by the States concerned.

73. Mr. SCELLE pointed out that the legality of the decisions taken by the Bureau of the Universal Postal Union derived from the fact that the States in question made no objection and were therefore regarded as accepting them.

74. Mr. YEPES wondered whether the text suggested by Mr. Hudson gave the Secretary-General the necessary power to classify reservations that were deposited. In the case of a convention that made no provision for reservations and of a State attaching to its ratification what it stated was a reservation, but what was in reality only an interpretation, did the text under consideration authorize the Secretary-General to declare that the reservation was not a reservation in the technical sense of the term, and not to treat that interpretation as though it were a reservation?

75. The CHAIRMAN, supported by Mr. KERNO (Assistant Secretary-General), pointed out that in such cases the Secretary-General took a position provisionally. In practice he acted in the way that Mr. Yepes had just indicated.

76. The CHAIRMAN asked the Commission whether it agreed to the text suggested by Mr. Hudson, in its new form as amended by Mr. el Khoury.

*The text as thus amended was adopted.*

77. The CHAIRMAN recalled that, after the words which had just been adopted, it had previously been proposed<sup>4</sup> that the text continue "and he would be expected to keep account...".

78. Mr. AMADO, reverting to the text which had just been adopted, said that he could not accept the word "easily".

79. Mr. SANDSTRÖM, recalling that the addition of that word had been proposed by him, explained that it had been his intention to bring out as clearly as possible the distinction between the system recommended by the Court in its advisory opinion and the traditional practice of international law. He did not insist on its being retained.

80. Mr. HUDSON proposed that the word "legal" be deleted as unnecessary and as open to criticism on the part of those who believed, like Mr. Scelle, that if the text was too far-reaching it would have the effect of giving the depositary judicial powers.

*It was agreed to delete the word "legal".*

*The whole of the last sentence of the new text was adopted subject to the above amendments.*

PARAGRAPH 16 (*paragraph 27 of the "Report"*)<sup>5</sup>

81. The CHAIRMAN read out the first sentence of paragraph 16, omitting the words "of course".

82. Mr. SCELLE pointed out that reservations to multilateral conventions could give rise to difficulties, even when the convention contained perfectly clear provisions on the matter.

83. Mr. HUDSON accordingly proposed that the words "raise difficulties only" be replaced by the words "usually raise difficulties". He also suggested that the two parts of the first sentence be transposed.

84. The first sentence, moreover, only mentioned provisions limiting the admissibility of reservations. Conventions could also contain provisions concerning the effects of objections to reservations.

85. The CHAIRMAN proposed that the words "and for the effect of objections to such reservations" be added to the sentence in question.

86. Mr. KERNO (Assistant Secretary-General) put the following question: When a convention provided that reservations could be made in respect of articles X, Y and Z, did it follow that reservations made in respect of other articles were inadmissible, even if all the contracting parties unanimously agreed to them?

87. Mr. SCELLE thought that such reservations were certainly inadmissible.

88. Mr. HUDSON believed, on the contrary, that given unanimity, nothing was impossible. In the case in point, if reservations were tendered in respect of articles other than X, Y and Z and accepted by all the contracting parties, it amounted to a revision of the convention.

89. Mr. FRANÇOIS said that in that case the whole revision procedure must be followed, including approval by parliaments. Governments could not by themselves revise a convention by accepting reservations to it.

90. Mr. KERNO (Assistant Secretary-General) said that that was the point he had wished to have clarified.

<sup>5</sup> Paragraph 16 read as follows:

"16. Reservations to multilateral conventions raise difficulties only when the convention itself contains no provision on the matter, and it is of course always within the power of negotiating States to provide in the text of the convention itself for the limits within which, if at all, reservations are to be admissible. An annex to this part of the Report contains a number of draft model clauses. One or other of these, depending on whether uniformity or universality is regarded as the more important in any particular case, would, it is believed, be suitable for inclusion in most multilateral conventions. Much difficulty and dispute may be averted if some such model clauses could be adopted by the General Assembly and recommended to the organs of the United Nations, the specialized agencies and to States, for selection and insertion in the multilateral conventions negotiated by them, wherever the nature of such conventions warrants."

<sup>4</sup> See para. 39 above.

91. Mr. SANDSTRÖM, taking up the hypothetical case presented by Mr. Kernö, asked whether objection to reservations in respect of articles X, Y and Z was excluded.

92. Mr. SPIROPOULOS thought that it was. If a reservation fell within the limits of those provisions of a convention that related to reservations, it did not need to be accepted.

93. Mr. HUDSON thought that Mr. Spiropoulos' observation was well-founded.

94. He proposed that the last sentence of paragraph 16, beginning with the words "Much difficulty", be placed immediately after the first sentence, viz: before the sentence beginning with the words "An annex to this part of the report".

95. *It was decided to leave it to the Rapporteur to recast paragraph 16 in the light of the various suggestions put forward and to decide the order of sentences.*

PARAGRAPH 17 (*paragraph 28 of the "Report"*)<sup>6</sup>

96. Mr. HUDSON pointed out that in paragraph 17 two separate questions were placed in juxtaposition. That of the right of States which had merely signed a convention to object to reservations was described with extreme brevity at the end of the paragraph; in fact it constituted a major difficulty and would certainly be brought up in criticism of the Commission's position in the matter. There was nothing but advantage to be gained from stating clearly the weak point of an argument without for one's opponent to discover it, and replying in advance to possible criticisms. Frankness was always appreciated, and it was good psychology to display it.

97. He proposed that a new paragraph be begun after the words "in paragraph 19 below" and that the point be developed.

98. Mr. AMADO fully subscribed to Mr. Hudson's remarks and proposed that the whole of that part of the paragraph beginning "The Commission is aware" be made a separate paragraph, numbered 18.

NEW PARAGRAPH 18 (*paragraph 29 and 30 of the "Report"*)

99. The CHAIRMAN thought that a special debate would have to be devoted to the point that had been raised: What States had the right to object to a reservation?

<sup>6</sup> The beginning of paragraph 17 was identical to paragraph 28 of the "Report". Then paragraph 17 read as follows:

"... On the whole, the Commission believes that such a rule is to be found in the practice hitherto followed by the Secretary-General, and it has formulated its views on this in greater detail in paragraph 19 below. The Commission is aware that certain authorities in international law, notably the Harvard Research, would extend the right of excluding a reserving State from participation in a multilateral convention to all the signatories, and it believes that strong arguments can be adduced in favour of a rule to this effect. On the whole, however, the Commission believes that such a rule would be unduly restrictive. A signatory is under no obligation to, and very often does not, ratify a convention, and unless it does so it will ultimately have no interest in the convention. It is believed that such interest as it has pending ratification can be sufficiently protected by providing that reservations should be communicated to signatories so that will have an opportunity to raise objections if they wish to do so."

100. Mr. HUDSON said that the Conventions drawn up at the Red Cross Diplomatic Conference at Geneva in 1949, for example, had been signed by sixty-one States, but that unfortunately they had provided for entry into force only after the deposit of ratification instruments by two States. Switzerland and Yugoslavia had been the first to ratify, and the Conventions had entered into force as a result.

101. If State A made its ratification subject to a reservation and if Switzerland and Yugoslavia accepted it, then, in the event of States which had merely signed the conventions being disqualified from objecting to reservations accompanying ratifications, fifty-eight other States would be prevented from tendering objections to the reservation tendered by State A.

102. That was a very awkward situation. It was the weak point of the Commission's argument. To escape from it an intermediate solution must be proposed. The Commission might compromise by recommending inclusion in conventions of a clause fixing a time-limit during which States which had merely signed the convention might lodge objections to a reservation. A further provision might also be added that in such cases the exercise of that right should be subject to early subsequent ratification.

103. He had just been dumbfounded to learn that Yugoslavia, one of the two States which had ratified the Geneva Conventions, had itself tendered reservations. That did not however affect his conclusions one iota.

104. Mr. FRANÇOIS submitted a proposal which he thought might get over the difficulties of which Mr. Hudson had just spoken, while at the same time respecting the principle that the consent of signatory States was necessary to give effect to ratifications with reservations. His proposal was to substitute the following for subparagraphs (1) and (2) of paragraph 19 of the draft report:<sup>7</sup>

"When, whether before or after the entry into force of a multilateral convention, a State signs, ratifies, accedes to or accepts the convention subject to a reservation, that State may become a party to the convention if all States which, at the time the reservation is tendered, have signed, ratified, acceded to or accepted the convention, expressly or tacitly consent to the reservation. The consent of a State which has not ratified or accepted the convention within three years of its signature shall not, however, be required."

105. That provision more or less followed the procedure adopted in the Convention on Terrorism dated 16 November 1937. A provision in article 23 of that convention, however, that reservations tendered within three years of the convention's entry into force should be liable to rejection by States which had merely signed the convention, had appeared impracticable because it would permit a State which had signed the convention, but had no intention of ratifying it, to prevent a reserving State from becoming a party to the convention, by refusing to accept the reservation.

<sup>7</sup> Paragraph 34 of the "Report".

106. He had thought it preferable to say that a reservation could not be refused by a State whose signature had not been followed within three years by ratification. In other respects his proposal reproduced the relevant provisions of the convention he had quoted.

107. The CHAIRMAN observed that Mr. François' proposal put forward a very interesting compromise solution.

108. Mr. SPIROPOULOS said he wished to stress the fact that the proposal did not correspond to existing law.

109. Mr. SCELLE pointed out that members of the Commission were not there merely to confine themselves to stating existing law.

110. Mr. HUDSON also thought that the Commission should propose a practical solution.

111. The CHAIRMAN said there was no point in continuing detailed consideration of the draft report until the Commission had decided which rule it was going to recommend. There were three possibilities, the Secretariat rule, stated in the conclusions of the report, the Harvard rule (articles 14–16) and an intermediate solution such as that suggested by Mr. François. The Commission should indicate which solution it preferred.

112. He had not referred to acceptance by signatories, because it often happened that signatories did not ratify a convention and took no interest in what might happen afterwards.

113. He approved Mr. François' proposal, which covered the difficulty by fixing a time-limit.

114. Mr. FRANÇOIS said that the system under which only States which had ratified a Convention could refuse to accept reservations to it presented another disadvantage. If certain States tendered reservations to which other States objected, the acceptance of reservations, and thus the entry into force of the convention, would depend on chance since, if the convention were first ratified by States which accepted the reservations, then the reservations would be accepted, but if it were first ratified by States which did not accept the reservations, then the reservations would not be accepted. The situation to which the system thus gave rise could make for perennial doubt and could not be tolerated.

115. Mr. KERNO (Assistant Secretary-General) wondered whether he understood Mr. François' proposal correctly. It seemed that in one respect the number of States which had a say in the matter was larger than under the system proposed in the draft report, since States which had merely signed the convention were given the right of objecting to a reservation. In another respect the number was smaller, for under the system advocated in sub-paragraph (1) in the draft report, all those States which had ratified or acceded to the convention by the time of its entry into force had a say in the matter, even if they had not ratified it or acceded to it till after the reservation had been entered. Under the system proposed by Mr. François, the relevant time, for the purpose of determining what States could make objections, was the time when the reservation was entered.

116. Mr. HUDSON asked if Mr. François would agree to alter slightly the last two lines of his proposal. He did

not think the Commission should say "within three years of signature", since experience had shown that it was rare for a multilateral convention to be ratified by more than a few States within two or three years of signature. The 1949 Geneva Conventions had been concluded in August; a year later they had been ratified by two States and now by nine.

117. The CHAIRMAN saw the force of Mr. Hudson's argument and asked what changes he suggested.

118. Mr. HUDSON replied that he was in a quandary.

119. Mr. FRANÇOIS thought that three years were usually sufficient. It should be remembered that the 1949 Geneva Conventions raised exceptional difficulties. In the case of the Netherlands, their translation, for example, had required a considerable time. It could however be said that States were usually in a position within three years to decide whether or not they accepted a convention.

120. Mr. HUDSON remarked that the observer from the International Committee of the Red Cross had informed him that three years was long enough to enable the parliaments of most States in the world to examine the convention. As Mr. François had pointed out, however, before submitting the text of a convention to parliament, the Ministry of Foreign Affairs had to study it carefully, and that might take a long time. He did not think the Commission could do more than suggest that a time-limit be fixed in each case with due regard to circumstances. The Montevideo Convention on the Nationality of Women, of 26 December 1933, for example, comprised only one article; in that case, study of the convention should not have required much time.

121. Mr. KERNO (Assistant Secretary-General) said he felt it necessary, in view of Mr. Hudson's remarks, to point out that the Commission was only considering cases where a convention made no special provision. The usefulness of the Commission's work lay in indicating to States which were negotiating a convention what the position would be if they made no provision regarding that question. If they then wished to adopt a different solution, they would make appropriate provision in the convention. Mr. Hudson appeared to have in mind the drafting of a standard clause.

122. Mr. HUDSON said in reply that the Commission was perhaps engaged both in trying to draft a standard article for inclusion in conventions, and also in trying to establish a procedure for present and future conventions which contained no provisions regarding that question.

123. Mr. SPIROPOULOS thought that the Commission must fix a time-limit for conventions which were silent on the point. Otherwise there was no means of knowing who was to fix it.

124. Mr. FRANÇOIS pointed out that the first sentence of paragraph 17 of the draft report indicated that the Commission was establishing rules for cases where negotiating States had omitted to include a special rule.

125. Mr. HUDSON thought that a signatory State which objected to a reservation must be in a position to say that it was actively considering ratification of the convention, or that ratification procedure was in progress. If it decided not to ratify the convention, and made a

statement to that effect, its objection should no longer be valid.

126. He thought that in cases where conventions made no special provision, the Commission might suggest that objections submitted within a certain period, which the Secretary-General would decide from purely objective considerations, would prevent the reserving State from becoming a party to the convention, provided that the signatory State which had submitted those objections was able to say that its ratification procedure was in progress.

127. Mr. FRANÇOIS thought it would be very difficult for a State to commit itself in that way. Everything depended on the consent of parliament.

128. Mr. HUDSON stressed the fact that a State would only have to say that ratification procedure was in progress. That did not prejudice the outcome. If parliament refused its consent, the State would say that it was not ratifying the convention and would withdraw its objection, and the reserving State would no longer be prevented from becoming a party to the convention.

129. Mr. FRANÇOIS said he could not accept a solution which made the validity of an objection dependent upon a declaration by the State which was the author of the objection that ratification procedure was in progress, or that it intended to ratify. That introduced an element of considerable uncertainty. The Secretary-General would wonder whether to include such States among those accepting, and the consequences could be imagined if he included them among those who accepted the convention and their parliaments subsequently rejected it.

130. Mr. HUDSON replied that the objection of one State would prevent a reserving State from becoming a party to the convention, but that the situation would be changed if the State which had lodged the objection declared that it was not going to ratify the convention; the reserving State would then no longer be prevented from becoming a party to it.

131. Mr. EL KHOURY said there were two possible solutions: either to wait indefinitely, or to fix a reasonable time-limit after which States which had not ratified a convention should be considered as not ratifying it, and their objections would no longer be valid.

132. Mr. HUDSON suggested saying that an objection by a State signing the convention would be valid provided that State ratified the convention within x months.

133. The CHAIRMAN observed that that suggestion amounted to the same thing as Mr. François' proposal, except that the period suggested was shorter.

134. Mr. FRANÇOIS pointed out that a period of a few months would not be sufficient. He preferred the method he had proposed, which was also more simple.

135. Mr. EL KHOURY considered that a year should be sufficient, since in general parliaments held one or two sessions annually.

136. Mr. AMADO thought that the system proposed by Mr. François did away with every difficulty. The Commission should have the courage to take a decision. He personally accepted the three-year period. If the Commission was going to discuss the likelihood or

otherwise of parliaments ratifying etc., there would be no end to it.

137. Mr. SCALLE observed that the system proposed by Mr. François obliged Governments to deal with conventions; if a time limit were fixed, it was more probable that they would settle down seriously to studying them. A three-year period was just right.

138. Mr. CORDOVA wondered whether Mr. François' proposal would constitute an obligation on signatory States to ratify conventions, an obligation which the Commission had refused to recognize.

139. Mr. FRANÇOIS said that the answer was a categorical negative. Once the time-limit had expired, a signatory State which did not ratify would only lose its right to object to a reservation.

140. Mr. AMADO pointed out that Mr. François' proposal put the emphasis on consent. If a State was slow about giving its consent, the international community was kept in uncertainty; and if consent was not given, the benefits that could be expected from the treaty were diminished. He approved Mr. François' proposal, which represented a practical solution of the problem under consideration.

141. The difficulties that had arisen in the Commission's discussions, and the stages through which it had had to pass in order to arrive at that conclusion, would be clearly seen.

142. The CHAIRMAN said that in that way one of the major difficulties in the systems recommended by the Harvard Research and by the United Kingdom was done away with, in that it became impossible for a signatory to abuse his right of objection.

143. Mr. HUDSON said he was in favour of the first part of Mr. François' proposal. He proposed that the last part read:

"An objection to the reservation may be made by a State which is signatory only, subject to that State proceeding within [a period of time of . . .] to deposit its ratification."

144. As the observer of the International Committee of the Red Cross could confirm, a number of Governments were expediting ratification procedure for the 1949 Geneva Conventions. They should surely be entitled to give their views on a reservation.

145. What the text he proposed said was, that an objection would be effective whether made by a State party, a State which had previously deposited its instrument of ratification, or a signatory State, but that in the last-named case the objection would cease to have the effect of debarring the reserving State unless the State that had made the objection proceeded to deposit its instrument of ratification within a period of x months.

146. The CHAIRMAN requested the Commission to take a decision in principle between the three possibilities that were open, which were, firstly, the rule recommended by the Secretariat and contained in paragraph 19 of the report; secondly, the rule that all signatory States must give their consent; and lastly, the intermediate system proposed by Mr. François, whereby a State which signed

a convention but did not ratify it could not prevent the reserving State from becoming a party to it.

147. He asked Mr. Kerno whether the system proposed by Mr. François would present any difficulties in practice.

148. Mr. KERNO (Assistant Secretary-General) replied that the Secretariat could put any of the systems into practice, provided it received guidance from the Commission; the only difference would be that it would take rather longer to apply the system proposed by Mr. François.

149. Mr. CORDOVA asked whether the three years period was to date from the entry into force of the Convention.

150. Mr. HUDSON replied that it would run from the date of notification of the reservation.

151. Mr. YEPES said that he was in favour of the text proposed by Mr. François, as he agreed that the period during which States should be entitled to object to a State's becoming party to the convention should be restricted as much as possible.

152. The CHAIRMAN stressed the importance of the Commission's taking a decision. He wished to have guidance from the Commission on the question of principle. A decision would not be irrevocable and would not prevent representatives from subsequently submitting objections.

*Mr. Francois' proposal was unanimously adopted in substance.*

153. Mr. KERNO (Assistant Secretary-General) thought that one point required clarification. Mr. François said that there was a decisive juncture for noting what States could submit objections, namely, when a reservation was notified. No doubt could arise if the reservation were entered at the time of ratification or accession. But what would happen if the reservation was entered at the time of signature? The time of signature by the reserving State should therefore be the time selected for ascertaining which States had signed and which might therefore object to the reservation.

154. Mr. FRANÇOIS thought that was a question of detail which could be settled with the Secretariat.

155. Mr. KERNO (Assistant Secretary-General) held, on the contrary, that the question was very important, since some considerable time might elapse between the submission of a reservation and ratification by the reserving State.

156. Mr. FRANÇOIS explained that the time limit for each State began to run from the date of its signature.

157. Mr. KERNO (Assistant Secretary-General) said that the question was to ascertain the number of States entitled to object; it might be three one day, five the following week and fifty the following year, so that if a State signed with a reservation and only three other States could object, the issue would depend on those three States. If the reserving State ratified much later, States which had ratified earlier would be debarred from consultation on the reservation. The fixing of the starting time was important, because only States which had signed by that time were qualified to object.

158. Mr. SCALLE pointed out that the memorandum he had submitted concerning reservations to multilateral conventions (A/CN.4/L.14) referred only to the original signatories. The other States could not be regarded as signatories, but must be counted among the States acceding to the Convention, since they had not framed the text.

159. Mr. HUDSON explained that various South American and Central American States were not invited to The Hague Conference of 1899 and that the Convention resulting from that Conference was put into effect just before The Hague Conference of 1907. The States in question had been authorized to sign and ratify the 1899 Convention, in other words, to accede to the Convention.

160. Mr. SCALLE agreed. Without re-stating the theory which he had expounded in his memorandum in order to show the relationship between national and international legislation, he would point out that in 1909 no South American State had been deemed to have participated in the framing of the Convention on the Pacific Settlement of International Disputes and that, having been invited to sign the Convention, the States of Latin America acceded to it.

161. The CHAIRMAN suggested that the discussion be adjourned until a text was drafted<sup>8</sup> and proposed that the Commission meanwhile examine the first part of paragraph 17, which was self-contained.

*It was so agreed.*

PARAGRAPH 17 (*paragraph 28 of the "Report"*) (resumed)<sup>9</sup>

*First three sentences*

162. Mr. HUDSON proposed the substitution of the words "or effect of" for the words "or otherwise of" in the first sentence of paragraph 17.

163. In his view, that sentence raised the whole question of the possibility of establishing a classification of multilateral conventions. In the written statement submitted by the United States to the International Court of Justice<sup>10</sup> a distinction was drawn between "organizational" conventions and other conventions. The former might be on a plane which enabled a very different rule to be applied to them. In one of his reports<sup>11</sup> Mr. Briery had pointed out that the Government of Haiti, among others, had made a reservation to the Hague Convention of 1907 for the establishment of an International Court of Prize, which would have prevented the Court from being set up. There were therefore certain types of reservations which were inadmissible, or whose effect must be limited, in the case of conventions which established an organization.

164. He had tried without success to frame categories for multilateral conventions.

165. The CHAIRMAN said that he also had found it very difficult to classify such conventions.

<sup>8</sup> See summary records of the 105th meeting, para. 2 and of the 106th meeting, para. 35.

<sup>9</sup> See paras. 96-98 above.

<sup>10</sup> I.C.J., *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. Pleading, oral arguments, documents*, Written statement of the U.S.A., p. 43.

<sup>11</sup> A/CN.4/41, para. 14.

166. Mr. KERNO (Assistant Secretary-General) thought that the Commission was not drawing a sufficient distinction between conventions which contained and those which did not contain a provision covering the point under review. The Commission was studying cases where a decision had to be taken failing a provision in the Convention. In such cases no uniform rule could be wholly satisfactory. Only approximate solutions were available and one such was to be found in the Secretariat's rule; but a solution must be found.

167. Mr. AMADO observed that General Assembly resolution 478 (V) did not include the classification of conventions among the questions which the General Assembly had requested the Commission to study. The Assembly had, in fact, invited the Commission "in the course of its work on the codification of the law of treaties, to study the question of reservations to multilateral conventions from the point of view of codification and from that of the progressive development of international law". He himself hoped that the professors of law and the publicists would study the question of conventions and give a ruling on the point, but the Commission was restricted by the directions it had received from the Assembly. He therefore did not think that it could deal with the question.

168. Mr. HUDSON felt it might perhaps be stated in the first sentence of paragraph 17 that it would be difficult to establish a classification of multilateral conventions.

169. The CHAIRMAN said that he would expand the sentence and explain that multilateral conventions varied greatly among themselves and that it did not seem possible to establish a classification. He would add the Commission's view that, where the convention contained no appropriate provision, no wholly satisfactory uniform rule could be applied.

170. Mr. HUDSON said that he had been disturbed by Mr. Scelle's criticism that even if the negotiating States had mentioned the admissibility of reservations in the text, certain difficulties might arise as to their application.

171. Mr. SCELLE pointed out that the Commission was at that stage solely concerned with the rules to be applied where a convention contained no provision. It had been said that reservations were admissible only where there was unanimity — but unanimity among whom? Among all States that were, or would in all likelihood be, parties to the convention, that was to say, the original signatories who were responsible for the text. All that the other signatories could do, in fact, was to accede to the convention. If a reservation was made it could be rejected by the States responsible for the convention, but not by other States. He would repeat that the question affected only the original signatories. States which signed subsequently could only make reservations with the unanimous consent of the authors of the convention.

172. The convention was a law, and the text of paragraph 17 contained the words "when the negotiating States have omitted to deal etc.". It was clear that States which signed after the final drafting of the convention were not negotiators. The example given by Mr. Hudson was

typical. The States invited to the 1907 Conference could not be regarded as negotiators of the 1899 Convention.

173. Mr. FRANÇOIS disagreed with Mr. Scelle. Many conventions contained a provision to the effect that they could be signed within a certain time limit. Therefore, States which were not among the negotiators were entitled to sign them up to a certain date. If a reservation was made such States were signatory States and must be consulted.

174. Mr. SPIROPOULOS pointed out that the Commission had settled the point by accepting Mr. François' proposal in substance, but that it could review the question when the Rapporteur submitted his text.

175. Mr. SCELLE said that Labour Conventions were drawn up after negotiations which became final when they were accepted by a two-thirds majority. The final draft of the relevant convention was then prepared and all States signing or ratifying it subsequently would accept the convention in its then form.

176. Mr. HUDSON thought that Mr. François would accept the Barcelona Convention and Statute on Freedom of Transit, of 20 April 1921, as a good example of a convention open for signature by certain States whether they had participated in its preparation or not.

177. The CHAIRMAN said that he would endeavour to draft a text.

178. He proposed that the Commission proceed to examine paragraph 18, which was unconnected with those questions.

#### PARAGRAPH 18<sup>12</sup> (*paragraph 33 of the "Report"*)

179. Mr. HUDSON thought the phrase "(or the prohibition of making)" was redundant. He proposed that the end of the paragraph be amended to read "provisions relating to the admissibility and effect of reservations."

180. The CHAIRMAN accepted that amendment.

181. Mr. LIANG (Secretary to the Commission) thought that it might perhaps be advisable to amend the beginning of the text to some extent. He had some difficulty in grasping what was meant by "organs... negotiating conventions". The Charter referred to the negotiation of conventions only in the case of the Economic and Social Council. He suggested that the phrase "Members of the United Nations" be substituted for the phrase "organs of the United Nations". Organs never negotiated.

182. Mr. KERNO (Assistant Secretary-General) pointed out that organs framed texts.

183. Mr. HUDSON proposed the substitution of "negotiators" for "organs of the United Nations", since paragraph 18 might refer to States which were not members of the United Nations.

184. Mr. SPIROPOULOS agreed.

<sup>12</sup> Paragraph 18 reads as follows:

"18. The Commission suggests that all organs of the United Nations, specialized agencies and States, whenever negotiating multilateral conventions, consider the suitability of inserting therein provisions relating to the making (or the prohibition of making) of reservations."

185. The CHAIRMAN confirmed that the text applied to States which were not members of the United Nations.

186. Mr. KERNO (Assistant Secretary-General) pointed out that in the case of the Convention on Genocide, among others, discussion had taken place in an organ, namely, the General Assembly, and that the States concerned were not negotiating States but members of the United Nations. Nevertheless, the result of their work was the text of the convention. Therefore, in practice, the clause relating to reservations would be incorporated in the convention during such a procedural discussion in an organ of the United Nations, and provision must be made for such an eventuality, even if some other formula were adopted.

187. Mr. LIANG (Secretary to the Commission) referred to the terms of Article 62, paragraph 3, of the Charter, which stated that the Economic and Social Council "may prepare draft conventions for submission to the General Assembly with respect to matters falling within its competence". He therefore suggested that the word "prepare" be used.

188. The CHAIRMAN accepted that suggestion.

189. In reply to a question by Mr. YEPES, the CHAIRMAN said that the present text was not limited to States Members of the United Nations.

190. Mr. HUDSON hoped that the text would apply to the States which had met at Geneva to negotiate the 1948 Convention. He suggested the wording: "during the negotiation or preparation of multilateral conventions it is advisable to consider the suitability . . .".

191. The CHAIRMAN then proposed the deletion of the word "all" and the use of the phrase "during the preparation of conventions, States consider . . .".

PARAGRAPH 19 (*paragraph 34 of the "Report"*)

*Sub-paragraph (3)*<sup>13</sup>

192. The CHAIRMAN explained that discussion of sub-paragraphs (1) and (2) had been adjourned until a text was prepared.

193. Mr. YEPES said that he would submit an amendment to sub-paragraphs (1) and (2) when the discussion on the latter was resumed. He could not accept them in their existing form.

194. Mr. HUDSON, referring to sub-paragraph (3), said that account must be taken of reciprocity between the reserving State and the other States.

195. The CHAIRMAN thought that the point was covered by the words "limits the effect of the convention".

The meeting rose at 1 p.m.

## 105th MEETING

Monday, 18 June 1951, at 3 p.m.

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*Chairman:* Mr. James L. BRIERLY

*Rapporteur:* Mr. Roberto CORDOVA

*Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, 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.

**Law of treaties: General Assembly resolution 478 (V) of 16 November 1950: Reservations to multilateral conventions (item 4 (b) of the agenda) (A/CN.4/L.18) (*continued*)**

DISCUSSION OF MR. BRIERLY'S DRAFT REPORT (*continued*) (A/CN.4/L.18)<sup>1</sup>

1. The CHAIRMAN said that he was by no means satisfied with the two draft texts he had had distributed, and which he had drawn up on the basis of the proposal submitted by Mr. François at the previous meeting and approved in substance by the Commission.<sup>2</sup>

NEW PARAGRAPH 18 (*paragraphs 29 and 30 of the "Report"*) (*resumed from the 104th meeting*)

2. The CHAIRMAN said that the first was intended to replace the last part of paragraph 17 of his draft report, from the words "The Commission is aware . . .",<sup>3</sup> and to form a new paragraph 18. It read as follows:

"18. The Commission believes that, in substance, the tender of a reservation constitutes a proposal of a new agreement, the terms of which are not the same as those of the agreement negotiated by the plenipotentiaries, and that for this proposal to take effect it must be accepted by all the contracting States, as would have been necessary if it had been put forward in the course of the negotiations. The difficulty of applying this principle lies in defining the States whose acceptance of a reservation is necessary in order that it may take effect. The practice followed by the Secretary-General

<sup>13</sup> Sub-paragraph (3) read as follows:

"(3) A duly accepted reservation to a multilateral convention limits the effect of the convention in the relations of the reserving State with the other States which have become or may become parties to the convention."

<sup>1</sup> See summary record of the 101st meeting, footnote 1.

<sup>2</sup> See summary record of the 104th meeting, paras. 104-152.

<sup>3</sup> *Ibid.*, footnote 6.

of the United Nations, which has been described in paragraph 9 above, requires that the reservation should be accepted only by States which are in the strict sense 'parties' to the convention; it does not require acceptance by States which are merely signatories. It is true that a signatory State, unless by ratification or acceptance it later becomes a party to the convention, has no legitimate interest in the convention, and that States are under no obligation to ratify or accept a convention which they have signed, and it is therefore conceivable that a single signatory State, having itself no intention of becoming a party, might object to a tendered reservation from motives unrelated to its merits and thus prevent the reserving State from becoming a party to the convention. The Commission thinks that, while theoretically a signatory State might thus abuse its right of objection, the risk is not so serious as to constitute a reason for withholding from it a right to object; in any case the risk can be reduced by limiting the duration of a signatory's right of objection to a period during which there is a reasonable likelihood of its becoming a party. The procedure of ratification prescribed by the constitution of some States often entails considerable delay, and a State which genuinely intends to proceed to the ratification of a multilateral convention is entitled to expect that the terms of the convention which it intends to accept will be the same as those of the convention which it signed."

PARAGRAPH 19 (*paragraph 34 of the "Report"*) (resumed from the 104th meeting)

*Sub-paragraphs (1) and (2)*<sup>4</sup> (*sub-paragraphs 4 and 5 of paragraph 34 of the "Report"*)

3. The CHAIRMAN said that the second draft text would replace paragraph 19 (1) and (2) of the draft report. It read:

"(1) When, whether before or after the entry into force of a multilateral convention, a State signs, ratifies, accepts or accedes to the convention subject to a reservation, that State may become a party to the convention if all the States which at the time the reservation is tendered have signed, ratified, accepted, or acceded to the convention, expressly or tacitly consent to the reservation, provided, however, that the consent of a State which has not ratified or accepted the convention within . . . shall cease to be required."

4. He was doubtful whether a subject to which the Harvard draft had devoted three articles, each consisting

<sup>4</sup> Sub-paragraphs (1) and (2) read as follows:

"(1) When, prior to the entry into force of a multilateral convention, a State signs, ratifies, accedes to or accepts the convention subject to a reservation, that State may become a party to the convention if all States which, by the time of its entry into force, have ratified, acceded to or accepted the convention, expressly or tacitly consent to the reservation.

"(2) When, after the entry into force of a multilateral convention, a State signs, ratifies, accedes to or accepts the convention subject to a reservation, that State may become a party to the convention if all States which have, up to the time of the reservation, ratified, acceded to or accepted the convention, expressly or tacitly consent to the reservation."

of several paragraphs, could be compressed into a single rule.

5. Mr. HUDSON was glad to find that the Chairman admitted that he himself was not satisfied with the revised text he was proposing. Personally, he had come to the conclusion that it was absolutely essential for the matter to be dealt with more fully. It must be borne in mind that certain multilateral conventions did not require ratification and could enter into force after they had merely been signed.

6. He had drafted a text to replace paragraph 19 (1) and (2) of Mr. Brierly's report. Sub-paragraph (1) would read as follows:

"(1) If a convention enters into force as a consequence of its signature only, no further action being requisite, a State which makes a reservation at the time of its signature may become a party to the convention only if no objection is expressed by any State which has previously signed the convention, or which may become a signatory during a limited period for which the convention is open to signature."

Sub-paragraph (2) would cover a second category, and would read as follows:

"(2) *a.* If ratification or acceptance in some other form after signature is requisite to bring a convention into force, a reservation made at the time of signature is not to be taken into account unless it is repeated in the later ratification or acceptance of the convention.

"*b.* In such case, a State which tenders a ratification or acceptance with a reservation, whether the reservation was made at the time of its signature or later, may become a party to the convention only in the absence of objection made by any other State which, at the time the tender is made, has signed, or ratified or otherwise accepted the convention: provided, however, that an objection made by a State which at that time had merely signed the convention will cease to have the effect of excluding the reserving State if after a period of 12 (possibly 18) months the State making the objection has not proceeded to effect its ratification or acceptance of the convention."

7. He explained the difficulties which the drafting of his text had presented. If it were stated that the consent of a mere signatory was necessary to enable a State which had formulated a reservation to become a party to a convention, there would be a period of uncertainty.

8. He had got away from the viewpoint of Mr. François who would like to see the three year period start from the date of signature by a State making an objection. He personally would like to see the period begin from the time the reservation was formulated, or perhaps from the time when the objection to the reservation was made. He was inclined to think that the period should run from the latter date. As the State making an objection might already have set in motion the procedure for ratification, which often took a long time, he was anxious to minimize, in the case of States which must be assumed to be acting in good faith, the "sanction", as it might be called implicit in the prescribed time limit.

9. With regard to the new text of paragraph 18 drafted by Mr. Brierly, he was not happy about the first sentence, insofar as it referred to relations with the State tendering a reservation. Moreover, the allusion to the practice followed by the Secretary-General of the United Nations and explained in paragraph 9 of the draft report did not seem to him accurate.

10. With regard to the redraft of paragraph 19 (1) and (2) prepared by Mr. Brierly on the basis of Mr. François' proposal, the Commission should not take into account, as a great many writers on the subject had done, the fact that a convention might or might not already have entered into force at the time when a State signed or ratified or accepted it with a reservation. For that reason, he was in favour of deleting from the redraft the words "before or after the entry into force".

11. Mr. FRANÇOIS said that he was perfectly willing to do away with that distinction. The purpose of the words "whether before or after the entry into force of a multilateral convention", which appeared in his text, was to make it clear that his text was intended to replace the first two sub-paragraphs of paragraph 19 of the draft report.

12. Mr. HUDSON pointed out further that in the text he was proposing for paragraph 19 (1) and (2) he had nowhere used the words "parties" or "contracting States" to designate States which might object to a reservation. He did not like the expression "all the contracting States" used in the fourth line of Mr. Brierly's new paragraph 18. In addition, he would like to see the expression "of the agreement negotiated by the plenipotentiaries" in the third line of the same text replaced by "embodied in the text of the convention".

13. Still on the subject of the first sentence, he remarked that a State tendering a reservation did not call upon the other States to modify the convention, but merely to recognize the position it had adopted as expressed in the reservation.

14. He was also in favour of adding a sentence following the final sentence of the proposed re-draft for paragraph 18, to allow for the fact that under the constitutional law of certain countries the acceptance of a reservation must have parliamentary approval. He mentioned the instance of the reservations formulated by the Dominican Republic to the Havana Convention of 20 February 1928 on consular agents. The United States Government had not approved the reservations, and had therefore not submitted them to the Senate for approval.<sup>5</sup>

15. Mr. KERNO (Assistant Secretary-General) said that the discussion at the previous meeting, together with Mr. Hudson's observations, had clearly brought out the great practical difficulties facing the Commission in its attempt to include signatories in the rule that there must be unanimity of consent to reservations. That was why the practice adopted by the Secretary-General had not included signatory States, even though logically their inclusion was fully justified. If the Commission wanted

to include signatory States, it must seek a satisfactory formula.

15a. The Commission was endeavouring to make a single formula cover all cases. In spite of all his efforts, Mr. François had not managed to resolve all the difficulties. Nor had Harvard Research managed to find a satisfactory single formula. Actually, treaty-making procedure was such that certain conventions might be kept open for signature for a given period or even indefinitely. Moreover, the mere signature of a convention might in certain instances make the convention binding on the State; in other instances it might constitute a preliminary to ratification.

16. There was some virtue in Mr. Hudson's attempt to set forth the matter in two paragraphs.

17. Following an exchange of views with various members of the Commission, he too had tried to find a formula. He did not of course claim that it was perfect; he was not even sure how useful it might be, but he would read out the text he proposed as a substitute for the first two sub-paragraphs of paragraph 19 of Mr. Brierly's report:

"1. When, either before or after the entry into force of a multilateral convention, a State undertakes to be finally bound by the convention, whether by signature, ratification, accession or acceptance as the convention may provide, subject to a reservation, that State may become a party to the convention if all the States which at the time the reservation is thus tendered have signed, ratified, accepted, or acceded to the convention expressly or tacitly consent to the reservation, provided, however, that the consent of a signatory State which has not ratified or accepted the convention within . . . shall cease to be required."

18. Mr. EL KHOURY pointed out that the words "undertakes to be finally bound by the convention" were not to be found in Mr. François' proposal. He regarded the change as extremely important.

19. Mr. HUDSON was of the opinion that the Commission had undertaken too much in trying to find a single rule. He thought his own approach to the matter was preferable. It was not necessary to use the word "accession"; the word "acceptance" was sufficient.

20. Replying to a question by Mr. FRANÇOIS, the CHAIRMAN said that there must be a full discussion of the point.

21. Mr. FRANÇOIS did not agree. What remained to be done was more in the nature of a skilful piece of drafting.

22. Mr. HUDSON also felt that the members of the Commission had found themselves largely in agreement during the discussion at the previous meeting.

23. Mr. SPIROPOULOS thought the best plan was to work out a formula covering all the proposals which had been submitted. The various instances mentioned by Mr. Hudson might be taken as a basis, and the Commission might see whether in a general way the new formula proposed by Mr. Kernö covered all cases. If Mr. Hudson considered that the new formula covered

<sup>5</sup> See Comment on article 13 of the Harvard draft on the Law of Treaties, *American Journal of International Law*, vol. 29 (1935), Supplement, p. 853.

substantially all the cases he himself had had in mind, the Commission might perhaps accept Mr. Kerno's text.

24. Mr. HUDSON did not think Mr. Kerno's text covered all the cases he had had in mind. He instanced the Red Cross Conventions of 12 August 1949, which had been kept open for signature by the States represented at the Conference until 12 February 1950. Supposing State A and State B ratified without making reservations; State C ratified with reservations; and then ratifications came in from States D, E, F, etc. According to Mr. Kerno's proposal, the consent of the latter States to the reservations made by State C was not necessary.

25. Mr. KERNO (Assistant Secretary-General) said that he had not put forward his text without some diffidence; but he did feel that it was to some extent an improvement on the formula proposed by Mr. François, in that the crucial moment for deciding which States constituted the group that must give their consent to a reservation would, under his own scheme, not be the date of notification of the reservation, but the date on which the State making the reservation was finally bound. Mr. Hudson's text went much further and included among the States required to give consent the States he called D, E, F, etc. in the example he had given.

26. Mr. SPIROPOULOS took the same view as Mr. Hudson. It was not right to select the date of ratification by a State formulating a reservation as the decisive moment for determining the group of States entitled to withhold consent to that reservation.

27. The CHAIRMAN was of the opinion that it would undoubtedly be going too far to exclude from that group States signing the convention before the final date up to which the convention was open for signature.

28. Mr. HUDSON pointed out that another case not covered by Mr. Kerno's text was, for example, that of a convention which provided for entry into force following mere signature, and where all the signatures were affixed on the same day.

29. Mr. FRANÇOIS would not be averse to accepting a formula under which, if it were laid down that a convention was open for signature for a certain length of time, all the States which had signed before the expiry of that period would be included in the group.

30. Mr. KERNO (Assistant Secretary-General) said that the question was still further complicated by the fact that there were conventions which were open for signature indefinitely.

31. Replying to Mr. FRANÇOIS, who maintained that such cases were not provided for in the draft report, Mr. AMADO read out article 14 (c) of the Harvard draft, which did, he thought, cover such cases.

32. Mr. HUDSON said he could not accept article 14 (d) of the Harvard draft, which in his opinion went much too far.

33. At the request of Mr. YEPES, the CHAIRMAN suggested that the text read by Mr. Hudson be circulated to the members of the Commission, which in the meantime<sup>6</sup> would carry on with the examination of paragraph 19 of his report. He read out sub-paragraph (4).

<sup>6</sup> See paras. 83 *et seq.* below.

*Sub-paragraph (4)*<sup>7</sup> (*sub-paragraph 1 of paragraph 34 of the "Report"*).

34. Mr. HUDSON pointed out that the sub-paragraph actually described the practice to be followed by depositaries of multilateral conventions, especially the Secretary-General of the United Nations. He thought that in the circumstances it would be better to say not "shall" but "should".

*It was so decided.*

35. Mr. SPIROPOULOS said that, as he had already intimated, in his view communication to the other States by the depositary of a multilateral convention was not an obligation. However, he had no objection if the Commission felt that such a measure would be useful.

*Sub-paragraph (5)*<sup>8</sup> (*sub-paragraph 2 of paragraph 34 of the "Report"*).

36. Mr. HUDSON wondered whether in the first sentence the word "signed" should not be added before the words "ratified, acceded to or accepted".

37. Mr. KERNO (Assistant Secretary-General) supported Mr. Hudson. The obligation on the depositary under sub-paragraph (5) extended to mere signatories where they belonged to the group of States whose consent was necessary according to the formula to be adopted for sub-paragraphs (1) and (2). A reference back to that formula would be enough.

38. Mr. HUDSON was not in favour of reference from one article to another, as being inconsistent with good drafting.

39. On a proposal by Mr. HUDSON, the CHAIRMAN suggested replacing the words "no such information is received" in the second sentence of the sub-paragraph by the words "no objection is received".

40. Mr. YEPES asked whether the term "he may assume" left the depositary free to assume or not to assume that the State had consented to the reservation. He felt that that would be allowing the depositary rather too much latitude, and he would prefer to say "he should assume".

41. The CHAIRMAN accepted the suggestion, though he explained that that was what was meant by "may assume".

42. Mr. EL KHOURY considered that the second sentence of sub-paragraph (5) raised the very important question of tacit consent. In his opinion, it was expecting too much from States having the right to object to a reservation to regard them as having consented to the

<sup>7</sup> Sub-paragraph (4) read as follows:

"(4) The depositary of a multilateral convention shall, upon receipt of each reservation, communicate it to all States which are or may become parties to the convention."

<sup>8</sup> Sub-paragraph (5) read as follows:

"(5) The depositary of a multilateral convention, in communicating a reservation to the convention to a State which has ratified, acceded to or accepted the convention, shall at the same time request that State to express within a reasonable specified period of time its attitude towards the reservation. If no such information is received by the depositary within the specified period of time he may assume that the State has consented to the reservation."

reservation if they did not tender their objections to the depositary within the specified period. It was not a question of forcing the hand of possible subscribers, as was the practice of certain newspapers. Personally, he was not inclined to agree to such a formula, since he felt that consent should be expressed.

43. Mr. KERNO (Assistant Secretary-General) agreed that it was a very important question. Unless some sort of tacit consent were recognized, it would never be possible to ascertain what was the attitude of States and thus the status of the convention. The more extensive the group of States whose consent was necessary, the more desirable it was to recognize tacit consent. In practice, of course, any such rule would invariably be relaxed. Where a State found difficulty in making up its mind as to a reservation, it would always be at liberty to intimate that its silence must not be construed as acceptance, and the depositary would await a declaration from it in due course.

44. Mr. EL KHOURY pointed out that the other party might not accept that way of thinking. In any case an attitude of the kind on the part of the depositary would induce States to make provisional declarations to prevent their right to make objections from lapsing.

45. Mr. KERNO (Assistant Secretary-General) added that moreover it would never be possible to achieve perfection, and that he had given a great deal of thought to the problem.

46. Mr. CORDOVA thought it would be better if the idea put forward in the second sentence of sub-paragraph (5) — which he approved — were expressed differently. He did not care for the wording, which would give the depositary the right to determine the juridical effect for the States concerned of failure to make known their attitude, i.e. the loss of their right to make objections to the reservation.

47. The CHAIRMAN and Mr. KERNO (Assistant Secretary-General) thought the rule meant that if a State had not expressed any opinion within the specified period, the depositary would assume that it had given its consent, though it was understood that the State was at liberty to make any declaration it wished.

48. Mr. CORDOVA thought that, for that very reason, it would be preferable to express the idea differently and not to speak of “rules”, as at the beginning of paragraph 19, but of “practices”.

49. Mr. HUDSON agreed.

50. Mr. SPIROPOULOS, supported by Mr. CORDOVA, thought that instead of stating that the depositary might assume that the State had consented to the reservation it might be better to say that the State was “deemed” to have consented to the reservation.

51. Mr. SCALLE asked whether Mr. KerNO agreed that a State could ask for an extension of the time-limit for making objections to reservations, but lost that right failing any such request.

52. Mr. KERNO (Assistant Secretary-General) replied that that was so. The formula compelled States to reply to the communication of a reservation by the depositary.

53. Mr. SANDSTRÖM said that the sub-paragraph did not constitute a rule for the Secretariat, except in form. In actual practice, it would not be concluded that a State which had not made objections was deprived of its right.

54. Mr. HUDSON and Mr. SCALLE thought that if any extension of the specified period was to be allowed in practice, the fact should be mentioned in the text.

55. Mr. KERNO (Assistant Secretary-General) assured the members of the Commission that the Secretary-General of the United Nations, as depositary for multi-lateral conventions, had no desire to impose his will on States. At the same time, in the capacity of trustee for the parties, it was only natural that he should try to prevent a state of uncertainty lasting for an indefinite period. If States did not reply and it was not permissible to assume that they had given tacit consent, the situation would become impossible. All that States were asked to do was to make known their attitude within a period of x months. There was nothing abnormal or ominous about stating that if they had not made known their views by the time that period expired, they would be deemed to have given their consent.

56. Mr. HUDSON pointed out that the text which the Commission was endeavouring to draft would apply not only to the Secretary-General of the United Nations but to all depositaries.

57. Mr. EL KHOURY was not convinced that States would be legally bound to observe the specified period. It would amount to a virtual ultimatum. Unless there were any such obligation, silence could not be regarded as tantamount to consent. States anxious for a convention to become universal in scope could surely be assumed to be reasonable enough not to make objections to a reservation.

58. Mr. KERNO (Assistant Secretary-General) argued that tacit consent would actually promote universal application of the convention.

59. Mr. AMADO said that a State formulating a reservation to which an objection was made would always be entitled to accede to the convention by withdrawing its reservation.

60. Mr. CORDOVA thought that, if Mr. KerNO's idea were accepted, the sentence should be altered, so that the last part: “he may assume that the State had consented to the reservation” would read: “the State should be deemed to have consented to the objection”. He favoured giving the depositary that directive, but he did not favour granting him the power to determine the juridical effects of a State's declaration.

61. Mr. YEPES thought the wording should be “shall be deemed” since it was a presumption *juris et de jure* and the State waiving its option of making an objection must be deemed to have accepted the reservation.

62. The CHAIRMAN pointed out that Mr. CORDOVA's amendment covered that hypothesis.

63. Mr. HUDSON pointed out that sub-paragraph (4) read: “communicate it to all States” whereas sub-paragraph (5) read: “in communicating a reservation . . . to a State”. He thought the text should be redrafted as follows:

"The depositary of a multilateral convention, in communicating a reservation to the convention to States which have ratified, acceded to or accepted the convention, shall at the same time request such States to express within a specified period of time their attitude towards the reservation, and such period may be extended if this is deemed to be necessary. If within the period specified or extended a State fails to make its attitude towards the reservation known to the depositary, that State may be deemed to have consented to the reservation."

64. Mr. SCALLE said that even if by objecting a State could prevent a convention from entering into force, its failure to make known its attitude could not be allowed to produce the same effect. The line must be drawn somewhere. Mr. el Khoury had referred to the practice followed in regard to newspaper subscriptions. It might equally be argued that the Secretary-General of the United Nations was not a mere private individual but an international official. A time-limit must be laid down.

65. Mr. SANDSTRÖM mentioned that Mr. el Khoury had cited an instance where failure to tender an objection was not tantamount to consent. Such instances might be provided for by using the words "may be".

66. Mr. CORDOVA thought that a State which had not replied to the communication of a reservation could not indefinitely prevent the State making the reservation from becoming a party to the convention, and similarly that the depositary could not be kept waiting indefinitely. If a State did not reply, some sanction must be applied. Either the words "shall be deemed" should be used or nothing should be said about it.

67. Mr. EL KHOURY asked what, supposing a State declared that it did not accept an objection after it had been deemed to have given its consent and had been recorded as having done so, the position would then be? He did not see why one State should be excluded in favour of another. When the time-limit had expired the Secretary-General should inform the State in question that it was deemed to have given its consent. The reply from the State would show what the position was.

68. After a discussion of the terms "shall be deemed", "may be deemed", "should be deemed", and "is deemed", it was decided to use the expression "is deemed".

*Sub-paragraph (5) as amended by Mr. Córdova, Mr. Hudson and Mr. Spiropoulos was adopted subject to drafting changes.*

*Sub-paragraph (6)*<sup>9</sup>

69. Mr. SANDSTRÖM thought that the wording of sub-paragraph (6) should be brought into line with that of sub-paragraph (5).

70. Mr. HUDSON wondered whether the provision was really necessary. Sub-paragraph (5) was surely sufficient.

<sup>9</sup> Sub-paragraph (6) read as follows:

"(6) When a State, subsequent to notice of a reservation to a multilateral convention, ratifies, accedes to or accepts the convention without express objection, the depositary may assume that the State has consented to the reservation."

71. Mr. KERNO (Assistant Secretary-General) maintained that it was a new notion and a very valuable one. The sub-paragraph laid down the rule of consent *per factum concludens*. In other words, it specified that a State performed an act and that act implied consent; where for example the State had been apprised of a reservation and accepted the convention without reference to the reservation, it could be deemed to have accepted it. Of course, if that State had already objected to the reservation, the objection would continue to be valid.

72. Mr. HUDSON assumed that if a State remained silent during the time-limit of x months, it would then be deemed to have given its consent.

73. Mr. KERNO (Assistant Secretary-General) replied that the case was not the same. A time-limit of x months was allowed for States to tender objections. In the instance referred to in the sub-paragraph under discussion, it was not necessary to wait until the end of that period to assume consent.

74. Mr. SCALLE asked whether it would not be better for sub-paragraph (6), which stated the general rule, to come before sub-paragraph (5), which referred to a specific case.

75. Mr. KERNO (Assistant Secretary-General) replied that sub-paragraph (4) laid down that the depositary of a multilateral convention would notify the other States on receipt of a reservation, without making any request; sub-paragraph (5) stipulated that those States having the right to make objections should be notified and asked to reply within a specified period — and incidentally be informed of the consequences of not making their attitude known; while sub-paragraph (6) dealt with the *factum concludens*.

76. Mr. SCALLE appreciated Mr. Hudson's objection. There did indeed appear to be some repetition.

77. Mr. CORDOVA took it that the depositary was to communicate the reservation to all States, allowing them a time-limit of x months to submit any objections. Supposing that meanwhile a State came along, tendered no objection, and ratified the convention. Would that mean that it had waived the rest of the period allowed?

78. The CHAIRMAN said it would.

79. Mr. HUDSON suggested the following version: "When a State, subsequent to notice of a reservation to a multilateral convention, ratifies, accedes to or accepts the convention within a period of x months without making objection, it is deemed to have consented . . ."

80. The CHAIRMAN suggested: "Within the period fixed in the preceding sub-paragraph after having received notice".

*Sub-paragraph (6) was adopted with the above amendments.*

*Sub-paragraph (7)*<sup>10</sup> (*sub-paragraph (3) of paragraph 34 of the "Report"*)

81. The CHAIRMAN read out the sub-paragraph and

<sup>10</sup> Sub-paragraph (7) read as follows:

"(7) The depositary of a multilateral convention shall communicate all replies to his enquiries, in respect of any reservation to the convention, to all States entitled to receive notice of such reservation."

remarked that the words "should communicate" might be substituted for "shall communicate".

82. Mr. HUDSON said that the sub-paragraph mentioned the replies to the communication referred to in sub-paragraph (4). He thought it better to use the same wording to express the same point, and instead of: "to all States entitled to receive notice of such reservation" to say: "to all States which are or may become parties to the convention".

*Sub-paragraph (7) was adopted with the above amendment.*

*Sub-paragraphs (1) and (2) (sub-paragraphs 4 and 5 of paragraph 34 of the "Report") (resumed)<sup>11</sup>*

83. The CHAIRMAN invited the Commission to resume discussion of the following text submitted by Mr. Hudson:

"(1) If a convention enters into force as a consequence of its signature only, no further action being requisite, a State which makes a reservation at the time of its signature may become a party to the convention only if no objection is expressed by any State which has previously signed the convention, or which may become a signatory during a limited period for which the convention is open to signature.

"(2) *a.* If ratification or acceptance in some other form after signature is requisite to bring a convention into force, a reservation made at the time of signature is not to be taken into account unless it is repeated in the later ratification or acceptance of the convention.

"*b.* In such case, a State which tenders a ratification or acceptance with a reservation, whether the reservation was made at the time of its signature or later, may become a party to the convention only in the absence of objection made by any other State which, at the time the tender is made, has signed, or ratified or otherwise accepted the convention: provided, however, that an objection made by a State which at that time had merely signed the convention will cease to have the effect of excluding the reserving State if after a period of 12 (possibly 18) months the State making the objection has not proceeded to effect its ratification or acceptance of the convention."

84. Mr. LIANG (Secretary to the Commission) did not see the point of the words "during a limited period" in sub-paragraph (1). If the convention provided for a time-limit, the period might or might not be limited. It was of no importance.

85. The CHAIRMAN agreed. One might say "during the period".

86. Mr. HUDSON said that the text applied to the very rare instances where States could sign a convention at any time and their mere signature would bring it into force.

87. Mr. KERNO (Assistant Secretary-General) said there had been instances of that during the League of Nations days.

88. Mr. SCALLE pointed out that there might be a considerable number of specialized agency conventions open for signature without any specified time-limit.

89. Mr. HUDSON thought that the idea of a time-limit was necessary.

90. Mr. KERNO (Assistant Secretary-General) pointed out that the Harvard draft (article 14 (c)) embodied the same idea. If the time-limit was not specified, the time of entry into force of the convention would be decisive. If the State making a reservation signed after the convention had entered into force, the time of signature would be decisive in determining what States were entitled to raise objections to the reservation.

91. The CHAIRMAN confirmed that if the convention was open for signature indefinitely, it remained so until its entry into force.

92. Mr. HUDSON thought that the examples were not sufficiently numerous to justify provision for such instances.

93. Mr. YEPES said that though he was sure the majority of the Commission would not share his view, he would like to make a final effort to prevent a mistake being made. He would like the wording to be: "only in the absence of objections formulated by a majority of the States". He wished to prevent the veto from being extended to a sphere where it had no place.

94. The CHAIRMAN pointed out that the proposal would mean an entirely different text. He did not imagine the Commission would wish to go back on its previous decision.<sup>12</sup>

*Sub-paragraph (1) was adopted subject to drafting changes.*

95. Mr. YEPES asked whether the expression "any State which has previously signed the convention" meant that a single State could object to another State becoming a party to the convention, in other words whether the article implied the unanimity rule.

96. Having received an affirmative reply from the Chairman, he pointed out that he had voted against the adoption of the sub-paragraph.

*Sub-paragraph (2)*

97. Mr. FRANÇOIS was not altogether happy about the text. So long as the convention was not ratified, the reservation would of course be taken into account, e.g. the depositary would be required to communicate it; but the reservation would only become fully effective at the time of ratification. He did not think the words "is not to be taken into account" were suitable.

98. Mr. KERNO (Assistant Secretary-General) saw Mr. François' point. The question was which States were entitled to submit objections and at what juncture that right would apply. If a given convention provided for signature and ratification, the important time was not the time when the State making a reservation signed the convention, but the time when it ratified.

99. With regard to the drafting, he had certain misgivings about sub-paragraphs (2) *a* and *b*. Sub-paragraph (2) *b* started off: "In such case...". Thus it appeared to refer to cases in which signature was followed by ratification or acceptance. But accession was also a

<sup>11</sup> See paras. 5 to 33 above.

<sup>12</sup> See summary record of the 103rd meeting, paras. 45 and 62-63.

method of becoming a party to a convention and accession was not preceded by signature. The latter case was not covered by the present wording of sub-paragraph (2) *b*.

100. Mr. HUDSON took the case of an instrument which was not signed at all, for example an instrument open merely for accession, such as the Geneva General Act of 26 September 1928. A new sub-paragraph would be needed beginning with the words "In such case" and then repeating the first two lines of sub-paragraph (2) *a*. The case of accession would not be covered; it was, however, desirable to cover it.

101. Mr. LIANG (Secretary to the Commission) asked whether accession was not covered in (2) *a* by the words "in some other form".

102. Mr. HUDSON said that by deleting the words "after signature", accession would be covered. He suggested deleting the phrase "whether the reservation was made at the time of signature or later". He also suggested making a single sub-paragraph and deleting the letters *a* and *b*.

103. Mr. FRANÇOIS asked whether it would not be advisable to add in (2) *b* also the words "or which may become a signatory..." as given at the end of sub-paragraph (1). Sub-paragraph (2) should also provide for the case of States which still had the right to sign. If signature was permissible within a certain time-limit, and before the time-limit for submitting reservations had expired a State had not signed but was at liberty to do so, it should enjoy the same rights.

104. The CHAIRMAN suggested: "or otherwise accepted the convention if the convention is open to signature; provided...".

105. Mr. HUDSON agreed to the amendment. He suggested "shall have no effect".

106. Mr. FRANÇOIS again proposed the addition of: "or which may become a signatory during a specified period for which the convention is open to signature" before the word "provided".

107. There was another point on which his proposal differed from Mr. Hudson's. In Mr. Hudson's proposal the period of twelve or eighteen months during which a mere signatory could object to a reservation started from the moment the objection to the reservation had been communicated. According to his own system, the three-year period would start from the time of signature by the State making the objection. That was a considerable difference. In practice, his own system would be preferable; suppose, for example, that immediately after signing a treaty, a State communicated an objection to a reservation. According to Mr. Hudson, the State would be told that it had twelve months in which to ratify. Twelve months was a very short time. If it made its objection three years after signature it would be told that though it had waited three years, it still had another twelve months. He saw no advantage in the system advocated by Mr. Hudson and he could not understand why Mr. Hudson should object to the specified period starting from the moment of signature by the State making the objection.

108. Mr. AMADO drew attention to the words "in some other form". The procedures for acceptance of a convention were so cut and dried that it was not clear why the expression "in some other form" should be used, since it could only refer to accession.

109. Mr. HUDSON explained that the words "in some other form" or "otherwise" referred to accession and acceptance. He thought it could be left to the rapporteur to put the text into proper shape.

110. Mr. François' observation worried him somewhat; but the opposite case might arise, namely, delay in ratification. Supposing a State signed, and two or three years elapsed before another State decided to ratify the convention with a reservation. The first State then raised an objection, but if its objection was to be effective, that State must deposit its ratification within three years of signature. In that case the specified period would have to be extended. That, rather than the necessity for taking signature as the starting point for the specified period, was the logical conclusion to be drawn from Mr. François' argument.

111. He was prepared to delete the reference to twelve or eighteen months and merely to say *x* months, which might mean thirty-six months. The Assembly might possibly adopt the text and still leave the period unspecified.

112. Mr. FRANÇOIS thought that the period could be left blank, but that a choice would have to be made between the two systems. Was the period to start from the date of signature or from the time when the objection was made?

113. Mr. HUDSON was opposed to Mr. François' system. Years might elapse before any State made a move.

114. Mr. FRANÇOIS replied that if a period of three years were fixed, it would be most unusual if no State made a move.

115. Mr. HUDSON said that he could cite many examples to the contrary. There must in any case be at least one year and then another six months. Suppose then that at the end of eighteen months a State came along and made a reservation; the signatory would still have eighteen months. He repeated that it was an argument for extending the period.

116. The CHAIRMAN pointed out that the *terminus a quo* was not mentioned in the text of sub-paragraph (2) *b*. He would like to know when the period of eighteen months would start.

117. Mr. HUDSON replied that the period would count from the time when the objection was made, and he agreed to insert words to that effect in the text.

118. Mr. ALFARO thought that if the system were adopted under which the period would begin on the date on which the objection was made, every signatory State would come up against a difficulty. There must be a starting-point for each State. He suggested that the period should be three years, starting from the date of signature.

119. Mr. KERNO (Assistant Secretary-General) asked what would happen if the signatures were not affixed simultaneously.

120. Mr. ALFARO replied that the period would begin from the time the treaty was open for signature or from some other date. The essential point was that the beginning of the period should be the same for all signatories.

121. Mr. HUDSON said that supposing only one State among twenty signatories of a convention had submitted an objection. It had the right to do so, but it would be told that if it made an objection, it should give evidence of its good faith by ratifying. The important point was to lay down a rule which would provide a safeguard against abuse of the right to make objections. If in the course of the specified period ratification by the State which had tendered the objection were not forthcoming, the reservation would become effective in respect of the other States. If later the State which had tendered the objection decided to ratify, it would have to ratify on the basis of acceptance of the reservation.

122. Mr. FRANÇOIS pointed out that, under Mr. Hudson's system, a signatory State acting in bad faith got the advantage of an additional period of grace after it had already delayed ratification for three years.

123. Mr. HUDSON replied that in such circumstances the period of grace should be curtailed. In his opinion it was nonsense to speak of the right of veto in the matter.<sup>13</sup> A State acting in bad faith would abuse its right as a signatory by presenting and maintaining an objection. Hence the specified period must not be too long.

124. Mr. FRANÇOIS thought that as the two viewpoints had been clearly explained the Commission should make its choice.

125. The CHAIRMAN asked the Commission to decide as to when the prescribed period should begin. He himself thought the date of the objection should be adopted.

*It was so decided by 6 votes.*

126. The CHAIRMAN considered it would be better not to specify the actual period but to call it x months.

127. Mr. FRANÇOIS asked why the period should not be specified.

128. Mr. HUDSON thought the General Assembly might be told that twelve months would be a suitable period.

129. Mr. SPIROPOULOS thought the important point was to decide whether that question came within the scope of codification. If so, a definite period must be fixed.

130. Mr. HUDSON replied that it was being dealt with in connexion with codification. The Commission was not stating that that was the law, but that it was the best method of achieving results.

131. The CHAIRMAN pointed out that the question would be dealt with in a special report to the Assembly.

132. Mr. SPIROPOULOS said that the rules in question would be inserted in Mr. Brierly's report. There was no doubt on that point. The Assembly wished the Commission to give priority to that section of Mr. Brierly's report, but the section in question would come within the general framework of the draft on treaties. Hence a definite period must be fixed.

133. The CHAIRMAN thought it would be time enough to do so when the Commission examined the draft Convention on Treaties.

134. Mr. AMADO thought Mr. Spiropoulos was right. The Commission was reaching a conclusion which he considered scientific. The fact that the Commission was replying to a specific question put by the General Assembly did not make its reply any less significant.

135. The CHAIRMAN replied that it was too soon to embark on that question.

136. Mr. SPIROPOULOS said he would not press the point, though he thought that the same rules should apply in both cases.

137. Mr. HUDSON agreed that they should be consistent, though not necessarily identical.

*It was decided that the period should be specified, and the duration should be 12 months.*

The meeting rose at 6 p.m.

## 106th MEETING

Tuesday, 19 June 1951, at 9.45 a.m.

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*Chairman:* Mr. James L. BRIERLY

*Rapporteur:* Mr. Roberto CORDOVA

*Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, 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.

<sup>13</sup> See para. 93 above.

**Law of treaties: General Assembly resolution 478 (V) of 16 November 1950: Reservations to multilateral conventions (item 4(b) of the agenda) (A/CN.4/L.18) (continued)**

DISCUSSION OF MR. BRIERLY'S DRAFT REPORT  
(A/CN.4/L.18)<sup>1</sup>

PARAGRAPH 19 (paragraph 34 of the "Report")  
(continued)

Sub-paragraphs (1) and (2) (sub-paragraphs 4 and 5 of paragraph 34 of the "Report") (continued)

1. Mr. YEPES asked when the amendment he had proposed to paragraph 19, sub-paragraphs (1) and (2), would be discussed. It read as follows:

"When, prior to or after the entry into force of a multilateral convention, a State signs, ratifies, accedes to or accepts a convention, *subject to one or more reservations*, that State may become a party to the convention if the *majority of the States*, which have, up to the time of notification of the reservation, signed, ratified, acceded to or accepted the convention, expressly or tacitly consent to the reservation. Consent shall not, however, be required from a signatory State which has not ratified or accepted the convention within three years from the date of signing it."

2. The CHAIRMAN replied that, should the Commission so desire, it could discuss Mr. Yepes' amendment forthwith. He pointed out, however, that it would not be easy to fit it into the report.

3. Mr. YEPES was sorry that his amendment had not yet been submitted to the Commission, but simply put on one side. The only reference to it had been Mr. Hudson's ungracious comment to the effect that it was absurd to speak of a right of veto in connexion with reservations.<sup>2</sup> His was a constructive proposal, put forward in a conciliatory spirit, and he was not prepared to see it treated in that way. That was why he asked that it be dealt with in accordance with the usual procedure.

4. He believed he was only doing his duty in asking the Commission to reconsider the question before entering upon so dangerous a course. The system which the Commission was about to adopt amounted to nothing less than the introduction of a right of veto in a field where it could neither be permitted nor tolerated. To make the rejection of a reservation dependent on the decision of a single State was tantamount to setting up a veto system. He had quoted the case of the Geneva Convention relative to the Protection of Civilian Persons in Time of War,<sup>3</sup> which was conclusive. The United Kingdom had made a secondary reservation to that convention, and the objection of a single State would suffice to exclude it from a convention, which it had been very largely instrumental in preparing, and of which it, in the main, approved. If that was not a right of veto, he did not know what was. If he could be shown otherwise, he was ready to follow the majority. His proposal would demonstrate that at

least one member of the Commission was opposed to the introduction of the right of veto. He would repeat that discussion of the question of a right of veto, in connexion with reservations, was not an absurdity. Mr. Hudson's outburst was not an argument.

5. The Commission's lengthy discussions on the subject had led Mr. ALFARO to the conclusion that all systems had serious practical disadvantages, and he had been trying, all along, to find the least objectionable. Generally speaking, he had been in favour of the so-called "classical" or League of Nations system, rather than that of the Pan-American Union, which would result in the fragmentation of a convention.

6. It appeared to him, however, that Mr. Yepes' objection to the unanimity rule was very serious. That rule, sometimes called the "veto system", had given rise to objections in the United Nations. It had been pointed out that if, for instance, forty States were prepared to accept a secondary reservation which did not affect the main purpose of the convention, it would be lamentable if one State were permitted to obstruct the wishes of those forty States. He was therefore in favour of the majority rule proposed by Mr. Yepes, provided that the majority be one of at least four-fifths.

7. Mr. YEPES accepted that amendment to his proposal.

8. Mr. CORDOVA understood the meaning of the proposal to be that, in accepting the reservation, the majority of the States could impose its will on the minority, and that the State, formulating the reservation, would become a party to the convention, in spite of the objections raised to the said reservation. He could not accept such a rule.

9. Mr. YEPES replied that that was indeed the case when the majority of the States in question were parties to the convention. The Convention relative to the Protection of Civil Persons in Time of War, for instance, had been signed by sixty States. Supposing there were forty-eight acceptances of the reservation formulated by the United Kingdom, that State could be a party to the convention, and if any State did not accept the United Kingdom reservation, its objection would hold good in regard to its relations with that country.

10. Mr. AMADO wondered how it was that Sir Hartley Shawcross, United Kingdom Attorney-General, and Mr. Fitzmaurice, Second Legal Counsellor at the Foreign Office, had advocated, before the International Court of Justice, a system opposed to that proposed by Mr. YEPES, and had elected for the traditional system.

11. Mr. YEPES replied that he was not called upon to explain the thought processes of the United Kingdom Government. He had stated facts, to wit, that there was a United Kingdom reservation, and that if a single State were to oppose that reservation, the United Kingdom would be excluded from the convention.

12. Mr. SANDSTRÖM did not believe that the matter could be regarded from the point of view of the veto. The question was whether a majority could deprive a minority of a right to which it was entitled.

13. Mr. SCALLE said that the Commission was only concerned with cases where no provision was made for

<sup>1</sup> See summary record of the 101st meeting, footnote 1.

<sup>2</sup> See summary record of the 105th meeting, para. 123.

<sup>3</sup> See summary record of the 103rd meeting, para. 19.

reservations in the convention. The States were free agents when concluding the convention, but once that had been done the convention had the force of law. It was in the same position as a law passed by a parliament. He did not see how one could speak of a veto in such a case. A group of States could not impose its will on other States by accepting a reservation to which they were opposed. The wording of the convention was final.

14. Mr. Yepes' proposal reversed the order of importance of the factors involved.

15. Mr. EL KHOURY put the case of a convention, concluded by sixty United Nations Member States, one of which attached a reservation. Fifty States accepted the reservation and ten rejected it. If those ten States insisted on the rejection of the reservation, failing which they would not be bound by the convention, should they be excluded because they objected to a reservation by a State that had not necessarily taken part in the negotiations? Should those ten States be left to withdraw from the convention, because there was a majority in favour of accepting the reservation? It was not a matter of majorities or minorities. That rule was only applicable in the case of a conference.

16. As Mr. Hudson had said, a reservation amounted to a new agreement, and a new agreement should be discussed and adopted by all the framers of the convention. He could not accept Mr. Yepes' proposal.

17. Mr. SPIROPOULOS had intended making the same observations as Mr. el Khoury. He did not understand the bearing of Mr. Yepes' proposal. Before taking a decision, the Commission must know what its effect would be. In the case of the Convention on Genocide, the Soviet Union had formulated a reservation in regard to compulsory appeal to the International Court of Justice, under article IX. Supposing that three States were to declare that they did not accept that reservation, what would be the effect of their objection? Would they cease to be bound by the convention?

18. Mr. YEPES assumed that forty States had accepted the Soviet Union's reservation. Would it be right to allow two or three States to stand in the way of the wishes of those forty States? States accepting the reservation would be bound by the convention in their mutual relations, and also in their relations with the Soviet Union subject to observance of the reservation. States that did not accept the reservation would still be bound by the convention, except that the part of the convention to which the reservation had reference would not be applicable in their relations with the Soviet Union.

19. Mr. HUDSON remarked that Mr. Yepes was again proposing the Pan-American system.

20. Mr. CORDOVA observed that the Pan-American system resulted in the fragmentation of conventions. Under that system, if, out of ten States, one formulated a reservation, it would be bound in regard to the States accepting its reservation. Insofar as they were concerned, it would be a party to the convention. Under the unanimity system, which was that of the League of Nations and of the Secretary-General of the United Nations, the objection of one State could prevent the

reserving State from becoming a party to the convention. Mr. Yepes and Mr. Alfaro were proposing a compromise solution. If the majority of the States accepted the reservation, the reserving State could become a party to the convention, insofar as its relations with the majority were concerned. The other States, that was to say those that did not accept the reservation, would not be bound in their relations with the reserving State but would be bound in regard to the other States. The difference between that proposal and the Pan-American system was that a majority was necessary. The proposal was therefore less extreme.

21. In the view of the CHAIRMAN, such a system was just as conducive to the fragmentation of conventions, as the Pan-American practice.

22. Mr. ALFARO said that, under the Pan-American system, there might be a convention, comprising ten articles, and signed by twenty-one republics, where ten groups of two States each made a reservation to a different article. There would then be two States for which the whole convention was in force except for article 1, two others for which it was in force except for article 2, etc. Mr. Yepes' proposal reduced the drawbacks of the Pan-American system to a minimum and would have the effect of preventing a state of mind in the Assembly such as had resulted in talk of vetoes. The representative of Uruguay's remarks in that connexion would not have been forgotten.<sup>4</sup> The unanimity rule gave any State the right of veto and thereby enabled it to prevent another State from becoming a party to the convention, by reason of the fact that the latter had made a reservation which had been accepted by 59 States out of 60.

23. Naturally there were disadvantages attached to Mr. Yepes' proposal, but they were not so great as in the case of the other systems.

24. Mr. KERNO (Assistant Secretary-General) observed that Mr. Yepes' proposal would result in the fragmentation of conventions, but to a lesser extent than the Pan-American system.

25. Mr. CORDOVA felt obliged to put a number of questions. In speaking of the system proposed by Mr. Yepes, mention had hitherto been made only of a single reservation, but it might happen that fifteen States would each make a different reservation. What would be the effect of all those different reservations? It would really be tantamount to splitting up the convention into, possibly, fifteen separate conventions. He could not support Mr. Yepes' proposal, as he was opposed to the fragmentation of conventions.

26. Mr. YEPES replied that the system of reservations was bad in itself. It had, however, to be accepted. The solution he proposed was the least harmful. Fragmentation would not be so extensive.

27. Mr. HSU felt that the above modification of the Pan-American system was very satisfactory and hoped that Mr. Yepes would advocate it within the Pan-American Union, but he did not believe that it could be

<sup>4</sup> See *Official Records of the General Assembly, Fifth Session, Sixth Committee*, 217th meeting, para. 61.

applied to the system adopted by the Commission without destroying it. There was, obviously, an analogy between the unanimity rule and the veto, but it should not be pressed too far. It was not possible to speak of a veto in the case of a reservation to a text which had already been promulgated.

28. Mr. AMADO wished to draw attention to the case of States that had made concessions in order to accept the convention, and were, then, faced with a demand from a single State that they agree to some particular point.

29. Mr. EL KHOURY considered that a State which formulated a reservation wished to be a privileged party to the convention and was not prepared to be on the same footing as the other States. In those circumstances, it might well be asked why it considered itself entitled to be in a more favoured position than the other parties. A new situation would have arisen in regard to which there should be a new agreement. The object was not to prevent a reserving State from entering the circle of States bound by the convention, but to prevent it from being in a specially favoured position. A reserving State was welcome, provided it did not seek to be in a more advantageous position than the other parties. That was the point.

30. The CHAIRMAN asked the Commission to vote on Mr. Yepes' proposal, as amended by Mr. Alfaro.

31. In view of the course taken by the discussion, Mr. AMADO did not consider it necessary to take a vote. Mr. Yepes had proved himself a doughty fighter, and Mr. Alfaro had brought to his assistance his long experience as a defender of democratic ideas. Mr. Córdova had given proof of his exactness of mind. The masters had spoken and nothing remained but to proceed with the Commission's deliberations, while paying tribute to Mr. Yepes.

32. The CHAIRMAN asked Mr. Yepes whether he wished his proposal to be put to the vote.

33. Mr. YEPES replied that the proposal was no longer his alone, since Mr. Alfaro had associated himself with it.

34. Mr. ALFARO felt that the Commission had already voted and rejected the proposal.

*It was so agreed.*

NEW PARAGRAPH 18 (*paragraphs 29 and 30 of the "Report"*)  
(*resumed from the 105th meeting*)

35. The CHAIRMAN asked the Commission to examine the redraft of a new paragraph 18, prepared by Mr. Hudson, which ran as follows:

"In so far as relations with the reserving State are concerned, a tender of a reservation constitutes, in substance, a proposal of a new agreement, the terms of which will differ from those of the agreement embodied in the text of the convention. Such a new agreement would require acceptance by all the States concerned. The question arises, however, as to which are such States. In the view of the Commission, a State which has signed but not ratified a convention which is subject to ratification, is not to be excluded from that category; for at the time the reservation is tendered such a State

may be actively engaged in the study of the convention, or it may be in the process of completing the procedure necessary for its ratification, or for some reason, such as the assembling of its parliament, it may have been compelled to delay its ratification. Yet its concern should be taken into account. If an objection to a reservation offered by a State is to have the effect of preventing that State's becoming a party to a convention, it is necessary to determine which are the States competent to interpose such an objection. In this connexion, some commentators have drawn a distinction between reservations offered before, and those offered after the entry into force of the convention; but that distinction encounters difficulty when the entry into force is brought about as a result of the deposit of the ratifications of a very limited number of States. It seems necessary to take account of the interests, not only of those States which become parties or which have deposited their ratifications, but also of States which are signatories but which have not completed the process of ratification.

"It is not to be anticipated that a signatory State would advance an objection to a reservation from motives unrelated to its merits. In order, however, to guard against any possible abuse by a signatory State of its right to object to a reservation, and to forestall the possibility of the reserving State being indefinitely excluded from participation in a convention by a State which itself refrains from assuming the obligations of a party, the Commission deems it necessary, while allowing the objection by a mere signatory to a reservation to have the effect of excluding a reserving State, to prescribe a time limit within which the effect of such objection may endure. Taking into consideration the normal administrative and constitutional procedures of most governments in respect of ratification, the Commission believes that a period of twelve months would be a reasonable time within which an objecting State could proceed to effect its ratification or acceptance of the convention and thereby demonstrate its willingness to undertake the obligations of the convention. Accordingly, the Commission is of the opinion that, if after a period of twelve months from the time it makes an objection to a reservation, a signatory State has not proceeded to effect its ratification or acceptance of the convention, its objection should cease to have the effect of preventing the reserving State from becoming a party."

36. Mr. HUDSON explained that the above was a first draft and that it needed putting into shape. He had done no more than formulate some concepts that might be of use.

37. The CHAIRMAN proposed that the Commission discuss the draft sentence by sentence. He read out the first sentence:

"In so far as relations with the reserving State are concerned, a tender of a reservation constitutes, in substance, a proposal of a new agreement, the terms of which will differ from those of the agreement embodied in the text of the convention."

38. He asked whether the sentence could not be shortened and begin with "A tender of a reservation constitutes . . .".

39. Mr. HUDSON felt it would be a mistake to do away with the first part of the sentence, which limited its scope. It was not a question of renewing the whole agreement.

40. Mr. CORDOVA observed that the tender of a reservation was equivalent to proposing an alteration in the original agreement.

41. Mr. HUDSON pointed out that such an alteration would only apply to the reserving State. The text proposed by Mr. Brierly read: "The Commission believes that, in substance, the tender of a reservation constitutes a proposal of a new agreement." He felt that was putting the matter too strongly.

42. Mr. EL KHOURY felt that Mr. Brierly had stated the position very accurately.

43. Mr. HUDSON replied that what Mr. Brierly had said was certainly correct, but only as regards the reserving State.

44. The CHAIRMAN undertook to add a few words to that effect.

*The first sentence was approved.*

45. The CHAIRMAN read out the second and third sentences:

"Such a new agreement would require acceptance by all the States concerned. The question arises, however, as to which are such States."

*The second and third sentences were approved.*

46. The CHAIRMAN read out the fourth sentence:

"In the view of the Commission, a State, which has signed but not ratified a convention which is subject to ratification, is not to be excluded from that category; for at the time the reservation is tendered such a State may be actively engaged in the study of the convention, or it may be in the process of completing the procedure necessary for its ratification, or for some reason, such as the assembling of its parliament, it may have been compelled to delay its ratification."

47. Mr. KERNO (Assistant Secretary-General) observed that, after raising the question as to which States were concerned, the draft only mentioned signatories.

48. Mr. HUDSON said that his draft was only intended to refer to signatories.

49. Mr. KERNO (Assistant Secretary-General) considered that the text should be more precise so that readers who had not attended the Commission's discussions should be under no misapprehension as to what was intended.

50. The CHAIRMAN suggested the wording "in the view of the Commission, not only the States which have ratified but also those which have signed . . .".

51. Mr. SCELLE remarked that a State which had taken part in drawing up a treaty was one of its framers.

52. Mr. HUDSON said that, if a convention could be acceded to by States which had not taken part in its preparation, the latter could sign it and would then be on exactly the same level as the original signatories.

53. Mr. SCELLE did not see any objection to that interpretation though it was wider than the one he had had in mind originally.

*The fourth sentence was approved.*

54. The CHAIRMAN read out the fifth and sixth sentences:

"Yet its concern should be taken into account. If an objection to a reservation offered by a State is to have the effect of preventing that State's becoming a party to a convention, it is necessary to determine which are the States competent to interpose such an objection."

55. Mr. HUDSON said that the sixth sentence should be deleted as it was only a repetition of what had been said before.

*The fifth sentence was approved and the sixth deleted.*

56. The CHAIRMAN read out the seventh sentence:

"In this connexion, some commentators have drawn a distinction between reservations offered before, and those offered after the entry into force of the convention; but that distinction encounters difficulty when the entry into force is brought about as a result of the deposit of the ratifications of a very limited number of States."

57. Mr. HUDSON said that the sentence referred to the 1949 Geneva Conventions. It might be as well to mention them specifically.

*The seventh sentence was approved on the above terms.*

58. The CHAIRMAN read out the eighth sentence:

"It seems necessary to take account of the interests, not only of those States which become parties or which have deposited their ratifications, but also of States which are signatories but which have not completed the process of ratification."

59. Mr. HUDSON said that the sentence was superfluous and should be deleted.

*The eighth sentence was deleted.*

60. The CHAIRMAN read out the ninth and tenth sentences:

"It is not to be anticipated that a signatory State would advance an objection to a reservation from motives unrelated to its merits. In order, however, to guard against any possible abuse by a signatory State of its right to object to a reservation, and to forestall the possibility of the reserving State being indefinitely excluded from participation in a convention by a State which itself refrains from assuming the obligations of a party, the Commission deems it necessary, while allowing the objection by a mere signatory to a reservation to have the effect of excluding a reserving State to prescribe a time limit within which the effect of such objection may endure."

61. Mr. YEPES asked whether it were wise to assume that reservations by States were always inspired by worthy motives. There might be cases where the object of the reservation was to impede the proper functioning of the convention.

62. The CHAIRMAN considered that there were reasons why the draft should be so worded.

63. Mr. KERNO (Assistant Secretary-General) was entirely of Mr. Yepes' opinion, but it was one of the rules of the game that the good faith of States was taken for granted.

64. Mr. LIANG (Secretary to the Commission) agreed with Mr. Yepes. He proposed the wording: "for reasons not relevant to the substance of the convention".

65. Mr. HUDSON recalled that Mr. Brierly's text read: "It is therefore conceivable that a single signatory State, having itself no intention of becoming a party, might object to a tendered reservation from motives unrelated to its merits." He thought that Mr. Liang was being too subtle.

66. Mr. YEPES said that he would not pursue the matter further.

*The ninth and tenth sentences were approved.*

67. The CHAIRMAN read out the eleventh sentence:

"Taking into consideration the normal administrative and constitutional procedures of most governments in respect of ratification, the Commission believes that a period of twelve months would be a reasonable time within which an objecting State could proceed to effect its ratification or acceptance of the convention and thereby demonstrate its willingness to undertake the obligations of the convention."

68. Mr. HUDSON proposed the deletion of the last part of the sentence starting with "...and thereby demonstrate...".

*The eleventh sentence was approved as thus amended.*

69. The CHAIRMAN read out the twelfth and last sentence:

"Accordingly, the Commission is of the opinion that, if after a period of twelve months from the time it makes an objection to a reservation, a signatory State has not proceeded to effect its ratification or acceptance of the convention, its objection should cease to have the effect of preventing the reserving State from becoming a party."

70. Mr. EL KHOURY asked, with reference to the words "has not proceeded to effect its ratification...", if it would be sufficient for the State to reply that the question had been discussed by the Council of Ministers or had been submitted to Parliament. In his opinion, it would be sufficient if the formalities had, at least, begun; it might take one or two years to complete them. He preferred that wording.

71. Mr. HUDSON said that he did not interpret the draft in that way. "Proceed to effect its ratification" meant "effect its ratification".

72. Mr. FRANÇOIS observed that the text was very ambiguous.

73. In order to meet that objection Mr. HUDSON proposed that wording: "a signatory State has not effected its ratification or acceptance".

*The twelfth and last sentence was approved as amended.*

TEXT PROPOSED BY MR. SANDSTRÖM

74. The CHAIRMAN invited the Commission to examine the text proposed by Mr. SANDSTRÖM for insertion in the Report, which read as follows:

"(a) The Commission first states, in conformity with the practice of States, the League of Nations and the United Nations and the opinions of most writers, that the standpoint of international law at present in force must be considered to be, in general terms, that no reservation is valid unless it is accepted by all "parties". The advisory opinion given by the International Court of Justice on the reservations to the Convention on the Prevention and Punishment of the Crime of Genocide does not depart from this rule. The majority opinion stresses, it is true, the need for flexibility in the operation of multilateral conventions (p. 22), but declares that the concept on which the above rule is based and "which is directly inspired by the notion of contract, is of undisputed value as a principle", and the majority founds its opinion on a variety of circumstances referring to the Genocide Convention, from which the conclusion is drawn that an understanding was reached within the General Assembly on the faculty to make reservations, within certain limits, to that convention and that States becoming parties to the convention gave their consent thereto (pp. 21-23).

"(b) The standpoint of present international law thus being determined, the problem facing the Commission is to examine whether, in view of the progressive development of international law, there are reasons to adopt some other rule. This question seems to require a special study in respect of the alternatives which are offered, on the one hand by the Pan-American Union system, and on the other by the system outlined in the majority opinion of the International Court of Justice conceived as a system for general application."

75. Mr. SANDSTRÖM recalled that he had already suggested the idea underlying his text at a previous meeting.<sup>5</sup> The Commission might be accused of being somewhat uncertain as to what the majority of the Court had wished to say, but he was, himself, unable to interpret the opinion of the Court otherwise than he had done in sub-paragraph (a). By interpreting the intentions of the parties the majority of the Court had completely altered the scope of the classic principle, but the rule of law was not changed. Interpretation of the parties' intentions had led to a different solution. The point of divergence between the Court and the Commission was that the Court had considered itself free to find such intention by interpreting the Convention, whereas the Commission demanded that the intention be clearly expressed by the terms of the Convention itself.

76. He did not claim that the wording of his text was satisfactory. He had done no more than put forward an idea.

77. The CHAIRMAN proposed the inclusion in Mr. Sandström's text of an extract from page 21 of the Court's opinion which read:

"It is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto. It is also a generally recognized principle that a multilateral con-

<sup>5</sup> See summary record of the 102nd meeting, para. 29.

- vention is the result of an agreement freely concluded upon its clauses and that consequently none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and *raison d'être* of the convention. To this principle was linked the notion of the integrity of the convention as adopted, a notion which in its traditional concept involved the proposition that no reservation was valid unless it was accepted by all the contracting parties without exception, as would have been the case if it had been stated during the negotiations.”<sup>6</sup>
78. That concept, which was directly inspired by the notion of contract, embodied a principle of undisputed value.
79. Mr. SANDSTRÖM was of the opinion that his text should be inserted immediately after the historical part of the report.
80. The CHAIRMAN took the opinion of the Commission on Mr. Sandström's proposal.
81. Mr. SPIROPOULOS considered that Mr. Sandström's point of view was entirely correct. The Court had confirmed the general principle on which the Commission had based its text. In his opinion the text proposed by Mr. Sandström was in entire conformity with what the Court had decided. It was necessary to accept that text, or it would be said that the Commission had put a false interpretation on the Court's advisory opinion.
82. Mr. HUDSON recalled that no objection had been formulated in the part of the document under consideration, which related to the Court's opinion. There was no reason why an explanation should not be given. He was not, however, sure whether the explanation given in sub-paragraph (a) of Mr. Sandström's text was correct. The Court had said that the General Assembly had, itself, contemplated the possibility that there would be reservations to the Convention on Genocide. It did not follow, however, that the Assembly had made provision for the manner in which such reservations should be treated. He was not at all in favour of giving that explanation. It was not germane to the question who should accept the reservation.
83. The CHAIRMAN considered that on page 21 the advisory opinion was dealing with the principle. The object of the passage was to show that the Commission did not depart from the Court's opinion on the point of law.
84. Mr. HUDSON remarked that the passages which followed that quoted by the Chairman showed that the Court had, in fact, departed from the traditional principle.
85. Mr. SPIROPOULOS considered that it was very important to stress that the Commission accepted that principle.
86. Mr. YEPES asked Mr. Sandström whether he considered that the first six lines of his text reflected the existing law.
87. Mr. SANDSTRÖM replied in the affirmative.
88. Mr. YEPES said that in that case he could not accept the text, as he did not believe that Mr. Sandström's contention was correct. His statement might perhaps apply as regards European regional law, but not as regards general international law, since twenty-one States, or a third of the United Nations, did not follow that rule. It could not, therefore, reflect general international law.
89. Mr. SANDSTRÖM remarked that the advisory opinion stated that the Pan-American system rested on the agreement of the parties.
90. Mr. YEPES saw in that proof that there was an international law other than that examined in the text. The Pan-American system had been accepted by other States.
91. Mr. SPIROPOULOS recalled that the majority and the minority of the Court were agreed on the question as to what was the existing law in the matter.
92. Mr. LIANG (Secretary to the Commission) had not found anything in Mr. Brierly's report on the question of whether the Commission intended to submit certain propositions, as constituting the existing law. General Assembly resolution 478 (V), dated 16 November 1950, did not oblige the Commission to do so. It might be held that the Commission had taken the same position as Mr. Sandström had done in his text.
93. Another point for consideration was whether the Commission intended to endorse the Court's pronouncement in regard to existing law. He did not, himself, think that was necessary and considered that the Commission would have completed its work when it presented the report, as prepared by Mr. Brierly, but a different course might be indicated when it came to the study of the draft convention on treaties.
94. He suggested the deletion of the last part of paragraph (a) of Mr. Sandström's text, following the words “is of undisputed value as a principle”. He did not consider that the Commission should run the risk of giving even such qualified approval, as contained in the last part of that paragraph, to the arguments on which the majority of the Court had based its opinion. It was doubtful whether the circumstances of the 1948 General Assembly afforded any grounds for the conclusion that the framers of the Convention on Genocide had visualized the possibility of reservations to that Convention or that at the time the States became parties to the Convention, they had given their assent to that condition. He himself could not recall any such circumstance. He thought the Commission ought to study the problem before approving that conclusion.
95. Mr. CORDOVA wished to lodge an objection to the first sentence. The principle adopted by the Court was that reservations should be accepted by the parties. If that were the existing law, there would be a contradiction in the Commission's speaking of the Pan-American practice as also constituting a legal system under international law which could be applied in cases where a convention did not contain any specific reference to the matter. If Mr. Sandström's text were adopted, no other procedure would be legal where a convention made no

<sup>6</sup> *I.C.J. Reports 1951*, p. 21.

mention of reservations. He considered that the text should be redrafted.

96. Mr. SPIROPOULOS held that, when nothing was said in the convention, the Commission's system would be applicable. Everyone was agreed on that point, and there was no necessity to re-open the question. The Pan-American system was only applicable when it was specifically so stated.

97. Mr. SANDSTRÖM was of the opinion that, in view of Mr. Yepes' and Mr. Córdova's objections, it was necessary to alter the wording of the text and expand his thesis. He had thought that priority should be accorded to the question as to what was the existing law. The General Assembly's resolution had, in fact, invited the International Law Commission "in the course of its work on the codification of the law of treaties, to study the question of reservations to multilateral conventions, both from the point of view of codification and from that of the progressive development of international law". He had considered that, in view of those terms of reference he had been under the necessity of considering what the existing international law actually was. As regards paragraph (b), he considered that, from the point of view of the development of international law, it was necessary to study other alternatives.

98. Mr. YEPES pointed out that the resolution also spoke of the progressive development of international law. He proposed the deletion of the words "at present in force" in the first sentence of Mr. Sandström's text.

99. Mr. HUDSON did not believe that the two paragraphs proposed by Mr. Sandström would serve any useful purpose.

100. Mr. SPIROPOULOS was favourably inclined towards the proposal, but did not believe it to be absolutely necessary. He proposed that the Commission vote on the matter forthwith.

101. In reply to a question by Mr. AMADO, Mr. SANDSTRÖM said that the two paragraphs proposed by him would be inserted immediately after paragraph 10, relating to the history of the question.

102. Mr. YEPES wondered whether the Commission could decide by means of a vote whether such and such constituted the existing law. He would like to know on what facts the Commission would base its opinion.

103. Mr. HUDSON remarked that the Commission was most definitely not called upon to decide whether such and such constituted the existing law.

*Mr. Sandström's text was rejected by 8 votes to 3.*

#### ANNEX.<sup>7</sup>

104. The CHAIRMAN said that the Commission had still to examine the annex to the draft report, containing draft articles relating to reservations. In his opinion, it would be difficult for the Commission to study the annex in plenary session, as the draft articles were of too technical a character and the Secretariat was best equipped to deal with the matter. He suggested that the Commission appoint one or two of its members to study the draft articles.

<sup>7</sup> The text of the Annex is reproduced in vol. II of the present publication.

105. Mr. YEPES regretted that he could not agree to the Chairman's suggestion. The Commission could not divest itself of so great a responsibility.

106. The CHAIRMAN said that the study of the annex by the Commission in plenary session would take at least a week.

107. Mr. YEPES considered that it would be time well spent.

*It was decided that a sub-committee composed of Mr. Brierly, Mr. Hudson and Mr. François be set up to study the annex to the report (A/CN.4/L.18).*

#### **Preparation of a draft code of offences against the peace and security of mankind: report by Mr. Spiropoulos (item 2 (a) of the agenda) (A/CN.4/L.15)<sup>8</sup> (resumed from the 92nd meeting)**

108. Mr. SPIROPOULOS said that he had no comments of a general nature in regard to the revised text he had prepared on the basis of the Commission's decisions and of the discussions that had taken place on the subject. The text would be the same, whether the Commission decided to submit the draft code to governments or to the General Assembly.

#### INTRODUCTION

PARAGRAPHS 1, 2 AND 3<sup>9</sup> (*paragraphs 54-56 of the "Report"*)

109. Paragraphs 1, 2 and 3 were *adopted* with the addition of the dates of the first and second sessions and the date of resolution 177 (II).<sup>9a</sup>

PARAGRAPH 4<sup>10</sup> (*last sentence of paragraph 54 of the "Report"*)

110. Mr. HUDSON proposed the deletion of the word "any" in line 5 of the English text.

*It was so decided.*

Paragraph 4 was *adopted* as amended, and with the addition of the date of resolution 488 (V).

<sup>8</sup> Mimeographed document only, the text of which corresponds with drafting changes to Chapter IV of the *Report of the International Law Commission covering the work of its third session*. (See vol. II of the present publication.) The drafting changes are indicated in the summary records of the 106th to 111th meetings.

<sup>9</sup> Paras. 1 and 2 read as follows:

"1. By resolution 177 (II), paragraph (b), the General Assembly requested the International Law Commission to prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles of international law recognized in the charter of the Nürnberg Tribunal and in the judgment of the Tribunal.

"2. At its first session, the International Law Commission appointed one of its members, Mr. Jean Spiropoulos, Special Rapporteur on this subject, and invited him to prepare a working paper for submission to the Commission at its second session. The Commission also decided that a questionnaire should be circulated to Governments inquiring what offences, apart from those defined in the charter and judgment of the Nürnberg Tribunal, should, in their view, be comprehended in the draft code."

<sup>9a</sup> See however summary record of the 111th meeting, para. 171.

<sup>10</sup> Corresponds to the last part of paragraph 54 of the "Report" beginning with the words "By resolution 488 (V) . . .". See also summary record of the 111th meeting, para. 176.

PARAGRAPH 5 (*paragraph 57 of the "Report"*)

111. Mr. SPIROPOULOS pointed out that the French and Lebanese Governments had submitted their observations. Documents A/CN.4/45 Add.1 and Add. 2 should therefore be added to the list of documents mentioned in the report.

*It was so decided.*

112. Paragraph 5 was *adopted* as amended, and with the addition of the date of the third session of the International Law Commission.

PARAGRAPH 6 (*paragraph 58 of the "Report"*)

*Sub-paragraph (a)*

113. Mr. SCELLE asked whether it would not be possible to combine under one general heading the matters listed in the third sentence of sub-paragraph (a), and which the Commission had decided to exclude from the draft code. In his opinion it would be desirable to furnish some explanation and state the reasons why those matters had been excluded.

114. Mr. SPIROPOULOS pointed out that the crimes listed in the sentence in question were not of a political character.

115. Mr. SCELLE thought that a juridical reason for such exclusion should, nevertheless, be given. He pointed out that counterfeiting currency and damage to submarine cables, for instance, could be of a political character and endanger peace.

116. Mr. AMADO observed that the offences in question were in existence before the Nürnberg trials and could not, therefore, be included amongst the crimes covered by the proposed Convention.

117. In order to meet Mr. Scelle's views, Mr. ALFARO proposed that the sentence start with the words "For reasons stated before".

118. Mr. SANDSTRÖM proposed the substitution of the word "therefore" for the word "nor". (The English text would then read "Therefore, such matters . . . should not be considered as falling within the scope of the draft code".)

119. Mr. KERNO (Assistant Secretary-General) considered Mr. Scelle's objection well-founded. He proposed that it be stated in the second sentence of sub-paragraph (a) that the phrase "offences against the peace and the security of mankind" only related to crimes whose predominant feature was that they contained a political element.

120. Mr. SANDSTRÖM considered that there should be a full stop after the words "the maintenance of international peace and security", and that the words "and that" should be deleted. "The draft code therefore . . ." would then start a new sentence.

121. Mr. HUDSON proposed to say "for these reasons".

122. The CHAIRMAN remarked that such a solution would not meet Mr. Scelle's objection.

123. Mr. SPIROPOULOS pointed out that, generally speaking, the offences listed in the last sentence of

paragraph (a) were the acts of private individuals and not of States.

124. Mr. SCELLE proposed the addition at the end of the last sentence of the words "except where the culpability of the State is in question".

125. Mr. SPIROPOULOS said that he would prefer the commentary to be worded differently. Many offences which, under certain conditions, might disturb the peace and security of mankind were not included. He thought that Mr. Kerno's formula was satisfactory.

126. Mr. AMADO would like to delete the whole of the last part of the paragraph after "international . . . security".

127. Mr. SPIROPOULOS thought there was something to be said for Mr. Amado's views but, generally speaking, the public was under the impression that the matters in question would also be dealt with in the code. The United States, for instance, had mentioned piracy<sup>11</sup> in their reply. For that reason it was necessary to explain why the Commission had left them out. He added that the text of the paragraph had been taken from the Commission's last report to the General Assembly.

128. Mr. EL KHOURY asked Mr. Spiropoulos whether he would agree to the following text: "nor should such matters of a non-political character as . . .".

129. Mr. SPIROPOULOS was prepared to abide by the Commission's decision.

130. Mr. SCELLE said that he was not proposing to delete the last part of the paragraph. It would, however, in his opinion be as well to explain why such matters were excluded from the draft code. He proposed the addition at the end of the last sentence of the words "unless they are of a political character . . .".

131. Mr. ALFARO was of the opinion that the second sentence should end with: "the maintenance of international peace and security". It would then be possible to go on to say "For these reasons the draft code does not deal with questions concerning conflicts of legislation and jurisdiction in international criminal matters and does not include such matters as . . .".<sup>12</sup>

132. Mr. SPIROPOULOS and Mr. SCELLE approved Mr. Alfaro's suggestion.

133. Mr. AMADO said that the Commission was engaged on a new classification of international offences, and that it would be easy to draw a distinction between offences already considered as crimes under international law before Nürnberg and those falling within the scope of national criminal law.

134. He was therefore in favour of either deleting the last part of paragraph (a), or adopting the formula proposed by Mr. Alfaro, which he considered acceptable.

*Mr. Alfaro's proposal was adopted.*

*Sub-paragraph (b)*

135. Mr. HUDSON wondered whether it would not be possible to do away with the division of sub-paragraph (b)

<sup>11</sup> See document A/CN. 4/19, Part II.

<sup>12</sup> The original text read: ". . . peace and security, and that the draft code, therefore should not deal . . ."

into two parts. He would also be in favour of deleting the second sentence of part (i).<sup>13</sup>

136. Mr. ALFARO and Mr. CORDOVA stressed the usefulness of the sentence in question, as showing the manner in which the Commission had interpreted its task.

*It was decided by 5 votes to 3 to retain the second sentence of part (i).*

137. Mr. AMADO proposed the deletion of the words "more or less" before the word "general" in part (ii).

*It was so decided.*

*Mr. Hudson's suggestion to eliminate the division of sub-paragraph (b) into two parts was accepted and the sub-paragraph was adopted as thus amended.*

*Sub-paragraph (c)*<sup>14</sup>

138. Mr. HUDSON was afraid that the phrase "on the question of the subjects of criminal responsibility under the draft code" was not very comprehensible. He thought it would be better to start sub-paragraph (c) at "The Commission decided . . .".

139. There followed an exchange of views as to whether the Commission wished to retain the reference to the charter of the Nürnberg Tribunal, which again did not refer to the criminal responsibility of States, and, if so, how the reference was to be worded.

*It was decided by a majority of 6 to delete the beginning and end of sub-paragraph (c).*

Sub-paragraph (c) then read: "The Commission decided to deal only with criminal responsibility of individuals". (See also the summary record of the 129th meeting, paras. 12-13.)

*Sub-paragraph (d)*<sup>15</sup>

140. Mr. HUDSON proposed that the second and third sentences of sub-paragraph (d) be replaced by the following: "it was felt that in the absence of a competent international judicial organ the implementation by national courts would be the only practicable procedure".

141. Mr. ALFARO, Mr. CORDOVA and Mr. YEPES preferred the text proposed by the Special Rapporteur.

142. Mr. SCELLE was also in favour of retaining the text proposed by the Special Rapporteur. In fact, if it went, hope went also. At its second session, the Commission had expressed the opinion that the establishment of an international criminal judicial organ was desirable and possible.

<sup>13</sup> Sub-paragraph (b) was originally split into two parts as follows: "The sense of the Commission was; (i) that the above phrase should not be interpreted . . . (ii) that it was not necessary to indicate . . .".

<sup>14</sup> Sub-paragraph (c) read as follows: "(c) On the question of the subjects of criminal responsibility under the draft code, the Commission decided to deal only with the criminal responsibility of individuals, following the example of the charter of the Nürnberg Tribunal."

<sup>15</sup> Sub-paragraph (d) read as follows: "(d) Considerable thought was given by the Commission to the question of the implementation of the code. It was felt that only the establishment of an international judicial organ could ensure adequate implementation. Pending the establishment of such an organ, the implementation by national courts would be the only practicable procedure."

*It was decided to substitute the phrase "a competent international criminal jurisdiction" for "an international judicial organ".*

*It was decided by a majority of 7 to retain sub-paragraph (d), as thus amended.*<sup>15a</sup> (See also the summary record of the 129th meeting, paras. 12-13.)

#### TEXT OF THE DRAFT CODE

##### ARTICLE 1

*On Mr. Hudson's proposal, it was decided to delete the word "the" before the word "offences" in article 1 of the draft code.*<sup>16</sup>

##### Comment

143. Mr. HUDSON proposed that the second sentence be redrafted to read: ". . . and in the Commission's formulation of the Nürnberg principle, it was stated . . ." instead of "and has been formulated by the Commission as follows: ". . .".

*It was so agreed.*

##### ARTICLE 2

##### Paragraph (1)

144. Mr. HUDSON wondered whether the words "or any of them" after "The following acts" in the first sentence of article 2 were absolutely necessary. In his opinion they did not make sense.

145. Mr. SPIROPOULOS said that the words appeared in the charter of the Nürnberg Tribunal, but they were, in effect, entirely useless.

*It was decided to delete the words "or any of them".*

146. Mr. SCELLE drew the attention of the members of the Commission to the fact that paragraphs 1, 3 and 4 and, perhaps even, paragraph 5 of article 2 were concerned with definite cases of aggression. The Commission had decided not to define aggression, but it was defined by implication in the above paragraphs.

147. He asked whether a passage could not be inserted in the commentary to the effect that the Commission had defined aggression in such and such an article of the draft code; always provided that the Commission did not prefer to go back on its decision not to define aggression.

148. In his opinion the Commission, in refusing to define aggression, had not shown much courage. It was not very difficult. That was the reason why he asked the Commission to reverse its decision.

149. Mr. YEPES strongly supported Mr. Scelle's statement. He was in favour of inserting a passage in the commentary to the effect that a definition of aggression was given in such and such an article.

150. In reply to the Chairman, Mr. SCELLE said that he would have a proposal to make concerning the definition of aggression. Actually the Commission had defined many aspects of aggression. It only remained to formulate a composite definition.

<sup>15a</sup> See however summary record of the 111th meeting, paras. 22-28 and 69-85.

<sup>16</sup> The original text used the expression "the present Code".

151. The CHAIRMAN pointed out that the acts listed in the various paragraphs of article 2 of the draft code constituted to some extent examples of offences against the peace and security of mankind. Those paragraphs, however, did not contain a definition.

152. Mr. AMADO considered that the addition proposed by Mr. Scelle would be more appropriately discussed in connexion with the Commission's report on the definition of aggression.

153. Mr. SCELLE supported that point of view and said that he was not proposing to offer an amendment to the text of the draft code. He could submit his definition of aggression at the next meeting.

*Paragraph (1) of article 2 was adopted without amendment.*<sup>17</sup>

*First paragraph of the comment*<sup>18</sup>

154. Mr. YEPES pointed out that in using the words "armed force" in article 2, paragraph 1, as well as in the comment in that paragraph, the Commission was restricting the scope of the article, seeing that Article 2, paragraph 2, of the Charter of the United Nations simply spoke of the use of "force". He therefore proposed the deletion of the word "armed", so as to bring the paragraph into line with the United Nations Charter.

155. The CHAIRMAN pointed out that the Commission had already discussed that point at length.

156. Mr. ALFARO said that that discussion had taken place in connexion with the definition of aggression. He saw some reason for using the term "armed force", but he was, in principle, always in favour of using the terms of the United Nations Charter. It would do no harm to delete the word "armed".

*It was decided by 8 votes to 4 to retain the term "armed force".*

157. Taking up a suggestion by Mr. SPIROPOULOS, the CHAIRMAN proposed the substitution in article 2, paragraph 1 of the wording: "It is to be noted that Article 2, paragraph 4, of the United Nations Charter binds all members . . ." for "this is in conformity with Article 2, paragraph 4 of the Charter of the United Nations . . ."

*It was so decided.*

<sup>17</sup> The original text of paragraph (1) opened with the following phrase: "(1) The employment, or threat of employment, by the authorities of a State, . . .". See also, summary record of the 108th meeting, paras. 115-155.

<sup>18</sup> The first paragraph read as follows: "In prohibiting the employment of armed force (except under certain specified conditions), this paragraph incorporates in substance that part of Article 6, paragraph (a), of the charter of the Nürnberg Tribunal, which defines as 'crimes against peace' *inter alia* the 'initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances . . .'. In addition, the present paragraph includes the threat of employment of armed force as an offence. This is in conformity with Article 2, paragraph 4, of the Charter of the United Nations which binds all Members to 'refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations'."

158. Mr. YEPES stressed the importance of the draft code which the Commission was preparing and earnestly requested that, whenever the latter departed from the text of the Charter, it should state its reasons for so doing. He considered that it was advisable to say "this provision is not in conformity with the Charter".

159. Mr. AMADO pointed out that the Charter was concerned with the acts of States, so no confusion was possible. Further, it could not be maintained that the violation of every obligation laid down in the Charter constituted an offence under international law, involving criminal responsibility.

160. Mr. YEPES asked that the Commission vote on this suggestion.

*Mr. Yepes' suggestion was rejected by 6 votes to 3.*

The meeting rose at 1 p.m.

## 107th MEETING

*Wednesday, 20 June 1951, at 9.45 a.m.*

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*Chairman:* Mr. James L. BRIERLY

*Rapporteur:* Mr. Roberto CORDOVA

*Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, 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.

**Preparation of a draft code of offences against the peace and security of mankind: report by Mr. Spiropoulos (item 2 (a) of the agenda) (A/CN.4/L.15)<sup>1</sup> (continued)**

TEXT OF THE DRAFT CODE

ARTICLE 2 (continued)

Paragraph (1)

*Second paragraph of the comment<sup>2</sup>*

1. The CHAIRMAN read out the text of the second paragraph.

2. Mr. HUDSON, supported by Mr. SPIROPOULOS, suggested that it might not be advisable to refer to the draft Declaration on Rights and Duties of States, in view of the reception given to that draft by the General Assembly. He recognized, however, that the draft was of some importance as a document on the subject. He explained that, if the Declaration had been adopted by the General Assembly, it would have had an authority independent of that of the Commission; but it had no such independent authority as yet.

3. Mr. ALFARO pointed out that the Assembly had not yet taken any decision regarding the Declaration.

4. The CHAIRMAN observed that the Assembly had transmitted it to Member States.

5. Mr. ALFARO thought that, until a decision had been taken, it was preferable to retain that paragraph in order to show that the Commission was systematic and referred to its previous work.

6. The CHAIRMAN read out part of General Assembly resolution 375 (IV), of 6 December 1949, on the draft Declaration:

“The General Assembly . . .

“2. Deems the draft Declaration a notable and substantial contribution towards the progressive development of international law and its codification and as such commends it to the continuing attention of Member States and of jurists of all nations;

“3. Resolves to transmit to Member States, for consideration, the draft Declaration . . .”

*The second paragraph was adopted.*

7. Mr. YEPES observed that the second paragraph just adopted was in conflict with the first paragraph approved the previous day. The first paragraph referred to “armed force”, whereas article 9 of the draft Declaration referred to the use of “force”. If armed force only were referred to, the scope of the definition would be restricted.

8. Mr. ALFARO said that the problem did not arise, since one document was a declaration and the other concerned offences.

<sup>1</sup> See summary record of the 106th meeting, footnote 8.

<sup>2</sup> The second paragraph read as follows: “This paragraph is also in consonance with the draft Declaration on Rights and Duties of States, prepared by the International Law Commission which, in Article 9, provides: ‘Every State has the duty to refrain from resorting to war as an instrument of national policy, and to refrain from the threat or use of force against the territorial integrity or political independence of another State, or in any other manner inconsistent with international law and order’.”

9. Mr. YEPES still maintained that there was a contradiction and that it would be preferable to refer to the employment of force without adding any qualification.

*Third and last paragraph of the comment<sup>3</sup>*

10. The CHAIRMAN reminded Mr. Yepes of the decision taken at the previous meeting. He read out the last paragraph of the comment.

*The third and last paragraph was adopted.*

*Paragraph (2) (paragraph (3) in the text of the “Report”)*

11. Mr. HUDSON asked whether it would not be possible to follow the terms of the Charter and use the words “individual self-defence”.

12. Mr. SPIROPOULOS pointed out that those words had originally been used but that the word “national” had been substituted for “individual”.

13. Mr. YEPES thought it preferable to follow the text of the Charter. He proposed the words “individual or collective”.

14. The CHAIRMAN pointed out that the same objection applied to article 2, paragraph 1.

15. Mr. HUDSON said that after reflection he thought it better to retain the word “national”, since, in the case of self-defence carried out by individuals, the words “by the authorities of the State” could not be used.

16. The CHAIRMAN also preferred the word “national”; he found the word “individual” entirely unsuitable.

17. Mr. EL KHOURY thought that the wording should be “The planning and preparation, by the authorities of a State”, rather than “The planning or preparation”, since the mere fact of planning to use force was not an international crime unless followed by preparation for the use of force. If the word “planning” was to be retained, it must be “preparation and planning”.

18. The CHAIRMAN did not see why the mere fact of planning could not be a crime; the article was intended to cover conspiracy.

19. Mr. ALFARO considered that planning and preparation were two different offences: planning meant drawing up a general plan, and preparation meant the execution of that plan, for which a physical act was required. Hence the wording should be “either planning or preparation”.

20. Mr. SPIROPOULOS reminded the Commission that the Nürnberg Charter referred to the planning, preparation, initiation or waging of a war of aggression as different crimes.

21. Mr. CORDOVA asked Mr. Spiropoulos whether, under the charter and judgment of the Nürnberg Tribunal, it was the attitude of mind or the planning that had been taken into consideration with regard to plans.

22. Mr. SPIROPOULOS pointed out that some Germans had been punished for preparing plans, while others

<sup>3</sup> The third paragraph read as follows: “The offence defined in this paragraph, by its nature, can only be committed by the authorities of a State. A criminal responsibility of private individuals may, however, arise under the provisions of paragraph 11 of the present article.”

were preparing for war. Besides conspiracy there was also mere planning.

23. Mr. YEPES observed that the English text of the comment referred to "planning and preparation".

24. Mr. EL KHOURY thought that the paragraph and the comment should be drafted in similar terms.

*It was decided by 7 votes to 2 to retain the text of paragraph 2.*

25. Mr. AMADO explained that he had been in favour of retaining the wording of the Nürnberg Charter.

26. Mr. SCELLE said that he had voted against the text because, from the French point of view, planning could not be considered an offence;<sup>4</sup> there must be a beginning of execution. A mere plan was not a crime. It was only an evil intention.

27. Mr. SPIROPOULOS observed that the French translation was incorrect.

28. Mr. CORDOVA explained that it was because of that error in translation that he had asked the Rapporteur for an explanation. Planning was not a mental attitude, it was an act.

29. The CHAIRMAN agreed with that interpretation.

30. Mr. YEPES believed that the misunderstanding was due to the fact that the English text of paragraph 2 referred to "planning or preparation", whereas the comment said "planning and preparation". He asked the Commission to take another vote.

31. The CHAIRMAN agreed that the French translation was bad, since the French word "*projeter*" was not the equivalent of the English word "planning".

32. Mr. SCELLE said that that was why he had been in favour of replacing the word "or" by the word "and".

33. Mr. CORDOVA said that he had voted for the retention of the word "or"; there were in fact two offences, planning and preparation.

34. Mr. ALFARO thought it advisable to clarify the point on which the Commission was to vote. He had assumed that according to Mr. el Khoury's proposal, planning and preparation were two separate offences. Mr. Scelle seemed to be troubled by the fact that planning was not an offence in itself; he agreed with that view so far as the French word "*projeter*" was concerned. The paragraph referred to acts constituting conspiracy to commit aggression. For instance, Hitler had summoned his generals, declared his intention of committing aggression against Poland, and asked them to prepare a plan. There had therefore been a group of generals who had prepared the plans, and another group who had taken the necessary measures for their execution. The first group had conspired with Hitler. He thought that the word "or" should be retained for that reason. Planning must be considered as one offence, and preparation for the employment of armed force as another.

35. Mr. EL KHOURY thought that another explanation was required. He would take Mr. Alfaro's example and assume that a group of experts drew up plans which were

carried out by another group; if the stage of "execution" were never reached, would the planning be an offence? Under ordinary criminal law, such groups of experts would be considered as accomplices if a crime were committed, but if no crime were committed, they would not be prosecuted. That was why he had proposed saying "planning and preparation". He was not proposing that the word "planning" be deleted, but that it be linked with the second stage, namely, preparation for the employment of armed force.

36. Mr. KERNO (Assistant Secretary-General) observed that the French text of paragraph 2 contained an error. In the French text of the Nürnberg Charter (article 6 (a)) the word "planning" was translated by "*direction*" and not by "*projeter*". The previous year the Commission had found the word "*direction*" unsatisfactory;<sup>5</sup> if it now rejected the word "*projeter*", were the words "*préparer des plans*" to be considered preferable?

37. Moreover, there was a discrepancy between the French and English texts: the English text of the definition in paragraph 2 used the words "planning or preparation" whereas the comment said "planning and preparation", which might perhaps be correct; the French text, on the other hand, used the word "or" in both cases.

38. Mr. AMADO said that the word "planning", in that definition, included the element of premeditation. When Hitler had drawn up his plan for the conquest for Czechoslovakia, he had committed an act which the Nürnberg judges had considered as being part of his plan to destroy the Czechoslovak State. The word "planning" enabled the judge to define the elements of the crime; the Nürnberg Charter spoke of the planning, preparation and waging of a war of aggression. Planning was not only a work of imagination, it included acts of war which the judges had recognized. Criminal law, of course, referred to acts; he did not see how execution could be brought in, in that particular case, since it came into another category. The word "planning" referred to organization and preparation; the conception of plans was not sufficient. The intention of the Nürnberg Charter was to apply the word "planning" to the positive element in the preparation of the crime, hence, the element constituting premeditation.

39. Mr. SPIROPOULOS recalled that the previous year Mr. Pella had criticized the text of the draft Code for referring to "planning" in paragraph 2, whereas paragraph 11 spoke of "conspiracy", and had declared that conspiracy meant the drawing-up of plans. He himself had made no comment, since the text had been prepared by the drafting Sub-Committee. He proposed that the word "planning" be deleted, because "conspiracy" certainly meant drawing up plans for the preparation of war.

40. Mr. SANDSTRÖM thought that the word "planning" implied a project which had been externalized, while "preparation" was the beginning of execution. Planning could be a separate offence from preparation. He was in favour of retaining the text as it stood.

<sup>4</sup> The French text read as follows: "*Le fait, pour les autorités d'un Etat, de projeter ou de préparer l'emploi de la force armée*".

<sup>5</sup> *Yearbook of the International Law Commission 1950*, vol. I, summary record of the 48th meeting, paras. 2-6.

41. Mr. SPIROPOULOS pointed out that he had said that it would be advisable to refer to the word "conspiracy" in paragraph 11.

42. Mr. SANDSTRÖM replied that although "planning" nearly always implied "conspiracy", it did not necessarily do so. A dictator might prepare his own plans.

43. Mr. AMADO urged the Commission to study the question carefully. If the idea of planning were withdrawn from the comment accompanying the text, that decision would have far-reaching consequences. If in future the head of a State made plans for a war of aggression and subsequently suffered defeat, he would maintain that he had confined himself to planning, which was not an offence, since the International Law Commission had withdrawn it from the draft code and the Rapporteur had associated planning with conspiracy; but he, the head of the State, had not conspired. He was in favour of retaining the word "planning".

44. Mr. SCALLE saw no objection to keeping the English word "planning". It was the French word "*projeter*" which he criticized. If the words "*faire un projet*" were substituted, the text became intelligible. The word "*projeter*" was ambiguous.

45. Mr. CORDOVA noted that all members of the Commission were in agreement. If planning were to be punishable, it must come within the realm of fact, and it then became preparation. The word "planning" could be deleted since a "conspiracy" was referred to in paragraph 11. When Hitler had written his book *Mein Kampf*, he had been making plans, which was not a punishable offence without preparation. He believed that the Rapporteur was right and that the word "planning" should be deleted from paragraph 2.

46. Mr. ALFARO read the following passage from "*The Charter and judgment of the Nürnberg Tribunal*":

"Military planning and preparation was considered criminal in so far as it was undertaken by persons in influential positions. Such military leaders as Goering, Keitel, Raeder and Jodl were found guilty of this crime. On the other hand, the Court said of Doenitz that, although he built and trained the German U-boat arm, the evidence did not show that he prepared aggressive wars. 'He was a line officer performing strictly tactical duties. He was not present at the important conferences when plans for aggressive wars were announced, and there is no evidence he was informed about the decisions reached there.' As a pre-requisite for criminal military planning the Court therefore seems to have required knowledge of the aggressive purpose of the planning. Such knowledge, however, might, apparently, not only be proved directly by showing that the defendant was informed in fact, but also be inferred from the position he held."<sup>6</sup>

Hence planning was a separate offence.

47. Mr. EL KHOURY said that he agreed with that interpretation, provided that planning was followed by preparation. He proposed that the word "planning" be deleted.

48. Mr. CORDOVA suggested that the commentary state that planning was included in preparation.

49. Mr. YEPES opposed the deletion of the word "planning", since if planning were omitted, many offences against peace would be left out of account. Planning for aggression was a punishable offence.

*It was decided, by 7 votes to 5, to delete the words "planning or" in the first line of paragraph 2.*

*First paragraph of the comment*

50. The CHAIRMAN observed that, as a result of the Commission's vote, the word "planning" must be deleted from the first line of the comment which read "In prohibiting the planning and preparation for the employment of armed forces...".

51. Mr. HUDSON thought that the text should be worded as follows: "Planning, preparation, initiation or waging...". The word "or" was to be understood as being repeated between each of those words.

52. Mr. SANDSTRÖM did not consider that all those words could be included.

53. Mr. HUDSON admitted that the initiation and waging of war could not be included in the text; it must be limited to the planning or preparation of a war of aggression. By using the word "preparation", the Commission had explained that it meant planning to be understood as included in that term.

54. Mr. SPIROPOULOS observed that that was certainly the sense of the Nürnberg Charter.

55. Mr. ALFARO emphasized that the Commission had decided that the idea of planning was included in the word "preparation", in spite of the fact that the Nürnberg Charter referred to planning as a crime.

56. The CHAIRMAN asked the Commission if it intended to stipulate that preparation included planning.

57. Mr. CORDOVA replied in the affirmative; the word "planning" was included in the Nürnberg principles, and it must be explained why the Commission had deleted it.

58. Mr. EL KHOURY stressed the danger of inserting the word "or" between the words "planning" and "preparation".

59. The CHAIRMAN, supported by Mr. ALFARO, proposed the following wording: "The Commission was of the opinion that preparation included planning".

60. Mr. CORDOVA suggested that the statement should be less concise.

61. Mr. HUDSON proposed the following wording: "As used in the text, the term preparation includes planning".

62. Mr. ALFARO thought it advisable to emphasize that planning and preparation were different offences, although guilt by reason of planning could not be established unless there had been preparation.

63. Mr. SPIROPOULOS advised leaving that question to judges.

64. Mr. ALFARO thought that suggestion justified, and proposed saying that planning was a separate offence from preparation.

<sup>6</sup> United Nations Publication, Sales No. 1949.V.7, pp. 56-57.

65. The CHAIRMAN, Mr. HUDSON and Mr. SPIROPOULOS pointed out that that wording was inconsistent with the decision just taken by the Commission.

66. Mr. ALFARO explained that, when a State decided to commit aggression and entrusted the planning to one group of generals and the preparation and execution to second and third groups, all three groups were guilty of a crime. It was not necessary for the first group to prepare and carry out the aggression. It was committing a separate offence. Of course, if the Commission considered that the man conceiving the idea of aggression was not committing an offence, that was another matter. The question must be made very clear; that was an important part of the Nürnberg Charter.

67. Mr. AMADO considered the case of two political leaders of a State who planned a war. One of them might, for instance, have written such a work as *Mein Kampf*. There was no conspiracy, but the planning included organization of the scheme. The two statesmen summoned their generals and instructed them to prepare a war of aggression. He thought that the Commission had made a mistake in deleting the word "planning".

68. Mr. EL KHOURY asked whether the preparation of plans which were subsequently shelved would constitute a crime. It was clear that if the plans were subsequently put into effect, their author would be found guilty.

69. The CHAIRMAN reminded the Commission that it had decided to delete the words "planning or". He asked whether it intended to reconsider that decision. If not, it must bring the comment into line with the text.

70. Mr. AMADO was convinced that the decision was a mistake, though that, of course, was only his opinion.

71. Mr. HSU thought that the word "planning" should be deleted. Preparation included the preparation of plans. Consequently there was no reason to include planning in the text. Moreover, the arguments for retaining that idea had not convinced him.

72. The CHAIRMAN thought that it should be explained in the comment that preparation included planning.

73. Mr. ALFARO suggested the following wording: "Planning as a separate crime is included in the word preparation".

74. Mr. SPIROPOULOS observed that members of the Commission were in general agreement.

75. The CHAIRMAN proposed the adoption of Mr. Hudson's text.

*The first paragraph of the commentary was adopted, with the amendment proposed by Mr. Hudson.*

*Second paragraph of the comment*

76. The CHAIRMAN read out the second paragraph of the comment.

77. Mr. EL KHOURY asked why that paragraph was repeated there when it already appeared in the comment on the first paragraph, and applied to all the offences.

78. Mr. SPIROPOULOS explained that certain crimes

could be committed by individuals, others by States and, finally, others by both States and individuals.

*The second paragraph of the commentary was adopted.*

*Paragraph (3) (paragraph (4) in the text of the "Report")*

79. Mr. HUDSON found the text unsatisfactory and proposed the following wording: "The incursion into the territory of a State from the territory of another State by armed bands acting for a political purpose" instead of "The incursion into the territory of a State by armed bands coming from the territory of another State and acting for a political purpose".

*Paragraph 3 was adopted, as amended.*

*Comment <sup>7</sup>*

80. Mr. HUDSON asked why a question already dealt with under article 1 was again taken up at that point.

81. The CHAIRMAN thought it unnecessary, and proposed that the words "who should be held individually responsible" be deleted.

82. Mr. AMADO said that his impression from the text was that each member of the armed band could be held responsible. He thought it should be pointed out that the comment took account of the fact that the offence was committed collectively, and that the individuals responsible for the acts were criminally responsible.

83. The CHAIRMAN said that that was already provided in article 1.

84. Mr. CORDOVA suggested the words "committed by members of armed bands", to show the individual nature of the responsibility.

85. Mr. SPIROPOULOS said that that meant "committed by some members of armed bands".

86. Mr. CORDOVA said that he was trying to prevent any false interpretation of the text, which was not clearly drafted. It was a question of the responsibility of the individuals forming the band.

87. Mr. SANDSTRÖM said that the offences were not committed by individuals as such, but by individuals forming a band.

88. Mr. AMADO saw no reason for making such trivial amendments to a text which the Commission had already adopted.

89. Mr. CORDOVA acknowledged the justification for that observation, but thought that the words should be deleted in view of the statement at the beginning of the code; he would not press the point, however.

90. Mr. AMADO said that article 1 established the principle that the offences to which it referred were not committed by the authorities as such, but by individuals. In article 2, paragraph 3, those individuals formed a band, but were not to be held responsible collectively. Nevertheless, there might be some confusion. Were there not certain criminal law theorists of extreme views who admitted that States might be considered as criminals?

<sup>7</sup> The first sentence read as follows: "The offence defined in this paragraph, by its nature, can be committed by individual members of armed bands, who should be held individually responsible."

The purpose of the commentary was to clarify that question and dispel all such confusion. Under article 1, individuals were responsible whether they were Heads of States, ministers or generals, but under article 2, paragraph 3, they would be responsible because they formed a band. He was in favour of retaining the commentary.

91. Mr. LIANG (Secretary to the Commission) did not see how the sentence could stand after the words "who should be held individually responsible" were deleted. Something would have to be added. The statement at the beginning of the comment was self-evident. He suggested the words "the offence defined in this paragraph . . . can only be committed by individual members . . .". That would exclude the idea of the offence being committed by an armed band as a group.

92. Mr. CORDOVA did not consider that the text of article 1 excluded the possibility of the offences being committed by bands. From the text of article 1 and of the paragraph under discussion, it might be thought that the offences could be committed by bands, and also that the individual members of such bands were punishable. He knew that that was not the intention of the Commission, but the meaning should be made clear. It was evident that individual members of the band were punishable, but the text did not exclude the possibility of the band itself being considered guilty of the offence. He proposed either retaining the first sentence of the comment or changing the text of the article.

93. Mr. HUDSON proposed that Mr. Liang's suggestion be adopted.

94. Mr. ALFARO wished to draw Mr. Córdova's attention to the fact that the responsibility of groups was also mentioned with reference to the other offences. If it were said that the offence "can only be committed by individual members", the meaning of the text would be clear.

*It was decided to retain the words "who should be held individually responsible".*

95. Mr. SCELLE said that he wished to make a comment on terminology. Each of the paragraphs included the words "*de par sa nature*" (by its nature) which had little meaning in French. Indeed, those words appeared to mean that there was no room for discussion, whereas the discussion which had just taken place between members of the Commission showed that the opposite was the case. It would be sufficient to say "the offence defined in this paragraph". He repeated that the words "*de par sa nature*" (by its nature) either had no meaning or else meant that no other interpretation was possible. But if that were so, there was no need to define the offence.

96. Mr. CORDOVA observed that Mr. Scelle's comment also applied to the Spanish and English texts. The words could therefore be deleted.

*It was decided to delete the words "by its nature" in the comments on paragraphs 1, 2 and 3.*

*Paragraph (4) (paragraph (5) in the text of the "Report")*

*Paragraph 4 was adopted without debate.*

#### *Comment*

97. Mr. HSU thought that the second paragraph of the comment on paragraph 4 could be deleted.<sup>8</sup> He would have preferred the idea of subversive acts to be included in the definition, but that short sentence did not express it satisfactorily. He would therefore prefer the paragraph to be deleted.

98. Mr. HUDSON and Mr. SCELLE agreed with that view.

*It was decided to delete the second paragraph of the comment on paragraph 4.*

99. Mr. YEPES considered the last paragraph of the comment superfluous, since the article itself already stated that, in order to constitute an offence, the act must be committed by the authorities of the State.

100. Mr. SPIROPOULOS pointed out that he had provided each paragraph with a comment of that nature at the request of Mr. Yepes himself. He certainly realized that the distinction drawn between offences which could be committed by individuals and those which could only be committed by the authorities of the State was arbitrary, and even incorrect; in his opinion only offences committed by individuals should be included, since there was no criterion for determining that an offence was committed by a State. Nevertheless, that distinction was part of the very foundation of the draft code; once accepted it must be maintained.

101. Mr. YEPES said that he had no amendment to propose.

*The comment was adopted as amended.<sup>8a</sup>*

*Paragraph (5) (paragraph (6) in the text of the "Report")*

102. Mr. SCELLE pointed out that, in the third line of the French text, the word "*terroristes*" before the word "*organisées*" should be deleted.

*Paragraph 5 was adopted.<sup>8b</sup>*

#### *Comment*

103. Mr. HUDSON pointed out that the Convention for the Prevention and Punishment of Terrorism referred to in the first paragraph of the comment had never entered into force. Hence that paragraph went too far in saying that the encouragement of terrorist activities was "prohibited" by article 1.

104. Mr. ALFARO thought it advisable to retain the reference to that convention; although it had never entered into force, it nevertheless expressed the views of 40 States which had thought it necessary to take measures against terrorist activities.

105. Mr. HSU considered that the terrorist activities referred to in paragraph 5 were a rather unimportant offence compared with those referred to in the other paragraphs. What the authorities of a State attempted to bring about in another State was subversion. That

<sup>8</sup> It read as follows: "The term 'foment' is used to include the meaning of 'aid and abet'."

<sup>8a</sup> See summary record of the 109th meeting, para. 119.

<sup>8b</sup> *Ibid.*, paras. 120-125.

being so, he wondered whether it would not be better to delete the whole of paragraph 5.

106. After a discussion on how the reference to article 1 of the Convention on Terrorism should be worded in order to avoid giving the false impression that the provisions of that article were an existing rule of law, it was decided to re-word the first paragraph of the comment as follows:

“Article 1 of the Convention for the Prevention and Punishment of Terrorism, of 16 November 1937, contained a prohibition of the encouragement of terrorist activities.”<sup>9</sup>

The second paragraph of the comment was adopted without debate.

Paragraph (6)<sup>10</sup> (paragraph (7) in the text of the “Report”)

107. Mr. FRANÇOIS pointed out that the Commission had adopted an amendment, proposed by Mr. Sandström, changing the text of paragraph 6 to read: “*y compris . . . les obligations d'un traité établissant des restrictions concernant*”,<sup>11</sup> which did not appear in the present French text of the draft code.

108. Mr. KERNO (Assistant Secretary-General) observed that the amendment was correctly included in the English text.

109. Mr. SCALLE said that in the French text the sentence would have no meaning. The words “*obligations d'un traité établissant des restrictions concernant: i) le caractère . . . d'armements*” did not convey anything.

110. Mr. CORDOVA proposed that the words “*y compris sans que cette énumération soit limitative*” should be replaced by the word “*notamment*”.

111. Mr. HUDSON thought that the paragraph should be deleted. He wondered whether, in the case of a treaty on arbitration, which was clearly “designed to ensure international peace and security”, the refusal by the authorities of a State to submit a dispute to arbitration would be an offence under international law. The definition in paragraph 6 included such acts.

112. Mr. YEPES asked whether the text of the paragraph meant that any violation of treaty obligations constituted an offence against peace. For instance, the Atlantic Pact fulfilled all the conditions stipulated in paragraph 6. Would a trivial and involuntary violation, such as might arise, be an offence against peace?

113. Mr. ALFARO announced that, after an exchange of views with several members of the Commission, he had

prepared the following new text to replace paragraph 6:

“Acts by the authorities of a State in violation of its obligations under 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 other restrictions of the same character.”

114. Mr. HUDSON proposed that the words “by means of restrictions” be replaced by the words “by placing restrictions”.

115. Mr. EL KHOURY had prepared another text, which he read out, and which was very similar to that proposed by Mr. Alfaro. He nevertheless supported the latter's proposal.

116. Mr. SCALLE did not think it advisable to include the enumeration contained in Mr. Alfaro's text. Any enumeration was dangerous and might even become a restriction. He proposed merely saying “international treaty obligations designed to ensure international peace and security by the limitation or reduction of armaments”.

117. Mr. SPIROPOULOS could not agree to those amendments. He emphasized that nearly all treaties contained enumerations. That was why he had thought it advisable to include one in his text. Moreover, it was not merely a question of reducing armaments.

118. He pointed out that Mr. Alfaro had not retained the location of armed forces or armaments in his amendment. That was a most important point, since it might be said that the Second World War had broken out for reasons of that kind. He thought it absolutely essential to retain the detailed enumeration.

119. Mr. HUDSON did not consider that Mr. Alfaro's amendment omitted anything.

120. Mr. SCALLE observed that Mr. Alfaro's text did not cover the case of a treaty stipulating that a State undertook not to require military service for a longer period than one year.

121. Mr. ALFARO pointed out that the case was covered by the words “military training”, which were included in his text.

122. The CHAIRMAN asked whether Mr. Alfaro's text provided for the case of demilitarized zones.

123. Mr. EL KHOURY, supported by Mr. SPIROPOULOS, thought that the last phrase of Mr. Alfaro's text could include demilitarized zones established under a treaty between two parties.

124. Mr. ALFARO pointed out that the last phrase of his text made it possible to avoid the danger of an enumeration.

*Mr. Alfaro's amendment to paragraph 6 was adopted.*

#### *Comment*

125. Following a remark by Mr. HUDSON, the CHAIRMAN announced that the Secretariat would revise the reference to League of Nations publications.

*The comment on paragraph 6 was adopted.*

<sup>9</sup> Instead of “The encouragement of terrorists activities is prohibited by Article 1 of the Convention for the Prevention and Punishment of Terrorism of 16 November 1937”.

<sup>10</sup> Paragraph 6 read as follows: “6. Acts by the authorities of a State in violation of obligations of a treaty which is designed to ensure international peace and security, including but not limited to acts in violation of treaty restrictions as to:

“(i) The character or strength or location of armed forces or armaments; or

“(ii) The training for service in armed forces; or

“(iii) The maintenance of fortifications.”

<sup>11</sup> See summary record of the 89th meeting, paras. 125–127.

*Paragraph (7)*<sup>12</sup> (*paragraph (8) in the text of the "Report"*)

126. Mr. KERNO (Assistant Secretary-General) regretted that paragraph 7 was not accompanied by any comment other than the paragraph indicating who could commit the offence (last paragraph of the comment in the text of the "Report").

127. Mr. SANDSTRÖM thought that the text of that paragraph was taken from the draft Declaration on Rights and Duties of States.<sup>13</sup>

128. Mr. YEPES asked if the paragraph also referred to territories placed under the authority of a State. He wished to know, for instance, whether annexation of a zone on the frontier between two States, which was in dispute, was a danger to international peace and constituted an international offence, as in the case of annexation of territory belonging to another State.

129. The CHAIRMAN, supported by Mr. SPIROPOULOS, thought that the paragraph should be deleted. The acts referred to would always come within the scope of the definition in article 2, paragraph 1.

130. Mr. KERNO (Assistant Secretary-General) emphasized that the reason why he had regretted the absence of a comment on that paragraph was that he thought that a similar idea was to be found in the Briand-Kellogg Pact, the United Nations Charter and articles 9 and 11 of the Declaration on Rights and Duties of States. He was, however, prepared to admit that the offence referred to in paragraph 7 was already covered by article 2, paragraph 1.

131. Mr. ALFARO also considered that the paragraph should be deleted.

132. Mr. YEPES was opposed to the deletion of paragraph 7, since that would amount to indirect approval of annexation. It would be a grave error not to consider annexation as an international offence.

*It was decided, by 7 votes to 5, to retain paragraph 7, subject to drafting changes.*

133. Mr. CORDOVA also thought that the paragraph should be retained. The Tribunal would decide whether any particular act came within the definition or not.

134. He thought that the words "or directed toward" could be deleted.

*It was so decided.*

135. Mr. EL KHOURY proposed deleting the passage beginning with the words "or of territory under an international régime" down to the end of the paragraph.

136. Mr. FRANÇOIS pointed out that if that were done, even annexation under a treaty would be an offence.

137. Mr. EL KHOURY agreed to limit the proposed deletion to the words "or of territory under an international régime".

138. Mr. HSU asked whether the deletion proposed by Mr. EL KHOURY implied that annexation of territory

<sup>12</sup> Paragraph 7 read as follows: "7. Acts by authorities of a State resulting in or directed toward the annexation of territory belonging to another State or of territory under an international regime, contrary to international law or to the Purposes and Principles of the United Nations."

<sup>13</sup> See General Assembly resolution 375 (IV) of 6 September 1949, annex, articles 9 and 11.

under an international régime would not be regarded as an offence.

*Mr. el Khoury's amendment was rejected by 6 votes to 4.*

*It was decided, by 8 votes to 1, to delete the words "or to the Purposes and Principles of the United Nations".*

139. Mr. EL KHOURY observed that it would be preferable for the words "contrary to international law" to be placed after the word "annexation".

*It was so decided.*

140. Mr. YEPES, supported by Mr. ALFARO, proposed that, after the words "belonging to another State", the words "or placed under the authority of another State" be inserted. He was thinking of the case of disputed sovereignty over a territory situated on the frontier between two adjoining States.

141. Mr. CORDOVA pointed out that Mr. YEPES' proposal meant applying the principle that no man could be a judge in his own cause.

142. The CHAIRMAN observed that that principle was already stated in article 1 of the draft code.

*Mr. Yepes' amendment was rejected by 6 votes to 3.*

143. Mr. KERNO (Assistant Secretary-General) still doubted whether paragraph 7 served any real purpose. It was clear that annexation by force was already covered by the definition of the offence referred to in the first paragraph of article 2. As the Commission had decided to retain paragraph 7, however, the need for a comment became all the more evident; it was necessary to state why annexation was to be described as an offence independent of that referred to in the first paragraph. He could not imagine that annexation could be carried out without the employment or threat of employment of force.

144. Mr. SPIROPOULOS agreed with Mr. Kerno's view regarding annexation. He added that writers who had studied the question declared that, without the employment of force or previous occupation, annexation was not valid and had no legal effect.

145. Mr. SCALLE considered that the Commission had been right in deciding to retain paragraph 7. A code of offences against the peace and security of mankind could not omit to mention annexation, which was the principal offence.

146. Moreover, something other than mere annexation could be imagined: for instance, blockade with a view to annexation. In that connexion he recalled the war between Austria-Hungary and Serbia, known as the "Pig War", during which Austria had closed her frontier in order to starve out Serbia, with a view to annexation. That blockade had been considered as an obvious legal abuse. The Commission had defined offences that were no more grave than starving out a country, which could be done without the employment of force.

147. Mr. HSU observed that there could be direct and indirect employment of force; he thought it well to clarify the matter.

148. Mr. AMADO pointed out that the argument that the subject was already covered by the first paragraph of article 2 could be applied to all the other paragraphs. Such an argument could not be accepted. In his opinion it was

necessary to give precise definitions of the offences against the peace and security of mankind, just as the general concept of homicide was defined by the terms parricide, infanticide, etc. That was why he had opposed the deletion of paragraph 7. It was a case of *dolus specialis*.

149. Mr. ALFARO proposed a slight drafting amendment, namely, that the words "contrary to international law" be replaced by the words "in violation of international law".

150. Mr. SPIROPOULOS undertook to draft a comment.<sup>14</sup>

*Paragraph (8) (paragraph 9 in the text of the "Report")*

151. The CHAIRMAN observed that that paragraph in fact related to crimes dealt with in the Convention on Genocide.

152. Mr. HUDSON wondered whether the paragraph as a whole was of any real value and whether the offences to which it referred were really offences against the peace and security of mankind. For instance, could it be said that the murder, by an individual, of a member of a national, ethnical, racial or religious group constituted an offence against peace?

153. Mr. AMADO emphasized the great importance attached to the definition of the crime of genocide by many people who had suffered much in the recent past from the sadism and brutality of certain men. The Convention on Genocide was, in the eyes of some, almost sacrosanct, owing to the conditions and the period in which it had been elaborated. A variety of intellectual and emotional factors had led jurists to bow to the sorrows of so many people and consequently to give the crime of genocide the place it occupied in the category of offences against mankind. For that reason he would vote for the retention of the paragraph.

154. Mr. SCALLE agreed with Mr. Amado. The characteristic feature of genocide was intent and the fact that it was committed with intent to harm a particular group. If a crime were committed by a single individual on a single occasion, but with the intent to harm a whole group of men, that was sufficient for it to take on the nature of genocide.

155. Mr. HUDSON pointed out that States which had not ratified the Convention on Genocide would nevertheless be required to respect the Code; he wondered whether that ought to be so.

156. Mr. SPIROPOULOS pointed out that States which did not accept the Convention on Genocide would probably not accept the draft Code either. At the second session the majority of members of the Commission had wished that offence to be included in the draft Code.<sup>15</sup> He himself did not insist upon it.

*It was decided, by 9 votes to 2, to retain paragraph 8.*

157. Mr. KERNO (Assistant Secretary-General) stressed the importance of the question of genocide. It was true that the murder of a single person could constitute

genocide, but only provided that the murderer had the intention not just to remove one member of a particular group, but also to destroy the group; it was for the judge to establish that intention.

158. Mr. ALFARO thought that, in the text of the commentary on paragraph 8, the words "in substance" should be deleted.<sup>16</sup>

159. Mr. HUDSON proposed that the commentary be replaced by the following text: "The text of this paragraph follows the definition of genocide given in article II of the Convention on the Prevention and Punishment of the Crime of Genocide."

*It was so decided.*

The meeting rose at 1 p.m.

## 108th MEETING

*Thursday, 21 June 1951, at 9.45 a.m.*

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*Chairman:* Mr. James L. BRIERLY

*Rapporteur:* Mr. Roberto CORDOVA

*Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCALLE, 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.

### Communication regarding the next session of the Commission

1. Mr. KERNO (Assistant Secretary-General) announced that he had received a telegram from Mr. Lall,

<sup>14</sup> See summary record of the 108th meeting, para. 97.

<sup>15</sup> See *Yearbook of the International Law Commission 1950*, vol. I, summary record of the 59th meeting, paras. 1-82.

<sup>16</sup> The comment read as follows: "The text of this paragraph follows the definition of the crime of genocide contained in article II of the Convention on the Prevention and Punishment of the Crime of Genocide."

Assistant Secretary-General in charge of the Department of Conference and General Services, informing him that he (Mr. Lall) considered it definitely preferable that the 1952 session of the International Law Commission should be held at United Nations Headquarters at New York, where all facilities in the matter of staff, conference rooms etc. would be available next year and where also it would cost less to hold the session. In the latter connexion Mr. Lall pointed out that in the present year the travel expenses and living allowances of the Secretariat would amount to \$16,200, and that such expenditure could be avoided if next year the Commission met at New York.

2. Mr. HUDSON asked whether the cost of bringing members of the Secretariat to Geneva would not be offset by the saving on the travel expenses of members of the Commission, most of whom resided in Europe. He hoped the Assistant Secretary-General would look into that point.

3. Mr. KERNO (Assistant Secretary-General) said that while he was not in a position to give an immediate reply to Mr. Hudson's question, he would point out that it was not only on budgetary grounds that Mr. Lall considered it preferable to hold the next session at New York.

4. Mr. HUDSON replied that, although he himself would have preferred the next session to be held at New York, he thought that the Geneva atmosphere was more appropriate to the work of the Commission. The General Assembly had urged the International Law Commission to conduct its proceedings in such a way as to produce quick results.

5. Mr. SPIROPOULOS mentioned that he intended, when the Commission came to discuss the question of amendments to its Statute, to move that Geneva be selected as the headquarters of the Commission. That was clearly a question to be decided by the General Assembly; but several members of the Commission could not possibly travel to New York in summer, while if the session was to be held in April, some members would be prevented by their professorial duties from attending.

6. Mr. SCELLE agreed with Mr. Spiropoulos that it was not only a question of the place, but also of the date.

7. Mr. AMADO also considered that the Commission could get through more work and in better conditions at Geneva than at New York. Working conditions at Geneva were more conducive to an effective contribution by the Commission to the task with which the General Assembly had entrusted it, a task which was very different from those assigned to other United Nations commissions.

8. Mr. KERNO (Assistant Secretary-General) thought it was an exaggeration to state that it was impossible for members of the Commission to meet at New York in summer. The Secretariat worked throughout the summer and there was a full programme of sessions and meetings. He thought he would be in a position to supply the information requested by Mr. Hudson in a few days.

**Preparation of a draft code of offences against the peace and security of mankind: report by Mr. Spiropoulos (item 2 (a) of the agenda) (A/CN.4/L.15, A/CN.4/L.19)<sup>1</sup>**  
(continued)

TEXT OF THE DRAFT CODE

ARTICLE 2 (continued)

Paragraph (8) (paragraph 9 in the text of the "Report")  
(continued)

Comment<sup>2</sup>

9. Mr. HUDSON observed that the comment on paragraph 8, unlike those on the preceding paragraphs, did not state by what particular category of persons the offence in question might be committed.

10. Mr. SANDSTRÖM pointed out that the information was contained in the actual text of the paragraph.

11. Mr. SPIROPOULOS thought that, even so, it should be mentioned in the comment.

Paragraph (9) (paragraph 10 in the text of the "Report")<sup>3</sup>

12. Mr. HUDSON thought that paragraph 9 went rather too far, particularly in including political and cultural grounds.

13. The CHAIRMAN pointed out that the paragraph required that such acts be "inhuman acts". In reply to a further observation by Mr. Hudson, he explained that the Commission had decided to delete the word "mass" before the word "murder".<sup>4</sup>

14. Mr. ALFARO pointed out that, although the deletion had been made in the English text, in the French text the expression "*l'assassinat en masse*" had been retained.

15. Mr. SCELLE said that the French text needed to be redrafted.<sup>5</sup> The expression "*toute population civile*", for example, was not correct French and should be replaced by some such expression as "*des éléments de la population civile*". The French wording of the last part of the sentence was also faulty; the phrase "*à l'occasion des*" should certainly be replaced by the words "*en relation avec les*".

16. The CHAIRMAN promised that the French translation would be revised.

17. Mr. SPIROPOULOS pointed out that the French Government had submitted its observations on the draft

<sup>1</sup> See summary record of the 106th meeting, footnote 8.

<sup>2</sup> The comment read as follows: "This paragraph is, in substance, similar to Article II of the Convention on the Prevention and Punishment of the Crime of Genocide which article defines the crime of genocide."

<sup>3</sup> The end of paragraph 9 read as follows: "... defined in the present article".

<sup>4</sup> See summary record of the 90th meeting, para. 112.

<sup>5</sup> The French text read as follows: "9. *Les actes inhumains commis par les autorités d'un Etat ou par des particuliers contre toute population civile, tels que l'assassinat en masse, l'extermination, la réduction en esclavage, la déportation ou les persécutions pour des motifs politiques, raciaux ou religieux, lorsque ces actes sont commis au cours de l'exécution ou à l'occasion des crimes définis dans le présent article.*"

code (A/CN.4/45/Add.2) and had noted, *inter alia*, that the term "opinion" had unfortunately disappeared from the definition of genocide as given in the 1948 Convention.

18. The CHAIRMAN said that the communication from the French Government contained a number of interesting suggestions which merited study; but he did not consider that the disappearance of the word "opinion" affected paragraph 9, which the Commission was then discussing. The Commission, he would repeat, was not concerned with the Convention on Genocide.

19. Mr. ALFARO wondered whether the words "political . . . grounds", as used in paragraph 9, did not cover what might be understood by the term "opinion".

20. As to acts of violence to life and person and outrages on personal dignity, as referred to in the Geneva Convention of 12 August 1949, which the French Government thought should be mentioned, he saw no objection to their inclusion in the text of paragraph 9.

21. Mr. KERNO (Assistant Secretary-General) wondered whether the concept "opinion" could be clearly defined. Before such a word, with its many possible meanings, was adopted agreement should be reached on the precise meaning to be attributed to it.

22. Mr. SCALLE thought that what was mainly implied was political opinions; but the word was certainly capable of a wide variety of meanings.

23. Mr. ALFARO pointed out that, when the draft Convention on Genocide had been discussed at the third session of the General Assembly, some members of the Sixth Committee had objected to the use, in the convention, of the expression "political opinion", on the ground that a political party which had suffered for its opinions might, in that case, appeal to the United Nations as a victim of genocide. However, the words could be used in the definition of the crime covered by paragraph 9.

24. Mr. SPIROPOULOS did not consider that the Commission need include those words in the draft code; but the question should be examined and a decision taken.

25. The French Government mentioned the question under the heading of "Crimes against humanity", which was precisely the type of crime covered by paragraph 9.

26. Perhaps the words "or for reasons of their opinion" could be added after the words "on political, racial, religious or cultural grounds".

27. Mr. SANDSTRÖM thought the text of paragraph 9 already covered all cases that should be included and that it was unnecessary to insert the word "opinion", the meaning of which was too general.

28. Mr. ALFARO thought that the Commission might direct the special Rapporteur to draft a short commentary noting the views of the French Government and stating that the term "opinion" referred to political, religious and cultural opinions.

29. In the view of Mr. SPIROPOULOS, supported by the Chairman, any reference in the comment to the reply of one government would set a regrettable precedent. Governments could obtain sufficient information from the summary records.

30. He wondered whether the acts of violence to life and person and outrages on personal dignity, referred to in the Geneva Convention of 12 August 1949, and which the French Government wished to have mentioned, were not war crimes. If so, they would come under paragraph 10 which concerned war crimes.

31. Furthermore, in its communication the French Government stated that the text adopted by the International Law Commission preserved the link established by the Nürnberg judgment, in accordance with the London Charter, between the punishment of crimes against humanity and the punishment of war crimes, and that there was no reason why that link should be maintained.

32. Mr. SANDSTRÖM said that he had already raised that question and that it had been discussed by the Commission, but that the Commission had rejected his view, which had coincided with that of the French Government.

33. The CHAIRMAN thought that the Commission had not preserved the link.

34. Mr. SANDSTRÖM observed that the French Government's objection concerned the limitation contained in the last phrase of paragraph 9, namely "when such acts are committed in execution of or in connexion with other offences defined in the present article".

35. Mr. SPIROPOULOS said that the French Government referred to the formulation of the Nürnberg principles, but would like the draft code also to cover offences against humanity committed in time of peace.

36. The draft code went much further than the Nürnberg principles, although it did not quite meet the wishes of the French Government, which would like the definition of offences against humanity to be so framed that certain acts would not be classified both as war crimes and as offences against humanity or, conversely, that certain obviously criminal acts would not be removed from both lists.

37. The CHAIRMAN considered that some overlapping was inevitable.

38. Mr. ALFARO thought that a differentiation had actually been achieved, since, under the draft code, acts in violation of the laws or customs of war were war crimes.

39. Mr. SPIROPOULOS thought that the dividing line was very difficult to draw, except as he had drawn it in his first report.

*Paragraph 9 was adopted.*

*Comment*

40. Mr. HUDSON proposed the deletion of the word "paragraph" in lines 1-2 of the comment and the substitution of the word "detrimental" for "offensive" in line 5.

41. He also pointed out that the comment on paragraph 9 did not specify by whom the crimes in question might be committed.<sup>6</sup>

<sup>6</sup> The second paragraph of the comment did not exist in the original text.

*Mr. Hudson's amendments were adopted.*

*Paragraph (10) (paragraph 11 in the text of the " Report ")  
Paragraph 10 was adopted without discussion.*

*Comment* <sup>7</sup>

42. Mr. HUDSON said that there was a large number of works on the subject of the destruction of historic monuments and such like, referred to in the second paragraph of the comment, though he personally was not familiar with them. If paragraph 10 referred to destruction of that kind, a more detailed comment should perhaps be given.

43. He wished, at all events, to state that he had a fundamental objection to paragraph 10 as a whole and to the comment on it. The phrase " laws or customs of war " was there used as though its meaning were well-established. But the laws and customs of war were, in fact, a very uncertain quantity, and the provisions of the Hague Conventions of 1907 concerning them seemed to have been completely forgotten.

44. He asked whether paragraph 10 covered any violation whatsoever of the laws and customs of war.

45. Mr. EL KHOURY was convinced that acts in violation of the laws or customs of war could not be omitted from the code of offences against the peace and security of mankind. It was true that the laws and customs of war were not clearly defined at the international level, and for that reason he thought that the International Law Commission should take up the study of the question at the earliest possible moment. The code should be supplemented by a report on the question of the laws and customs of war.

46. Mr. HSU thought the question could be covered in the commentary on paragraph 10, where it might also be suggested that the codification of the laws and customs of war be undertaken.

47. Mr. FRANÇOIS pointed out that, at the first session of the Commission, he had proposed the inclusion of the laws and customs of war among the topics to be dealt with by the Commission, but his suggestion had been rejected by a large majority.<sup>8</sup>

<sup>7</sup> The comment read as follows: "[First paragraph as in the " Report "].

...

"The United Nations Educational, Scientific and Cultural Organization has urged that wanton destruction of historical monuments, historical documents, works of art or any other cultural objects should be considered as a crime punishable under international law. It is understood that such destruction comes within the purview of the present paragraph.

"This paragraph applies to any and all acts committed in violation of the laws or customs of war, whatever the degree of gravity of such acts.

"This paragraph applies to all cases of declared war or of any other armed conflict which may arise between two or more States, even if the state of war is not recognized by one of them. It also applies to all cases of partial or total occupation of the territory of a State, even if the said occupation meets with no armed resistance."

<sup>8</sup> See " Report of the International Law Commission covering its first session," para.18, in *Official Records of the General Assembly, Fourth Session, Supplement No. 10 (A/925)*; also in *Yearbook of the International Law Commission, 1949, Part II*.

48. The Netherlands Government had held the view that the laws and customs of war might be reviewed, but not before the findings of the Geneva Diplomatic Conference of 1949 were known. It was common knowledge that, as a result of that Conference, many of the laws and customs of war had been codified in four Conventions.

49. The thorny question of prohibited weapons was, however, still outstanding. The Netherlands Government was therefore rather chary of tackling the subject, particularly so long as the question of atomic weapons had not been settled, since it considered that a conference on the regulation of the laws and customs of war would be more or less pointless if the question of prohibited weapons was to be shelved.

50. However, the Netherlands Government would certainly welcome a decision by the Commission to undertake a study on the laws and customs of war also, although such a study would undoubtedly be fraught with difficulty. He was therefore reluctant to support Mr. el Khoury's proposal.

51. Mr. SPIROPOULOS said that he had outlined, in his first report, the grounds for the inclusion in the code of the crime concerned. That crime was the subject of article 6 (b) of the Nürnberg Charter. It did not, in fact, violate the peace and security of mankind and, accordingly, from the purely theoretical point of view, should have no place in the draft code; but he had proposed its inclusion because it was among the crimes enumerated in the Nürnberg Charter.

52. There was no specific definition of that crime; but the Commission had discussed the problem and adopted a decision, and he wondered whether it could now reverse its decision.

53. Mr. SCELLE stressed the extreme importance of the point raised. The request by the United Nations Educational, Scientific and Cultural Organization (UNESCO) showed conclusively that it was impossible to define all war crimes. Mr. Georges Berlia had submitted a very full report on the question to UNESCO which was anxious to have the backing of the draft code prepared by the International Law Commission in deciding whether the wanton destruction of historic monuments etc. should be included in the definition of war crimes.<sup>9</sup> In fact, the question was one of principle.

54. UNESCO was preparing an extremely detailed draft convention, in connexion with which it had requested the assistance of a large number of architects, museum curators, etc., who had been asked for their technical advice on the best method of ensuring the protection of historic monuments.

55. In his view, the Commission could and should meet the needs of that Organization by specifying that the wanton destruction of historic monuments etc. could be classified as a crime against peace. All that was required was the inclusion of a statement to that effect in the commentary on paragraph 10.

<sup>9</sup> " Report on the international protection of cultural property, by penal measures, in the event of armed conflict." 5c/PRG/6 Annex I, UNESCO/MUS/Conf.1/20 (rev.).

56. On the main question he agreed with Mr. François. Since war was now regarded as a crime, general regulations governing the use of force, including even the legitimate use of force, must be framed. For there were certain uses of force which did not constitute war, for example its use in self-defence and the coercive measures referred to in Chapter VII of the Charter. But the legitimate use of force did not justify the commission of any and every kind of act; any more than it did at the national level, where a police officer who committed an illegal act in the performance of his duties was liable to be, and in fact frequently was, tried and convicted.
57. He therefore considered that the category of acts under discussion could not be omitted from a code of offences against the peace and security of mankind, although an effort should be made to find another expression for "acts in violation of the laws or customs of war". He was consequently strongly in favour of the retention of paragraph 10, just as he considered that aggression and annexation should be mentioned in the draft code.
58. Mr. EL KHOURY suggested that the General Assembly be recommended to authorize the Commission to give the question of the laws and customs of war priority in the agenda for its next session. He had, however, no objection to the text of paragraph 10.
59. Mr. CORDOVA said he was concerned at the statement by Mr. Hudson, who seemed to consider that very many acts in violation of the laws or customs of war should not be included in the category of war crimes. Could Mr. Hudson explain what he had in mind?
60. Mr. HUDSON said that in the Geneva Convention of 1949 a distinction had been drawn between serious violations of the laws and customs of war and other violations.
61. Mr. CORDOVA asked whether Mr. Hudson wished the code to deal with all aspects of the question.
62. Mr. HUDSON replied in the affirmative; he thought the code would then be more acceptable.
63. Mr. ALFARO was of the opinion that the draft code should not go further than the Geneva Conventions. If the acts referred to by UNESCO were not covered by the Hague Convention of 1907, they should be included in the Code.
64. Mr. HUDSON presumed that the request submitted by UNESCO referred only to the wanton destruction of historical monuments, etc., during hostilities.
65. Mr. SPIROPOULOS observed that the crime would then be a war crime.
66. The CHAIRMAN asked whether the Commission wished to limit criminal liability to certain serious violations of the laws or customs of war, or whether it agreed to leave paragraph 10 as it stood.
67. Mr. CORDOVA thought that the Special Rapporteur might make a detailed statement on the question, indicating which acts were included in, and which were excluded from, the definition.
68. Mr. SPIROPOULOS said that the Nürnberg Charter referred to violation of the laws or customs of war without drawing any distinction.
69. Mr. HUDSON observed that the Nürnberg Tribunal had nevertheless drawn a distinction.
70. Mr. SPIROPOULOS disagreed. He thought that no doubt was possible and that no distinction could be drawn.
71. Some members of the Commission seemed to believe that, for there to be a violation of the laws or customs of war, some dreadful crime had to be committed. But even a minor violation of the laws or customs of war could very well constitute an international crime. What mattered was that such crimes should be tried by an international court.
72. Mr. AMADO drew the attention of the Commission to a passage in the memorandum submitted by the Secretary-General on war crimes as violations of the laws or customs of war.<sup>10</sup>
73. In the passage in question the Secretary-General did not attack the problem squarely, because he realized that no conclusion could be reached so long as the laws and customs of war were not clearly defined. But those laws and customs were continually evolving.
74. He thought that there should be a reference, at least in the comment on paragraph 10, to the Hague Convention of 1907 and to the Geneva Conventions of 1929 and 1949. The laws and customs of war were not the same in the twentieth century as in earlier centuries, having acquired a complexity typical of our age. Such a subject was extremely difficult to define. Many experts had acknowledged the impossibility of enumerating all war crimes that were violations of the laws or customs of war. He was accordingly prepared to accept paragraph 10 either as it stood or with the addition of a reference to the Hague and Geneva Conventions.
75. Mr. CORDOVA said that, if Mr. Spiropoulos' view was the correct one, it would be for the judges to determine the gravity of the crime. There were, however, acts in violation of the laws or customs of war which were harmless. He thought that it should perhaps be stated briefly in the commentary that the application of the general rule might be limited.
76. Mr. EL KHOURY observed that the comment on paragraph 10 contained no mention of the authorities in which the laws and customs of war were specified, whereas other paragraphs referred to the texts on which they were based. That omission must be remedied and it should also be stated whether such authorities as existed were reliable.
77. Mr. LIANG (Secretary to the Commission) thought that the enumeration of acts in violation of the laws or customs of war would be a long, difficult and complicated task. The War Crimes Commission, which had sat in London and of which he had been a member, had endeavoured to draw up such a list, but had been obliged to admit defeat.

<sup>10</sup> *The Charter and Judgment of the Nürnberg Tribunal*, United Nations Publication, Sales No. : 1949.V.7., p. 62.

78. He considered that the purposes of the draft code were not the same as those of the Geneva Conventions and that the inclusion in it of a list of war crimes as violations of the laws or customs of war might cause confusion, the more so since the list contained in the Geneva Conventions was the same as the list of inhuman acts given in paragraph 9 of the code.

79. Furthermore, he did not think that it could be stated in the code that only serious violations would be punishable. The Geneva Conventions, which depended on domestic legislation for their implementation, did not serve the same purpose as the code.

80. Again, no penal code made acts punishable on the ground of their gravity, that element being taken into account only in determining the penalty.

81. He disagreed with Mr. EL KHOURY so far as concerned the difficulty of determining what constituted violation of the laws or customs of war. Treaties were not the only sources where a definition of the laws and customs of war could be found. That had been explicitly stated by the Nürnberg Tribunal.<sup>11</sup>

82. He himself could see no reason why paragraph 10 should not be accepted as it stood. The Court would judge borderline cases in the normal course of its judicial duties.

*It was decided to retain the text of paragraph 10.*

83. Mr. HUDSON pointed out that the word "or" in the English text meant "and/or".

84. Mr. SPIROPOULOS thought that the original wording of the Hague Convention should be preserved, that was to say, the word "or" should be used. For the benefit of Mr. Alfaro he would read article 56, paragraph 2, of the regulations annexed to the Hague Convention IV, of 18 October 1907, concerning the laws and customs of war on land, which ran:

"All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings."

*First paragraph of the comment*

85. The CHAIRMAN noted that the Commission had already discussed most of the commentary on paragraph 10.

*The first paragraph of the comment was adopted.*

*Second paragraph of the comment*

86. Mr. HUDSON thought that a reference to article 56 of the regulations annexed to the Hague Convention IV of 1907 might be inserted at the end of the second paragraph of the comment in some such words as: "This, in fact, follows from article 56 of etc.."

*The second paragraph of the comment was adopted as amended.*

*Third paragraph of the comment*

87. Mr. SCALLE said that not every act in violation of the laws or customs of war was a crime. The stealing of a chicken was forbidden by the laws of war, but was not

a crime. He did not see why the word "crimes" should not be used instead of the word "acts". The paragraph included the phrase "whatever the degree of gravity". A theft was not a crime, it was often a petty offence.

88. Mr. SANDSTRÖM asked whether that was not a question to be settled by the judges.

89. The CHAIRMAN recalled that the Commission had agreed that such a distinction was impracticable.

90. Mr. SPIROPOULOS, supported by the CHAIRMAN and Mr. AMADO, suggested as a solution that the paragraph be deleted.

91. Mr. CORDOVA pointed out that, even if the Commission deleted the paragraph, the general terms used to define the crime would leave matters as they stood, unless the definition were changed. The Commission had considered that every violation of the laws or customs of war was an international crime and that the judges would have to take the gravity of the offence into account.

92. Mr. SCALLE said that, if that were so, there was no need for the phrase "whatever the degree of gravity".

93. The CHAIRMAN pointed out that Mr. Spiropoulos had stated in his first report that the Commission must decide whether every violation of the laws or customs of war was to be considered as a crime under the code or whether only acts of a certain gravity should be so classified.<sup>12</sup> The Commission had decided in favour of the first alternative. He suggested that it be stated that the Commission had decided against the second alternative because no distinction could be drawn.

*It was decided to substitute for the third paragraph of the comment the relevant passage from the first report by Mr. Spiropoulos.*

*Fourth paragraph of the comment*

94. The CHAIRMAN pointed out that, at the time of the Sino-Japanese "incident", neither of the two parties had recognized that there was a state of war.

95. Mr. HUDSON asked whether the second sentence of the paragraph was applicable and whether a war crime existed where there was no resistance.

96. The CHAIRMAN confessed that he was not very clear as to the connotation of the sentence.

*It was decided to delete the second sentence of the fourth paragraph.*

*Paragraph (7) (paragraph 8 in the text of the "Report")*

*Comment*<sup>13</sup> (resumed from the 107th meeting)

97. The CHAIRMAN read out the following text which he suggested ought to be added as the first paragraph of the comment:

"Annexation of territory in violation of international law constitutes a distinct offence, within the purview of the present article, because it presents a particularly lasting danger to the peace and security of mankind.

<sup>12</sup> See *Yearbook of the International Law Commission 1950*, vol. II, doc. A/CN.4/25, Crime No. IX.

<sup>13</sup> The original comment to paragraph 7 was identical to the last paragraph of the comment to paragraph 8 in the text of the "Report".

<sup>11</sup> *Ibid.*, p. 64.

The Covenant of the League of Nations, in article 10, provided that 'Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League'. The Charter of the United Nations, in Article 2, paragraph 4, stipulates that 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State . . .' Illegal annexation may, however, be achieved without overt use of force, for instance, by the threat of force or by economic coercion. For this reason the element of force is not deemed to be requisite. It is conceivable that illegal annexation may be accomplished through one or more of the acts defined in the other paragraphs of the present article. In that case, the offender will have been guilty of those offences as well.

"The term 'territory under an international régime' envisages territories under the international trusteeship system of the United Nations as well as those under any other form of international control, permanent or temporary."

#### *First paragraph*

##### *First three sentences*

The CHAIRMAN invited the Commission to consider the first three sentences of the above text.

98. Mr. HUDSON proposed the deletion of the phrase "within the purview of the present article".

*It was so agreed.*

##### *Fourth sentence*

99. The CHAIRMAN read out the fourth sentence and pointed out that the threat of force was covered by article 1.

100. Mr. KERNO (Assistant Secretary-General) said that the word "however", which appeared in the fourth sentence, always implied a contrast; but the preceding sentence contained a quotation from the Charter of the United Nations in which there was also a reference to the threat or use of force, so that the word "however" was inappropriate.

101. Mr. LIANG (Secretary to the Commission) pointed out that force was a normal aspect of annexation, but the point should be stressed that annexation could be accomplished without overt use of force. He suggested the deletion of the end of the sentence beginning with the words "for instance . . .".

*It was so agreed.*

102. The CHAIRMAN observed that the examples quoted in the sentence demonstrated the weakness of the sentence as a whole.

103. Mr. HUDSON, while agreeing with Mr. Liang's proposal that the end of the sentence be deleted, thought that the word "however" or a word of equivalent meaning should be retained.

104. Mr. ALFARO proposed the insertion, immediately after the quotation from Article 2, paragraph 4, of the Charter, of the sentence: "Any annexation carried out

by threat or use of force is illegal according to the Charter."

105. Mr. KERNO (Assistant Secretary-General) thought that, since the Commission had decided to retain paragraph 7, it should explain its reason for doing so and not merely repeat article 1 of the draft code or quote Article 2, paragraph 4, of the Charter. Some such explanation was essential. So far as concerned the word "however", it was perhaps not indispensable. The sentence might begin with the words "Illegal annexation may be achieved . . .".

*The following wording was adopted:*

"Illegal annexation may also be achieved without overt use or threat of force, etc."

##### *Fifth sentence*

106. Mr. HUDSON thought that the fifth sentence should be worded as follows: "For this reason, the paragraph is not limited to annexation of territory achieved by force."

107. Mr. ALFARO proposed the addition of the words "use of" before the word "force".

108. Mr. HUDSON pointed out that, in that case, the word "threat" must also be added. He preferred his own wording but would not oppose Mr. Alfaro's suggestion, provided the word "threat" were added.

*The fifth sentence was adopted as thus amended.*

##### *Sixth and seventh sentences*

109. Mr. HUDSON proposed the deletion of the sixth and seventh sentences.

110. Mr. SCELLE thought that, while the first of those two sentences had a meaning, the second had none. It merely stated that annexation was covered by the other articles of the code.

111. The CHAIRMAN agreed that it was quite unnecessary to state that.

*It was decided by 6 votes to 3 to retain the sixth sentence.*

112. On the proposal of Mr. AMADO, supported by Messrs. HUDSON and SCELLE, it was decided, by 6 votes to none, to delete the seventh sentence.

113. On the proposal of the CHAIRMAN, it was decided to combine the fourth and sixth sentences into one, as follows:

"Illegal annexation may also be achieved without overt use or threat of force, or by one or more of the acts defined in the other paragraphs of the present article."

##### *Second paragraph*

114. Mr. HUDSON proposed the deletion of the words "permanent or temporary" and the substitution of the word "régime" for the word "control".

*The second paragraph was adopted as amended.*

##### *Paragraph 1 (resumed from the 106th meeting)*

115. Mr. YEPES asked whether it would not be as well at that stage to discuss Mr. Scelle's proposal concerning aggression against the peace and security of mankind (A/CN.4/L.19).

116. The CHAIRMAN pointed out that the Commission had decided to study that question when examining the general report.<sup>14</sup>

117. Mr. SCELLE said that he had not overlooked that fact, but he thought that the Commission might deal with aggression in the same way as it had just dealt with annexation. If a passage in almost the same terms were added to the first paragraph, that would not prevent the reopening of the question when the part of the general report devoted to aggression came up for consideration.

118. If annexation was held to be an international crime he asked whether there was any objection to stating in article 2, paragraph 1, that aggression was also an international crime covered by that and other paragraphs of the same article. The sentence "Illegal annexation may also be achieved without overt use or threat of force, or by one or more of the acts defined in the other paragraphs of the present article", was applicable, *mutatis mutandis*, to both aggression and annexation. The same paragraph could therefore be used with the substitution of "aggression" for "annexation".

119. He would not labour the point, because the question of the definition of aggression, which the Commission had been requested to supply, would come up again when the general report was examined: that the Commission had already decided.

120. He could not help thinking, however, that there was something lacking in a draft code in which the word "aggression" did not appear. Since it must be agreed that aggression was the gravest international crime, it should be mentioned in the first paragraph. That would be done, but only implicitly, whereas he would prefer an explicit reference.

121. The CHAIRMAN said that the Commission might reopen discussion on the first paragraph. Since that was the last opportunity which the Commission would have of discussing the proposal, the matter had best be dealt with then and there.

122. Mr. HUDSON thought that, in view of the absence of Mr. Scelle from the meeting at which the Commission had abandoned the attempt to define aggression,<sup>15</sup> the Commission might reconsider the commentary on the first paragraph of article 2. He called the Commission's attention to the operative part of General Assembly resolution 378 B (V), the text of which ran as follows:

"Decides to refer the proposal of the Union of Soviet Socialist Republics, and all the records of the First Committee dealing with this question, to the International Law Commission, so that the latter may take them into consideration and formulate its conclusions as soon as possible."

123. He saw no objection to stating in the first paragraph of the comment on article 2, paragraph 1, that:

"The acts mentioned in this paragraph are included in the general concept of acts of aggression referred to in Article 1, paragraph 1, of the Charter of the United Nations; but that concept may also be applied to other paragraphs of this article."

<sup>14</sup> See summary record of the 96th meeting, para. 106.

<sup>15</sup> *Ibid.*, para. 86.

124. That would meet Mr. Scelle's request for the inclusion in the list of acts which were offences against the peace and security of mankind of a passage concerning aggression, and the Commission could report to the General Assembly that the latter's resolution had been taken into consideration. That would be one way of resolving the deadlock. The Commission would be explaining the paragraph even though the word "aggression" were not used in the paragraph itself. It would be sheltering under the "umbrella" of acts of aggression and saying that the latter also covered paragraph 1.

125. Mr. SPIROPOULOS fully agreed with Mr. Hudson's proposal.

126. Mr. SCELLE gratefully accepted Mr. Hudson's proposal; but, being obstinate, he was not satisfied so far as concerned the definition of aggression which the Commission had been asked by the General Assembly to supply. That was another question, which would come up again when the Commission examined the general report. It was some satisfaction to him that the concept of aggression was to be mentioned in the commentary. But he would point out, in all fairness, that he could not accept Mr. Hudson's proposal without reservation.

127. Mr. HUDSON was still of the opinion that the General Assembly resolution had not asked the Commission to define aggression; but the point would be raised again when the general report was examined.

128. Mr. CORDOVA thought that the general report should be drafted in the light of the discussion. If the decision on Mr. Scelle's proposal were postponed until the general report was discussed, the whole report might have to be changed. He therefore thought it preferable, if the question of aggression was to be re-opened, to discuss Mr. Scelle's view and, if it was adopted, to amend the text of the draft report accordingly, rather than to draft the report first and have to change it subsequently.

129. Mr. ALFARO said that Mr. Hudson had, of course, suggested a very happy solution which would enable the Commission to escape from the dilemma in which it found itself. He proposed the addition of a passage to article 2, whereby aggression would be included among the crimes which the Commission had in mind. It might be disconcerting for a reader seeking a definition of the concept of aggression not to find a paragraph on the subject. He proposed that article 2 begin with the words: "The following acts, or any of them, are offences against the peace and security of mankind: 1. aggression contrary to the Charter of the United Nations . . .".

130. He thought that the Commission ought to consider Mr. Hudson's proposal and decide whether it should not be inserted at the beginning of article 2. If that were done, the reader would learn what was meant by "aggression".

131. The CHAIRMAN said that that was a different proposal from Mr. Hudson's.

132. Mr. HUDSON pointed out that Mr. Scelle had accepted his proposal.

133. Mr. SCELLE said that he had accepted Mr. Hudson's proposal, but with reservations, and that he also accepted, *a fortiori*, Mr. Alfaro's proposal. He thought the Commission might finish with the question

of aggression. It would be more logical and also simpler from the point of view of the preparation of the general report. The Commission was not obliged to adhere strictly to the Nürnberg Principles. It had just drafted a paragraph on annexation. Why should it not draft one on aggression?

134. Mr. HUDSON pointed out that his suggestion did not depart from the lines which many members of the Commission thought should be followed. It was a matter of the addition of a new paragraph to the commentary on article 2, paragraph 1, to be worded as follows :

“ The employment or threat of employment of armed force, as envisaged in this paragraph, is included in the general concept of “ acts of aggression ” as that term is used in Article 1 (1) of the Charter of the United Nations. That general concept also includes some of the acts described in other paragraphs of this article.”

135. The advantage of that solution was that, while no attempt was made to set any limits to the concept of aggression, the Commission could reply to the General Assembly that it had examined the question when studying the draft code of offences against the peace and security of mankind.

136. Mr. CORDOVA thought that in view of the importance of Mr. Hudson's proposal, he should be requested to transmit it in writing to the Secretariat. There were two proposals before the Commission, Mr. Scelle's, which was the more ambitious, and Mr. Hudson's. The Commission should first examine the former, since its adoption would dispense with the need to discuss the latter. On the other hand, if the Commission rejected Mr. Scelle's proposal it would have to examine Mr. Hudson's. He proposed that Mr. Scelle's formula (A/CN.4/L.19) be examined first.

137. Mr. SCELLE explained that the question to be decided at that stage was whether it was easier to insert a definition of aggression at the end of article 7, or to revert to the comment on article 2, paragraph 1, and take shelter under the “ umbrella ” to which Mr. Hudson had referred.

138. The CHAIRMAN pointed out that the Commission had not defined annexation.

139. Mr. HSU said that Mr. Hudson's proposal was attractive and sound. It should appear in the draft code independently of whether the Commission defined aggression, so that the reader might not be surprised to find that the code contained no provision concerning aggression. At the same time he agreed with Mr. Hudson that the General Assembly had perhaps not requested the Commission to define aggression. But the Commission, having already taken up the question, should do its utmost to define aggression, since it had already made an unsuccessful attempt to do so, and that might adversely affect its reputation.

140. Mr. AMADO thought that the question should be thoroughly examined. Mr. Hudson's proposal disposed of the problem in a comment on one paragraph. That method did not satisfy Mr. Scelle and other members of the Commission who wished to define aggression. The question was whether the Commission intended to attempt

to define aggression in the terms proposed by Mr. Scelle or to dispose of the question by adding the “ umbrella ” clause suggested by Mr. Hudson. He himself was prepared to consider either solution.

141. One thing was certain : if the Commission accepted Mr. Hudson's proposal, it would mean that it was not defining aggression and that it considered the question of minor importance.

142. Mr. SPIROPOULOS said that the Commission had discussed the question of aggression and had reached a certain conclusion. Now that Mr. Scelle was proposing a new definition, must the question be re-opened? At all events there must be no confusion between the present task of the Commission and the definition of aggression. Mr. Hudson had proposed referring to aggression in one of the comments on the code. Quite apart from Mr. Scelle's proposal, it would be a good thing to mention aggression in one of the comments. Absence of such a reference would be a weakness in the code. But it remained to be seen whether Mr. Hudson's formula was the best. He did not think so.

143. The question raised by Mr. Scelle was different and would be discussed separately. But, as Mr. Córdova had said, it could not be discussed during the examination of the general report.

144. The Commission must meanwhile complete its consideration of Mr. Hudson's proposal and decide whether to adopt that proposal as it stood or in some amended form. It was generally agreed that the code should contain a reference to aggression, but the question was to find a suitable formula.

145. Mr. SCELLE said that, as Mr. Amado had so well explained, what had then to be decided was whether a paragraph on aggression could be added to the commentary on article 2, paragraph 1, or whether a special article on aggression, matching the article on annexation, should be inserted in the code.

146. The CHAIRMAN thought it preferable to wait until Mr. Hudson's proposal was communicated in writing to the Commission.

147. Mr. EL KHOURY still held the view that he had held from the outset, namely, that while aggression should not be defined it could be mentioned at that point. The list of international crimes which appeared in article 2 covered all forms of aggression. It would therefore be convenient to add after the word “ mankind ” at the beginning of article 2 the words “ the various forms in which an act of aggression can be committed are also enumerated in this article ”. That would meet the request of the General Assembly.

148. Mr. SCELLE was by no means convinced that all forms of aggression were covered by the various paragraphs of article 2. Far from it. For example, a government which had a verdict in its favour and wished to execute it by force would be committing an act of aggression not covered by article 2.

149. Mr. HUDSON said that he had submitted his proposal in order to reconcile the various views ; but he did not intend to press it.

150. The CHAIRMAN pointed out that Mr. Hudson's proposal was acceptable in substance to the Commission; the only question was how, precisely, it should be worded.

151. Mr. CORDOVA said that the part of the general report which concerned aggression was ready and that he intended to circulate it to his colleagues for their information. He thought that if Mr. Scelle's proposal were discussed, the discussion should be provisional until such time as the relevant passages of the general report on aggression were known.

152. Mr. SCELLE said that he would much prefer the definition of aggression to follow that of annexation in the draft Code.

153. The CHAIRMAN thought that that would be somewhat illogical.

154. Mr. HUDSON proposed that article 2 begin as follows:

"1. Any act of aggression, including the employment or threat of employment, by the authorities of a State, of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations."

155. Mr. SCELLE pointed out that Mr. Hudson's proposal was not a definition of aggression.

The meeting rose at 1 p.m.

## 109th MEETING

Friday, 22 June 1951, at 9.45 a.m.

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*Chairman:* Mr. James L. BRIERLY

*Rapporteur:* Mr. Roberto CORDOVA

*Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, 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.

**Preparation of a draft code of offences against the peace and security of mankind: report by Mr. Spiropoulos (item 2 (a) of the agenda) (A/CN.4/L.15, A/CN.4/L.19) (*continued*)**

#### TEXT OF THE DRAFT CODE

ARTICLE 2 (*continued*)

Paragraph (1) (*continued*)

1. The CHAIRMAN proposed that the Commission examine the two alternative amendments to article 2, paragraph 1, proposed by Mr. Hudson, which had just been distributed to members of the Commission. The first alternative called for the addition of the following paragraph to the comment on paragraph 1:

"The employment or threat of employment of armed force, as envisaged in this paragraph, is included in the general concept of 'acts of aggression' as that term is used in Article 1, paragraph 1, of the Charter of the United Nations. That general concept also includes some of the acts described in other paragraphs of this article."

The second alternative called for the addition, at the beginning of paragraph 1, of the following words: "Any act of aggression, including"<sup>1</sup>

2. Mr. HSU said that, although both proposals were very interesting, he himself preferred the first alternative. The second did not appear to meet the objections raised during the discussion at the previous meeting. The first alternative only expressed some of the ideas put forward by members of the Commission and he would prefer the idea of indirect aggression to be included also. He thought the first alternative entirely suitable for inclusion in a comment.

3. Mr. YEPES still favoured an independent definition of aggression. But the discussion the previous day had convinced him that it was preferable to include the definition of aggression in the code of offences against the peace and security of mankind. The question arose, however, whether that definition should be included in one of the articles of the code or in the comment on one of those articles.

4. He could not support the first alternative proposed by Mr. Hudson; to insert the definition of aggression in a comment would be to minimize the importance of the problem, which was considerable. Was not aggression the greatest offence against the peace and security of mankind and the common denominator of all the other offences to be defined in the code? That was why he considered that a special article should be devoted to its definition.

5. He found the second alternative preferable, but thought that the definition proposed by Mr. Scelle in his memorandum (A/CN.4/L.19) was acceptable. Nevertheless, he did not approve of the words "positive international law in force" and would prefer "international public peace".

6. Mr. AMADO asked whether, if he accepted the

<sup>1</sup> See summary record of the 108th meeting, para. 154.

formula proposed by Mr. Hudson, he would be rejecting that proposed by Mr. Scelle, or whether he could support both texts.

7. Mr. SANDSTRÖM asked whether Mr. Scelle proposed that the definition given in his memorandum be inserted as an article of the code.

8. Mr. SCELLE replied in the affirmative.

9. Mr. AMADO said that he did not fully understand the last phrase of the definition proposed by Mr. Scelle, in particular, the term "*ordre public*" (public peace). For all jurists who had specialized in criminal law or private international law, that term suggested the idea of a conflict of laws. Under existing systems, the public peace meant the external aspect of a country. If aggression were considered as an act designed to disturb the public peace, i.e., the *status quo*, it must be concluded that countries which had been brought against their will under the domination of a powerful neighbour would be committing aggression if they attempted to escape that domination, since they would be disturbing the public peace. Similarly, colonies which fought against the domination of a metropolitan country would also be disturbing the public peace.

10. Mr. EL KHOURY observed that the Commission was returning to the question of aggression and attempting to find a means of carrying out the task which the General Assembly had entrusted to it. Most of the members of the Commission had considered that it would be better not to enumerate offences against the peace and security of mankind, in view of the difficulty of doing so. But in an international criminal code it was essential to enumerate all the offences conceived to be punishable under international law.

11. All acts of aggression were punishable international crimes and should be included in the code. If it was desired that the code should cover all crimes under international law and be universally accepted, it was impossible not to include all forms of aggression. Hence it was necessary to work out a definition of aggression.

12. He referred to General Assembly resolution 378 B (V) on the question of aggression and emphasized its intimate connexion with the code under discussion and the formulation by the International Law Commission of the Nürnberg principles. He proposed that the following paragraph be added to article 1 of the code:

"They also represent the various forms in which acts of aggression may be committed."

13. He pointed out that some of the offences mentioned in the different paragraphs of article 2 also constituted acts of aggression. Mr. Hudson's second alternative, which read: "Any act of aggression, including," was consequently not suitable, since it gave the impression that only the first paragraph referred to acts of aggression, whereas the formula he himself proposed also referred to the acts of aggression dealt with in the other paragraphs.

14. Mr. SPIROPOULOS thought that it would be better first to study Mr. Scelle's definition, which went further than Mr. Hudson's proposal. If the Commission did not wish to adopt the former, it could then turn to the two alternatives proposed by Mr. Hudson.

15. Mr. YEPES thought that the Commission should first settle the question whether the definition of aggression was to be included as a paragraph of the code or in the commentary.

16. Mr. SCELLE, replying to a question by the CHAIRMAN, again explained that he wished his definition to be included as a paragraph of the code.

17. Mr. ALFARO thought that Mr. Scelle's proposal and the two proposals submitted by Mr. Hudson could be considered simultaneously.

18. Mr. SCELLE pointed out that the second alternative proposed by Mr. Hudson was also intended for inclusion as a paragraph of the Code. He agreed with Mr. Hudson on that point, but would have some comments to make regarding that text. In his opinion the most important point was to insert the definition of aggression in the Code. He was prepared to amend his proposal in accordance with the suggestions of members of the Commission.

19. Mr. CORDOVA formally proposed that Mr. Scelle's proposal be considered first.

*It was so decided.*

20. Mr. ALFARO said that, with very slight amendment, the formula proposed by Mr. Scelle in his memorandum could provide a satisfactory solution of the problem under discussion. In his opinion Mr. Scelle had also been right in asking that his definition should be included as a separate paragraph of the code.

21. He pointed out that article 2 was divided into several paragraphs, some of which referred to various forms of aggression: paragraph 1 referred to the most usual form of aggression, paragraph 2 to the planning and preparation of aggression, paragraph 3 to incursion by armed bands, paragraph 4 to the fomenting of civil strife, paragraph 5 to terrorist activities, and paragraph 7 to annexation. All those acts constituted aggression, whereas strictly speaking, those referred to in the other paragraphs of article 2 did not.

22. Mr. Scelle wished to supplement article 2 by the definition of aggression he had proposed, namely, that aggression consisted of "any resort to force contrary to the provisions of the Charter of the United Nations, the purpose or effect of which is to modify the state of positive international law in force and to disturb public peace". In his (Mr. Alfaro's) opinion that definition differed from the formula adopted for article 2, paragraph 1, which referred to the employment or threat of employment of force, in particular, of armed force.

23. Various members of the Commission had pointed out that there might be aggression by forces which were not armed. Hence he believed that it would be better to retain the first paragraph of article 2 in its present form and add a paragraph based on Mr. Scelle's text. The task entrusted to the Commission by the General Assembly would thus be accomplished, since the definition of aggression would be included in the code of offences against the peace and security of mankind.

24. Moreover, he considered that Mr. Hudson's formula did not contribute anything new to the definition of aggression.

25. He himself would prefer article 2, paragraph 1, to be retained, with the insertion, at the beginning, of a definition of aggression based on that proposed by Mr. Scelle.
26. Mr. SANDSTRÖM pointed out that the authors of ordinary criminal codes attempted to define precise and concrete acts; the formula proposed by Mr. Scelle proceeded entirely otherwise, since its author made use of concepts which were neither concrete nor precise, but extremely vague. He referred to the United Nations Charter, which was a most uncertain factor in that context, and then to the concepts of positive international law and public peace, which were even broader. Criminal codes certainly made violence an element in the definition of specific crimes, but they did not make it a crime in itself.
27. He did not think it possible to use such a definition in a criminal code.
28. Mr. SCELLE admitted that his definition contained terms which were rather too abstract.
29. He believed that the expression "positive international law", to which Mr. Yepes had referred, was correct. By it, he meant to convey that there was aggression whenever there was recourse to force in violation of the essential obligations imposed by the Charter, which prohibited resort to force to change an established legal situation, even in order to enforce a right.
30. That, precisely, was the great progress which the Charter represented. He wondered how a meeting of jurists could overlook the opportunity to emphasize the enormous progress represented by the absolute prohibition of resort to force in order to change a legal situation, even if the change were legitimate.
31. Mr. Amado had raised the question of the position of colonies. Although he was certainly not a colonialist, he (Mr. Scelle) emphasized that anything established by law could only be changed by law. He was sure that Mr. Amado would agree with him on that point.
32. Any employment of force, even in a just cause, constituted aggression. That was why he had used the words "any resort to force contrary to the provisions of the Charter of the United Nations". The Charter prescribed legal procedure for all cases in which a State might be tempted to resort to force; even for extreme cases, such as that referred to in Article 94, paragraph 2. Attempts to establish that very system on the international level had been continuing for decades. He could not understand how jurists could hesitate to introduce that idea into the code of offences against the peace and security of mankind.
33. He had no objection to Mr. Alfaro's proposal which, incidentally, followed the lines of his own; he pointed out that in his definition he had endeavoured to avoid enumeration.
34. As regards the term "*ordre public*" (public peace), with which Mr. Amado had said that he was not satisfied, he was prepared to replace that expression by the word "*la paix*" (peace), which was used in the Charter itself, or to be more explicit by saying "*l'ordre public international*" (international public peace).
35. Mr. AMADO observed that the order established by Fascism and Nazism was "*l'ordre public*" (the public peace).
36. Mr. SCELLE replied that internal revolution in a State did not become aggression until it disturbed international public peace.
37. The criticisms brought by Mr. Sandström against his proposal could be applied to any definition of any offence whatever. Mr. Sandström confused the definition of the crime with the determination of the criminal. No definition, whether of murder, theft, fraud, misrepresentation, bankruptcy, etc. could include all the elements, otherwise there would be no further need for courts of law. The function of the code was to define the crime and that of the judge to determine the criminal. For instance a code could not be expected to define negligence or attenuating circumstances, but the court had to apply those concepts.
38. The Commission's great mistake in seeking to establish a definition of aggression was that it had never established a clear distinction between definition of aggression and determination of the aggressor.
39. Self-defence was not a crime, although it could combine all the material conditions of aggression. Only a judge or a competent body could determine that a particular case was really one of self-defence.
40. Thus any definition of aggression would have the same legal value as any definition of crime, but it would translate the spirit of the Charter into normative language.
41. The Commission consisted of jurists and had been instructed to prepare a criminal code which was to define the main offences against the peace and security of mankind; the whole world was watching the Commission and would not understand its failure to define aggression.
42. Mr. KERNO (Assistant Secretary-General) emphasized that the discussion which was taking place was of great importance, but was complicated by the fact that the Commission wished to arrive at a definition of aggression and include that definition in the code of offences against the peace and security of mankind.
43. Unanimity had, however, been reached on a number of substantive points; for instance, there was agreement that any act of aggression was an offence against peace and against mankind and that the Charter provided that the employment of force, even in a just cause, was prohibited; but from those premises different conclusions were drawn and that was where complications set in.
44. The authors of the Charter had not overlooked the difficulties raised by the definition of aggression; the question had been discussed at length at San Francisco, and many delegations had urged that the Charter should contain a definition of aggression. But in the Charter, "aggression" and "the employment of force", and "aggression" and "a breach of the peace" were not synonymous. Thus Article 1 of the Charter stated that one of the purposes of the United Nations was the "suppression of acts of aggression or other breaches of the peace" while Article 39 stated that "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression . . .".

45. He, too, had been struck by the term “*ordre public*” (public peace), which was used in Mr. Scelle’s definition. When Hitler had invaded first the Sudetenland and later the whole of Czechoslovakia, he had claimed that it was to preserve the public peace (“*l’ordre public*”). The effect of any definition might be that an aggressor, acting in bad faith, could claim that his actions did not constitute aggression.

46. He well understood that a competent body would have to decide whether such a claim was justified. But that would only complicate the task of such bodies.

47. In reply to Mr. Scelle, who had pointed out that his memorandum explained the sense of the terms used in the definition, he recalled that the International Court of Justice only allowed the interpretation of texts in the light of preparatory work if those texts were obscure.

48. He stressed that he had only wished to draw attention to the difficulties which might arise in applying Mr. Scelle’s definition.

49. Mr. HUDSON pointed out that the first sentence of the text proposed by Mr. Scelle: “Aggression is an offence against the peace and security of mankind”, could not be inserted in the introductory sentence of article 2. Mr. Scelle had no very definite views on where his definition should be inserted in the code; it would, however, be well for him to explain where he wished it to appear.

50. Moreover, he could not accept the second sentence of the definition, since it did not condemn all resort to force contrary to the provisions of the United Nations Charter, but only resort to force with a particular purpose or effect. In his opinion that weakened the effect of the Charter.

51. He also wondered what was to be understood by “to modify the state of positive international law”. As for the words “disturb the public peace”, they added absolutely nothing to what every one understood by aggression.

52. Mr. SCELLE said that he was willing to replace the words “state of positive international law in force” by some such expression as “an existing legal situation”. He had already said that he was prepared to replace the words “*ordre public*” (public peace) by the words “*la paix*” (peace).

53. Mr. FRANÇOIS said that he had been one of the three members of the Commission who had been in favour of the definition of aggression which the Commission had rejected.<sup>2</sup> He preferred that definition to the one proposed by Mr. Scelle; the latter certainly seemed to have the defect of weakening the Charter. In particular, it would be desirable to delete the end of the definition, from the words “the purpose or effect . . .”.

54. He raised the same objections as several other members of the Commission to the words “the state of positive international law in force” and “*ordre public*” (public peace).

55. He asked whether Mr. Scelle could not support the definition accepted by the minority of the Commission,

which contained everything he desired and was less open to criticism. Moreover, he thought that the Commission was going about the insertion of the definition of aggression in the code in a rather unsatisfactory manner. He found Mr. el Khoury’s formula the best.

56. Mr. EL KHOURY observed that, when the General Assembly had instructed the International Law Commission to draw up a definition of aggression, it had not expected such an abstract formula as that proposed by Mr. Scelle. He thought that the Commission must either draw up a concrete definition or no definition at all. In any case, if an abstract definition were adopted, it must be accompanied by concrete examples and he would like his own proposal to be added.

57. Mr. HUDSON said that Mr. el Khoury’s suggestion could be followed by amending the first sentence of article 2 to read as follows:

“The acts set forth in the following paragraphs of this article are offences against the peace and security of mankind. They include all acts of aggression, by whatever means and in whatever manner they may be committed.”

58. Mr. SANDSTRÖM said that he had not criticized Mr. Scelle’s definition because it failed to include all the necessary elements, but because the criteria on which it was based were too abstract and too general.

59. Mr. YEPES observed that it would be possible to avoid all the difficulties raised by Mr. Scelle’s definition if the final passage of his text were deleted, as from the words “the purpose or effect”.

60. Mr. SPIROPOULOS thought that the discussion was sufficiently far advanced for the Commission to arrive at a definite conclusion. Mr. Scelle’s definition contained precise elements; Mr. Alfaro’s views were in general agreement with that definition; the Commission also had before it several variants proposed by Mr. Hudson and an important proposal by Mr. el Khoury.

61. He thought that members of the Commission were agreed that Mr. Hudson’s last proposal, in which all acts of aggression were mentioned, did justice to all the previous proposals and reflected the general feeling of the Commission.

62. Mr. SCELLE considered that the essential point was that the Code should contain a special article on aggression, which should be specifically mentioned. He would not attempt to impose his own definition on the Commission, but the draft code should contain the statement that aggression constituted an international crime.

63. In the second alternative proposed by Mr. Hudson he could not accept the words “threat of employment . . . of armed force”, since he must take self-defence into account; the words “by the authorities of the State” were not satisfactory either, since aggression could, for instance, be carried out by volunteers. Finally, he thought that such an enumeration as that contained in the text was dangerous.

64. The CHAIRMAN asked whether Mr. Scelle withdrew his proposal in favour of one of the variants suggested by Mr. Hudson.

<sup>2</sup> See summary record of the 96th meeting, para. 73.

65. Mr. SCELLE replied that he was prepared to do so, provided that whichever of Mr. Hudson's proposals were adopted, it was included as a separate paragraph and not adopted as it stood.
66. Mr. ALFARO thought that the Commission should first decide whether it accepted Mr. Scelle's definition or not. If that definition were not accepted it could then take up Mr. Hudson's proposals.
67. He pointed out that he had explained the reasons why, in his opinion, the Commission should adopt Mr. Scelle's definition, with certain drafting amendments; he did not consider that the formula proposed by Mr. Hudson provided a complete definition of aggression.
68. Mr. SCELLE said that, whatever definition the Commission decided to adopt, the crime of aggression must be mentioned among the international crimes covered by the code. The text proposed by Mr. Hudson, however, was not especially concerned with aggression, being intended to replace a former text.
69. Mr. CORDOVA did not consider that Mr. Hudson's second alternative provided a definition of aggression. In his opinion an abstract definition should be included in the code. The terms of the definition proposed by Mr. Scelle had been discussed at length; only the basic idea should be retained, namely that aggression must be defined as a crime.
70. Mr. AMADO thought that the time for noble sentiments was past.
71. He had studied that problem and submitted a memorandum on it (A/CN.4/L.6). In his opinion, it was not possible to attempt to define aggression in other than very broad and general terms. All acts of violence other than the exercise of self-defence or the execution of a measure decided upon by the Security Council must be considered as aggression. He had referred to Article 42 of the Charter. Mr. Alfaro had then submitted a proposal, without success. The Commission now had before it the proposal of Mr. Scelle, who had made no clear statement of his wishes. He had, in fact, said that any definition would be acceptable to him; that attitude placed the Commission in a difficult position. Mr. Scelle should withdraw his proposal or submit a more precise draft. How could he (Mr. Amado), with his modest learning, assert that aggression was any act which constituted a negation of positive international law in force? Who could say what was the positive law in force? And what about custom? Was not that in force? Was not that positive law? Had not positive law often been modified to bring it into line with what Mr. Scelle in his book described as objective law?
72. Mr. SCELLE and Mr. CORDOVA pointed out that it must never be modified by force.
73. Mr. AMADO repeated that any act of violence for purposes other than self-defence or the implementation of enforcement measures decided upon by the Security Council could be aggression. It was not a question of a strict definition but he would be compelled, to his great regret, to abandon Mr. Scelle's formula and vote in favour of the text proposed by Mr. Hudson, in which the element of uncertainty was less.
74. Mr. HSU said that he had endeavoured to persuade Mr. Scelle to submit a definition; he regretted that the latter said that he wished a formula to be adopted without explaining what he wished it to include. In those circumstances he thought it advisable to take up one of Mr. Hudson's suggestions; but he proposed that before doing so the meeting should be suspended so that Mr. Scelle could submit to the Commission the new draft that he had in mind. When the meeting was resumed, the Commission would examine that draft and, if it decided not to adopt it, could then consider Mr. Hudson's proposal. He did not think that the Commission should reject Mr. Scelle's proposal at that stage.
75. Mr. HUDSON observed that if the Commission adopted his second alternative, Mr. Scelle would have achieved success. Acts of aggression would thus be included at the very beginning of the enumeration of offences.
76. Mr. SCELLE agreed to consult with Mr. Hudson, the Rapporteur-General and Mr. Alfaro with a view to arriving at a joint text.
77. After a short intermission the CHAIRMAN announced that he had received the joint text, accepted by various members of the Commission.
78. The text, which differed slightly from Mr. Hudson's second alternative,<sup>3</sup> was a substitute for Mr. Scelle's proposal. It differed from Mr. Hudson's proposal in that the words "or threat of employment" and the word "armed" had been deleted. He thought that the text should be substituted for article 2, paragraph 1.
79. Mr. SANDSTRÖM asked how the question of threats was to be dealt with.
80. Mr. HSU asked whether the text took account of the possibility of force being employed openly or otherwise.
81. Mr. HUDSON explained that the text was the same as Mr. Spiropoulos' original proposal (A/CN.4/44, Text of the draft code, article 1) except for the opening words and the two deletions which had been made.
82. Mr. HSU was not satisfied and felt bound to say so. As he had repeated on several occasions, the definition was only important because of its practical purpose, which was to assist the international community. The indirect employment of force was also aggression. That was a point which could not be overlooked.
83. Mr. HUDSON replied that the text did not prevent the Security Council from dealing with such acts; but the code concerned offences which would be tried by a Court.
84. The CHAIRMAN added that the text was only a substitute for the definition given in article 2, paragraph 1, which did not take account of indirect aggression.
85. Mr. HSU repeated that he was anxious to solve the practical problems which might arise. The Commission should endeavour to show that indirect aggression was also covered by its text. If the words "whether openly or otherwise" were added to the proposed text, he would be satisfied. Indirect aggression would thus be covered. He had not wished to press the point so strongly, but a

<sup>3</sup> See para. 1 above.

definition of aggression which did not cover indirect aggression would be incomplete.

*Mr. Hsu's proposal was rejected by 6 votes to 5.*

86. Mr. EL KHOURY explained that he had voted against the addition of the words "whether openly or otherwise" because, in his opinion, force could only be employed openly.

87. Mr. SPIROPOULOS drew the Commission's attention to the fact that the text began with the words "Any act of aggression, including the employment . . . of armed force". That meant that the definition referred to all acts of aggression; hence the acts defined in paragraphs 3 and 4 could not be considered as acts of aggression in the strict sense of the term. He found the text unsatisfactory, but nevertheless would not propose any amendment.

88. Mr. HUDSON admitted that the criticism made by Mr. Spiropoulos was entirely justified. He thought a comment should be added to the text.

89. Mr. CORDOVA, on the other hand, did not think Mr. Spiropoulos' criticism justified. The paragraph stated that all acts of aggression were crimes. There were other paragraphs which referred to particular cases of aggression. Thus the procedure followed was that used in criminal codes when referring to homicide and parricide. What the Commission intended was to include all acts of aggression among the offences.

*The joint text based on Mr. Hudson's proposal was adopted by 7 votes to 1.*

90. Mr. SPIROPOULOS said that he had abstained from voting not because he was opposed to the idea, but because the definition might lead to misunderstanding.

91. The CHAIRMAN pointed out that the text would be substituted for the definition of the offence dealt with in article 2, paragraph 1.

92. He announced that the Commission had before it Mr. Hudson's proposal to add the following comment in article 2, paragraph 1:

"The General Assembly, by its resolution 380 (V) of 17 November 1950, solemnly reaffirmed that any aggression 'is the gravest of all crimes against peace and security throughout the world'."

*Mr. Hudson's proposal was adopted, the text to be inserted at the beginning of the comment on article 2, paragraph 1.*

93. Mr. SPIROPOULOS asked why the word "armed" was retained in paragraph 2 (*paragraph 3 in the text of the 'Report'*).

94. Mr. ALFARO said that the definition of the first-named offence gave a general idea of acts of aggression. Those could be committed by a force which was not armed; to take an example given by Mr. Spiropoulos, 500,000 unarmed Chinese might enter the territory of another country. Hence there could be aggression by a force which was not armed. Paragraph 2 referred to planning or military preparation. Thus there was no contradiction in referring to armed force in that paragraph.

95. Mr. LIANG (Secretary to the Commission) felt it would be difficult to justify such differences in wording. He thought there was a contradiction. An examination of

paragraphs 1 and 2 showed that they were drafted on similar lines. They were identical except that paragraph 2 began with the words "The planning or preparation". If the word "armed" were retained in paragraph 2, a comment would be necessary, since otherwise the reader would think that its inclusion was due to sheer carelessness.

96. Mr. SPIROPOULOS thought that the preparation of aggression by an armed force was certainly an offence. He pointed out that the two paragraphs had formed a single text, but that the Commission had decided to separate them. He added that he was not proposing the deletion of the word "armed" in the second paragraph.

97. Mr. HUDSON explained that the reason for retaining the word "armed" in the second paragraph was that it referred to the preparation of armed force with a view to its employment.

98. The CHAIRMAN thought it contradictory to refer to "armed force" in paragraph 2 and merely to "force" in paragraph 1. He did not see how the Rapporteur could explain that difference.

99. Mr. HUDSON suggested, after reflection, that the word "armed" in paragraph 2 be deleted.

100. Mr. HSU proposed that, instead, the word "armed" be restored in paragraph 1. The Commission had, in fact, made a mistake. It would be most unsatisfactory to say "armed force" in one of the paragraphs and merely "force" in the other.

*Mr. Hsu's proposal was adopted by 7 votes to 3.*

101. Mr. FRANÇOIS asked whether the formula adopted meant that the threat of employment of force would not be included among the offences.

102. Mr. SANDSTRÖM observed that the Charter referred to the threat and the use of force and asked why the threat should not be expressly mentioned.

103. Mr. HUDSON replied that the Charter did not specify aggression. Mr. Scelle and Mr. Alfaro had found it so difficult to accept threat as constituting aggression, that he had given way on that point. It was a matter of interpretation, which would have to be decided by judges. His own opinion was that the threat of force amounted to the employment of force.

104. It would be advisable to delete the second sentence of the first paragraph of the commentary which read: "In addition, the present paragraph includes the threat of employment of armed force as an offence." The threat was in fact no longer mentioned in the text.

105. Mr. SCELLE thought that, if the threat of employment of force was in itself aggression, a distinction could no longer be made between what was self-defence and what was not. It would be for judges to decide that question.

106. There followed an exchange of views between Mr. CORDOVA, Mr. HUDSON, Mr. ALFARO, Mr. HSU and Mr. EL KHOURY on the question whether it should be provided that the threat of employment of force constituted an offence, since the definition of the offence referred to in paragraph 1 was confined to acts of violence.

*It was decided, by 10 votes to 1, that the threat of employment of force was an offence.*

*It was decided, by 6 votes to 4, that the threat of employment of force did not constitute aggression.*

107. The CHAIRMAN asked whether a separate paragraph should be devoted to the threat and whether the Commission wished to adopt the formula proposed by Mr. Córdova which read as follows :

“The threat of aggression should also be deemed to be an offence under this article.”

108. Mr. ALFARO observed that Mr. Córdova had proposed that the Commission should merely state that the threat of aggression was an offence. The Commission had already voted that the threat of the employment of force was an offence, but did not constitute aggression. Hence it could not accept Mr. Córdova's proposal without reversing that vote.

109. He proposed drafting a new paragraph to follow that devoted to aggression. After the opening sentence of article 2 — “The following acts, or any of them, are offences against the peace and security of mankind” — the following text should be inserted :

“The threat of employment, by the authorities of the State, of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations.”

Thus the threat would be reintroduced into the code.

110. The CHAIRMAN considered that that text came to the same thing as Mr. Córdova's proposal.

111. Mr. CORDOVA explained that, in the paragraph already adopted by the Commission, it was stated that an act of aggression constituted an offence; the Commission now wished to say that the threat of aggression was also an offence. In his opinion the threat of any conceivable kind of aggression was an offence.

112. Mr. HUDSON suggested to Mr. Córdova a new paragraph of article 2 to read as follows :

“Any threat by the authorities of the State to use armed force . . .”

113. Mr. CORDOVA pointed out that that wording left any other threat of aggression out of account. He himself wished to include any threat of an act of violence.

114. Mr. LIANG (Secretary to the Commission) suggested to Mr. Córdova that the threat of aggression was not a separate offence. Aggression was a legal concept and it would be better to say “the threat of an act which amounts to aggression”, or “the threat of resort to acts which result in the juridical notion of aggression . . .”

115. After a discussion on the terms to be used for the final form of Mr. Córdova's proposal, Mr. HUDSON suggested the following wording :

“Any threat by the authorities of the State to resort to aggression against another state . . .”

*Mr. Hudson's wording was adopted by 7 votes to 2.*

116. Mr. EL KHOURY said that he had voted against the proposal and Mr. ALFARO explained that he had

been unable to support it, since he did not wish to depart from the terms of the Charter, which did not refer to the “threat of acts of aggression”.

117. Mr. SANDSTRÖM asked whether it would not be advisable to make the text more specific; the previous text referring to the threat of employment of force had included the additional words “for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations”. It would not be possible to condemn every threat of the use of force. In cases where the use of force was permissible the threat must also be permitted.

118. The CHAIRMAN asked whether the existing comment was suitable for the offence referred to.

*It was decided that the Special Rapporteur amend the comment in the light of the discussion.*

*Paragraph (4) (paragraph (5) in the text of the “ Report ”)*

*Comment (resumed from the 107th meeting)*

119. Mr. HUDSON pointed out that he had proposed the following text :

“In its resolution 380 (V) of 17 November, 1950, the General Assembly declared that ‘fomenting civil strife in the interest of a foreign power’ was aggression.”

*The text was adopted.*

*Paragraph 5 (paragraph (6) in the text of the “ Report ”)*  
(resumed from the 107th meeting)

120. Mr. EL KHOURY proposed that the latter part of the paragraph be deleted, beginning with the words “or the toleration”. He had in mind the case of the factory producing certain goods, which attempted to stop the production of competitors in another country; even though there were recourse to dumping, the authorities of the former country were not obliged to intervene.

121. The CHAIRMAN did not see how such acts could constitute terrorist activities.

122. Mr. HUDSON gave the following example: A State A produced certain goods and a State B placed a prohibitive tariff on those goods, which it had formerly imported in large quantities from State A. Would Mr. el Khoury consider that a case of terrorist activity? To do so would be going far beyond the scope of the text.

123. Mr. EL KHOURY did not wish mere toleration to be considered as an offence.

124. The CHAIRMAN pointed out that before the war Italy had tolerated the activities of Yugoslav terrorists.

125. Mr. AMADO considered that if a Government knew that an industrialist was producing bombs to be used against another State and did not intervene, it would be tolerating terrorist activities.

*It was decided by 9 votes to 1 to retain paragraph 5 unamended.*

*Paragraph 11 (paragraph 12 in the text of the “ Report ”)*

*Sub-paragraph (i)*

126. The CHAIRMAN read out sub-paragraph (i).

*Sub-paragraph (i) was adopted without comment.*

## Sub-paragraph (ii)

127. Mr. HUDSON proposed that the sub-paragraph be deleted; he did not see who the provision would apply to.

128. Mr. SPIROPOULOS pointed out that it would apply, for instance, to newspaper administrations.

129. Mr. HUDSON observed that if an individual, not necessarily the authorities of a State, published a seditious article in a newspaper, the authorities would have to intervene and punish the paper.

*It was decided by 4 votes to 3 to retain sub-paragraph (ii).*

## Sub-paragraph (iii)

130. Mr. HUDSON proposed that the sub-paragraph be deleted.

131. Mr. EL KHOURY said that, since attempts were worse than incitement, he did not see how the sub-paragraph could be deleted.

*It was decided by 7 votes to 1 to retain sub-paragraph (iii).*

## Sub-paragraph (iv)

132. Mr. HUDSON proposed that the sub-paragraph be deleted.

133. Mr. FRANÇOIS reminded the Commission that he had proposed a text to be added to the comment on paragraph 11. If that text were adopted, he would vote in favour of sub-paragraph (iv). He thought, moreover, that the Commission had already adopted the comment and that its omission from document A/CN.4/L.15 was an error.<sup>4</sup>

134. Mr. SPIROPOULOS said that he was willing to include the comment in paragraph 11.

135. The CHAIRMAN read out the amendment proposed by Mr. François, to add at the end of the commentary on article 2 the following:

“ In including ‘ complicity in the commission of any of the offences defined in the preceding paragraphs ’ among the acts which are offences against peace and security, the Commission did not intend to stipulate that all those contributing, in the normal exercise of their duties, to the perpetration of crimes against peace and security could, on that ground alone, be considered as accomplices in such crimes. There can be no question of punishing, as accomplices in an offence against peace, all the members of the armed forces of a State which has been guilty of illegal warfare, or the workers in its war industries.”

136. Mr. FRANÇOIS repeated that that text had already been adopted in principle and could be found in the summary records.

137. Mr. HUDSON wondered whether that comment was consistent with the text of the paragraph. If sub-paragraph (iv) were not deleted, he would vote in favour of Mr. François’ amendment, subject to drafting changes.

138. Sub-paragraph (iv) did not apply to anything which was not already covered; he saw no difference between conspiracy and complicity.

*It was decided, by 8 votes, to retain sub-paragraph (iv).*

<sup>4</sup> Summary record of the 91st meeting, paras. 105–111.

## Comment

## First paragraph

139. The CHAIRMAN read out the first paragraph of the comment on paragraph 11.

*The first paragraph was adopted without comment.*

## Second paragraph

140. The CHAIRMAN asked whether national enactments should be mentioned.

141. Mr. SPIROPOULOS explained that national courts had applied rules similar to those laid down in paragraph 11.

*The second paragraph was adopted with the substitution of the word “ certain ” for the word “ several ”.*

Third paragraph<sup>5</sup>

142. Mr. HUDSON asked Mr. François whether he would accept the words “ it is not intended ” instead of the words “ the Commission did not intend ”, since the same text might be adopted by the General Assembly.

143. He also proposed that the word “ all ” in the last sentence of the text be deleted.

144. Mr. FRANÇOIS pointed out that Generals were also members of the armed forces and in certain cases it would be possible to punish them. The deletion of the word “ all ” would imply that no member of the armed forces of a State could be guilty of the complicity referred to in sub-paragraph (iv).

145. Mr. HUDSON said that he would not press the point. He proposed deleting the words “ which has been guilty of illegal warfare ” in the last sentence. The term “ illegal warfare ” was not included in the code.

146. The CHAIRMAN added that the code did not refer to the guilt of a State and agreed that the words “ which has been guilty of illegal warfare ” should be deleted.

147. Mr. FRANÇOIS accepted those amendments.

*The proposal submitted by Mr. François was adopted unopposed.*

The meeting rose at 1 p.m.

## 110th MEETING

Monday, 25 June 1951, at 3 p.m.

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*Chairman:* Mr. James L. BRIERLY  
*Rapporteur:* Mr. Roberto CORDOVA

*Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, 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.

**Preparation of a draft code of offences against the peace and security of mankind: report by Mr. Spiropoulos (item 2 (a) of the agenda (A/CN.4/L.15))<sup>1</sup> (continued)**

TEXT OF THE DRAFT CODE

ARTICLE 3

1. The CHAIRMAN observed that he did not quite understand why the idea of attenuating circumstances had been introduced into that article when, on the contrary, the fact of having acted as Head of State or responsible government official should be an aggravating circumstance.<sup>2</sup> He pointed out that the tenor of article 3 was entirely different from that of article 4, and proposed that the last phrase of the article, from the words "but may be taken into consideration", be deleted.
2. Obviously, if the Commission decided to delete the last phrase of the article, it would be necessary to recast the whole of the relevant commentary.
3. Mr. ALFARO remarked that article 3 did not conform to the Commission's formulation of the Nürnberg Principles.<sup>3</sup>
4. Mr. HUDSON wondered whether it would not be possible to replace the last phrase of the article by a text based on the last part of article 7 of the Nürnberg Charter.<sup>4</sup> The text of the relevant article of the Nürnberg Charter, which was reproduced in the first paragraph of the comment on article 3 of the draft Code, said exactly the opposite to that article.
5. Mr. ALFARO pointed out that, in formulating the third of the Nürnberg Principles, the Commission had not retained the phrase in article 7 of the Charter which prohibited the Tribunal from taking attenuating circumstances into consideration.

<sup>1</sup> See summary record of the 106th meeting, footnote 8.

<sup>2</sup> The end of article 3 read as follows: "... defined in the present Code, but may be taken into consideration in mitigation of punishment if justice so requires...".

<sup>3</sup> *Report of the International Law Commission covering its second session, Part II, Principle III, in Official Records of the General Assembly, Fifth Session, Supplement No. 12 (A/1316)*. Also in *Yearbook of the International Law Commission 1950*, vol. II.

<sup>4</sup> Article 7 of the Nürnberg Charter read as follows: "The official position of defendants, whether as Heads of State or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment."

*It was decided to delete the words "but may be taken into consideration in mitigation of punishment if justice so requires".*

6. Mr. HUDSON proposed that, in the English text, the words "the present" (Code) be replaced by the word "this".

*It was so decided.*

*Comment*

7. Mr. HUDSON, supported by Mr. YEPES and Mr. SCELLE, pointed out that the second, third and fourth paragraphs of the commentary did not form a coherent whole. He suggested that the second and third paragraphs be transposed; in fact, he wondered whether it would not be better to delete the third paragraph; moreover, since the Commission had just decided not to retain the idea of mitigation of punishment in article 3, there was no further justification for the fourth paragraph, which would be more appropriate in the comment on article 4.

8. Mr. ALFARO considered that the third paragraph had only one point of interest: that was the reference to paragraphs 103 and 104 of the Commission's report on its second session.

9. Mr. CORDOVA thought that the Commission had not given a satisfactory reason for its decision not to retain, in its formulation of Principle III, the words "or mitigating punishment", which appeared at the end of article 7 of the Nürnberg Charter.

10. Mr. HUDSON proposed that the second and third paragraphs of the comment be replaced by the following text: "The concluding phrase of article 7 of the Charter of Nürnberg is omitted here as it was omitted in Principle III of the Commission's formulation of the Nürnberg Principles which reads: 'The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law'".

11. Mr. ALFARO thought it should be pointed out in the comment, that, at its second session, the Commission had not retained the idea of mitigation of punishment, for the reason stated in paragraph 104 of the report on its second session. He also considered that it would be advisable to state that the Commission now adopted the same attitude with regard to the draft code, since the fact of having acted as Head of State or responsible government official in fact constituted an aggravating circumstance.

12. The CHAIRMAN pointed out that the Nürnberg Principles did not go so far as that.

13. Mr. YEPES and Mr. CORDOVA thought it essential for article 3 to be followed by a comment explaining why the Commission had departed from the provisions of article 7 of the Nürnberg Charter; otherwise the deletion of the phrase in question might be interpreted as permitting the tribunal to take the fact that an accused person had been Head of State or a responsible government official into consideration in mitigation of punishment.

14. Mr. SANDSTRÖM read out paragraph 104 of the Commission's report on its second session. He thought that, by stating the view that mitigation of punishment was a matter for the competent court to decide, the Commission had given sufficient reason for its decision not to retain the last phrase of article 7 of the Nürnberg Charter in its formulation of Principle III.

15. Mr. HUDSON said that the decision just taken by the Commission was easily explained by the fact that it did not wish to go back on its formulation of the Nürnberg Principles.

16. Mr. FRANÇOIS observed that there was yet another reason for deleting the phrase in question, namely that, as the Chairman had said, it would be entirely illogical to assume that the fact of being Head of State could be taken into consideration in mitigation of punishment.

17. Mr. HUDSON pointed out that the General Assembly by its resolution 488 (V) of 1 December 1950 had invited Governments to furnish their observations on the formulation of the Nürnberg Principles, and had requested the International Law Commission, in preparing the draft Code of offences against the peace and security of mankind, to take account of the observations made. He himself considered that the Commission should not go back on the decision it had taken at the last session, but that there was no need to restate the inadequate reason it had given on that occasion.

18. The CHAIRMAN pointed out that article 7 of the Nürnberg Charter stated that "the official position of defendants . . . shall not be considered as . . . mitigating punishment", and asked why the Commission should not retain that idea in the draft code.

19. Mr. KERNO (Assistant Secretary-General) said that all members of the Commission were certainly agreed that the fact of having acted as Head of State or responsible government official was not an attenuating circumstance; moreover, that was precisely what the Nürnberg Charter stated. In addition, in the report on its second session the Commission had explained why it had not retained the last phrase of article 7 of the Nürnberg Charter in its formulation of the Nürnberg Principles. But his impression was that there had been some hesitation by various members of the Commission regarding the constitutional position of Heads of State.

20. Mr. HUDSON proposed another formula for the comment. It might, for instance, be worded as follows: "It seems unnecessary to retain the last phrase of article 7 of the Nürnberg Charter, as the fact that a person who committed an act which constituted a crime under international law acted as Head of State or responsible government official would seem to be related to aggravation rather than mitigation."

21. Mr. CORDOVA said that that would be going back on the decision taken by the Commission the previous year. As the Assistant Secretary-General had said, it seemed to him that certain members of the Commission had raised the question of the position of a Head of State who had declared war merely in obedience to a decision of Parliament. He read out various remarks reported in

the summary record of the 46th meeting, including his own statement in paragraph 86.

22. Mr. YEPES proposed that the third paragraph of the comment on article 3 be reworded as follows: "The last phrase of article 7 of the Nürnberg Charter was not retained because the Commission considered that the fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official is not a sufficient basis for mitigating punishment."

23. Mr. SANDSTRÖM wondered whether the last paragraph of the comment on article 3 did not contain an argument justifying the omission of the relevant phrase in article 7 of the Nürnberg Charter. It would, perhaps, be equitable not to mitigate punishment for Heads of State and responsible government officials, but it might be otherwise in the case of less highly placed officials. He felt, however, that it would be better not to raise that question in the comment.

24. Mr. CORDOVA thought it would be advisable to make a brief reference in the comment to the decision taken by the Commission at the previous session regarding the formulation of the Nürnberg Principles. It seemed to him that the formula proposed by Mr. Yepes would be suitable for the purpose.

25. Mr. KERNO (Assistant Secretary-General) thought that if the Commission confined itself to recalling its decision not to retain, in Principle III of its formulation of the Nürnberg Principles, the last phrase of article 7 of the Nürnberg Charter, that would imply that it considered the same reason as being still valid and that it thought that the question of mitigating punishment was for the competent court to decide.

26. Mr. HUDSON said that the reason given the previous year for omitting the phrase in question had been valid because neither Principle III nor Principle IV referred to mitigation of punishment. But, as it stood, article 4 of the draft code reintroduced that idea.

27. Mr. CORDOVA observed that that idea was perfectly appropriate in article 4, which dealt with orders from a superior.

28. Mr. HUDSON said that the Commission might perhaps decide, when it examined article 4, to delete the phrase relating to "mitigation of punishment". He hoped that Mr. Yepes would not press his proposal and that, in that case, the Commission could take a decision on the Chairman's suggestion.

29. The CHAIRMAN thought it would certainly be wiser to examine article 4 first and to return to the comment on article 3 after the Commission had taken a decision on article 4.

*It was so decided.*<sup>5</sup>

#### ARTICLE 4<sup>6</sup>

30. Mr. SCALLE observed that the words "*moyen de défense*", used in the French text of article 4, were a bad

<sup>5</sup> For the continuation of the discussion on the comment on article 3, see below, para. 77 *et seq.*

<sup>6</sup> Article 4 read as follows: "The fact that a person charged with an offence defined in this Code acted pursuant to order of his

translation of the English word "defence". The correct term was "*excuse absolutoire*".

*It was decided to amend the French text of article 4 accordingly.*

31. Mr. HUDSON, supported by the CHAIRMAN, proposed the deletion of the words "either... or in mitigation of punishment", so that the text would then read: "The fact that a person charged with an offence defined in this code acted pursuant to order of his Government or of a superior may be taken into consideration as a defence."

32. Mr. YEPES asked why Mr. Hudson proposed the deletion of the words "or in mitigation of punishment". If the fact that a defendant acted pursuant to order of his Government or of a superior could be taken into consideration as a defence, there was all the more reason why it should be taken into consideration in mitigation of punishment.

33. Mr. HUDSON thought that the court could always decide to reduce the penalty, but that it was not for the Commission to introduce that idea into the code.

34. Mr. AMADO said that the idea of attenuating circumstances was no part of the definition of offences.

35. Mr. SCELLE asked whether a judge could take account of attenuating circumstances if the code did not refer to them. In France, at any rate, special legislation had been required to introduce the idea of attenuating circumstances into the penal code.

36. Mr. HUDSON replied in the affirmative. He added that, in the Code, the Commission was only dealing with the question of responsibility.

37. Mr. EL KHOURY thought it necessary to introduce that idea into the code; he even thought it would be advisable to draft a special article on the subject.

38. Mr. CORDOVA agreed that the words "in mitigation of punishment" should be retained. In his opinion the distinction between defence and attenuating circumstances was only a matter of degree. If defence were mentioned, there must also be a reference to attenuating circumstances.

39. Mr. KERNO (Assistant Secretary-General) pointed out that article 4 of the draft Code stated that the fact of having acted pursuant to order of a Government or of a superior could be taken into consideration "if justice so requires", whereas Principle IV of the formulation of the Nürnberg Principles provided that "The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him."

40. Moreover, there was no doubt that the words "in mitigation of punishment" could be omitted, since it was clear that a judge could always reduce the penalty, especially if the fact of having acted pursuant to order of a Government or of a superior were taken into consideration as a defence. He was not sure, however, that the same applied to the case referred to in article 3.

Government or of a superior may be taken into consideration either as a defence or in mitigation of punishment, only if justice so requires."

41. Mr. SCELLE observed that the draft code of offences against the peace and the security of mankind did not prescribe penalties, whereas many codes did so. In France, the penal code often provided maximum and minimum penalties. The question therefore arose whether, when there were attenuating circumstances, the judge would be entitled to reduce the penalty below the minimum or whether it must remain between the minimum and the maximum? He thought it might be advisable to retain the words "in mitigation of punishment".

42. Mr. SANDSTRÖM pointed out that in Sweden the code always provided a minimum penalty. If there were attenuating circumstances the judge was sometimes permitted to reduce the penalty below that minimum; for such cases, either no limit was set or else another minimum was stipulated.

43. The CHAIRMAN said that English law, on the other hand, did not provide minimum penalties, but only maximum penalties. In his opinion it would be dangerous to introduce the idea of a minimum penalty into an international code.

44. Mr. AMADO stressed that the offences referred to in the draft Code were too great for mitigation and were beyond any conceivable penalty.

45. Mr. HUDSON proposed that the Commission adopt the first part of article 4 in the following form: "The fact that a person charged with an offence defined in this Code acted pursuant to order of his Government or of a superior may be taken into consideration as a defence." Thus the clause regarding mitigation of punishment would be omitted.

46. Mr. YEPES said that he would vote for retention of the text as it appeared in Mr. Spiropoulos' Report.

*Mr Hudson's proposal was adopted by 6 votes to 5.*

47. With regard to the last phrase of article 4, Mr. HUDSON asked why the Rapporteur had introduced the word "only", which had not been included in the preliminary draft of the Code.<sup>7</sup>

48. Mr. SCELLE found that the addition of the word "only" made the text much more explicit.

49. The CHAIRMAN thought, on the contrary, that the original formula had been very satisfactory.

50. Mr. HUDSON proposed that the words "only if justice so requires" be replaced by the words "only if a moral choice was not in fact possible to him", following the lines of Principle IV of the Nürnberg Principles, as formulated by the Commission.

51. Mr. AMADO pointed out that, in the Sixth Committee, several delegations had not approved of that phrase.<sup>8</sup>

52. Mr. CORDOVA thought that it should be left to the judge to decide whether the fact of having acted pursuant to order of a Government or of a superior could be considered as a defence.

53. Mr. KERNO (Assistant Secretary General) thought that that proposal would entail an important change in

<sup>7</sup> See A/CN.4/25, Appendix, Basis of discussion No. 3.

<sup>8</sup> See *Official Records of the General Assembly, fifth session, Sixth Committee, 231st and 239th meetings.*

article 4. In his opinion it would be well to give guidance to judges.

54. Mr. AMADO, supported by the CHAIRMAN and Mr. SCELLE, proposed that the wording of Principle IV of the Nürnberg Principles be adopted.

55. Mr. HUDSON supported that proposal and suggested that article 4 be replaced by the following text :

“The fact that a person charged with an offence defined in this code acted pursuant to order of his Government or of a superior does not relieve him from responsibility if a moral choice was in fact possible to him.”

*Article 4, as amended in accordance with Mr. Hudson's proposal, was adopted by 9 votes to 2.*

#### *Comment*<sup>9</sup>

56. The CHAIRMAN thought it would be sufficient to point out in the comment that the text of the article reproduced the substance of Principle IV of the formulation of the Nürnberg Principles.

57. Mr. KERNO (Assistant Secretary-General) agreed that that should certainly be pointed out, but wondered whether it would not be advisable to add that the Commission had examined the objections to Principle IV raised at the fifth session of the General Assembly, but had considered that formula the best.

58. He also thought it would be advisable to explain in the comment that the idea of mitigation of punishment had not been retained in article 4, because the Commission considered that a judge could always reduce the penalty.

59. Mr. FRANÇOIS observed that the Commission had not refuted the criticisms of Principle IV made at the fifth session of the General Assembly, and asked what they had been.

60. Mr. KERNO (Assistant Secretary-General) replied that a number of representatives had stated in the Sixth Committee that the idea expressed by the words “a moral choice was in fact possible” was too vague and lacked clarity.

61. Mr. ALFARO thought that the comment should mention that the idea of moral choice had been used by the Nürnberg Tribunal, from which the Commission had taken it. In his view, that idea simply meant that it had been possible for the author of an act to choose the course that was considered morally good.

62. Mr. HUDSON considered that a statement on those lines in the comment would to some extent answer the criticisms made in the General Assembly.

63. The CHAIRMAN remarked that the passage in question had been quoted in the Commission's report on

<sup>9</sup> The first paragraph of the comment was unchanged. It was followed originally by two paragraphs reading as follows :

“In drafting the present article, account has been taken of certain observations made on the above-quoted principle during the fifth session of the General Assembly, especially those referring to the concept of “moral choice” which was criticized as lacking in clarity.

“The words ‘either as a defence’ are used as meaning that ‘superior order’ may constitute a ground for relieving responsibility if justice so requires.”

its second session. The Rapporteur could be instructed to draft a suitable paragraph for insertion in the comment.

64. Mr. HUDSON proposed that, after the words “moral choice”, at the end of the second paragraph of the comment on article 4, the words “which was criticized as lacking in clarity” be deleted and the following words added: “The concluding phrase of this article is based on the passage of the Tribunal's judgment which states that the true test ‘is not the existence of the order, but whether moral choice was in fact possible’”.<sup>10</sup>

65. Mr. ALFARO observed that the French text of that passage of the Nürnberg judgment was much clearer than the English.

66. Mr. KERNO (Assistant Secretary-General) agreed that that passage of the Nürnberg Judgment gave a very clear explanation of the problem; but the judgment had been quoted the previous year and had been criticized in the General Assembly. If the Commission reverted to the text of the Nürnberg Principle, it would have to state that the criticisms made in the General Assembly had not convinced it and that it preferred the opinion of the Nürnberg Tribunal.

67. Mr. ALFARO saw no reason why the Commission should not quote Principle IV of the Nürnberg Principles in the comment.

68. Mr. HUDSON pointed out that the Commission had never yet been cited in the comment on the articles of the Code.

69. Mr. AMADO said that it was not for the Commission to engage in polemics with the General Assembly but to state its opinion; consequently it need only re-state the view expressed the previous year.

70. The CHAIRMAN thought that, if the comment referred to criticisms made by the General Assembly, it would be necessary to say why the Commission had not accepted them.

71. Mr. SCELLE thought that the Commission might express regret that it was not in agreement with the General Assembly.

72. Mr. CORDOVA considered that, as a subsidiary organ of the General Assembly, the Commission should at least take account of the Assembly's comments.

73. Mr. HUDSON referred to the comments made in the Sixth Committee of the General Assembly by the representatives of Belgium, Brazil, China, Poland, and the United Kingdom,<sup>11</sup> but added that he had not been at all convinced by the criticisms of Principle IV.

74. The CHAIRMAN thought the Commission could state that it had not been convinced by the views expressed in the Sixth Committee. He pointed out, moreover, that it was only a matter of opinion and not of a decision by the General Assembly.

75. Mr. KERNO (Assistant Secretary-General) thought it would be possible to introduce that idea into the comment in an impersonal form, for instance as follows: “It is true that criticisms were made during the fifth

<sup>10</sup> See *The Charter and Judgment of the Nürnberg Tribunal*, United Nations publication, sales No. : 1949.V.7, p. 42.

<sup>11</sup> See A/CN.4/44, paras. 88-98.

session of the General Assembly, but they did not convince the Commission”.

76. Mr. HUDSON pointed out that the final paragraph of the comment should be deleted.<sup>12</sup>

*The first paragraph of the comment was adopted.*

#### ARTICLE 3 (resumed)

*Comment (resumed from paragraph 29)*

77. Mr. HUDSON said that he wished to revert to the comment made by Mr. Yepes on the third paragraph of the commentary on article 3.<sup>13</sup> He thought that Mr. Yepes had been right, but now that the Commission had decided not to refer to mitigation of punishment in article 4, it was no longer necessary to insert the passage proposed by Mr. Yepes.

78. Mr. YEPES agreed with Mr. Hudson regarding his proposal. Since the words “or in mitigation of punishment” had been deleted, there was no need to add a paragraph to the comment on article 3.

79. Mr. HSU considered that neither too much nor too little attention should be paid to the discussions of the Sixth Committee. The members of that Committee frequently made unconsidered statements. Moreover, no decision had been taken.

80. In the Sixth Committee he had adopted an attitude similar to that of Mr. Spiropoulos, but it had been based on practical considerations. He had thought that the introduction of the idea of moral choice might weaken the Nürnberg Principle. But he approved of its insertion in the draft code.

81. Mr. HUDSON said that he could accept the third paragraph of the comment on article 3, provided the reference to the Commission’s report were deleted.

82. The CHAIRMAN observed that the first three paragraphs of the commentary *were consequently adopted, subject to the deletion of the words in brackets at the end of the third paragraph, and the fourth paragraph deleted.*<sup>14</sup>

#### ARTICLE 5<sup>15</sup>

83. Mr. HUDSON said that he would prefer the first line to be deleted and the following words to be inserted

<sup>12</sup> For the continuation of the discussion on the commentary on article 4 of the draft code, see below, para. 135 *et seq.*

<sup>13</sup> See para. 22 above.

<sup>14</sup> The fourth paragraph read as follows :

“In the present article, the notion of mitigation of punishment is included, not only for the sake of clarity, but primarily because it is thought that the present Code, designed as it is for general application in the future, rather than for specific application to some ‘major war criminals’ as was the case of the Nürnberg charter, should allow some flexibility.”

<sup>15</sup> Article 5 read as follows :

“Pending the establishment of a competent international criminal court, the States which adopt this Code undertake to enact the necessary legislation for the trial and punishment of persons accused of committing any of the offences defined in this Code.”

Its comment read as follows :

“Although the punishment by domestic courts of perpetrators of offences defined in this Code is not the ideal solution, it is, in the absence of an international criminal court, the only possible one.”

in the commentary: “The international criminal court does not now exist”.

84. The CHAIRMAN agreed with Mr. Hudson. He stressed that the legislation would be permanent and would not be applied merely pending the establishment of an international criminal court.

85. Mr. KERNO (Assistant Secretary-General) thought that all reference to the possibility of an international criminal jurisdiction being established in the future should not be deleted. If the present formula was unsatisfactory, the Commission might seek a formula similar to that used in the Convention on Genocide (article VI) and say that States undertook to bring the authors of the offences in question to trial before their national courts and to punish them under their national laws, and subsequently to bring the guilty persons before the international court, when the latter was established.

86. The international criminal court had given rise to great hopes ; he agreed that they were remote enough, but the court should nevertheless be mentioned in the draft code of offences against the peace and security of mankind.

87. Mr. YEPES agreed with Mr. Kerno, but thought that the place to mention those hopes was not the article itself, but the commentary.

88. Mr. CORDOVA asked whether States would not have to bring the criminals before the international criminal court when it was established. He feared that if the criminals were made subject to national laws there would be no consistency in the penalties applied.

89. The CHAIRMAN observed that the word “pending” was misleading.

90. Mr. HUDSON said that a State might adopt the code without ever becoming a party to the Convention establishing the international criminal court.

91. Mr. CORDOVA said that, if one State held that a Mexican should be tried in Mexico and another held that he should be tried in France, there would be a conflict of laws ; that was a point which must not be overlooked.

92. Mr. HUDSON did not consider that the Commission should deal with that question. States adopting the code must have jurisdiction over an offender under general legislation.

93. Mr. AMADO objected that, even when the code was in force, jurisdiction in criminal cases would continue to be territorial. If the international criminal court were set up the position would change.

94. Mr. HUDSON said that he would prefer to see the article remodelled on the basis of article VI of the Convention on Genocide — the drafting of which, incidentally, he did not approve — so as to meet the difficulty mentioned by Mr. Amado. That article provided that : “Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed . . .”.

95. He agreed with Mr. Amado that it was unnecessary to make such an amendment, but in order to satisfy Mr. Córdova the Commission might say : “accused of committing, within their territory, any of the offences

defined . . .". Mr. Córdova's argument was as follows: Suppose an offence were committed against the peace — that would be an international crime — and a State adopted the code, under which international crimes were punishable, then it must be known whether there would be universal jurisdiction as there was, for instance, in the case of piracy.

96. Mr. LIANG (Secretary to the Commission) observed, with reference to Mr. Hudson's comment on the first line of article 5, that there would come a time when the Commission would have to decide whether the code it was drafting would be applied under national legislation and jurisdiction or under international legislation and jurisdiction. In its present form, the article was only a transitional provision. Although there seemed no reason to assume that the Court would be established in the near future, the possibility that it might soon be set up must not be excluded.

97. The question was whether the basis for application of the code would be national or international legislation. If the international criminal court were established, it would also be necessary to amend article 6.

98. Mr. ALFARO thought that there was complete similarity of purpose between the article under discussion by the Commission and article VI of the Convention on Genocide, although they were differently drafted. The latter article read as follows: "Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction".

99. That wording had been criticized by Mr. Hudson, but an international crime should in any case be tried by an international tribunal. The activities of territorial tribunals had not been satisfactory. Out of 896 cases tried by the German territorial courts after the First World War, there had been 6 convictions. It could not be supposed that only 6 of the accused had been guilty.

100. He believed that both the General Assembly and the Commission considered that an international court should be set up; that was why the question of the possibility of establishing such a court was being examined.

101. He could only agree to the deletion of the first line of article 5 if the article were drafted on the same lines as article VI of the Convention on Genocide and provided that:

"The States which adopt this instrument undertake to enact the necessary legislation for the trial and punishment of persons accused of any of the offences defined in this instrument, and to enforce this legislation until such time as a competent international criminal court has been established for the trial and punishment of the offences defined in this code."

102. Mr. HUDSON wondered whether the Commission was not going beyond its terms of reference. It was not drafting a convention to bring the code into force. The General Assembly had asked it to prepare a list of offences against peace and that had so far been the

Commission's purpose. If the General Assembly found the Code satisfactory, it could choose between many different procedures for the adoption of the code by States. If it were assumed that the procedure adopted would be a convention, it would have to contain much more than articles 5 to 7.

103. He had at first thought that it would be easy to reply to Mr. Córdova's question, but the more he reflected the more difficult it appeared to be. There was no doubt that the Commission's task was not to draft a convention, but to enunciate offences against peace and security.

104. He had been struck by the comments of Mr. Liang and Mr. Alfaro regarding the question of international crimes. With all due deference to Mr. Amado he believed that it was no longer so important to deal with the question of the territory in which the offence was committed; the procedure applied to piracy should be followed and international jurisdiction recognized.

105. It might not be necessary to mention extradition requirements in article 6; that depended on how the Commission presented the code. If it decided to present it in the form of a Convention, not just a few articles but over 20 would be needed.

106. Mr. FRANÇOIS said that one thing was obvious, namely, that article 5 was not clear. He had understood that it dealt with an international crime and that jurisdiction was to be internationalized, as in the case of piracy. He still thought that the article required States to punish criminals found in their territory, whatever the place and where the crime had been committed, and that if the international court were already in existence States would bring the criminals before it; if extradition were not requested or granted, article 5 would be applied and States would be obliged to punish the authors of such crimes.

107. After the discussion he had been able to note that several of his colleagues had not interpreted the article in the same way and regarded it as recognizing the principle of *ratione loci*. The Commission must first decide what it intended to do.

108. Mr. KERNO (Assistant Secretary-General) pointed out that the previous year the Commission had stated that it was possible and desirable to establish an international criminal court. On the basis of that statement the General Assembly had set up a special committee of seventeen Members which was to meet at Geneva in the coming August.

109. Hence it would be impossible to adopt a code based exclusively on the jurisdiction of national courts. Articles 5 and 6 of the draft code provided that such courts should be competent during the transition period. That implied that the normal procedure would be for such offences to be punished on the international level and not on the national level, the action of national courts being supplementary. All that was perfectly possible, but the effect of Mr. Hudson's proposal to delete the first line of article 5 would be that the code would provide exclusively for the competence of national courts and make no mention of the establishment of an international court; such a course did not seem possible. The Commission

might not refer to any court at all, so that it could not be accused of eliminating the international court; but if article 5 were retained and the first line deleted, the idea of an international criminal court would be set aside, whereas the previous year the Commission had advocated the establishment of such a court and the General Assembly had not rejected the idea, but had set up a committee to examine it.

110. Mr. CORDOVA pointed out that the Commission had been instructed by the General Assembly to draft a code of offences, and not to deal with prevention and punishment or with jurisdiction. In the comment to be inserted in its general report, the Commission should state that it considered that question outside its terms of reference and that consequently it could not decide what courts should try the authors of the crimes.

111. Mr. SCALLE said that he was somewhat disturbed by the view he had just heard. He might be mistaken, but the Commission had finally defined international crimes and he thought that the essential principle relating to such crimes was the principle of universal jurisdiction. Any court of any State was competent, wherever the crime had been committed, if the authorities of that State could seize the criminal. It was the principle of Grotius, *aut punire aut dedere*. That was how he had understood article 5. He believed that, like article 6, article 5 provided that, pending the establishment of an international criminal court competent to try the authors of the crimes, States were required either to punish them or to extradite them and, in pursuance of article 6, not to refuse extradition on the ground that the offences were political crimes. That was the very essence of the international crime. In conclusion, States were required to punish the criminal or not to refuse to deliver him to the State requiring him for punishment, in other words, to apply article 6, the text of which was as follows: "As regards the offences defined in the present Code the States which adopt this Code undertake not to refuse extradition on the ground that they are political crimes."

#### ARTICLE 6<sup>16</sup>

112. Mr. HUDSON pointed out that States might refuse extradition for other reasons. For instance, the United States and the United Kingdom could refuse it on the ground that there was no extradition treaty in respect of the offence with which the person it was desired to bring to trial had been charged.

113. Mr. SCALLE said that that view would have to change if the Code became a convention.

114. Mr. HUDSON accepted Mr. Scelle's conclusion, but did not think that it should be based on article 6.

<sup>16</sup> Article 6 read as follows:

"As regards the offences defined in the present Code, the States which adopt this Code undertake not to refuse extradition on the ground that they are political crimes."

Its comment read as follows:

"Extradition laws and treaties usually contain provisions designed to prevent extradition of persons charged with political crimes. This article is intended to exclude the possibility of States invoking such provisions with respect to persons accused of offences defined in the Code."

The Commission was required to enumerate the offences and nothing more. It could not deal in two or three articles with the extensive subject which had just been raised.

115. Mr. SCALLE agreed that if the Commission were not prepared to draw up a convention to ensure the punishment of the perpetrators of such crimes pending the establishment of an international criminal court, articles 5 and 6 must be deleted. On the other hand, he thought that article 7 should be retained.

116. Mr. CORDOVA also thought that article 6 meant that States could refuse extradition for other reasons, even in the case of an international crime. He did not think that article 6 could be retained without amendment.

117. Mr. AMADO said that a penal code contained a list of crimes and that in no country did the penal code include the offences enumerated in the draft code of offences against the peace and security of mankind. The purpose of article 5 of the draft was to ensure that those offences were included in national penal codes.

118. A decision should be taken on the question of jurisdiction. The characteristic feature of piracy was that it was subject to the principle of the universal right of punishment. He pointed out that Grotius had adopted the practice of Italian cities. If a murderer fled from Florence and was arrested at Siena, it was the authorities of the latter town which brought him to trial. Grotius had defended the principle of the freedom of the seas, because it was consistent with the interest of the Netherlands.

119. When the international code of offences against the peace and security of mankind had been adopted, States which accepted it would be required, under article 5, to do their utmost to ensure that their penal code included such crimes, which would have to be punished in accordance with the general rules of criminal law, and hence in accordance with the principle of territoriality of criminal law.

120. Once published and promulgated, the convention containing the code would become the law of the land. Article 5 required States to enact legislation under which the offences enumerated in the code would be considered as crimes.

121. Mr. CORDOVA said that it was necessary for the offences to be included in national codes, but that each country would prescribe different penalties, and that would raise another difficulty. Moreover, should the Commission adopt the principle of Grotius, the principle of jurisdiction of the country where the crime was committed, or that of international jurisdiction?

122. Mr. AMADO observed that, although article 6 provided that States undertook not to refuse extradition for the offences defined in the code on the ground that they were political crimes, that did not exclude other possibilities. For instance, Brazil did not recognize capital punishment. Consequently she would not extradite a person who might be condemned to death under the laws of the country applying for extradition. In general, a country would not extradite a person who might be condemned to a more severe penalty than that prescribed in its own penal code.

123. The article under consideration showed that there was not much confidence in establishing of an international criminal court or at any rate that the idea of its establishment was not generally accepted. If it were accepted that the court should be set up, the provisions were unnecessary.

124. The CHAIRMAN observed that the Commission had before it a proposal to delete articles 5 and 6. He thought it advisable to settle that question of principle before proceeding to consider how it should be explained in the general report that the Commission did not believe that question to be within its terms of reference.

125. Mr. EL KHOURY pointed out that Mr. Hudson had said that the question could not be dealt with in a single article; but all the offences referred to in the code were dealt with in article 2, whereas a separate article should be devoted to each offence, not merely a separate paragraph. Why should the Commission adopt a different presentation from that of all other codes?

126. The CHAIRMAN thought it was only a question of style.

127. Mr. HUDSON explained that his idea that articles 5 and 6 should be deleted was the result of the discussion which had just taken place. He suggested waiting till the following day to consider the matter. If the Commission decided that it had not been requested to prepare a convention to bring the code into force, a decision could be taken at once; but if, on the contrary, it considered that it had been requested to prepare a convention, Mr. François' comment on article 6 should be taken into account, and time for consideration would be necessary for that purpose.

128. The CHAIRMAN thought that the Commission could defer its decision till the following day.

129. Mr. SANDSTRÖM pointed out that, in the report covering its second session, the Commission had included the following paragraph:

"156. Another problem considered by the Commission was the implementation of the Code. The Commission concluded that, pending the establishment of a competent international criminal court, such implementation would have to be achieved through the enactment by the States adopting the code . . ."

130. He had quoted that passage from the previous year's report because he considered that the Commission could not leave the question entirely aside after having made such a statement; but it could, of course, be discussed apart from the code.

131. The CHAIRMAN observed that the solution proposed by Mr. Córdova was to deal with it in the general report.

132. Mr. ALFARO pointed out that the code would have to be adopted by means of a Convention. Whether that convention would be separate from the code or would contain it was a matter of secondary importance. But the Commission must not lose sight of the fact that, if it deleted the two articles in question, it would have to state in its general report that the convention bringing the code into force must contain those two articles. Hence

he considered that the Commission could not confine itself to deleting the articles.

133. Mr. HSU also thought that it would be wise to take time to consider the matter.

134. There was a difference between a code and a convention. Nevertheless that difference was mainly a matter of form, as could be seen from the Convention on Genocide. Some changes in presentation would be necessary. With slight amendments, the code drafted by the Commission could become a convention. Even if it were decided to delete the articles in question, time must be taken for consideration.

*It was decided to defer a decision on articles 5 and 6 until the next meeting.*

#### ARTICLE 4 (resumed)

*Comment (resumed from paragraph 76)*

135. The CHAIRMAN read out the text proposed by Mr. Hudson for the second paragraph of the comment on article 4:

"The criticisms of Principle IV voiced in the General Assembly during its fifth session have been carefully studied, but in view of the fact that it is based on a clear enunciation by the Nürnberg Tribunal, no substantial modification has been made in the drafting of this article of the code."

136. Mr. HSU considered that the paragraph was satisfactory and could be adopted, but he wondered whether it was necessary to attach so much importance to the opinions expressed in the Sixth Committee, which were not always carefully weighed and approved by governments, and which had not led to any action. It was the formulation of the Nürnberg Principles which had been criticized, not the drafting of the code. A text might raise objections in one instance and be approved in another. He would abstain from voting.

137. Mr. FRANÇOIS proposed certain amendments to Mr. Hudson's text. He was not very satisfied with the words "in view of the fact." It was not because the Nürnberg Tribunal had so expressed itself that the Commission had adopted that Principle. He asked whether Mr. Hudson would accept the following text:

"... have been carefully studied; however, no substantial modification has been made in the drafting of this article of the Code, which is based on a clear enunciation by the Nürnberg Tribunal."

138. Mr. AMADO fully approved of that amendment, which Mr. Hudson accepted.

139. Mr. CORDOVA did not think it sufficient to say that the criticisms had not been accepted because the text was based on a clear enunciation. That would be giving the Tribunal undue authority. The Commission could depart from the decisions of the Tribunal, but he thought it necessary to give a reason, which Mr. François had not done.

140. Mr. FRANÇOIS considered that his text showed that the Commission adhered to its original formula.

141. Mr. CORDOVA thought that the Commission

should say why it rejected the criticisms made by the General Assembly.

142. Mr. EL KHOURY asked why criticisms were referred to. There had been a general discussion in the Assembly, and different opinions had been expressed.

143. Mr. AMADO did not approve of the word "criticisms". He would prefer a reference to the "observations" made.

144. Mr. CORDOVA proposed saying that the observations made in the General Assembly had failed to convince the Commission.

145. Mr. AMADO repeated that it was not advisable to engage in polemics with the General Assembly. It would be sufficient to explain that, after studying the observations made by the latter on the subject, the Commission had thought it inadvisable to depart from the substance of the Nürnberg Principles. If it gave reasons for its decision, it should give scientific reasons, and that would take a considerable time. It would be sufficient for the Commission to state that it had seen no reason to change its opinion.

146. With regard to the words "a moral choice was in fact possible", which had been criticized as lacking in clarity, Mr. ALFARO explained that, judging by the French text, that phrase meant that, if the accused had had the moral capacity to determine the criminal nature of the act and to decide whether to commit the act or not, he was responsible if he had decided to commit it. The Commission might explain why it had expressed itself in that manner.

147. The CHAIRMAN pointed out that other criticisms had been made. If one of them were to be examined in detail, the others would also have to be dealt with.

148. Mr. HUDSON read out the new draft of his text as amended by Mr. François:

"The observations on Principle IV made in the General Assembly during its fifth session, have been carefully studied; however, no substantial modification has been made in the drafting of this article of the code, which is based on a clear enunciation of the Nürnberg Principles."

*The amended text was adopted in substitution for the second paragraph of the comment.*

*The third paragraph of the comment was deleted.*

#### COMPETENCE OF THE COMMITTEE ON INTERNATIONAL CRIMINAL JURISDICTION

149. Mr. SCELLE asked Mr. Kerno and Mr. Liang to be good enough to state their views on the respective competence of the Commission and of the committee which was to meet in August. That might help the Commission to take a decision regarding articles 5 and 6. If the committee which was to sit as from August took a decision on the competence of the future international criminal court, the Commission might come into conflict with it.

150. The CHAIRMAN pointed out that that question could not be considered in connexion with article 4; Mr. SCELLE agreed.

151. Mr. KERNO (Assistant Secretary-General) replied provisionally to Mr. Scelle's questions by saying that the idea of setting up an international criminal court went back to General Assembly resolution 260 B (III). When the Convention on Genocide was being drafted, the question of implementing that Convention had been considered. It had been held by some that genocide should be punished by an international court. When it had been pointed out that no such court existed, they had said that, pending its establishment, genocide should be punished by national courts. After long discussions, article VI of the Convention had been adopted, which provided that persons charged with genocide should be tried by a competent tribunal of the State in the territory of which the act was committed, or by the international criminal court if and when it was set up and if the States accepted its jurisdiction. There had been a compromise under which, at the same time, another resolution invited the International Law Commission to study the desirability and possibility of establishing an international criminal court. Thus partial satisfaction had been given to those who advocated the establishment of such a court, and the idea had not been abandoned. The Commission had expressed its opinion the previous year. The General Assembly had taken a decision and had referred the matter to a special committee of seventeen Members. The Commission must wait and see how that decision affected it.

152. Mr. SCELLE still wondered what a committee of seventeen Members could do with regard to the penalties to be applied. It might say that the court should apply whatever penalties it thought fit, as the Nürnberg Tribunal had done, and the Commission might have another opinion and prescribe a certain penalty for each offence. The text in question was only a beginning of codification.

153. Mr. HUDSON pointed out that the Commission had only been instructed to prepare a draft code of offences against the peace and security of mankind.

154. Mr. SCELLE went on to say that the penalties must be fixed. The Commission could not confine itself to a mere enumeration of the offences.

155. Mr. AMADO observed that the committee of seventeen would have a heavy task. The first essential was to know whether it would accomplish anything. In any case, it had wide terms of reference. It would have to prepare a draft and examine the possibilities of implementation.

156. The CHAIRMAN proposed that the Commission should state in its general report that it had refrained from trespassing on the committee's ground.

157. Mr. SCELLE advised postponing the question till the following day, for consideration.

The meeting rose at 6.15 p.m.

## 111th MEETING

Tuesday, 26 June 1951, at 9.45 a.m.

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Chairman: Mr. James L. BRIERLY  
Rapporteur: Mr. Roberto CORDOVA

#### Present:

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi Hsu, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, 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.

#### Preparation of a draft code of offences against the peace and security of mankind: report by Mr. Spiropoulos (item 2 (a) of the agenda) (A/CN.4/L.15)<sup>1</sup> (continued)

##### TEXT OF THE DRAFT CODE

#### ARTICLES 5, 6 (resumed)<sup>2</sup> AND ARTICLE 7<sup>3</sup>

1. Mr. HUDSON proposed the deletion of articles 5, 6 and 7.
2. Mr. YEPES said he could not support Mr. Hudson's proposal and would like to know the grounds on which it was based. Article 5, in particular, was very important, since it was in a sense a reminder that the Commission had approved the principle of the establishment of an international criminal court and regarded the latter as not only possible but also desirable. It was to be hoped that an international criminal court would eventually be established before which States could bring criminals who violated international peace and security.

<sup>1</sup> See summary record of the 106th meeting, footnote 8.

<sup>2</sup> *Ibid.*, 110th meeting, paras. 83-134.

<sup>3</sup> Article 7 read as follows:

"Disputes between the States which adopt the present 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 of any party to the dispute."

3. The CHAIRMAN said that, should the Commission decide not to retain articles 5, 6 and 7, the Commission's report to the General Assembly would contain an explanation of the decision.

4. Mr. KERNO (Assistant Secretary-General) pointed out that, at the previous meeting, Mr. Sandström had quoted paragraph 156 of the report of the International Law Commission covering its second session, in which it was stated that, pending the establishment of a competent international criminal court, implementation would have to be achieved through the enactment by the States adopting the code of the necessary legislation for the trial and punishment of persons charged with offences under the code. He presumed that, in the event of the Commission deciding in favour of Mr. Hudson's proposal, its finding of the previous year would still hold good.

5. Mr. SCELLE fully agreed with Mr. Yepes. Whenever the Commission reconsidered a question it reversed its decisions. It was caught in a vicious circle and the hesitancy it displayed was a confession of impotence. In its present form the draft code added little to the formulation of the Nürnberg Principles.

6. Mr. ALFARO, while agreeing with Mr. Yepes and Mr. Scelle, recognized that articles 5, 6 and 7 had no real place in a criminal code. Since a convention would have to be prepared in order to enable the draft code to be adopted, those three articles could be included in that convention. The Commission might explain in a comment that it had decided not to retain articles 5, 6 and 7 on the ground that they were more suitable for a convention.

7. Mr. FRANÇOIS, while emphasizing the importance of articles 5, 6 and 7, agreed with Mr. Alfaro that they were out of place in a criminal code and should be included in regulations governing criminal procedure, which would of course also contain many other articles.

8. Articles 5 and 6 were incomplete and defective; but that was a matter with which the Commission could not deal in detail at that stage. He supported Mr. Hudson's proposal that articles 5, 6 and 7 should be deleted, but thought that the grounds for the deletion should be explained in the commentary.

9. Mr. AMADO would have liked to support Mr. Scelle and Mr. Yepes in that particular case, but felt regretfully obliged to vote for Mr. Hudson's proposal.

10. The General Assembly had directed the Commission to prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the Nürnberg Principles in that draft code. The Commission had performed its task, except that it had not clearly indicated that place. It had endeavoured to frame the code of offences against the peace and security of mankind, defined those offences and stated that the code must be implemented. Weakness was the sole reason for its inclusion of articles 5, 6 and 7 in the draft code.

11. In short, the Commission had assumed a task which did not concern it when it began to study the question of the implementation of the draft code. The articles which specified the liability of the criminals

certainly required expansion. But he thought that articles 5, 6 and 7 were out of place in the draft code.

12. He would be regretfully obliged to vote for the deletion of articles 5, 6 and 7, on the understanding that a comment on implementation would appear in the draft code.

13. Mr. YEPES said that the fact that the articles under discussion were certainly imperfect and in need of amendment was no reason for deleting them. It was obvious that the draft code would not be approved by governments in its existing form and should be incorporated in a convention, but he saw no reason why the articles under discussion should not be submitted to the General Assembly and to governments.

14. Mr. EL KHOURY considered that, properly speaking, articles 5 and 6 had no place in a criminal code, since they were administrative articles which would be more appropriate in a code of criminal procedure or a convention. It was understood that a convention would be required in order to enable the code to be implemented. The Commission had the necessary authority, under one of the articles of its statute, to prepare such a convention. Another article of its statute provided that the Commission might recommend the General Assembly to summon a conference to conclude a convention. He proposed that the Commission submit such a recommendation to the Assembly.

15. Mr. HSU favoured the retention of articles 5, 6 and 7. The difference between a code and a convention was only one of form. What mattered was the spirit informing the instrument. He was afraid that the deletion of articles 5 and 6 might be interpreted as evidence of a lack of faith in the establishment of the international criminal court and thus a retreat from the previous year's decision.

16. Mr. CORDOVA thought it preferable that articles 5, 6 and 7 should be included in a convention. He was afraid governments might have doubts as to their exact interpretation if they were included in a code.

17. Furthermore, it must not be overlooked that the draft code was incomplete; in his view, it should include a section on penalties, and the Commission could not recommend its adoption until it was complete. The result of leaving each government free to choose the penalties for the various crimes covered by the draft code was bound to be chaos.

18. When the Commission had completed the draft code it could communicate it to governments for their comments and follow the procedure set out in article 23 of its statute.

*It was decided, by 7 votes to 4, to delete articles 5, 6 and 7.*

#### PREPARATION OF A DRAFT CONVENTION

19. Mr. EL KHOURY said that he had voted for the deletion of articles 5, 6 and 7 because he hoped for their incorporation in a convention. He would repeat that the Commission should examine the question of preparing a convention, without which the draft code would remain a dead letter. The appropriate procedure was

stated in articles 15 and 23 of the Commission's statute. 20. Mr. YEPES said that it would, of course, be mentioned in the comments on the draft code submitted to the General Assembly that the deletion of article 5 did not represent a retreat by the Commission, which did not despair of the eventual establishment of an international criminal court.

21. Mr. ALFARO, agreeing with Mr. YEPES, said that articles 5, 6 and 7, which the Commission had just decided to delete, should be reproduced in the report of the Commission covering its third session. It should also be stated in the same report that those articles ought to be incorporated in a convention for the implementation of the draft code.

22. The CHAIRMAN pointed out that the question of the implementation of the draft code pending the establishment of an international jurisdiction was dealt with in paragraph 6 (d) of the introduction to document A/CN.4/L.15.<sup>4</sup> But the report would, of course, contain a more detailed explanation.

23. Mr. KERNO (Assistant Secretary-General) thought the Commission should next decide whether it would submit the draft code to governments or to the General Assembly. The Commission's report to the General Assembly should include comments and, among them, one emphasizing the deletion of articles 5, 6 and 7.

24. Although the Commission's present task might be regarded as a special one, he himself thought that the procedure set forth in article 16, sub-paragraphs (g) and (h), of the Commission's statute should be followed, namely, that "when the Commission considers a draft to be satisfactory, it shall request the Secretary-General to issue it as a Commission document" and "shall invite the Governments to submit their comments on this document within a reasonable time."

25. Mr. LIANG (Secretary to the Commission) said that he had discussed the matter in the previous year with the Special Rapporteur, who had agreed with Mr. Kerno and himself that the preparation of a draft code of offences against the peace and security of mankind was an aspect of the "progressive development of international law", in that it concerned a subject on which the "law had not yet been sufficiently developed in the practice of States". The question was therefore not one of codification, although the word "code" had been used. There being no general agreement that the Commission was engaged on a special task, in performing which it need not follow the procedures set forth in its Statute, article 16 of the Commission's statute ought to apply. But account must also be taken of article 15 since, as Mr. el Khoury had said, the draft code could only be implemented by means of a convention.

26. Without articles 5, 6 and 7, the draft code would be neither a convention nor a code, but a skeleton. A large number of additional articles was required and the instrument would have to take the form of a convention. It would therefore be illogical to follow the procedure set forth in article 16 of the statute and at the same time to disregard the provisions of article 15.

<sup>4</sup> See text in summary record of the 106th meeting, footnote 15.

27. Mr. HUDSON considered that the preparation of a draft code was, in the General Assembly's view, a special task comparable to the formulation of the Nürnberg Principles. The Commission had therefore no justification for not dealing with both in the same way. That was why he thought that the practical solution would be to report to the General Assembly, which could submit the draft code to governments if it so desired.

28. He agreed that a fuller comment on implementation was needed than that contained in paragraph 6 (d) of the introduction to document A/CN.4/L.15. He read out a text<sup>5</sup> which might be substituted for paragraph 6 (d). His proposal might not fully meet the Commission's requirements; but he was prepared to amend it where necessary.

29. Mr. ALFARO thought that the text proposed by Mr. Hudson, although not quite satisfactory, might be adopted in default of a better. But he was glad that Mr. Liang had drawn the Commission's attention to the fact that article 15 of the statute provided for the preparation of a draft convention. He himself had always been, and still was, in favour of the preparation of a convention for the draft code of offences against the peace and security of mankind. He might add that he had discussed the matter with Mr. Spiropoulos. He was convinced that the document submitted by the Commission to the General Assembly would be much more complete if it took the form of a convention incorporating the draft code.

30. He did not think that in preparing a convention the Commission would be competing with the Committee on International Criminal Jurisdiction, which was to meet at Geneva in August. He therefore considered that the Commission might explore the possibility of preparing a draft convention in accordance with the provisions of article 15 of its statute.

31. Mr. SCALLE, supporting Mr. Alfaro and Mr. Liang, said that in his view the Commission should not leave to the Committee on International Criminal Jurisdiction the task with which it had been entrusted by the General Assembly. The function of that Committee was to establish the international criminal court, that was to say, a purely administrative function. He himself was convinced that the Commission should submit a draft convention to the General Assembly.

32. He also thought that the Rapporteur should state in the report of the Commission covering its third session that the deletion of articles 5 and 6 was in no sense an encouragement to potential criminals to indulge with impunity in all sorts of crimes pending the establishment of a competent international court.

33. He regretted that Mr. Spiropoulos had been unable to attend that day's meeting to defend the draft code which he had prepared.

34. Mr. SANDSTRÖM said that, since he had voted for the deletion of articles 5, 6 and 7, under the impression that they would appear in the report of the

Commission, he considered the text proposed by Mr. Hudson somewhat unsatisfactory. There was no reason to fear that the Commission might be encroaching on the territory of the Committee on International Criminal Jurisdiction. The danger was greater with respect to the conference which might be called to prepare the convention for the implementation of the code. But there was nothing to prevent the Commission stating its views on certain principles for incorporation in the convention. It could very well undertake such preparatory work. Indeed, article 15 of its statute instructed it to do so.

35. Mr. HUDSON thought that article 5 of the draft code was purely illusory, since not a single State would ever undertake to enact the necessary legislation for the trial and punishment of any of its authorities charged with offences under the code.

36. The solution recommended by Mr. Alfaro struck him as premature. Since there were no means of knowing what the findings of the Committee on International Criminal Jurisdiction would be, the preparation of a convention at that juncture was a practical impossibility, since any convention prepared might have no application. The Commission should therefore avoid taking such a step. The establishment of the Committee on International Criminal Jurisdiction had brought the Commission's efforts in that direction to a halt.

37. Mr. KERNO (Assistant Secretary-General) thought that the Commission should next decide whether the draft code would be submitted to governments or to the General Assembly, that was to say, whether or not the procedure set forth in articles 15 and 16 of its Statute should be applied.

38. He fully shared Mr. Hudson's views as to the purely illusory character of article 5 of the draft code. In practice it was inconceivable that courts would punish their own nationals as international criminals; or if they did do so — for example, in the event of a complete change of government — it would be not in the interest of justice, but for partisan reasons.

39. On the other hand, he did not share Mr. Hudson's view that the findings of the Committee on International Criminal Jurisdiction should be awaited before a convention was prepared. Reversing that argument, it might be claimed that an international criminal court could not be set up so long as no code existed. That had, in fact, been the argument used during the discussions preceding the adoption of resolution 360 B (III).<sup>6</sup> It might perhaps be preferable that the International Law Commission and the Committee on International Criminal Jurisdiction should work along parallel lines.

40. Mr. HUDSON thought that the Commission had already achieved substantial results, since it had prepared a draft code of offences against the peace and security of mankind comprising 4 articles. The situation would be clearer when the Committee on International Criminal Jurisdiction had completed its work.

41. Mr. ALFARO thought that there was nothing in

<sup>6</sup> See *Historical survey of the question of an international criminal jurisdiction*, United Nations publication, sales No.: 1949.V.8, pp. 36-38.

<sup>5</sup> See para. 69 below.

common between the task with which the Committee on International Criminal Jurisdiction had been entrusted and the preparation of a convention concerning the implementation of the draft code. There were excellent reasons for the preparation of a convention by the Commission. The Committee had been set up because the International Law Commission had replied in the affirmative to the twofold question whether the establishment of an international criminal court was desirable and possible. The Committee's effort to establish such a court might fail, in which case the Commission would be justified in preparing a draft convention to complete the task which fell to it under resolution 177 (II) of the General Assembly.

42. Mr. CORDOVA thought that it might perhaps be advisable to state in the report of the Commission in its third session that the Commission remained convinced of the desirability of establishing an international criminal court. The Commission might also express the hope that the Committee on International Criminal Jurisdiction would define the competence of such an international criminal court. But provision should be made against the possibility that the Committee on International Criminal Jurisdiction might fail to reach agreement on the establishment of a court. The International Law Commission would then reserve the right to study the question of jurisdiction in order to facilitate the implementation of the draft code.

43. In his view, it was too early for the Commission to consider the question of preparing a convention. All that was required was that the Commission should reserve the right to review the question should the Committee on International Criminal Jurisdiction fail to complete its task.

44. Mr. EL KHOURY pointed out once more that the Commission could follow either the procedure set forth in article 15 of its statute, or that set forth in articles 22 and 23. If the preparation of a Convention could not be considered at that stage, the Commission might at least recommend the General Assembly to convene a conference to conclude a convention, as provided in article 23, paragraph 1 (*d*).

45. Mr. KERNO (Assistant Secretary-General) pointed out to Mr. el Khoury that article 23 concerned procedure for the codification of international law. Before that procedure could be applied, it was necessary first to apply article 21, whose provisions were roughly the same as those of article 16 (*g*) concerning the progressive development of international law.

46. In the progressive development of international law the instrument must necessarily take the form of a convention, whereas the procedure applicable to codification was more flexible.

47. Mr. FRANÇOIS shared the doubts of Mr. Hudson, Mr. Kernó and Mr. Córdova as to the possibility of implementing the draft code before an international penal code had been established. Mr. Kernó had pointed to the dangers involved in implementing the code so long as no international criminal court existed. Once the establishment of the latter had been decided, the imple-

mentation of the draft code would depend on the form of the court. Should the efforts to establish the court fail, procedure for implementing the code would have to be examined. In the meantime it could only be hoped that the court would be established. The Commission's time might therefore be more usefully employed than in protracted discussion of the implementation of the code.

48. Mr. SANDSTRÖM said that he had been much impressed by the very forceful arguments of Mr. Hudson.

49. Mr. ALFARO said that the question had merited the thorough study which it had just received. It was clear that the majority of the members of the Commission did not think it feasible to submit the draft code of offences against the peace and security of mankind in the form of a convention. He himself did not share that view; but he would fall in with the wishes of the majority, although still convinced that the document submitted by the Commission to the General Assembly would be unsatisfactory.

50. Mr. AMADO was surprised to hear the international criminal court referred to as if it were shortly to become a reality, which, to him, was inconceivable. After reading out the list of the members comprising the special committee, in accordance with resolution 489 (V) of the General Assembly, he pointed out that certain States had refused to be represented on the Committee.<sup>7</sup> If the Committee was successful in its task and a court was established, the co-operation of countries which were at present deliberately standing aloof from the efforts to create such a court would have to be assured before the court could usefully function.

51. Since it might be several years before an international criminal court was established, the main point was that the members of the Commission should agree to be satisfied with what they had accomplished. He could not believe that the mere addition of four or five articles to the draft code would mean that an important contribution had been made to the progressive development of international law.

52. Nor did he consider that the question before the Commission related to the codification of international law. It was, in fact, an entirely new problem. The article of the statute which applied was therefore article 16.

53. Mr. YEPES regretted that Mr. Alfaro was not pressing a formal proposal that the Commission proceed to prepare a convention. He himself did not wish to submit such a proposal, but was sorry that the Commission was missing an opportunity to take a step forward.

54. Mr. EL KHOURY thought that, from the point of view of the practice of States, since the States Members of the United Nations had confirmed the Nürnberg Principles,<sup>8</sup> the Commission's task might be regarded as relating to the codification of international law, so that the Commission might follow the procedure set forth in article 23 of its statute.

55. The CHAIRMAN thought that a decision on the question was unimportant, since, at all events, the draft

<sup>7</sup> See *Official Records of the General Assembly, Fifth Session, Sixth Committee*, 246th meeting, paras. 1-29.

<sup>8</sup> General Assembly resolution 95 (I), of 11 December 1946.

code must be communicated to States, either under article 16 (h) or under article 21.

56. Mr. HUDSON said that the formulation of the Nürnberg Principles had not been communicated to States. The Commission could follow the same procedure with the draft code.

57. Mr. CORDOVA pointed out that, by resolution 177 (II), the General Assembly had directed the Commission to formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal and to prepare a draft code of offences against the peace and security of mankind. It would therefore appear that the same procedure should be followed in regard to the draft code as in regard to the formulation of the Nürnberg Principles.

58. Should the Commission consider that the question was one relating to the progressive development of international law, the article of its statute which was applicable was clearly article 16. But in that case the Commission had not observed the terms of article 16 (c), in that it had not circulated a questionnaire to governments and had not invited them to supply data and information.

59. The CHAIRMAN said that governments had been invited to transmit their comments on a draft code. Furthermore, he thought it would be illogical if the Commission did not regard the preparation of a draft code as a special task with which it had been entrusted, as it had done in the case of the formulation of the Nürnberg Principles, since it had been requested to carry out both tasks by one and the same resolution of the General Assembly.

60. Mr. AMADO said that, although only a few governments had transmitted their comments, the information they had supplied was at any rate full of interest.

61. Mr. YEPES was in favour of communicating the draft code to governments; he thought that the provisions of article 16 must be applied, although that would not prevent the Commission from communicating the draft code to the General Assembly.

62. Mr. HUDSON thought that the draft code would, at all events, be communicated to governments.

63. Mr. LIANG (Secretary to the Commission) considered that the formulation of the Nürnberg Principles, which had already been confirmed by the General Assembly, was a question relating to the codification of international law. On the other hand, the purpose of preparing a draft code was to produce an instrument which would impose obligations on the States accepting it, so that it might be considered as a question relating to the progressive development of international law, the more so since the General Assembly had adopted no formal decision on the Nürnberg Principles, but was awaiting the findings of the Commission in regard to the draft code. He could see nothing illogical in dealing differently with the two questions.

64. The CHAIRMAN said that the practical effect of any differences was almost nil, except that the transmission of the draft code to States rather than to the

General Assembly would delay its possible adoption.

65. Mr. HUDSON inferred that the question would remain on the agenda for another year.

66. The CHAIRMAN asked the Commission to decide whether the draft code should be sent to States or to the General Assembly.

67. Mr. HUDSON moved that it be transmitted to the General Assembly.

*By 10 votes to none with 1 abstention, it was so agreed.*

68. Mr. YEPES said that, although he had abstained from voting, he had also requested in his proposal that the draft code be sent to the General Assembly.

#### INTRODUCTION (*resumed from the 106th meeting*)

PARAGRAPH 6 (d) (A/CN.4/L.15) (*paragraph 58 (d) of the "Report"*) (*resumed from the 106th meeting*)

69. Mr. HUDSON proposed the substitution of the following text for paragraph 6 (d) of the introduction to document A/CN.4/L.15:<sup>9</sup>

"In the preparation of this draft code, the Commission has not considered itself called upon to deal with the various methods by which it may be given binding force. It has therefore refrained from drafting an instrument for implementing a code. The offences set forth are characterized in article 1 as international crimes. Hence, the Commission has envisaged the possibility of an international tribunal for the trial and punishment of persons committing such offences. As the General Assembly has set up a special committee to prepare draft conventions and proposals relating to the establishment of an international criminal court, the Commission has refrained from anticipating the work of that committee.

"Pending the establishment of a competent international criminal court, a transitional measure might be adopted providing for the application of the code by national courts. Such a measure would doubtless be considered in drafting the instrument by which the code would be put into force."

70. Mr. ALFARO, paying tribute to the excellence of Mr. Hudson's proposal, suggested that the concluding words of the first paragraph of the proposal be amended to read: "... the Commission has sought to avoid anticipating the work of that committee." He thought that there could be no question of anticipating the work of the committee. The tasks of the Commission and the committee were different.

71. He might add that he considered it preferable to state that the Commission "has considered it advisable before taking any further action on this subject to await the results of the work of that committee."

72. Mr. HUDSON said that Mr. Alfaro's proposal seemed to suggest that the Commission would review the question. He himself had sought to avoid explaining why the Commission could not include in the code a provision concerning the international criminal court.

<sup>9</sup> See para. 28 above.

73. Mr. HSU asked whether there was any objection to the deletion of the last sentence of the first paragraph of Mr. Hudson's proposal.

74. Mr. HUDSON proposed as an alternative:

"Note has been taken by the Commission of the General Assembly's decision to set up this committee."

75. Mr. CORDOVA thought Mr. Hudson's alternative proposal would give the impression that the committee was to settle the problem. If it did not do so he wondered what steps the Commission would take to implement the code. He suggested a statement to the effect that the Commission reserved the right to review the question. A text on the lines of that proposed by Mr. Alfaro could be added.

76. Mr. HUDSON thought that the problem should be left to the General Assembly, to which it had been submitted, until such time as the Assembly decided to refer it to the Commission.

77. Mr. KERNO (Assistant Secretary-General) said that a minor amendment to the text proposed by Mr. Alfaro might cover the point raised by Mr. Hudson. The sentence might run:

"The Commission thinks it advisable to await the results of the work of that committee before any action is envisaged."

78. Mr. CORDOVA said that the Commission was actually telling the committee that the latter should do the work.

79. Mr. EL KHOURY said that the task was one for the Commission, which should ignore the existence of the committee. The establishment of implementation procedure was linked with the drafting of the code. The adoption of the text proposed would mean that the Commission was depending on the committee to give the code binding force. He thought that the Commission should perform its task and not make it dependent upon the work of the committee.

80. At the request of Mr. HSU, Mr. HUDSON read out the following amendment which he proposed to the last sentence of the first paragraph of his original proposal.

"The Commission has taken note of the action of the General Assembly in setting up a special committee to prepare draft conventions and proposals relating to the establishment of an international criminal court."

81. The CHAIRMAN explained that the second paragraph of Mr. Hudson's proposal remained unchanged.

*The redraft proposed by Mr. Hudson was adopted as amended.*

82. Mr. YEPES asked why the text adopted referred only to the "possibility" of setting up the international criminal court when the Commission had considered its establishment as both possible and desirable.

83. The CHAIRMAN replied that only the possibility of its establishment should be mentioned in that paragraph.

84. Mr. HUDSON explained that he had intended to state that the crimes enumerated in article 1 were international crimes, which explained the proposal to set up an international court. That was a logical sequence.

85. Mr. YEPES did not press his point.

#### TEXT OF THE DRAFT CODE (*resumed*)

##### ARTICLE ON PENALTIES (*article 5 in the text of the "Report"*)

86. Mr. SANDSTRÖM thought that an article on penalties, perhaps providing that the latter should be left to the discretion of the judge, ought to be added to the draft code, for psychological reasons.

87. Mr. ALFARO said that he was unreservedly in favour of Mr. Sandström's proposal. During the previous year he had more than once had occasion to draw the Commission's attention to a criticism levelled at the judgment of the Nürnberg Tribunal, namely, that it had violated the well-known principle of criminal law: *nulla poena nullum crimen sine lege*. He had already stated that there were several arguments in favour of the inclusion in the penal code of an article concerning penalties since a code was called "penal" because it laid down penalties for crimes. He thought that the Commission might at least fix a maximum penalty, for example, imprisonment for life, or use the phrase "any penalty awarded by the Court".

88. He would repeat that an international penal code should include the penalties applicable to international crimes.

89. Mr. EL KHOURY agreed. There could be no penalties without an appropriate text. If penalties were not provided, the court, if established, would be impotent. The Nürnberg Charter had authorized the Tribunal to fix penalties. The Commission might give the international court the same authority. A minor amendment, designed to remedy an omission, would suffice. A provision of that nature should be adopted, at least so far as concerned the main penalty provided by the Nürnberg Charter. In his view, a code that did not include penalties was incomplete.

90. Mr. FRANÇOIS thought that it would be extremely difficult to lay down the penalty for every crime. Mr. Sandström thought that the fixing of the penalty should be left to the judges. That was a question of principle, and it must be decided whether the intention was to allow the judges to fix the penalty in every case. Mr. Alfaro had said that not only should the maximum penalty be fixed, but that it should be stated that there could be no question of the death penalty. In his own view, the maximum penalty should be death, since the crimes concerned were so serious that death would not be too severe a punishment for them.

91. He wondered what point there was in stating that the death penalty was the maximum penalty. In order to fix the appropriate penalty for every offence it would be necessary to have the opinion of specialists in international penal law — and the Commission included only one in its number.

92. What had to be decided was whether there should be a penalty for each offence or whether the fixing of the penalty in each case should be left to the judges. If the latter alternative were adopted, he did not see how penalties could be included in the code.

93. Mr. CORDOVA proposed the following new article:

“The penalty corresponding to the offences enumerated in this code shall be determined by the court which shall have jurisdiction to try and condemn the individuals found guilty of having committed an international crime.”

94. The article which he proposed therefore provided for punishment without stating its nature, which would be very difficult.

95. Mr. SANDSTRÖM read out article 27 of the Nürnberg Charter, as follows:

“The Tribunal shall have the right to impose upon a defendant, on conviction, death or such other punishment as shall be determined by it to be just.”

96. Mr. SCALLE thought that penalties could not be omitted from a penal code. He was well aware of the current movement in favour of a return to the principle of *nulla poena sine lege*. That principle had not been followed at Nürnberg, nor could it have been followed, otherwise the guilty could never have been punished. A formula might be adopted pending the insertion in the draft Code of a more precise provision concerning the penalty for each crime. It might, for example, be stated that the international court could fix the penalty in each case.

97. He regarded the proposal submitted by Mr. Sandström, Mr. Alfaro and Mr. Córdova as logically defensible. The question was whether the Commission wished to produce a true code or merely to enunciate general principles.

98. Mr. HUDSON thought that a decision was difficult so long as the nature of the relevant provision in the statute of the international court was unknown. Furthermore, if national courts were competent, the question of the death penalty arose. Brazil, for example, had abolished capital punishment and refused to extradite a criminal to a country where it was in force. The proposed statement would therefore be valueless. He thought that the Commission ought not to touch the question of implementation of the code.

99. Mr. AMADO wished to point out since specialists in penal law had been mentioned, that none of them applied the same canons to political crimes as to other crimes. The principle of *nulla poena sine lege* applied to common law crimes. Nor should it be overlooked that the object of the penalty was not the same for political as for common law crimes. An anarchist or a communist could not be re-educated. That was why the statute of the French Supreme Court, which was a model of its type, stipulated no penalties, but left them to the appropriate court.

100. The crimes of the Nazis had exceeded the wildest imagination and ordinary penalties could not be applied to men committing such crimes.

101. He would suggest an attitude of extreme caution on the question. The Commission could await the establishment of the international criminal court or include in the draft code an article based on article 27 of the

Nürnberg Charter, such as had been proposed by Mr. Córdova.

102. Mr. CORDOVA thought that there were two possibilities. International crimes would be punished either by an international court or by national law. It was impossible, in either case, to specify the penalties for such crimes. Capital punishment might be in force in one country, and not in another. It would be regrettable to draft a code and not to state that the fact that it ought to provide penalties had been considered by the Commission. Mr. Hudson's criticism was equally applicable to the enumeration of crimes. A penal code consisted of two main parts, namely, the definition of the crimes and the determination of the penalties. It would be pointless to enumerate crimes without mentioning penalties.

103. Mr. AMADO said that national laws which did not provide for the death penalty could be amended. He was convinced that, in view of the enormity of the crimes concerned, States would be prepared to provide the death penalty. For philosophical reasons connected with the concept of educative or corrective penalties, no State would refuse to incorporate the death penalty in its domestic legislation as a punishment for crimes of the character concerned.

104. The difficulty was to fix a penalty for the individual guilty of the crime. A uniform penalty without gradations was unthinkable. It would be very difficult to fix the penalty for invasion of the territory of a State or for fomenting civil war. He considered that it was too early at that stage to attempt to fix penalties; but the Commission could make a recommendation. Nor did he believe that the Commission should fix a maximum penalty. A provision similar to article 27 of the Nürnberg Charter might be acceptable.

105. Mr. YEPES said that the extreme delicacy of the problem was no reason for avoiding a decision. The work of the Commission would be incomplete if it were left as it stood. The Commission must state that the acts enumerated deserved punishment. While it was impossible to fix a penalty for every crime, the proposals submitted by Mr. Sandström and Mr. Córdova were acceptable. Mr. Hudson had objected that certain States had abolished capital punishment and refused to extradite criminals who were likely to be executed. Capital punishment had been abolished in Colombia on philosophical grounds, and if it was still in force in the State requesting extradition the latter was only granted on condition that the death penalty was commuted. In his view, that objection ought to be disregarded.

106. Mr. ALFARO agreed with Mr. Amado. The same canons could not be applied to political crimes as to common law crimes. In the case of political crimes the modern penologist's view that the aim of punishment was to rehabilitate the criminal could not be entertained. Citizens were entitled to defend themselves against dangerous individuals who committed political crimes. It was therefore natural for the State to impose a penalty which would eliminate such men and make it impossible for them to disturb international life.

107. For him the principle of *nulla poena sine lege*

remained applicable and it should not be disregarded in a penal code drafted by a Commission which numbered a distinguished penologist among its members. The omission of penalties from the code would be a retrograde step as compared with the Nürnberg Charter. Of course, in the cases tried at Nürnberg the penalty had not existed before the crimes; but it had been established. A decision could be taken subsequently as to whether the penalty should be the death penalty or imprisonment for life. A very flexible type of penalty should be established in order to enable the verdict of the court to be adjusted to the degree of guilt of each defendant.

108. If the Commission stated that the penalty for all such crimes would be the death penalty, or any lesser penalty that justice might require, the criminals would know that they were risking the death penalty, but the court would not be bound by a hard-and-fast provision. He thought the Commission would find itself in a very awkward position if it went back on the Nürnberg Charter and omitted all reference to penalties.

109. He did not much favour the idea that the court should decide the penalty, since that was an unusual provision in penal law. There should be a reasonable relationship between the penalty and the crime.

110. He thought that the Commission should agree in principle to adopt an article stipulating penalties. The choice between the death penalty and imprisonment for life could be made later. The penalty for a minor offence could be fixed by the court, since it would have the right to impose a lighter penalty.

111. Mr. SCELLE thought that Mr. Córdova's proposal should perhaps state that the solution recommended was provisional and would only apply pending the fixing of a penalty for each crime, because the principle of *nulla poena sine lege* was endorsed in the Universal Declaration of Human Rights. Consequently, if the proposal were adopted as it stood it would contradict the Declaration. An article was absolutely essential; for a code that enumerated crimes without providing penalties for them was purely theoretical.

*It was decided, by 8 votes to 2 with 1 abstention, that an article on penalties be included in the draft code.*

112. The CHAIRMAN then requested the Commission to decide what form the article should take and referred to the proposal submitted by Mr. Córdova.<sup>10</sup>

113. Mr. CORDOVA explained that the text he had proposed should appear as a separate article at the end of the code.

114. Mr. AMADO said that, if Mr. Córdova's text were adopted, the Commission would again have to face the problem which had arisen in connexion with article 5. Pending the establishment of an international criminal court the penalties for the crimes concerned would be those stipulated in national penal codes. Since the Commission had adopted the principle that penalties should be included in the draft code, the nature of the penalties must be stated.

115. Mr. CORDOVA said that the Commission should not make the mistake for which the Nürnberg Tribunal had been blamed.

116. Mr. AMADO replied that the code had not existed at the time of the Tribunal.

117. Mr. CORDOVA agreed that it should be left to judge to award a penalty commensurate with the gravity of the offence, which could be done by fixing a maximum penalty.

118. Mr. AMADO asked who would apply the penalty.

119. Mr. CORDOVA replied that it would be awarded by the international court, if competent, otherwise by the national court.

120. Mr. FRANÇOIS, referring to Mr. Córdova's remark that the Commission should not fall into the error committed at Nürnberg and ignore the principle of *nulla poena . . .*, pointed out that there was a cardinal distinction. The Commission had now established the law; what it had not yet done was to fix the penalties and delegate the task of awarding them. It would not be contrary to the principle of *nulla poena . . .* to adopt a rule of the type proposed by Mr. Córdova. He disagreed with Mr. Scelle's observation that the adoption of Mr. Córdova's proposal would be contrary to the Universal Declaration of Human Rights.

121. Mr. CORDOVA thought that, in fact, if the maximum penalty were fixed the principle of *nulla poena . . .* could not be invoked. The judge would adjust the penalty to the gravity of the crime.

122. Mr. SCELLE said that his opinion on Mr. Córdova's proposal had been expressed because the basic aim of the principle of *nulla poena . . .* was clearly to prevent the court fixing an arbitrary penalty. Once the code was adopted the principle of *nullum crimen sine lege* would be respected, but not so the principle of *nulla poena . . .*

123. He suggested the addition to the text proposed by Mr. Córdova of a reservation in the following terms:

"Pending the inclusion in the code of a penalty for each crime the court shall be competent to choose the penalty."

124. The whole procedure would, of course, be provisional; but it had been followed already and could be followed again. If the principle of *nullum crimen* were strictly applied, a person convicted of a new crime could not be punished. The Nürnberg Tribunal had been obliged to adopt the decisions which it had adopted, because otherwise it would have been impossible to punish war crimes. He would welcome a provisional reservation on the matter. The objective was to ensure that there was a specific penalty for every crime. The Commission could not fix the penalties, because in doing so it would be exceeding its duty, and also because there was only one penologist in the Commission, namely, Mr. Amado. The adoption of the reservation which he proposed would meet the objection which had been raised.

125. Mr. SANDSTRÖM wondered whether it would actually meet every objection. The Commission would be blamed for not fixing penalties.

<sup>10</sup> See para. 93 above.

126. Mr. SCELLE explained that the reservation which he had in mind would state that, pending the inclusion in the code of a penalty for each crime, the Commission left to the court the task of fixing the penalty.

127. Mr. CORDOVA said that the problem was to avoid coming into conflict with the principle of *nulla poena* . . . He proposed the addition of the following words to his text:

“according to the gravity of the criminal act and also taking into account that the maximum penalty to be imposed shall be the death penalty (or imprisonment for life).”

128. Failure to lay down the maximum penalty would contradict the principle of *nulla poena* . . .

129. Mr. EL KHOURY said that he was opposed to fixing either a maximum or a minimum penalty. He proposed the addition to the text proposed by Mr. Córdova of the following sentence:

“In determining the penalty the Court shall take into consideration the gravity of the crime and the corresponding national penal code in force.”

130. The CHAIRMAN asked what was meant by the “corresponding . . . code”.

131. Mr. EL KHOURY replied that what was meant was the provisions of the code in respect of, for example, murder or arson.

132. Mr. AMADO said that Mr. Hudson had been good enough to put into English the proposal which he himself intended to submit, as follows:

“Pending the establishment of a competent international criminal court, the penalty for any offence defined in this code shall be that fixed by the national law applied”.

133. So far as concerned the principle of *nulla poena* — which had never been known in Rome, although stated in Latin — the crimes under consideration could not be punished in the various countries if it were applied. If armed bands killed someone their members could be punished for murder. That was a crime covered by the penal code; but certain political crimes were, of course, not covered by national codes, which showed the complexity of the question.

134. Mr. ALFARO proposed the substitution, for the words “by the national law applied” in Mr. Amado’s proposal, of the words: “by the national penal code of the country in which the crime has been committed.”

135. Mr. AMADO pointed out that in the case of genocide, which was an international crime, one article of the appropriate Convention provided that the person responsible would be punished by the national courts. The question was somewhat similar.

136. Mr. KERNO (Assistant Secretary-General) said that he was trying to imagine what penalty was prescribed in any national legislation for the international crime of annexation or the crime of preparing to use armed force. Genocide corresponded to murder; but national codes contained no provisions in respect of many other international crimes.

137. Mr. AMADO said he would point out to Mr. Kerno that the draft code contained a provision to the effect that States adopting the code should enact the necessary legislation.

138. Mr. HUDSON observed that, since the wording of the text must conform to that used elsewhere, it should be given careful study. He proposed the following amendment to the text submitted by Mr. Córdova:

“The penalty for any offence enumerated in this code shall be determined by the tribunal exercising jurisdiction over an individual accused of the offence”.

139. Mr. CORDOVA thought that the Commission should perhaps decide whether to mention the maximum penalty or not.

140. Mr. HUDSON suggested the following wording:

“ . . . taking into account the gravity of the act and limiting the maximum penalty to death.”

141. Mr. EL KHOURY said that no maximum penalty should be stated. The death penalty was essential in certain cases, but not so in others. He thought it should be left to the court to fix the penalty.

142. Mr. FRANÇOIS said that failure on the part of the Commission to prescribe the death penalty would suggest that it disapproved of the penalties imposed by the Nürnberg Tribunal.

143. The CHAIRMAN thought that the text should close with the words “taking into account the gravity of the act”.

144. Mr. ALFARO agreed with Mr. Scelle that to state that the court would fix the penalty would be a contradiction of the principle of *nulla poena*. If the Commission decided not to prescribe the maximum penalty, he would support Mr. Amado’s proposal. He proposed the following text:

“For these crimes, pending the establishment of a competent international criminal court, the penalty shall be that set forth in the penal code of the territory where the crime has been committed.”

145. Mr. AMADO thought that the members of the Commission would find it extremely difficult to justify, in the eyes of their fellow jurists, their rejection of the traditional principle, which was accepted both in theory and, in practice, that determination of the penalty should be left to the judge.

146. Mr. KERNO (Assistant Secretary-General) pointed out that the principle of *nulla poena* was best known in the legal systems of Continental Europe and Latin America, and less known in the Anglo-Saxon countries. The principle applied except where the law gave the judge the right to fix the penalty; that was an exception to the rule.

147. Mr. SCELLE pointed out that Mr. Amado had observed that it also applied to the Supreme Court in France.

148. Mr. HUDSON asked whether the principle was not *nullum crimen sine lege*.

149. The CHAIRMAN said that Mr. Scelle apparently drew a distinction. So far as he (the Chairman) was

concerned, he thought it was two ways of expressing the same idea.

150. Mr. HUDSON said that there could be no guilt if there were no law already in force which made commission of the act a crime. If that was the interpretation of the principle, the Commission had conformed to it by defining the crimes in article 2. The code constituted a basis in enabling persons who had committed certain acts to be tried. Having defined the crimes in the draft code, the Commission could stop there and claim that the principle had been applied.

151. Mr. SCELLE said that that was the French interpretation of the principle.

152. The CHAIRMAN drew attention to the following amendment to the end of Mr. Córdova's text, proposed by Mr. Hudson:

"... exercising jurisdiction over the individual accused, taking into account the gravity of the offence".

153. Mr. EL KHOURY reminded the Commission that he had proposed the addition of the words:

"and the corresponding national penal code in force".

The code referred to was that of the country in which the crime had been committed.

154. Mr. HUDSON said that Mr. el Khoury's proposal would mean a return to the territorialization of crime.

155. Mr. SANDSTRÖM proposed the addition of the following words:

"Capital punishment may be imposed if the offence requires it".

156. The CHAIRMAN said that such a provision would cause difficulties for countries which had abolished capital punishment.

*Mr. el Khoury's amendment was rejected.*

157. Mr. ALFARO said that he was in favour of the principle contained in Mr. el Khoury's amendment, but not of its wording.

*Mr. Sandström's amendment was rejected by 5 votes to 4.*

158. Mr. ALFARO proposed the addition of the following words to Mr. Córdova's text:

"The maximum penalty should be imprisonment for life".

*Mr. Alfaro's amendment was rejected by 8 votes to 1.*

159. Mr. AMADO recalled his proposal, as follows:

"Pending the establishment of a competent international criminal court, the penalty for any offence defined in this code shall be that fixed by the national law applied."

160. Mr. SANDSTRÖM asked what national law was meant.

161. Mr. AMADO explained that States accepting the convention would have to enact legislation in conformity with it. If the international criminal court was established it would apply the penalty prescribed in the amendments to the national codes.

162. Mr. HUDSON pointed out that adoption of Mr. Amado's text would entail the reinsertion of article 5

in the draft code. Mr. Amado's proposal was incomprehensible without article 5, which had been rejected.

163. Mr. YEPES supported the amendment proposed by Mr. Amado, since he had voted in favour of article 5, which, in his view, should have been adopted.

164. Mr. AMADO said he would not press his proposal to a vote.

165. The CHAIRMAN reminded the Commission of the amended text of Mr. Córdova's proposal:

"The penalty for any offence defined in this code shall be determined by the Court exercising jurisdiction over the individual accused, taking into account the gravity of the offence."

166. Mr. YEPES asked whether it was enough that an individual should be accused, and proposed the substitution for the word "accused" of the words "found guilty".

167. The CHAIRMAN observed that the courts exercised jurisdiction, not over individuals found guilty, but over individuals accused. The words might be "individuals accused of a crime".

168. Mr. HUDSON thought that the end of Mr. Córdova's proposal should read: "taking into account the gravity of the act".

*Mr. Córdova's proposal, as amended, was adopted by 6 votes to 2 with 3 abstentions.*

169. The CHAIRMAN said that he had abstained from voting because he thought that the proposal was out of place at that point.

170. Messrs. HUDSON and AMADO explained that they were opposed to the text.

#### INTRODUCTION (*resumed*)

PARAGRAPH 1 OF THE INTRODUCTION (*resumed from the 106th meeting*)

171. The CHAIRMAN suggested that the Commission discuss the following redraft submitted by Mr. Hudson for paragraph 1 of the introduction:

"1. By its resolution 177 (II), of 21 November 1947, the General Assembly decided

'To entrust the formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal to the International Law Commission, the members of which will, in accordance with resolution 174 (II), be elected at the next session of the General Assembly;'

and directed the Commission to:

(a) Formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, and

(b) Prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in sub-paragraph (a) above.'

"In 1950, the International Law Commission reported its formulation under (a) to the General Assembly. By its resolution 488 (V), of 12 December 1950, the General Assembly invited the Governments

of Member States to express their observations on the formulation, and requested the Commission

'In preparing the draft code of offences against the peace and security of mankind, to take account of the observations made on this formulation by delegations during the fifth session of the General Assembly and of any observations which may be made by governments.'

172. Mr. HUDSON explained that he had become convinced during discussion of the need to quote the text of resolution 177 (II).

173. The CHAIRMAN agreed that it would be an improvement.

174. Mr. KERNO (Assistant Secretary-General) pointed out that the text proposed by Mr. Hudson was to replace only paragraph 1 of the introduction and he was surprised to find that paragraph 1 referred to the second session of the Commission while paragraph 2 referred to the first session.

175. Mr. HUDSON replied that the difference was admissible, since the two paragraphs did not refer to the same part of the General Assembly resolution.

176. The CHAIRMAN pointed out that paragraph 4 of the introduction would also have to be deleted.

*The redraft proposed by Mr. Hudson was adopted.*

177. The CHAIRMAN announced that, in view of the number of amendments to the draft code, voting must be delayed until all had been issued in documentary form by the Secretariat. There would be no further discussion on the text.

*The meeting rose at 1 p.m.*

## 112th MEETING

*Wednesday, 27 June 1951, at 9.45 a.m.*

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*Chairman:* Mr. James L. BRIERLY  
*Rapporteur:* Mr. Roberto CORDOVA

#### *Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, 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.

### Communication concerning the next session of the Commission

16. The CHAIRMAN proposed that a reply be transmitted to Mr. Lall, Assistant Secretary-General in charge of the Department of Conference and General Services, informing him that, after considering his telegram, the Commission was still convinced that, in the interests of its work, its next session should be held at Geneva.

17. Mr. LIANG, Secretary to the Commission, suggested that a paragraph of the general report to the General Assembly be devoted to the subject.

*The Chairman's proposal was adopted unanimously.*

### General Assembly resolution 484 (V) of 12 December 1950: Review by the International Law Commission of its Statute with the object of recommending revisions thereof to the General Assembly (item 1 of the agenda)

#### DRAFT REPORT TO THE GENERAL ASSEMBLY PROPOSED BY THE SUB-COMMITTEE (A/CN.4/L.21)<sup>1</sup>

22. Mr. HUDSON, Chairman of the sub-committee,<sup>2</sup> explained that the latter had considered that it had received a twofold instruction from the Commission. First, it had been directed to express the view that members of the Commission should devote their full time to its work; that was done in Part I of its report. Secondly, it was to consider the advisability of making certain amendments of detail to the present statute.

23. The sub-committee had carefully considered both questions and decided that the Commission would perhaps create a false impression if it assumed that the General Assembly would deal with amendments to the statute that year and with the question of full-time membership and with further amendments in the following year. The sub-committee had considered that the General Assembly might be disinclined to discuss those questions in two consecutive years. In addition, should the Assembly consider amendments to the statute that year and full-time membership of the Commission in the following year, its views might change in the interval. Such were the grounds on which the conclusion at the end of paragraph 12 in Part II of the report had been reached.

24. The sub-committee had dealt with a question which had not been mentioned during the general discussion, namely, the staggering of the terms of office of members of the Commission as a means of promoting continuity in its work. If, for example, the composition of the Commission were completely changed at the end of the five-year term of office the new members of the Commission

<sup>1</sup> Mimeographed document only, the text of which corresponds with drafting changes to chapter V of the *Report of the International Law Commission covering the work of its third session*. (See text in vol. II of the present publication.) The drafting changes are indicated in the present summary record.

<sup>2</sup> Set up at the 96th meeting. See summary record of that meeting, para. 148.

would have to begin all over again. The sub-committee suggested that the terms of office of the members should be staggered, as was done in the International Court of Justice. That change had only been introduced in 1945 for the Court; but when terms of office had expired in 1930 several judges had been re-elected. If the Commission were regarded as a continuing body, which it was, its terms of office must be staggered. A recommendation to that effect was therefore made in paragraphs 13 and 14 of the Report.

25. He suggested that the report be examined paragraph by paragraph. Mr. François had submitted amendments to paragraphs 9 and 10. He himself readily accepted these amendments; but he could not speak for Mr. Córdova and Mr. Sandström.

26. He did not know whether the Commission intended to re-open the question as to whether its members should devote their full time to its work. The sub-committee had assumed that most of the members of the Commission were in favour of the solution which it had proposed. He himself was doubtful whether that was the case.

27. Mr. EL KHOURY pointed out that the principle that members of the Commission should devote their full time to its work had been adopted with one dissentient voice, namely, his own.<sup>3</sup>

28. The CHAIRMAN said that he also was opposed to the full-time principle; but, at all events the majority of the members of the Commission could be said to have supported it.

29. Mr. AMADO, explaining his own position, said that the Commission should not overlook the need to ascertain whether the General Assembly considered the task of codification as important at the present time, in the present international situation, as immediately after the War, when the Charter was adopted and faith in co-operation between the victorious nations was still alive. Generally speaking, codification was peace-time work. When countries settled down after vast conflicts they contemplated giving their legislation a more precise and more final form. He asked whether the members of the Commission felt sufficiently sure of themselves to embark on such a work. They were all specialists, and specialists' ideas were apt to be moulded by their own particular cast of mind.

30. Most members of the Commission considered that they should devote their full time to its work; but the Assembly should be asked whether it was prepared to shoulder the burdens entailed in such a long-term undertaking. It was hard to say whether it could be accomplished under existing conditions. The Assembly should state whether it still wished the work of codification to be completed. The international climate had changed. The Commission had been set up at a time when it had been believed that an era of co-operation between the nations was beginning. If the General Assembly was really prepared to attach to codification the same importance as it had attached to it when the Commission had begun its work, the question was different. But he himself was opposed to a permanent Commission and

did not believe that the time had yet come to carry out the necessarily vast task of codification. Nevertheless, if the work was to be done, the Commission must be given the necessary means to do it and its members would have to devote their full time to it.

31. Mr. HUDSON explained that, although he had been prepared to fall in with the majority of the Commission on that point, he could hardly believe, that it would be possible to find fully qualified persons who would be prepared to give up all other activities in order to devote themselves to the work of the Commission.

32. The CHAIRMAN thought that the proposal was impracticable on those grounds.

33. Mr. CORDOVA thought that the General Assembly would be very reluctant to accept a report on those lines. The report should state no more than that the Commission considered it would be a more efficient body if its members devoted their full time to its work.

*Paragraph 1 (paragraph 60 of the "Report")*

*Paragraph 1 was adopted without comment.*

*Paragraph 2 (paragraph 61 of the "Report")*

34. Mr. FRANÇOIS read out the last sentence of paragraph 2, as follows:

"Yet hopes for 'rapid results' are to be indulged only with appreciation of the magnitude of the task of developing or codifying international law in a manner which will command general acceptance."

35. He wondered whether the statement was not unduly optimistic and whether it would not be preferable to conclude with the words "in a manner which will give the greatest possible satisfaction", since general acceptance would never be achieved.

36. Mr. HUDSON pointed out that the meaning of the English phrase "general acceptance" was slightly different from that of the French phrase "*approbation générale*".

37. The CHAIRMAN explained that "general" did not mean "universal".

38. Mr. HUDSON proposed the phrase "in a manner giving general satisfaction".

39. Mr. FRANÇOIS agreed.

40. Mr. SCALLE suggested the phrase "in a manner which will command a measure of general acceptance". It was the words "general satisfaction" which might arouse a doubt in the mind of the reader. The same difficulties would not arise with the phrase "a measure of general acceptance".

41. Mr. HUDSON thought that Mr. François' criticism was somewhat finicking, since the word used was not "universal" but "general". The continental shelf doctrine, for example, had commanded general acceptance; but that did not mean universal acceptance.

42. Mr. AMADO looked at the question from another angle. What mattered was that the work should give satisfaction to the Commission, even though it were composed of specialists. It should be stated that the Commission could not be satisfied with its work so long

<sup>3</sup> See summary record of the 96th meeting, para. 153.

as that work continued to be carried on by the present methods.

43. The Commission should bear in mind the importance and the quality — he did not expect perfection — of its work. When asked what it had done, it would have to explain that the General Assembly had given it additional tasks, such as the formulation of the Nürnberg Principles and the Draft Declaration on the Rights and Duties of States. It would be noted that the Commission had prepared eight articles on treaties and that it had produced nothing on either the régime of the high seas, or arbitral procedure, which was a question on everybody's lips. It was the members of the Commission who must be satisfied. He was opposed to the expression "general acceptance", but must confess that he had no alternative to propose.

44. Mr. HUDSON proposed the phrase "in a manner which will give general satisfaction".

45. Mr. AMADO failed to see how Mr. Hudson's proposal met the objection.

46. Mr. HUDSON then proposed the phrase "in a satisfactory manner".

47. Messrs. AMADO, SANDSTRÖM and FRANÇOIS supported Mr. Hudson's proposal, but Mr. EL KHOURY considered it too weak.

*Paragraph 2 was adopted as thus amended.*

*Paragraph 3 (paragraph 62 of the "Report")*

*Paragraph 3 was adopted without comment.*

*Paragraph 4 (paragraph 63 of the "Report")*

48. Mr. AMADO read out the first sentence of paragraph 4 namely: "The members of the Commission elected in 1948 are, without exception, men engaged in professional activities which are not directly concerned with the work of the Commission", and asked whether it was not somewhat too sketchy. It was to be feared that it might be said that the General Assembly had appointed persons not well-versed in questions of international law.

49. He really could not understand the beginning of the paragraph. The second sentence ran: "Some of the members, indeed a majority of them have responsibilities as permanent officials of their Governments; some of them are professors of international law in universities; some of them are engaged in the private practice of the law". All of them therefore, exercised professions which were directly concerned with the work of the Commission.

50. Mr. SCALLE agreed with Mr. Amado.

51. Mr. HUDSON could not say that his professional duties at Harvard University were directly concerned with the work of the Commission, since he dealt with many questions which the Commission would never take up. As adviser to the United States Government he had had occasion to act in a dispute between the Federal Government and the State of California. That activity was not directly related to the work of the Commission. Some members of the Commission, who were permanent officials of their Governments, did not always deal with questions studied by the Commission. Their activities

were therefore not directly concerned with the latter's work.

52. Mr. AMADO observed that if the Commission was studying treaties, for example, it could not be composed solely of specialists on treaties. He was surprised that his objection was not understood.

53. Mr. EL KHOURY proposed the deletion of the words "which are not directly concerned with the work of the Commission".

54. Mr. HUDSON thought that the words could not be deleted.

55. Mr. EL KHOURY asked to what professions members of the Commission must belong so that their activities might be directly concerned with the work of the Commission. If the persons referred to in the second sentence were not in that category, who was?

56. Mr. HUDSON explained that, if members of the Commission were devoting their full time to its work, they would fulfil those requirements.

57. Mr. EL KHOURY said that was another question, whereas the beginning of the paragraph seemed to be a criticism of members elected in 1948.

58. Mr. HUDSON denied that that was the case. The report was coloured by the desire expressed by the Commission that its members should devote their full time to its work.

59. Mr. CORDOVA pointed out that the beginning of the paragraph favoured the view that future members of the Commission would have to give up their other activities, which would be asking a great sacrifice of them.

60. Mr. LIANG (Secretary to the Commission) said he must confess that he shared the doubts of Messrs. Amado and Scelle. In his view, the words "directly concerned with the work of the Commission" were ambiguous. So far as both the public and the General Assembly were concerned, the work of the Commission consisted in the codification and development of international law, so that the professional activities of Mr. Scelle, Mr. Brierly and Mr. Hudson, for example, could not be said to be not directly concerned with the work of the Commission. He suggested the deletion of the words "without exception".

61. Mr. AMADO proposed the inclusion of the following sentence in paragraph 4:

"The members of the Commission elected in 1948 cannot, under present conditions, devote their full time to the work of the Commission."

62. Mr. HUDSON pointed out that that was already stated in the last sentence, and explained in the first sentence of the paragraph.

63. Mr. SANDSTRÖM was very satisfied with the proposed sentence, but thought that reference should be made to "their activities outside the Commission".

64. Mr. YEPES shared the misgivings expressed as to the effect of the paragraph under review. He proposed the deletion of the words "which are not directly concerned with the work of the Commission". There was no point in describing the professional activities of the members of the Commission. If his proposal was accepted the

meaning of the sentence would be clear and no mis-interpretation possible.

65. The CHAIRMAN pointed out that Mr. Yepes' proposal was the same as Mr. el Khoury's.

66. Mr. EL KHOURY said that it was self-evident that professional activities were not directly concerned with work of the Commission.

*It was decided to delete the words "which are not directly concerned with the work of the Commission".*

67. The CHAIRMAN asked if the Commission wished to retain the words "without exception".

68. Mr. EL KHOURY said that the expression had been true in 1948.

*It was decided to retain the words "without exception".*

69. Mr. HUDSON, referring to the words "indeed a majority of them", pointed out that Messrs. Sandström, el Khoury, François, Córdova, Hsu, Yepes, Amado, Spiropoulos, Koretsky and Sir Benegal Rau were permanent officials of their Governments.

70. Mr. LIANG (Secretary to the Commission) considered that the concluding words of the paragraph, "has the effect of negating that course", lacked clarity.

71. Mr. HUDSON pointed out that the *per diem* allowance referred to in article 13 of the statute of the Commission, was not adequate to permit members of the Commission to abandon their other activities.

*Paragraphs 5 and 6 (paragraphs 64 and 65 of the "Report")*

*Paragraphs 5 and 6 were adopted without comment.*

*Paragraph 7 (paragraph 66 of the "Report")<sup>4</sup>*

72. Mr. FRANÇOIS said that he had two comments to make on paragraph 7. To begin with, the first sentence repeated itself.

73. Mr. HUDSON pointed out that there was a discrepancy between the French and the English texts. The English text read "*much* of the Commission's time", but the French rendering was "*la plus grande partie de son temps*". The words "more than half of the time of the Commission" were justified, because the Sub-Committee had actually counted the number of meetings with the aid of the chart prepared by the Secretariat.

74. Mr. FRANÇOIS thought that the words "more than half of the time . . . of such assignments" should be deleted.

75. Mr. SCALLE thought that the first sentence of the paragraph should read as follows:

<sup>4</sup> The original text of paragraph 7 read as follows:

"7. During each of the three sessions of the Commission, much of its time has been occupied in dealing with special assignments made by the General Assembly; more than half of the time of the Commission during each of the three sessions has been given to the consideration of such assignments. Some of these assignments have been cast in terms which require priority to be given to them by the Commission. All of the assignments to date have had relation to the progressive development of international law, but most of them have borne little relation to the Commission's task of codification; compliance with them has had some effect in retarding the Commission's work on the topics selected for codification, with the approval of the General Assembly."

"During each of the three sessions of the Commission much, indeed more than half, of its time has been occupied in dealing with special assignments made by the General Assembly."

76. Mr. EL KHOURY thought that the special assignments should be enumerated.

77. Mr. HUDSON pointed out that the draft declaration on the rights and duties of States had occupied 16 meetings, the formulation of the Nürnberg Principles 11, the draft Code of offences against the peace and security of mankind 10, and the question of the possibility and desirability of establishing an International Criminal Court 5, or a total of 42 out of 81 meetings. That was certainly more than half, and the figures he had given related only to meetings held during the first two sessions.

78. Mr. FRANÇOIS said that he would not press the question of drafting. He was afraid that the sentence beginning with the words "All of the assignments to date . . ." might create the impression that the real work of the Commission was codification and that the progressive development of international law was less important. He would like to know the precise meaning of the paragraph, that was to say, whether it really meant that the proper task of the Commission was only the codification of international law.

79. Mr. HUDSON said that the report merely adopted the distinction which was very clearly drawn in article 15 of the statute, and stated that the Commission had two tasks, first, the progressive development, and, secondly, the codification of international law.

80. He proposed the insertion of the word "additional" between the words "Commission's" and "task" in the third sentence of paragraph 7.

81. Mr. LIANG (Secretary to the Commission) thought that all the special assignments had been dealt with as such. It was only at the previous meeting that the Commission had decided that the draft Code of offences against the peace and security of mankind should be regarded as a special assignment. If such assignments were regarded as relating to the progressive development of international law, as was suggested in paragraph 7 of the report, logic would demand that it also be stated that the whole procedure set forth in article 16 of the statute must be followed.

82. Mr. HUDSON saw no reason for adopting such a formalistic attitude.

83. Mr. LIANG (Secretary to the Commission) said that, from the technical point of view, such a distinction would be obvious only to persons who had studied the statute of the Commission, which was perhaps not true of all members of the General Assembly.

84. He proposed that the phrase "All of the assignments to date . . . the Commission's task of codification" be deleted and that the final sentence of paragraph 7 begin the words "Compliance with them . . .". That would avoid confusing the General Assembly.

85. Mr. AMADO did not understand the use of the words "cast in terms".

86. Mr. HUDSON replied that the words were used for stylistic reasons.

87. Mr. CORDOVA agreed that the word "cast" was perhaps rather affected; but the idea had to be expressed. The General Assembly had wished priority to be given to certain assignments. A mere statement to the effect that "some of these assignments required priority" would not indicate who was to decide the priority. He proposed that the second sentence begin with some such words as "The General Assembly has drafted some of these assignments in terms which . . .", or "Some of these assignments required priority because the General Assembly had so decided."

88. The CHAIRMAN proposed the wording: "The General Assembly has asked the Commission to give priority to some of these assignments".

89. Mr. SCELLE asked whether it would not be of more value to insert at that point a more precise reference to article 17 of the statute of the Commission, which stated that it was not only the General Assembly, but the principal organs of the United Nations, the specialized agencies, or official bodies established by inter-governmental agreement, that could submit proposals and drafts to the Commission. In his view, if the Commission were really obliged to receive proposals from these organs its work would never end.

90. Mr. CORDOVA explained that the report dealt only with the difficulties which the Commission had so far encountered. It had never received requests from bodies other than the General Assembly.

91. Mr. SCELLE pointed out that the Commission had received a request from the Economic and Social Council,<sup>5</sup> and, he might add, had left it on the table. He thought it should be stated that if the Commission were obliged to conform to all the provisions of article 17 of its statute it would be impossible for it to carry out its work. He was making that suggestion because he thought that the paragraph under review should be worded more forcibly.

92. Mr. CORDOVA said he would repeat that paragraph 7 dealt only with the difficulties which the Commission had encountered. There had been no difficulties so far with organs other than the General Assembly. Of course, he agreed with Mr. Scelle that, when the statute of the Commission was being revised, a statement such as Mr. Scelle proposed should be made concerning article 17. But the matter should not be discussed at that stage, when the Commission was solely concerned with requests to give priority to certain questions, and according to the statute, such priority could only be requested by the General Assembly.

93. Mr. SCELLE said that he would not press the point, which he had made only in passing.

94. Mr. HUDSON proposed the following sentence as an alternative to the second sentence of paragraph 7:

"The General Assembly has required of the Commission that some priority be given to some of its assignments."

95. Mr. KERNO (Assistant Secretary-General) pointed out that the purpose of paragraph 7 was to indicate that the special assignments had substantially delayed the work of the Commission. The statement that codification was the Commission's main task was superfluous. All that need be said was that the General Assembly had requested that priority be given to certain questions and that compliance with such requests had delayed the Commission's work of codification. He thought that the penultimate sentence of paragraph 7 might be deleted.

96. Mr. EL KHOURY repeated that paragraph 7 should mention the special assignments in question for the information of delegates.

97. Mr. SANDSTRÖM opposed the deletion proposed by Mr. Kerno. When the effects of such special assignments were mentioned it should be remembered that they were nevertheless part of the Commission's work, which was the burden of the sentence which Mr. Kerno proposed should be deleted.

98. Mr. FRANÇOIS supported Mr. Kerno's suggestion. He drew the Commission's attention to a further inaccuracy in the last sentence of paragraph 7. The words "compliance with them has had some effect in retarding the Commission's work . . ." suggested that all the topics which it had selected concerned only codification, whereas the régime of the high seas, for instance, was far more closely connected with the progressive development than with the codification of international law.

99. Mr. CORDOVA said that a new text might be drafted in accordance with the suggestions submitted.

100. Mr. HUDSON suggested the insertion of the words "may have had" between ". . . compliance with them" and "some effect" in the last sentence of paragraph 7. That had, in fact, been the precise effect of the assignments. The first half of the same sentence might be deleted, if the Commission so desired; but the second half must be retained.

101. Mr. CORDOVA agreed that paragraph 7, as it stood, seemed to exaggerate the importance of codification. The General Assembly had criticized delays, not in the work of codification, but in the work of the Commission, which also included the progressive development of international law.

102. Mr. HUDSON observed that speakers in the Sixth Committee had had codification in mind and had believed that the Commission could complete in two years the codification of the three topics to which priority had been given.

103. After some discussion, in which the CHAIRMAN, Mr. CORDOVA, Mr. EL KHOURY and Mr. HUDSON, took part, on the wording required to meet the objections to the passage in question, Mr. HUDSON proposed that the following text be substituted for the last two sentences of paragraph 7:

"The General Assembly has requested the Commission to give priority to some of these assignments. The Commission has endeavoured to comply with all

<sup>5</sup> See the "Report of the Commission covering its second session" paras. 19-20 in *Official Records of the General Assembly, Fifth Session, Supplement No. 12 (A/1316)*, or in *Yearbook of the International Law Commission 1950*, vol. II.

of these assignments promptly and such compliance may have had some effect in retarding the Commission's work."

Such a text would indicate that the Commission had achieved rapid results "on the topics selected by the General Assembly for codification".

*Mr. Hudson's proposal and paragraph 7 as thus amended were adopted.*

*Paragraph 8 (paragraph 67 of the "Report")*

104. Mr. KERNO (Assistant Secretary-General) pointed out that paragraph 8 was extremely important on account of the recommendation it contained. In that connexion he wondered whether it would not be advisable to amend the last sentence, which read: "The Commission is convinced that the adoption...". Was the Commission really "convinced"?

105. The CHAIRMAN said that the word "Commission" should be understood to mean the majority of the members of the Commission.

106. Mr. CORDOVA also thought that the expression was somewhat too strong.

107. Mr. HUDSON proposed the substitution for "Commission" of the words "Commission as a whole", since two members had opposed the recommendation in question and two others had no strong feelings on the matter.

108. Mr. SCALLE wondered whether the Commission could request the General Assembly to adopt a recommendation of whose desirability it was not itself convinced.

109. Mr. EL KHOURY asked whether majority decisions were binding on the Commission as a whole, and if so, whether members of the Commission who were also members of the Sixth Committee of the General Assembly could state in that Committee that they had opposed the recommendation.

110. Mr. HUDSON said that the members concerned, as governmental representatives in the Sixth Committee, were entitled to state that they had opposed such a recommendation.

111. Mr. CORDOVA said that the members concerned would then be able to explain their viewpoint before the General Assembly, whereas other members of the Commission could not.

112. Mr. AMADO pointed out that members of the International Law Commission who were also members of the Sixth Committee had always defended the Commission in the General Assembly.

113. Mr. HUDSON proposed that the words "It is thought by a preponderant majority of the members of the Commission" be substituted for the words "The Commission is convinced...".

*It was so agreed.*

*Paragraph 9 (paragraph 68 of the "Report")*

114. Mr. FRANÇOIS proposed the substitution of the following text for the last sentence of paragraph 9:

"The vast majority of the present members of the Commission have a decided preference for Geneva over New York, where the climate, during the months when the Commission has to meet, is detrimental to the sustained work of the Commission. Another argument in favour of the change, especially should members of the Commission have to sit permanently, is that the seat of the International Law Commission should not be at the headquarters of the United Nations, for the same reasons as induced States to establish the seat of the International Court of Justice elsewhere than at United Nations headquarters or at one of the other important international political centres."

115. Mr. HUDSON said that he personally supported the amendment submitted by Mr. François; but he thought that the words "should not", in the second sentence were perhaps too strong. The members of the Sub-Committee had sought to avoid a definite statement on the question whether the seat of the International Law Commission should or should not be at the headquarters of the United Nations. He proposed some such wording as: "It is to be considered whether the seat of the International Law Commission ought not to be different from that of the United Nations, for the same reasons...".

116. Mr. FRANÇOIS accepted the above amendment.

117. Mr. KERNO (Assistant Secretary-General) had some misgivings concerning the amendment proposed by Mr. François, even in its present milder form, since it seemed to imply that the establishment of the seat of the International Court of Justice at The Hague had been due to a desire to separate the Court from the seat of the political organs of the United Nations. So far as he was aware, when the question of the seat of the new Court had been discussed at the San Francisco Conference, the main consideration had been the need to ensure continuity between the old and the new Courts. If he were also asked to say why the Permanent International Court of Justice had had its seat at The Hague, and not at Geneva, he would reply that it had been established there, not in order to separate the Court from the political headquarters of the League of Nations, but in recognition of the work for peace done at The Hague and of the existence of the Peace Palace in that city. Even assuming that the intention had been to remove the International Court of Justice from an important international political centre, such a reason did not, in his view, hold good in the case of the International Law Commission.

118. After all, the members of the International Law Commission should not shut themselves up in an ivory tower. On the contrary, they should maintain contact with the outside world and therefore not be deprived of the right to meet at the headquarters of the United Nations.

119. Mr. HUDSON said that he was much impressed by the arguments of the Assistant Secretary-General.

120. Mr. FRANÇOIS said that Mr. Kerno was perhaps correct in stating that the need to ensure continuity between the old Court and the new had counted in 1945. But at the time of the establishment of the old Court after the first World War the main desire had been to

avoid having the seat of the new Court at the political centre of the League of Nations. The arguments adduced in favour of The Hague as the seat of the Court had been a secondary consideration.

121. As to the next argument submitted by Mr. Kerno, he would repeat that he attached considerable importance to it. But the experts elected for a given period to the International Law Commission would not lose all contact with the outside world just because they were living at The Hague, Geneva or elsewhere. What must be avoided was that members of the International Law Commission, or members of the International Court of Justice, should allow themselves to be influenced by the major political trends that always made themselves felt in important centres of international political life.

122. Mr. HUDSON said that the same point of view had been expressed by Mr. Sandström in the Sub-Committee, although the matter was not mentioned in the report, since it was extremely delicate.

123. Mr. SANDSTRÖM considered that the text submitted by Mr. François was not open to the same objections. For his part, he had not contemplated mentioning the International Court of Justice.

124. Mr. HUDSON pointed out that the Sub-Committee had sought to approach the question indirectly in view of its very delicate nature. It had, for example, originally intended to state that the Geneva atmosphere was more conducive to sustained work.

125. Mr. SCELLE was as convinced of the need for Mr. François' amendment as he was that New York was the least suitable place in the world for the work of the International Law Commission. At Geneva the members of the Commission did not have to report to their governments. But what would be their position at New York when the General Assembly or the main Commissions were meeting and they were in constant contact with their colleagues, friends or disciples, who would keep them informed of proceedings in the General Assembly or the Commissions?

126. There was, of course, much force in Mr. Kerno's argument that the members of the Commission should not cut themselves off from the outside world. Fortunately, most of the members of the Commission could not be described as abstract intellectuals or scholars shut off from the rest of the world. Their professional duties continually brought them down to the hard earth of political necessities.

127. On all the above grounds he fully supported the amendment proposed by Mr. François.

128. Mr. HUDSON said that, while wholly convinced by Mr. Scelle's argument, he wondered whether the time was ripe for such a decision. So long as its recommendation was expressed in general terms, the Commission could not adopt a formal decision on such a delicate question. It might perhaps be possible to go into the matter more fully next year.

129. Mr. HSU also considered that the time was not ripe for a decision on that question. Mr. François' amendment could not be adopted. In his view, the choice of headquarters was linked with the question

whether the Commission would sit permanently or not. In the former case, there would be no objection to sitting in New York, in the latter, Geneva would be more suitable considering that it was only during the summer months that sessions could be held.

130. Mr. HUDSON suggested the insertion, at the end of the last sentence of paragraph 9, after the words "less conducive to sustained work", of the words "especially in the summer months".

131. Mr. SANDSTRÖM doubted the value of such an amendment, since it weakened the argument. In addition the text submitted by the Sub-Committee suggested the possibility of members of the Commission devoting their full time to its work, whereas the amendment submitted by Mr. François was mainly based on the assumption that the Commission would not sit permanently.

132. Mr. HUDSON withdrew his proposal.

133. Mr. FRANÇOIS observed that the wording of the last sentence of paragraph 7 was rather unfortunate. Since ten million people were obliged to live and work in New York during the summer, it could hardly be said that the pace and atmosphere of that city were not conducive to sustained work. If that were so, perhaps the headquarters of the United Nations should never have been established at New York.

134. Mr. HUDSON said that the word "atmosphere" should be understood in its psychological rather than its physical sense.

135. He proposed the substitution for the words "sustained work" of the phrase "the kind of sustained work in which the Commission is engaged".

136. Mr. FRANÇOIS wondered whether the work of the Commission was of such a special character. International law was studied in New York in the same way as in other places. The summer climate was certainly less suitable at New York than at Geneva, but such an argument would not hold if the Commission sat permanently.

137. Mr. HUDSON proposed the substitution of the words "For the same reasons a change may perhaps be made" for the words "A change might also be made", at the beginning of the penultimate sentence in paragraph 9, since the aim was to facilitate recruitment to the Commission. But he thought that the last sentence aptly expressed the attitude of the present members of the Commission.

*Mr. Hudson's proposal was adopted*

138. The CHAIRMAN put Mr. François' amendment to the vote.

*Mr. François' amendment was rejected by 5 votes to 3.*

139. Mr. EL KHOURY proposed the deletion of the last sentence in paragraph 9.<sup>6</sup>

140. Mr. CORDOVA considered that the last sentence could not be deleted, since it explained the preference of the members of the Commission for Geneva.

<sup>6</sup> The last sentence read as follows: "Most of the present members of the Commission have a decided preference for Geneva over New York, as they have found the pace and atmosphere of the latter less conducive to sustained work."

141. Mr. EL KHOURY referred to article 12 of the statute of the Commission which stated: "The Commission shall sit at the headquarters of the United Nations. The Commission shall, however, have the right to hold meetings at other places after consultation with the Secretary-General." The article was excellent and, in view of its provisions, there was no need to select Geneva as the permanent seat of the Commission.

142. The CHAIRMAN put el Khoury's proposal to the vote.

*Mr. el Khoury's proposal was rejected by 6 votes to 4.*

143. Mr. HUDSON suggested that the last sentence of paragraph 9 be redrafted as follows: "Under present conditions most of the members of the Commission have a decided preference for Geneva over New York, as they have found the pace and atmosphere of the latter less conducive to the kind of sustained work in which the Commission is engaged".

144. Mr. AMADO thought that the phrase "pace and atmosphere" should be deleted. Some of the members of the Commission thrived on the pace and atmosphere of New York.

145. Mr. CORDOVA said that the Commission need not sit during the summer.

146. Mr. HUDSON pointed out, however, that some members of the Commission were otherwise engaged during the remainder of the year.

147. Mr. ALFARO thought that the personal comfort of members of the Commission should not be taken into account. Nor was the question of climate relevant, since the United Nations building was air-conditioned.

148. Since the Commission had decided to retain the last sentence of paragraph 9, the word "decided" might be deleted and the words "conditions in New York" substituted for the words "the pace and atmosphere of the latter".

*It was decided, by 6 votes, to delete the word "decided".*

149. Mr. EL KHOURY thought that the last sentence of paragraph 9 should begin with the words "For various reasons most of the present members of the Commission prefer Geneva to New York...".

*Mr. el Khoury's proposal was rejected.*

150. Mr. HUDSON thought it would be preferable to say merely: "Most of the present members of the Commission prefer Geneva to New York".

*Mr. Hudson's proposal was adopted by 7 votes.*

151. Mr. HUDSON proposed the insertion at the beginning of the sentence of the words "Under present conditions".

152. Mr. SANDSTRÖM thought Mr. Hudson's amendment would have the effect of weakening the argument.

153. Mr. HSU agreed with the proposal, although he thought that it was rather vague.

154. Mr. FRANÇOIS could not see the point of the addition, since even when the statute had been revised there would still be reasons against the Commission's meeting in New York.

*Mr. Hudson's proposal was rejected by 6 votes to 2.<sup>7</sup>*

<sup>7</sup> See summary record of the 113th meeting, paras. 9-13.

*Paragraph 10 (paragraph 69 of the "Report")*

155. On the proposal of Mr. HUDSON and Mr. SANDSTRÖM, it was decided to amend the first sentence of paragraph 10 to read as follows:

"Taking note of the fact that a proposal of a full-time Commission made in 1947 by the Committee on the Progressive Development of International Law and its Codification (A/AC.10/51, paragraph 5 (d)) was not adopted, the Commission has given careful consideration..."<sup>8</sup>

156. Mr. FRANÇOIS proposed the substitution for the phrase "It seems objectionable... and because it would present" of the following text:

"It seems objectionable, because the principle that representation of the main forms of civilization and of the principal legal systems of the world should be assured (article 8 of the statute) would be affected if all members were not elected to the Commission on the same basis. It would also present..."

157. He thought that the words "an invidious distinction between the members", which appeared in the text proposed by the sub-committee, were neither very clear nor very convincing, and that the idea should be expanded.

158. Mr. HUDSON did not think that the alternative suggested by the United Kingdom delegation in the Sixth Committee<sup>9</sup> would affect the principle that representation of the main forms of civilization and of the principal legal systems of the world should be assured, as set forth in article 8 of the statute. In addition, the phrase "invidious distinction" had been used during the discussion.

159. Article 8 stated that the persons to be elected to the Commission should individually possess the qualifications required, but that as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured. That condition could be fulfilled either by the group of members elected on a full-time basis or by the group not so elected. He therefore thought that the suggestion of the United Kingdom delegation might be accepted.

160. Mr. FRANÇOIS pointed out that, if the member for Asia, for example, were only elected on a part-time basis, geographical representation would not be assured.

161. Mr. AMADO, supported by Mr. KERNO (Assistant Secretary-General), proposed that the phrase under discussion be retained, but with the addition of the text proposed by Mr. François.<sup>10</sup>

*It was so agreed.*

162. Mr. ALFARO thought that the English word "invidious" — and probably its French and Spanish equivalents — might be a source of difficulty. It might be preferable to substitute the word "undesirable".

163. The CHAIRMAN and Mr. HUDSON pointed out that the word "invidious" clearly expressed what the Commission had in mind.

<sup>8</sup> Instead of "was not approved by the Sixth Committee in that year, the Commission...".

<sup>9</sup> See *Official Records of the General Assembly, Fifth Session, Sixth Committee*, 226th meeting, para. 3.

<sup>10</sup> The sentence "Moreover... be assured" did not exist in the original text.

*Paragraph 11 (paragraph 70 in the "Report")*

164. The CHAIRMAN thought that the words "finalized by the General Assembly in 1952" in the last sentence of paragraph 11, should be replaced by the words "considered by the General Assembly in 1952".

*It was so agreed.*

*Paragraph 12 (paragraph 71 in the "Report")*

165. Mr. KERNO (Assistant Secretary-General) thought that Mr. Scelle's suggestion that article 17 of the Commission's Statute be mentioned in paragraph 12 might usefully be examined.

166. Mr. SCELLE said he regarded article 17 of the Statute of the Commission as one of the most baneful. A statement to that effect might have been included in the paragraph, or in a footnote, in some such terms as the following: "The Commission has found, in particular that the provisions of article 17 were such as to hamper and delay its work".

167. Mr. HUDSON said that he would prefer no reference to a single article.

168. Mr. SCELLE did not press his proposal.

169. Mr. KERNO (Assistant Secretary-General) thought that the phrase "in the light of discussions in the General Assembly" might perhaps be inserted after the words "the present Statute" in the third line of paragraph 12, since the Commission had examined the various suggestions submitted in the General Assembly.

*Mr. Kerno's suggestion was rejected.*

*Paragraphs 13 and 14<sup>11</sup>*

170. Mr. AMADO was surprised at the recommendation contained in paragraph 13. So far as he was aware, the sub-committee's suggestion that the terms of office of the members should be staggered had not been discussed in the Commission. He also thought that the case of the International Court of Justice was different from that of the International Law Commission.

171. Mr. SCELLE also doubted the value of the suggestion contained in paragraph 13.

<sup>11</sup> Paragraphs 13 and 14 read as follows:

"13. There is one matter, however, with regard to which the Commission wishes to make a second general recommendation at this time. The continuous existence of the Commission seems to be envisaged by the provision in Article 10 of its Statute that its members 'shall be eligible for re-election'. Yet continuity in its work would be subject to interruption if upon the expiration of the term of office of one group of members, a group of wholly different composition should be elected by the General Assembly. In the view of the Commission, a solution of this problem may be sought along the lines adopted for a similar problem in 1945, in Article 13 of the Statute of the International Court of Justice; in other words, the terms of office of members should be staggered so that the terms of all members will not expire simultaneously. The application to be given to such a solution would, of course, depend on the length of the normal term of office once the staggering is fully inaugurated.

"14. This change in the Statute could be made whether or not the Commission is placed on a full-time basis. If it should commend itself to the General Assembly, the Commission would be prepared — if so requested — to draft precise amendments for giving effect to it."

172. Mr. HUDSON thought that the proposed staggering of the terms of office of members of the Commission so that the terms of all members would not expire simultaneously was extremely simple and would enable the continuity of the Commission's work to be assured.

173. Mr. LIANG (Secretary to the Commission) pointed out that the question had not been examined by the Commission itself, although another problem concerning the continuity of its work had been discussed in the Sixth Committee. The Yugoslav delegation had suggested, as a means of ensuring the continuity of a rapporteur's work in the event of his not being re-elected before completing his task, the introduction of the system in force at the International Court of Justice.<sup>12</sup>

174. He thought the second sentence of paragraph 13 might give the impression that the Commission might not continue in existence at the end of its initial period.

175. The CHAIRMAN was opposed to discussion of that question. Since the Commission made no detailed suggestion elsewhere in its report there was no reason for making one on that point.

176. Mr. CORDOVA explained that the change proposed in the report by the Sub-Committee might be adopted, even if the General Assembly did not decide that the members of the Commission should devote their full time to its work. The Commission must at all events request the General Assembly to adopt a substantive decision on the matter.

177. Mr. SCELLE thought that the question was very delicate and did not affect the Commission in the same way as it affected the International Court of Justice. The Commission was a pre-legislative organ. The introduction of the system proposed in paragraph 13 would be a retrograde step, since old members of the Commission would always be inclined to defend their work against the objections of new members. He hoped that the question would be given thorough consideration.

178. Mr. HUDSON thought that the first sentence of paragraph 14 might be more appropriately placed at the end of paragraph 13.

179. Mr. AMADO objected to the submission by the Sub-Committee of a suggestion concerning a matter which had not been discussed in the Commission.

180. Mr. SANDSTRÖM pointed out that the Sub-Committee's terms of reference had been very wide.

181. The CHAIRMAN proposed the deletion of paragraphs 13 and 14.

*There being 5 votes for and 5 against, the Chairman's proposal was rejected.*

182. Mr. KERNO (Assistant Secretary-General) pointed out that, although the Commission had just decided to retain paragraphs 13 and 14, if the Chairman had put the retention, instead of the deletion, of those paragraphs to the vote and the result of the vote had been the same, the two paragraphs would have been rejected. It might therefore be preferable if the members of the Commission thought the matter over before the next meeting.

*The meeting rose at 1.10 p.m.*

<sup>12</sup> See *Official Records of the General Assembly, Fifth session, Sixth Committee, 227th meeting, paras. 35-36.*

## 113th MEETING

Thursday, 28 June 1951, at 9.45 a.m.

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*Chairman:* Mr. James L. BRIERLY

*Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, 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.

## Communication from Sir Benegal Rau

1. The CHAIRMAN announced that he had just received a letter from Sir Benegal Rau. He had hoped to be able to come to Geneva towards the middle of the month, but political developments had forced him to change his plans. He now hoped to be able to attend the last week of the session and asked the Commission to excuse his prolonged absence.

**General Assembly resolution 484 (V): Review by the International Law Commission of its Statute with the object of recommending revisions thereof to the General Assembly (item 1 of the agenda) (A/CN.4/L.21) (*continued*)**

**DRAFT REPORT TO THE GENERAL ASSEMBLY PROPOSED BY THE SUB-COMMITTEE (*continued*)**

*Paragraphs 13 and 14 (continued)*

2. The CHAIRMAN recalled that, at the last meeting, the votes on the two last paragraphs of the sub-committee's report had been equally divided.<sup>1</sup> He explained that, whether the motion were for the deletion, or the adoption of the paragraphs, in case of an equal division of votes, it was not carried. He asked the Commission what it intended to do.

3. Mr. HSU stated that he had abstained from voting because he had not fully understood what his colleagues had in mind in regard to those paragraphs. He would like to be informed what were the arguments in support of the proposal contained in paragraphs 13 and 14.

4. The CHAIRMAN explained that some members of the Commission had considered that, in including in its report a question that had not been discussed by the Commission, the sub-committee had gone beyond its terms of reference, while, on the other hand, the report's general structure did not allow for detailed suggestions. It was, in fact, stated in paragraph 12 that the Commission preferred to abstain, for the time being, from submitting detailed proposals in regard to desirable amendments. It was therefore illogical that paragraphs 13 and 14 should contain detailed proposals for desirable amendments on one single point. Why had special emphasis been placed on that one particular question? Those had been the main arguments advanced. He himself was of the opinion that the paragraphs should be omitted.

5. Mr. FRANÇOIS considered that the question should be studied more thoroughly. Actually, the problem was not the same in the case of a full-time commission as it was for a body such as the present Commission. With a commission of the former type, there was a great deal to be said for partial renewal, but with a commission meeting by sessions, if the number of its members were not changed and if they were appointed for six years, five members would retire every two years. In his opinion, such a situation would react very unfavourably on the stability of the commission's work. It had already been argued that a term of three years was too short. Under the proposed system a third of the membership would be renewed every two years. The Commission's time was very valuable and such a system would hold up its work. He was very doubtful whether it could be recommended, so long as the Assembly had not decided whether members should devote the whole of their time to the Commission, or whether the Commission was to retain its existing form.

6. For various reasons Mr. SCELLE was also opposed to the system of partial renewal. The sub-committee had not been wrong in studying the question, but their opinion was not his. Actually, if the members of the Commission were elected for six or nine years, the system would prevent it from meeting the requirements of the international community. But it was a pre-legislative body which needed to be in constant touch with the international community. Under the system of partial replacement, the newly-elected third would be of one opinion, whereas the other two-thirds would take another and more conservative view. They would, in fact, be concerned to safeguard what they had done. As a result the Commission's desire for more rapid progress would, to some extent, be frustrated. In Europe, experience of assemblies whose membership was renewable by a third at a time had shown that they were reactionary, and mainly concerned to safeguard what had happened in the past. He was in favour of complete renewal.

7. The CHAIRMAN was not sure how to put the matter to the vote. Mr. ALFARO and Mr. AMADO

<sup>1</sup> See summary record of the 112th meeting, para. 182.

proposed that the paragraphs be deleted, whilst Mr. YEPES advocated their retention.

8. The CHAIRMAN pointed out that, provided there was not an equal division of votes, no difficulty would arise.

*It was decided by 7 votes to 3 to delete paragraphs 13 and 14.*

*Paragraph 9 (paragraph 68 of the "Report") (resumed from the 112th meeting)<sup>2</sup>*

9. Mr. HUDSON proposed the addition of the following sentence at the end of the above paragraph:

"Consideration might also be given, in this connexion, to the possibility of staggering the terms of office of the members of the Commission, in the interests of the continuity of its work."

10. Mr. HSU felt that the Commission should not recommend a course which was contrary to the intention of the decision it had just taken.

11. The CHAIRMAN explained that there was a difference. The deleted paragraphs contained a definite recommendation, whereas the text proposed by Mr. Hudson only suggested that the question be considered.

12. Mr. HUDSON said that the question should be examined in connexion with the recommendation for a full-time commission.

*Mr. Hudson's proposal was rejected by 5 votes to 4.*

13. The CHAIRMAN observed that it was no longer necessary to divide the report into two parts.<sup>3</sup> (See summary record of the 129th meeting for final discussion of that item.)

#### **Régime of the high seas: report by Mr. François (item 6 of the agenda) (A/CN.4/42)**

##### CHAPTER 11: CONTINENTAL SHELF

14. Mr. FRANÇOIS, in tendering his report, said that so far as the continental shelf was concerned his work had been comparatively simple. The previous year, the Commission had asked him to submit a new report, based on the principles which it had provisionally adopted.<sup>4</sup> It had been his responsibility to give them concrete form. The result of his efforts was to be found on page 69 (mimeographed English text; para. 162, printed French text) of his report where his conclusions were given in the form of nine articles.

15. The Commission could consider those articles and then decide on the course to be followed. He was convinced that it was a matter of the development of international law. If so, the Commission had, under its statute, to submit the results of its work to governments, but that was a matter it could decide later.

16. In his opinion, it was not only the conclusions on page 69 that had to be considered. After a first reading of the conclusions relating to the continental shelf, in

the strict sense of the term, it would be necessary to examine the parts of his report which concerned the resources of the sea and the contiguous zone, as those two questions were closely linked with that of the continental shelf. It would be impossible for governments or the General Assembly to comprehend the Commission's views on the latter question, if they were unaware of its opinions concerning the resources of the sea and the contiguous zone.

17. The members of the Commission would recall that, in many of the proclamations relating to the continental shelf, the questions of fisheries and of control of the waters overlying the continental shelf were very closely linked with the latter concept. In accordance with the view adopted by the Commission the previous year, he had dealt with the question of the continental shelf separately, but it was impossible to avoid giving consideration, at the same time, to the main features of the decisions arrived at in regard to fisheries and the protection of the resources of the sea.

18. It was also necessary to decide whether the question of territorial waters could be dealt with before, or at the same time as, that of the continental shelf. The answer to that question must be in the negative. The question of territorial waters related to a narrow coastal-strip, sometimes three and sometimes six miles wide or even, as claimed by the Soviet Union, as much as twelve miles wide. But in comparison with the 50, 100 or even 200 miles claimed for the continental shelf, even 12 miles was just a trifle. Once the question of the continental shelf was decided, it would probably be very much easier to settle the problem of territorial waters. Although a solution of the problem of territorial waters would be no help towards solving that of the continental shelf, it did not follow that no useful purpose would be served by examining the former question as well. The General Assembly had invited the Commission to do so. It was not, however, necessary to link it with the problem of the continental shelf.

19. Mr. HUDSON wondered whether Mr. François' report clearly indicated that the part of the sea-bed and subsoil with which he was concerned, was entirely outside territorial waters. It was necessary to make that clear, since, geologically, the sea-bed and subsoil of territorial waters formed part of the continental shelf. The continent started at the point where the surface of the sea touched land. Geologically speaking, the continental shelf stretched from there to the point where the sea-bed dropped abruptly to the ocean depths. It was therefore necessary to stipulate that, from the legal standpoint, the continental shelf only consisted of that part thereof which lay outside territorial waters.

20. Mr. FRANÇOIS was entirely of Mr. Hudson's opinion. As regards the sea-bed and subsoil of territorial waters there was no difficulty. The question was governed by the régime of such waters. Only the sea-bed and subsoil outside territorial waters entered into question.

21. Mr. HUDSON repeated that it was very important to make that point clear. He had just received a copy of a bill before the United States Congress which, from the national standpoint, had the effect of assimilating

<sup>2</sup> Paras. 114-154.

<sup>3</sup> Part I comprised paras. 1-11; Part II comprised paras. 12-14.

<sup>4</sup> Summary record of the 66th meeting, para. 22, and subsequent summary records up to the 69th meeting.

completely the sea-bed and subsoil of territorial waters to those of the high seas, up to the limits of the continental shelf. In his opinion, such an assimilation would be very regrettable and not justified by the historical development of the law in the matter.

22. He could not find that the Rapporteur had drawn any such distinction in the report, and he would ask him to make it quite clear.

23. Mr. FRANÇOIS said that the question would come up in connexion with the examination of article 1 of his conclusions. It should then be brought out very clearly.

24. Continuing with the introduction of his report, he wished to add a few comments concerning the question of the continental shelf in the strict sense of the term.

25. The Secretariat had supplied him with fairly complete documentation on the rules relating to the continental shelf. He used the words "fairly complete" because nothing was perfect in this world. He had, since, received an article entitled "National Claims in Adjacent Seas" by S. Whittemore Boggs,<sup>5</sup> which mentioned some rules of which he had been unaware. He had also seen the Brazilian decree of 8 November 1950 concerning the continental shelf, which Mr. Amado had been kind enough to send him. Some new rules were to be found on pages 202 and 203 of Whittemore Boggs' article which were not mentioned in his first report (A/CN.4/17) and were not all included in the documentation supplied by the Secretariat. But with the sole exception of the Brazilian decree of 1950 they were not, in general, very important.

26. He had stated in his report that the question of the continental shelf had been studied by the International Law Association. It would be recalled that the Association had put the question on the agenda of the Copenhagen conference held in August 1950. To his great regret he had not been able to attend that conference, but the secretariat of the conference had sent him the provisional verbatim records of the discussions, so he had been able to inform himself regarding the discussions. He had also read the very interesting report submitted to the conference by a committee under the chairmanship of Mr. Leopold Dor which included, amongst others, Professor Bingham, Mr. Fisher, Professor Gidel, Professor Kahn-Freund and Professor Waldeck. The rapporteur was Jonkheer P. R. Feith. In all but a few instances, that report came to very similar conclusions to those of the International Law Commission. A perusal of it suggested that it was likely to be approved by the conference without much difficulty, and it was, in fact, approved by a large number of the members present.

27. However, some opposition was manifested in various quarters. A number of Scandinavian members were afraid that the adoption of the concept of the continental shelf would endanger fishing rights. But their opposition was not the most formidable. That came from supporters of the thesis advanced by Mr. Hsu<sup>6</sup> at the International Law Commission's second session,

advocating the internationalization of the subsoil, and eloquently championed at Copenhagen by Mr. Albert and Mr. Paul de Lapradelle.

28. It was to be noted that the members of the International Law Association could not all be considered as acknowledged experts in international law, and that the audience was much influenced by the speakers' eloquence. He had the impression that if the report had been put to the vote, it would almost certainly have obtained a majority, but that there would have been a considerable minority against it, and that it was not considered desirable to have it adopted by only a small majority. It was decided to add some members of the opposition to the committee and to ask the enlarged committee to submit a new report at the next session, which would not be held until 1952.

29. The CHAIRMAN mentioned that Mr. Kerno had attended the International Law Association conference.

30. Mr. KERNO (Assistant Secretary-General) recalled that he had attended the Copenhagen conference, as representative of the Secretary-General of the United Nations, and that Mr. Yepes had also been present. The discussions on the continental shelf had been very interesting as all shades of opinion were represented. Mr. François had given a very good description of the conditions in which the discussions were held. The International Law Association provided an example of how official could be combined with private codification. That was very interesting.

31. The report submitted at Copenhagen had been inspired by Mr. François' first report, and it emphasized that the work of the International Law Association might be of some service to the Commission. He could say the same thing of the International Bar Association. He had not been able to attend its discussions, but had received an account of them. The Association was doing its utmost to promote the study of the question.

32. Mr. YEPES confirmed what Mr. François and Mr. Kerno had said about the Copenhagen Conference. Despite the opposition of the French delegation, he believed the draft report could have obtained an appreciable majority.

33. Mr. FRANÇOIS proposed that the Commission base its discussion of his report on the nine articles on pages 69 and 70 (mimeographed English text; para. 162, printed French text) and on paragraph 6 (pages 67 to 69, mimeographed English text; para. 159, printed French text), which dealt with the delimitation of the continental shelf.

34. He considered that the Commission should commence the study of his report by an examination of its conclusions, article 1 of which was very important, as it contained a definition of the continental shelf. It would also be seen from paragraph 6 that there were several divergent opinions in the matter. Delimitation of the continental shelf should be the first point to be considered.

35. Mr. AMADO was very glad that the discussion had turned to practical matters. Last year the Commission had discussed Mr. François' report in all its aspects.

<sup>5</sup> Offprint from the *Geographical Review*, vol. XLI, No. 2, 1951, pp. 185-209.

<sup>6</sup> Summary record of the 66th meeting, para. 82.

That report had been "exploratory". Mr. François' latest report went into the question in all its details, offered conclusions and proposed articles.

36. The question of the continental shelf was somewhat different from problems of the high seas and was full of contradictions. In the United States the question of territorial waters had been merged in that of the continental shelf. He himself did not see why two different subjects should be so combined. If there were a relationship, it was with the contiguous zone. Territorial waters had nothing to do with the continental shelf.

37. He had pleasure in communicating to the Commission the text of the Brazilian decree, dated 8 November 1950:

"Article 1. It is expressly recognized that that part of the submarine plateau adjoining the continental and island territory of Brazil is incorporated into that territory under the exclusive jurisdiction and authority of the Federal Union.

"Article 2. The working and exploration of natural products or resources situated in that part of the national territory shall in all cases be subject to federal authorization or concession.

"Article 3. Regulations governing shipping in the waters above the said plateau shall remain in force, without prejudice to any future regulations enacted, in particular those relating to fishing in that area."

38. It would be seen that Brazil had taken care not to make use of the term "continental shelf", which had not yet been juridically defined, and spoke of the right of jurisdiction and control. Navigation and fishery rights were safeguarded.

39. Mr. LIANG (Secretary to the Commission) said that the Brazilian decree was included in a collection of documents prepared by the Secretariat, but not yet published owing to printing delays.

40. Mr. HUDSON said that the April 1951 number of the *American Journal of International Law* (vol. 45, No. 2) contained two articles, one by Mr. Richard Young entitled "The Legal Status of Submarine Areas Beneath the High Seas", page 225, and another by Mr. S. Whittemore Boggs, "Delimitation of Seaward Areas under National Jurisdiction", page 240. Mr. Boggs, who was a geographer, had recently published two articles on the matter in the same month. The other had appeared in the *Geographical Review*. In the article to which he had referred Mr. Boggs was mainly concerned with the question of frontiers between coastal States. He asked whether it would not be possible to circulate the text of those articles for study.

41. Mr. LIANG (Secretary to the Commission) said that he had received a letter from Mr. Boggs in which the latter had informed him that he was sending offprints of his article for the use of the Commission. He was sorry to say that Mr. Young had not sent any.

#### Article 1

42. The CHAIRMAN read the first article of Mr. François' conclusions:

"The continental shelf is constituted legally by the bed and the subsoil of the submarine regions, situated off the coast, where the depth of the water does not exceed 200 metres."

43. Mr. HUDSON said that, in the first place, it must be obvious that the text was not so much a definition as an explanation of the use of the term "continental shelf".

For the Commission's purpose he would prefer:

"The term 'continental shelf' refers to the sea-bed and subsoil of submarine regions situated off the coast but outside the areas of marginal seas where the depth of the water does not exceed 200 metres."

44. The Secretariat's memorandum (A/CN.4/32) made it clear that the 200-metre limit did not apply in all parts of the world and that, at times, the continental shelf lay at a greater depth before the abrupt drop to ocean depths.

45. The Oceanographical Institute, in California, which had been surveying the sea-bed of the Pacific for the last three years, had, a few weeks ago, summarized its findings in the most glowing terms. It reported having discovered a mountain of magnesium in the Pacific at a depth of 2,000 feet, and that was only one of its discoveries. It added that the sea-bed of the Pacific might be able to nourish the world, if means could be found to exploit it, and it hoped that they would.

46. He observed that the possibility of perfecting technical methods for working the sea-bed and subsoil at greater depths was already under consideration. That possibility should not be excluded. Up till then it had not been possible to sink oil wells at a greater depth than 100 feet. A Venezuelan delegate had recently told him that it was very difficult to keep the rigging required for reaching greater depths. At Lake Maracaibo, a British company had had to abandon its efforts because of the depth of the water, but operations had been restarted by another company. He considered that any depth decided upon should be on a provisional basis to allow for the possibility that States might claim that the continental shelf extended beneath waters of a greater depth before reaching the drop to the ocean deep.

47. Mr. KERNO (Assistant Secretary-General) said that Mr. Hudson had raised the question of an exact definition of the continental shelf and had maintained that legally the term "continental shelf" was only applicable to that part of the shelf which lay outside territorial waters. According to Mr. Hudson that fact was not clearly apparent from Mr. François' report. As regards article 1, it would be seen that Mr. François had defined the continental shelf in terms of the expanse of water from the coastline seawards up to a depth of 200 metres. According to that definition the continental shelf also existed under territorial waters. For that reason it would have to be specified, in the succeeding articles, that only the continental shelf outside territorial waters was affected. If that were made clear in article 1, there would be no necessity to repeat the statement subsequently

48. Mr. FRANÇOIS accepted that suggestion.

49. Mr. YEPES had read the definition given by Mr. François several times. With the best will in the world he had not been able to find a reply to the question as to what was the position of coastal States which did not enjoy the advantage referred to in article 1, that was to say, which had no submarine regions, situated off their coast, where the depth did not exceed 200 metres. In Chile the depth of the sea, close in shore, was considerably more than 200 metres. Would a State in that position have a right to compensation because it did not possess a continental shelf?

50. Mr. HUDSON said that the United States was in the same position as regards certain parts of its Pacific coast. The situation did not, at the moment, give rise to any practical problems in regard to the exploitation of the resources of the bed and subsoil of the sea, as it was not yet possible to exploit anything at those depths. It was, therefore, hardly necessary to consider the question. The study of the continental shelf should be given a severely practical turn. The rules which the Commission was to prepare should meet existing requirements, while providing for the possibility of exploiting resources at very great depths by means of new technical processes.

51. Mr. AMADO observed that the two preceding speakers had both been right. Mr. François, from the general point of view, and Mr. Hudson when the matter was considered from a special angle. He wondered whether a legal definition of a geological situation was possible. He had traced Mr. François' line of thought to its source and had found that it was based on proclamations and not on customary law, which, in fact, did not exist. Mr. François had himself recognized that fact. He wondered how Mr. François had reached his conclusions.

52. He agreed with Mr. Hudson that any limitation should be provisional.

53. He was glad that Mr. Yepes had raised a point of interest to all countries where the existence of such an extension of national territory had not yet been demonstrated.

54. Mr. FRANÇOIS explained that the main feature of his definition was that it entirely disregarded the geographical and geological concept of the continental shelf. It was well-known that geographers and geologists were not at all agreed as to the meaning to be attached to the notion of the continental shelf. In his opinion the only way to get results was to adhere to the strictly legal concept of the continental shelf. The first advantage derived from that course was that it enabled the inclusion of the sea-bed and sub-soil of shallow waters. In that connexion experts differed as to whether there could be a continental shelf under shallow waters. Some maintained that there was a continental shelf between France and Belgium on the one side, and England on the other. Others claimed that there were shallow waters but no continental shelf. No positive and concrete result could therefore be achieved except by adopting a strictly legal definition. He had adopted the solution approved by the commission the year before.

55. As regards Mr. Yepes' question, experts maintained that it was not possible to work the resources of the sea at a depth of more than 200 metres, so under those conditions the question did not arise. Moreover, at a depth of more than 200 metres there was no longer any life, and, in consequence, fishing was not possible. As regards the working of submarine resources, he had pointed out that the limit of 200 metres was not final, but conformed to existing technical limitations. That was why it had been adopted in a number of conventions, a fact which constituted his answer to Mr. Amado. Admittedly President Truman's proclamation of 28 September 1945<sup>7</sup> did not refer to that limit, but it was mentioned in the official press release, issued after the proclamation. The Mexican proclamation of 29 October 1945<sup>8</sup> also mentioned it expressly. A depth of 200 metres had been more or less generally accepted as the limit of exploitation.

56. Mr. HUDSON said that the point at issue was the working limit in the foreseeable future.

57. Mr. FRANÇOIS claimed that he had said that himself. Naturally, if technical progress made it possible to exploit the sea-bed beyond the 200 metre-limit, it would have to be reviewed. It could be said that the continental shelf extended up to the limit set by the technical possibilities of working the sea-bed and subsoil. He had considered such a definition, but had believed that it was to everyone's interest to determine, at least provisionally, for the guidance of all concerned with the working of any such waters, how far the rights of States extended. That was the only reason why he had adopted the limit of 200 metres which was, moreover, to be found in a number of proclamations.

58. Mr. SANDSTRÖM wondered whether Mr. François considered that his conclusions reflected the rules which the Commission had formulated.

59. Mr. FRANÇOIS said that they did no more than constitute a basis for discussion.

60. Mr. SANDSTRÖM considered that, if no attention was to be paid to the geographical and geological definition of the "continental shelf", that term should not be used in formulating a rule of law. He was in favour of the solution provisionally adopted the year before, which was not to fix any depth limit. Actually, fixing a limit would result in the delimitation of an area and the tendency would be to extend sovereignty over the whole of that area.

61. Mr. HSU believed that, in spite of its possibly artificial character, a limit was inevitable. It should be realized that if coastal States were accorded a right of control for the purpose of working the resources of the continental shelf, and if it were accepted that any limitation of such rights was provisional, the result of technical progress might be to extend the limit to the middle of the ocean.

62. Mr. AMADO wondered whether it would not be possible to combine Mr. François' first two articles in a

<sup>7</sup> See A/CN.4/17 (p. 35, mimeographed English text; para. 105, printed French text).

<sup>8</sup> *Ibid.* (para. 106, printed French text).

single article to serve as a basis for discussion. That article might be worded as follows :

“ The continental shelf, constituted by the bed and subsoil of the submarine regions off the coast where, according to the latest available geological information, the depth of the water does not exceed 200 metres, is subject, or may be subjected, to the exercise by the coastal State of a right of control and jurisdiction for the purposes of its exploration and exploitation.”

63. Mr. HUDSON also wished to propose a text for article 1 ; it read as follows :

“ For present purposes, the term ‘ continental shelf ’ is employed to refer to the sea-bed and subsoil of the submarine areas situated off the coast outside the areas of marginal seas, and where the depth of the superjacent water does not exceed 200 metres.”

64. All the notions contained in Mr. François’ text were to be found in that proposal, the two main qualifications to which were contained in the phrases “ for present purposes ”, which indicated the provisional character of the definition, and “ outside the areas of marginal seas ”.

65. He then read out the following extract from an article by Mr. Richard Young on “ The Legal Status of Submarine Areas beneath the High Seas ”, published in the *American Journal of International Law* (vol. 45 (1951), p. 235) :

“ 1. As a general rule, the seaward limit of the continental shelf should be considered to be the 100-fathom (or 200-metre) line. For the sake of uniformity, this should be the case even when the shelf in fact terminates at a lesser depth.

“ 2. When the submarine terrain creates more than one such line, the outermost 100-fathom contour should be regarded as the limit of the shelf.

“ 3. A possible boundary line should not be regarded as discontinuous merely because it may be interrupted by submarine canyons running out from land. On a principle somewhat analogous to the headland theory for bays, such canyons should be spanned by straight lines connecting the 100-fathom contours. By the same analogy, the permissible length of such lines might be limited to that applied by the coastal State to its bays.

“ 4. Isolated patches of limited size which are over 100 fathoms in depth should be disregarded and absorbed into the shelf area. In narrow or landlocked seas particularly, depressions over 100 fathoms deep which do not connect with the ocean depths, or which are of small size in relation to the total area of the sea in question, should be assimilated to the surrounding shallows.”

66. He called attention to the entirely novel character of the standards formulated by the writer of the article, who had devoted several years to the study of the question. He considered that the text he had just read might form a pertinent comment to the definition of the continental shelf which the Commission had before it.

67. Mr. SCELLE expressed his great interest in the extract from Mr. Young’s article to which they had just

listened. A special case occurred to him ; that of a mountain rising out of the high seas at a certain distance from the coast of a State, from which it was separated by a deep depression. Could the State in question lay claim to the mountain as forming part of its continental shelf? That was to say, was it necessary to determine distance in length as well as depth?

68. Mr. HUDSON said that Mr. Young had not definitely taken a position in the matter. He only spoke of a case where “ the submarine terrain creates more than one 100-fathom line ”, in which case “ the outermost 100-fathom contour should be regarded as the limit of the shelf ”.

69. Mr. AMADO would take Mr. Scelle’s remarks into account in drawing up his proposed text, but, so far as he was concerned, the continental shelf could only be adjacent to a coastal State. He did not see how it was possible to establish a continental shelf in the middle of the sea.

70. Mr. YEPES believed that a fundamental notion was being overlooked. The continental shelf was nothing more than an extension of the continent beneath the sea. It must in consequence be adjacent to the land, or else it could not be called a continental shelf.

71. He pointed out that, near the coast, the sea-bed consisted of a series of levels, the first of which extended to a depth of 200 metres. That level, in which life was possible, constituted the continental shelf. There followed a second level with a depth from 200 to 1,000 metres where life was hardly possible, and finally a third level at a depth of over 1,000 metres where no life at all was possible. If there were a mountain beyond that limit, and separated from the continent, it could not be considered as belonging to the continental shelf. It could only be held to belong to the high seas. It was, therefore, very necessary to agree on what constituted the continental shelf from the geographical point of view.

72. Mr. AMADO said that the Brazilian decree had adopted the notion of an extension of the continent. It defined the continental shelf as a submerged territory constituting a single geographical unit with the continent.

73. Mr. HUDSON stated that Mr. Young had dealt with the question of distance in another part of his article and adopted the position taken by the French branch of the International Law Association, according to which coastal States were entitled to a right of control and jurisdiction up to a distance of 20 miles.

74. Mr. EL KHOURY considered that it should be possible to settle the question of the definition of the continental shelf by determining its extent in terms of a maximum and a minimum distance. The minimum distance should be stated in miles, irrespective of depth, or of whether the sea-bed could or could not be worked. All the shallows included within such limits would belong to the continental shelf. The maximum distance, on the other hand, would depend on depth.

75. The definition of the continental shelf might, in fact, be worded as follows :

“ Legally the continental shelf is constituted by the sea-bed and the subsoil of the submarine regions

- situated off the territorial waters, to a minimum distance of  $x\frac{1}{2}$  miles, irrespective of the depth of the water, and to a maximum depth of . . . . irrespective of length or distance.”
76. Mr. FRANÇOIS said that Mr. el Khoury's view was referred to in paragraph (f) on page 68 of his report (mimeographed English text; para. 159, printed French text), and had, moreover, been adopted, in part, by the French branch of the International Law Association. He himself did not consider, and had so stated in his report, that a right of control and jurisdiction over the subsoil should be accorded up to a distance of 20 miles, where the depth exceeded 200 metres and where, in consequence, there could be no question of exploitation.
77. Mr. el Khoury's view that the existence of a continental shelf must be accepted, even where there could be no question of exploitation, was absolutely opposed to that of the Commission.
78. Mr. KERNO (Assistant Secretary-General) felt that, with so difficult a problem, it was essential to keep the desired aim clearly in view, and that was to enable, in the general interests, the exploitation of submarine resources. For that purpose it was necessary to accord coastal States a right of control and jurisdiction. There was, however, no question of granting them absolute sovereignty over the continental shelf. It followed that, where working of submarine resources was not possible, no control or jurisdiction was required, and there was, therefore, nothing to regulate.
79. On the other hand, it was necessary to set a limit to such rights of control and jurisdiction. It was thus essential to specify the depth and distance up to which they could be exercised. The limit should be that provided by existing technical knowledge. Scientific progress might, obviously, make it possible, within a comparatively short time, to work natural resources at a depth of more than 200 metres. But such a contingency could be provided for by stating, at the end of a convention for instance, that the convention was subject to periodical revision. Such revision might even be made compulsory.
80. The CHAIRMAN suggested that the Commission study Mr. Hudson's amendment, which had just been circulated.<sup>9</sup>
81. Mr. HUDSON wished to make some changes to his text, namely the insertion of the word “here” before “employed”, and the substitution of the words “contiguous to” for “situated off”.
82. Mr. YEPES wished to be sure that Mr. Hudson's definition took due account of the notion of continuity which to his mind was essential.
83. Mr. ALFARO was also of the opinion that the notion of continuity was absolutely necessary. He did not consider the term “continental shelf” a very good one, as there might be a submarine shelf contiguous to islands. It would in his opinion be better to say “submarine shelf”, a term which had, moreover, been employed in certain treaties.
84. Mr. AMADO pointed out to Mr. Alfaro that the term “marginal seas” employed in Mr. Hudson's text made it possible to include islands also.
85. Mr. HUDSON, supported by the Chairman, expressed the opinion that the term “continental shelf” had entered into general use and could not give rise to confusion. There was no question of excluding islands.
86. Mr. FRANÇOIS also preferred the term “continental shelf”. He gladly accepted Mr. Hudson's amendment but wondered what was to be understood by “for present purposes”. He would prefer “for present-day purposes.”
87. Mr. YEPES wondered whether it was really necessary to add “here”, as proposed by Mr. Hudson.
88. Mr. HUDSON pointed out that the definition in question was not intended for either geologists or geographers. He proposed the substitution of the words “as here used” for “for present purposes.”
89. Mr. FRANÇOIS agreed to that proposal.
90. Mr. SCELLE wished to know whether the Commission proposed to take a vote on Mr. el Khoury's and Mr. Kerny's suggestion in regard to deciding on the distance.
91. Mr. HUDSON thought that question should be dealt with in connexion with article 2.
92. Mr. FRANÇOIS, on the other hand, considered that it related to article 1.
93. Mr. AMADO wondered what criterion could be adopted for deciding the distance; he was afraid considerable difficulty might be encountered in that connexion as had happened in the case of the delimitation of territorial waters.
94. Mr. SCELLE wondered whether mine galleries, for instance, could be prolonged indefinitely beneath the bed of the sea. In that case there would be no limit to the continental shelf.
95. Mr. FRANÇOIS said that, in practice, exploitation was not possible beyond certain limits, but it would be very difficult to fix a specific limit.
96. Mr. EL KHOURY pointed out that he had not asked for a maximum limit, but it would be necessary to fix a minimum distance, in some way or other.
97. Mr. AMADO said that there was no precedent in the matter, nor did any of the existing proclamations mention distance, whereas they did mention depth. The Commission was, no doubt, studying a question relating to the progressive development of international law, but some point of departure was nevertheless required. He was afraid that States would disagree in regard to the question.
98. Mr. FRANÇOIS pointed out that Peru and Chile had taken 200 miles as the maximum distance.
99. Mr. SCELLE remarked that, in the case of France and England, it would, under those conditions, be very difficult to say where the French continental shelf ended and the English one began.
100. Mr. AMADO was all in favour of fixing a distance but did not see how it was to be done. The necessity of

<sup>9</sup> See para. 63 above.

safeguarding the freedom of the seas in regard to fisheries, navigation, etc., should not be overlooked. He was afraid that, in taking a decision of that kind, the Commission might accord States control over much too large an area.

101. Mr. FRANÇOIS did not see how it was possible to lay down maximum and minimum distances.

102. Mr. HUDSON remarked that Mr. Young had, apparently, come to the same conclusion.

103. Mr. YEPES observed that the French branch of the International Law Association accorded coastal States rights of control and jurisdiction up to a distance of 20 miles.

104. The CHAIRMAN considered that to be an entirely arbitrary limit.

105. Mr. YEPES maintained that, all the same, the Commission could not ignore the fact that three States, Chile, Peru and Costa Rica, had fixed the maximum distance at 200 miles. That represented the beginning of a custom.

106. Mr. HUDSON pointed out that the distance of 200 miles was not a maximum, and that, moreover, those three States did not exercise either control or jurisdiction over that distance. It only appeared on paper.

107. The CHAIRMAN put to the vote Mr. el Khoury's proposal to recommend the establishment of a maximum horizontal distance.

*Mr. el Khoury's proposal for a maximum distance was rejected by 7 votes to 1.*

108. Mr. AMADO considered that, as there were neither basic data nor precedents, it would be better to leave it to States to settle the question of a minimum distance by mutual arrangement.

109. The CHAIRMAN thought that the notion of a minimum distance did not make sense. Chile, for instance, had no continental shelf.

110. Mr. EL KHOURY wanted all States to be in a position to exercise the rights in question up to a minimum distance, irrespective of the depth of water. He was thinking of the possibility of a rise in the sea-bed, resulting in the formation of a continental shelf.

111. Mr. AMADO considered that the course advocated by Mr. el Khoury would represent a total subversion of all law; that might have very serious consequences.

112. Mr. KERNO (Assistant Secretary-General) pointed out that there was no question of depriving States of rights of control and jurisdiction required for the exploitation of the sea-bed and subsoil; but why should they be given those rights when no exploitation was possible?

113. Mr. YEPES considered there might be a substratum of scientific truth in Mr. el Khoury's idea. He would, however, like to be able to study the proposal in written form. Such a suggestion could not be rejected *a priori* but should be carefully examined.

114. Mr. AMADO pointed out to Mr. Yepes that due account must be taken of the interests of the community of States. Any limitation of the régime of the high seas

was liable to be prejudicial to the international community. It had, therefore, to be justified up to the hilt.

115. Mr. YEPES said that, since Mr. el Khoury's object was to provide a minimum limit of control and jurisdiction in the case of States that did not possess a continental shelf, he would vote for his suggestion.

116. Mr. SCALLE said that he would abstain from voting on the matter.

*Mr. el Khoury's proposal for a minimum distance was rejected by 7 votes to 2.*

117. The CHAIRMAN asked the Commission to vote on Mr. Hudson's text.

118. Mr. FRANÇOIS thought that it could, with advantage, be shortened to read:

“As here used, the term ‘continental shelf’ refers to the sea-bed and subsoil of the submarine areas contiguous to the coast, but outside the areas of marginal seas where the depth of the superjacent water does not exceed 200 metres.”

*Mr. Hudson's text was adopted as thus amended.*

#### Article 2

119. Mr. HUDSON suggested to Mr. François that he delete the words “of a right” and substitute the words “exploring and exploiting its natural resources” for “its exploration and exploitation”.

120. Mr. SCALLE pointed out that the French text should then read: “*est soumis au contrôle et à la juridiction de l'Etat riverain*”.

121. Mr. FRANÇOIS supported Mr. HUDSON in considering that the word “exercise” should be retained.

122. Mr. KERNO (Assistant Secretary-General) pointed out that article 2, as amended by Mr. Hudson, would reinforce what had already been said to abate the apprehensions of some members of the Commission. The control and jurisdiction exercised by coastal States was, in effect, limited to the exploring and exploiting of natural resources.

123. The CHAIRMAN observed that, under the terms of the article in question, it was not necessary for coastal States to proclaim that they exercised a right of control and jurisdiction over the continental shelf. There was, however, a contrary opinion. Perhaps a comment was required.

124. In Mr. HUDSON'S opinion the coastal State's right of control and jurisdiction must be exclusive.

125. Mr. AMADO pointed out that the word “exclusive” did, in fact, appear in the Brazilian decree.

126. Mr. FRANÇOIS considered that the idea of exclusiveness was implied in article 2.

127. Mr. ALFARO did not consider it necessary to add the word “exclusive”.

128. Mr. EL KHOURY thought that it would be better to do so. He proposed: “The coastal State has the exclusive right to exercise control and jurisdiction over the continental shelf . . .”

129. Mr. HUDSON preferred the formula employed in article 2. Some States might not, in fact, wish to exercise the right.

130. The CHAIRMAN remarked that article 2 made no reference to the question of sovereignty; but the concept of control and jurisdiction was not far removed from that of sovereignty.

131. Mr. HUDSON said that control and jurisdiction were only admissible for a specific purpose.

132. Mr. FRANÇOIS said that, hitherto, the notion of sovereignty had been considered to include sovereignty over the sea and in the air. As it was not the intention of the Commission to accord sovereign rights in regard to the sea and the air, it might, for that reason, be better not to use the term in that connexion.

133. Mr. HUDSON wondered whether sovereignty was divisible. He was only aware of one case where such a notion had been adopted, and that was in regard to certain underground coalmines in the Maastricht district which belonged to the Netherlands, although they were situated in German territory. That question did not, however, arise in relation to the matter under consideration. For that reason, he preferred not to use the word "sovereignty".

134. While the CHAIRMAN did not wish to press the matter, he still considered that a comment would serve a useful purpose.

135. Mr. SCELLE remarked that the question was not of great practical importance. In his opinion the new notion of the continental shelf was destructive of the old concept, according to which the sea, including its bed, was common property. It completely upset the principle of the freedom of the high seas. If it were said that States had absolute sovereignty over the continental shelf, that would mean that they were free to refrain from exploiting the natural resources of the subsoil of the sea should they not wish to do so. But the Commission's purpose in studying the question of the continental shelf was to facilitate the exploitation of natural resources. In bringing the notion of absolute sovereignty into article 2, it would therefore be acting against its declared purpose.

136. The CHAIRMAN said that, in view of the importance of the question, the Commission would continue its study at its next meeting.

The meeting rose at 1 p.m.

## 114th MEETING

Friday, 29 June 1951, at 9.45 a.m.

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*Chairman:* Mr. James L. BRIERLY  
*Rapporteur:* Mr. Roberto CORDOVA

#### *Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, 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.

#### **Régime of the high seas: report by Mr. François (item 6 of the agenda) (A/CN.4/42) (*continued*)**

##### CHAPTER 11: CONTINENTAL SHELF (*continued*)

##### *Article 2 (continued)*

1. The CHAIRMAN recalled that a number of alterations had been made during the previous meeting to the text of article 2, which now read as follows:

"2. The continental shelf is subject to the exercise by the coastal State of control and jurisdiction for the purposes of exploring it and exploiting its natural resources."

2. Mr. SANDSTRÖM again raised the question whether it might be desirable to mention that control and jurisdiction by the coastal State would be exclusive.

3. Mr. FRANÇOIS said that most regulations did not include any such qualification, but he had no objection to it.

4. Mr. EL KHOURY thought it would be better to insert the word "exclusive".

5. Mr. SCELLE was of the opposite opinion.

*It was decided not to insert the word "exclusive".*

6. Mr. HUDSON asked Mr. François whether he considered that the sense would be changed if the words "exploring it and" were deleted.

7. Mr. FRANÇOIS did not think so.

8. Mr. ALFARO was afraid that, if the word "exploring" were deleted, difficulties might arise in the event of a State wishing, prior to undertaking the exploitation of natural resources, to carry out certain

exploratory operations which other States might regard as prejudicial to the freedom of the seas.

9. Mr. HUDSON pointed out that that matter was dealt with under article 7.

*It was decided to delete the words "exploring it and".*

10. Mr. HUDSON said that Mr. François had informed him that Mr. Young, the author of the study on "The Legal Status of Submarine Areas beneath the High Seas", published in the *American Journal of International Law*, vol. 45 (1951), appeared to be in favour of the general concept of submarine areas (page 227), basing his preference on the treaty of 26 February 1942 concluded between the United Kingdom and Venezuela on the subject of the submarine areas in the Gulf of Paria. Without wishing to go back on the definition of the continental shelf accepted under point 1, and which incidentally he personally preferred, he pointed out that in the treaty in question the whole of the Gulf of Paria had been partitioned without any reference to the depth of the water. With regard to the terminology, he preferred the term "continental shelf".

11. Mr. FRANÇOIS saw one advantage at least in Mr. Young's argument, namely, that the notion of submarine areas enabled shallow waters to be included more easily in the term "continental shelf", even where there was no continental shelf as such. Possibly it might be better to use a new term, although the expression "continental shelf" was by now in current use.

12. Mr. AMADO wondered whether it would not be feasible to say "the continental shelf or the submarine areas".

13. The CHAIRMAN thought the point might be dealt with in the commentary. His own opinion was that it would be better to continue to use the term "continental shelf", which was already a classic term.

14. Mr. SANDSTRÖM thought that the continental shelf and shallow waters might each be dealt with in a separate article. When the term continental shelf was used, a certain natural area was circumscribed. From that circumscription certain conclusions could be drawn in regard to shallow waters. It might perhaps be preferable to postpone the discussion until the Commission came to study the question of successive contours.

15. Mr. HSU thought the expression "submarine areas" was preferable, as being more accurate. Moreover, "continental shelf" was a recent term and could quite easily be replaced by some other expression.

16. Mr. KERNO (Assistant Secretary-General) did not see how the expression "submarine areas" could constitute a definition, since it would cover all parts of the sea-bed and not merely those constituting the continental shelf.

17. Mr. AMADO thought it would be well for the moment to keep to the formula "continental shelf", subject to a possible revision at the conclusion of the discussion.

*It was so decided.*

*Article 2 was adopted as amended.*

### Article 3

18. Mr. HUDSON thought article 3 unnecessary.

19. The CHAIRMAN thought it would be more appropriate to examine article 3 after articles 4 and 5.<sup>1</sup>

*It was so decided.*

### Article 4

20. Mr. HUDSON thought that the wording used for article 1 might be adopted for article 4, which would then read as follows:

"The exercise by a coastal State of control and jurisdiction over the continental shelf does not affect the legal status of the superjacent waters as high seas."

21. Mr. AMADO argued that the expression "régime of the high seas" had become traditional and should be kept. He did not particularly like the English word "status", even though the International Law Association had used it in its report.

22. Mr. HUDSON said that the word "status" meant juridical régime.

23. Mr. KERNO (Assistant Secretary-General) appreciated Mr. Hudson's reasons for submitting his proposal. But all the members of the Commission were agreed that the right of control and jurisdiction by the coastal State was exercised not over the waters but over the sea-bed and its subsoil. It was true that in certain instances installations were necessary to reach the exploitation area, and that the régime of the high seas would thus be subject to certain easements. But such easements were delimited under articles 6 and 7. Hence there was no reason why article 4 should not remain as it stood.

24. Mr. SCELLE did not imagine the Commission was proposing to lay down the principle that access to the continental shelf would only be permissible via territorial waters. So long as it did not do that, there was no risk of violating the principle of freedom of the high seas.

25. Mr. FRANÇOIS said that in the Gulf of Mexico drilling operations had been carried out in the open sea.

26. Mr. SCELLE said that with him it definitely went against the grain to admit the concept of a continental shelf. He was afraid that it would be impossible to avoid some encroachment on the high seas.

27. Mr. AMADO, supported by Mr. CORDOVA, thought that article 4 as worded in Mr. François' report was sufficient, since all that mattered was that it should be made clear that the waters covering the continental shelf came under the régime of the high seas.

28. Mr. SCELLE wondered whether it was any more than a pious wish.

29. Mr. FRANÇOIS thought that all the members of the Commission were in agreement. It was merely the formulation of a principle, not an article of a convention. The wording he was proposing could not give rise to any misunderstanding.

30. Mr. YEPES thought there was a serious contradiction between article 4 and article 1 as accepted by the Commission the day before. The continental shelf had

<sup>1</sup> See para. 67 et seq. below.

been defined at the previous meeting as consisting of the sea-bed and the subsoil of the submarine areas contiguous to the coast. But according to article 4, the waters covering the continental shelf were subject to the régime of the high seas. Hence, there were two completely different régimes involved.

31. Under which régime then would sedentary fisheries come? In his opinion, while the notion of sedentary fisheries was bound up with that of the sea-bed, it was also bound up with that of the high seas.

32. Mr. FRANÇOIS agreed that certain difficulties could indeed arise in connexion with sedentary fisheries. It would be necessary to consider what régime should apply to them. Incidentally the problem was discussed in the report he had drawn up. No doubt a special régime would have to be adopted for sedentary fisheries, but as that type of fishing was carried on in comparatively few places, the difficulties could not be tremendous. He did not think it was necessary to consider the continental shelf and sedentary fisheries at the same time.

33. Mr. YEPES thought the Commission had made a great mistake by adopting the definition of the continental shelf it had accepted at the previous day's meeting. He considered that the question of the continental shelf could not be dealt with separately from that of sedentary fisheries.

34. The CHAIRMAN thought that the sea-bed and whatever covered it were two quite distinct problems.

35. Mr. FRANÇOIS was not so sure.

36. Mr. HUDSON shared Mr. François' doubts. There were for example certain types of fish, known to fishermen as bottom fish, which did not live attached to the sea-bed but moved about in the water. Hence the paragraph would have to be drafted very carefully so as to ensure that sedentary fish, pearls, etc., as well as bottom fish, were not placed under the control and jurisdiction of the coastal State.

37. Mr. KERNO (Assistant Secretary-General) said he too had pondered the question. Possibly a distinction might be established similar to that in civil law between movables and real estate. The sea-bed proper would come under the régime of the continental shelf, while all movables, i.e., anything not attached to the sea-bed, would come under the régime of the high seas.

38. The question might be studied closely when sedentary fisheries were discussed.

39. Mr. SCELLE said he was waiting impatiently to see whether the Commission would be bold enough to remove all distinction between the sea-bed and the sea itself. In his opinion it was well-nigh impossible to establish any distinction such as Mr. Kernó had suggested. The notion of a continental shelf was entirely incompatible with that of the high seas, and was calculated to destroy it completely. Mr. Kernó's observations were very significant in that respect. How in fact would it be possible to exploit submarine petroleum and coal without creating a disturbance which would oust the underwater fauna?

40. Mr. AMADO thought there was no question but

that sedentary fisheries should come under the régime of the high seas.

41. Mr. SANDSTRÖM considered that the difficulty could be overcome by specifying which were the natural resources referred to in article 2.

42. The CHAIRMAN did not think the suggestion was practicable. There was no telling what resources scientific progress would make it possible to exploit in the future.

43. Mr. FRANÇOIS, supported by Mr. EL KHOURY, thought it would be better to adjourn the discussion. Mr. Yepes could reserve the right to come back to the definition of the continental shelf when the Commission studied the problem of sedentary fisheries.

44. Mr. ALFARO admitted that Mr. Scelle's and Mr. Yepes' arguments were sound. But it must be remembered that the question of the continental shelf was a very recent one, and properly speaking had to do with the development of international law. There was on the one hand the principle of the freedom of the seas; on the other hand, scientific progress had shown that the legitimate right to exploit the sea-bed and its subsoil could not be exercised without to some extent interfering with the principle of the freedom of the seas.

45. Hence it might be necessary to state in one of the articles of the draft under consideration by the Commission that the principles of international law relative to the freedom of the seas would normally apply, subject to the requirements for the exploitation of the natural resources of the continental shelf.

46. Mr. SANDSTRÖM asked whether "natural resources" meant anything more than mineral resources. He pointed out that the article on the subject by Mr. Boggs referred only to "mineral resources".

47. Mr. HUDSON thought that the interpretation of the term "natural resources" should not be restricted so narrowly. Kelp gathering for example was an industry of some importance in parts of France and Ireland.

48. Mr. YEPES said that in his proclamation of 28 September 1945, President Truman had had in mind only "mineral resources", petroleum in particular.

49. Mr. AMADO referred to the summary records of the second session of the Commission. The question of sedentary fisheries had been studied the previous year;<sup>2</sup> and it had been made quite clear then that sedentary fisheries came under the régime of the high seas and had nothing to do with the exploitation of the continental shelf.

50. Mr. KERNO (Assistant Secretary-General) thought that the question of sedentary fisheries should be studied later. It ought to be possible to find a solution for it, and ease the minds of certain members of the Commission.

51. Mr. SCELLE did not think that Mr. Kernó's analogy between movables and real estate and the subsoil of the sea-bed and the high seas was a sound one. The high seas could not be regarded as property, since they

<sup>2</sup> See summary record of the 66th meeting, para. 6 onwards, especially para. 32.

were public, i.e., for the use of all and sundry, and included what was to be found both in the sea and under the sea.

52. The more deeply the question of the continental shelf was studied, the more evident it would become that the notion of the continental shelf destroyed the notion of public property. A choice would have to be made — either to regard the high seas as public property, or to apply the régime of the continental shelf, and it was impossible to forecast what the consequences of the latter course would be.

53. Mr. FRANÇOIS said that President Truman in his proclamation had referred to “natural resources”, but that the preamble referred only to “mineral resources”. Hence the exploitation of natural resources might perhaps be restricted to mineral resources, as Mr. Sandström had suggested.

54. Mr. YEPES was strongly in favour of that suggestion.

55. Mr. AMADO pointed out that article 6 covered all the questions that had been raised during the present discussion.

56. Mr. CORDOVA thought that article 4 was sufficient. In regard to the waters covering the continental shelf, all the regulations constituting the régime of the high seas would apply, including those connected with sedentary fisheries.

57. The CHAIRMAN again suggested that study of the question be postponed.

*It was decided to adjourn for the time being the discussion of the question of sedentary fisheries.*

*It was also decided to postpone consideration of the question whether the word “mineral” should be substituted for “natural” in article 2.*

58. Mr. HUDSON thought that the text of article 4 was too condensed and not sufficiently clear. He again read out the text by which he proposed to replace it:

“4. The exercise by a coastal State of control and jurisdiction over the continental shelf does not affect the legal status of the superjacent waters as high seas.”

59. Mr. FRANÇOIS accepted the redraft.

60. Mr. AMADO thought that the redraft added nothing to the version proposed by Mr. François; it was merely more wordy. But he would not object to it.

*Mr. Hudson's redraft for article 4 was adopted.*

61. Mr. SCELLE was anxious that the English term “legal status” should be rendered in French by the word “régime”.

#### *Article 5*

62. Mr. HUDSON wondered whether article 5 was really necessary. The air above the waters of the high seas was not subject to any control or jurisdiction.

63. Mr. FRANÇOIS, supported by Mr. ALFARO, agreed that the article was not strictly necessary, but he thought it useful as an indication that no restriction on the freedom of the air would be permissible.

64. Mr. HUDSON did not like the expression “free air”. He suggested that the text of article 5 be replaced by the following, which was in keeping with the text of the preceding article:

“5. The exercise by a coastal State of control and jurisdiction over the continental shelf does not affect the legal status of the air-space above the superjacent waters.”

65. On reflection he agreed that an article of the kind had some point, in view of the progress being made daily in aviation.

66. Mr. FRANÇOIS was prepared to accept the redraft.

*Mr. Hudson's redraft for article 5 was adopted.*

#### *Article 3 (resumed)<sup>3</sup>*

67. The CHAIRMAN pointed out that article 3 of Mr. François' draft would be renumbered 5.

68. Mr. FRANÇOIS said that in drafting the text of that article, he had used the actual wording of the International Law Association's report. He considered that text most valuable.

69. Mr. HUDSON said he could not accept the text as it stood. He did not like the word “recognition”; and he wondered what was meant by “the existing international law with regard to the laying and operation of cables or pipelines on the sea-bed”. Surely anyone had the right to lay and operate cables or pipelines. He did not think there was any rule of international law on the subject. In any case, there could not be very many pipelines laid on the sea-bed.

70. However, if the Commission considered that an article of the sort would be useful, he suggested that it be drafted as follows:

“3. The exercise by a coastal State of control and jurisdiction over the continental shelf does not affect the legal status of cables or pipelines on the sea-bed, subject to the right of the coastal State to take reasonable measures in connexion with the exploitation of the natural resources.”

71. Mr. FRANÇOIS thought that if it were felt desirable to recognize the right to lay and operate cables or pipelines on the sea-bed, it would be a good thing to say so explicitly. Incidentally, the International Law Association report from which he had borrowed the text of the article had been prepared by highly qualified experts. If they had seen fit to introduce such an article, no doubt it was because they had felt that it would be useful.

72. Mr. CORDOVA asked Mr. François what would happen if a coastal State wished to exploit the sea-bed and its subsoil and erected installations, and another State then wished to lay a pipeline. The coastal State might be given the right to do whatever it wished, but then there would be a clash of interests between the two States.

73. Mr. FRANÇOIS replied that the words “subject to . . .” had been used. The right to lay a pipeline was

<sup>3</sup> See paras. 18 and 19 above.

recognized, but in certain circumstances the track of the pipeline might have to be changed. The coastal State's right of control and jurisdiction would have priority.

74. The CHAIRMAN asked the Commission whether it wished to keep the article. It was a matter to which a great many people had given much thought, and it was desirable that some rule should be laid down.

75. Mr. YEPES supported Mr. François' argument. The article was most useful. Should Mexico for example not be allowed to reserve the right to construct a pipeline if she so wished, so as to export petroleum to Canada across the continental shelf of the United States?

*It was decided to keep the article.*

76. The CHAIRMAN said that Mr. Hudson was in touch with a member of the Venezuelan delegation in Geneva, Mr. Hagen, who was very well informed on the question. The Commission might perhaps invite Mr. Hagen to give a talk, so as to give the members some idea of the special difficulties encountered by engineers in carrying out such operations.

*After a short intermission, the Commission listened to an informal talk by Mr. Hagen.*

77. Mr. HUDSON read out article I of the *Convention for the Protection of Submarine Cables*, which was signed on 14 March 1884 and came into force in 1895:

"The present Convention shall be applicable, outside of the territorial waters, to all legally established submarine cables landed in the territories, colonies or possessions of one or more of the High Contracting Parties."

78. He mentioned that the Convention spoke of "landed" cables and did not mention the laying of cables. The Convention appeared to assume that the laying of cables was unrestricted. It was the only text he was aware of on the subject.

79. Mr. CORDOVA said that, according to Mr. François, the laying of cables was unrestricted under the existing law.

80. The CHAIRMAN read out the text proposed by Mr. Hudson for article 3:

"3. The exercise of a coastal State of control and jurisdiction over the continental shelf does not affect the legal status of cables or pipelines on the sea-bed, subject to the right of the coastal State to take reasonable measures in connexion with the exploitation of the natural resources."

81. The new text merely made a few slight changes to the text proposed by Mr. François.

82. Mr. ALFARO observed that the English term "legal status" appeared to refer only to existing cables or pipelines, whereas the main concern was to protect the right to lay down new cables or pipelines.

83. Mr. FRANÇOIS had the same impression as Mr. Alfaro.

84. Mr. HUDSON said he would not interpret his text in that way; but the comment could explain the sense to be given to it. The terminology used in article 3 as proposed by him was very similar to that used in his versions of articles 4 and 5.

85. Mr. ALFARO observed that the term "superjacent waters" was a reference to something which had always existed.

86. Mr. CORDOVA had a similar feeling about the use of the word "status", which referred to something which existed.

87. Mr. SCELLE said that for him, the interesting point in article 3 was the necessity for a concession from the coastal State. Concession after all implied monopoly. Could concessions for the exploitation of the continental shelf be reconciled with the installation of new pipelines or cables? It seemed to him that a concession restricted the entire area of the sea-bed. It was true that the words "subject to" were used, but the endeavour seemed to be mainly to protect the exploitation of the resources of the sea and not the right of thirty party States to operate a pipeline or a cable. That was the difference.

88. Mr. CORDOVA had been under the impression that a coastal State had priority in any decisions relating to applications for concession.

89. Mr. SCELLE maintained that if the coastal States were given priority, the freedom of the high seas was destroyed.

90. The CHAIRMAN pointed out that what was involved was a minor restriction of no great importance. A third party State wishing to lay a cable would merely have to change its track slightly.

91. Mr. SCELLE said that the Commission was giving coastal States Sovereignty over the sea. The main question was: who was at liberty to exploit the high seas, the international community or the coastal State?

92. Mr. CORDOVA said that what was being established was an easement over the high seas.

93. Mr. HUDSON said that when he had submitted his proposal, he had kept the latter part of Mr. François article 3, though he had hesitated about the words "reasonable measures". After all, one could prove almost anything by reasoning. The expression was not satisfactory; he suggested instead:

"Subject to the right of the coastal State to take the necessary measures for the exploitation of the natural resources."

94. Mr. FRANÇOIS accepted the new version.

95. There was a general exchange of views as to the most suitable way of stating that the right to lay, exploit and repair cables and pipelines remained intact, subject to the right of the coastal States to take measures to protect the exploitation of the natural resources of the continental shelf, such measures to be kept down to a minimum as inevitably bound to restrict the freedom of the high seas.

96. Mr. HUDSON said that article 4 would become article 3; article 5 would become article 4, and article 3 would become article 5. The new articles 4 and 5 would be special applications of the general principle laid down in the new article 3, and would not affect the freedom of the high seas. The comment would explain all that in detail. He did not think any more should be

said in article 5 than: "the laying and maintenance of cables and pipelines on the sea-bed".

97. Mr. SANDSTRÖM had some slight misgivings as to the order of the articles. Article 4 of Mr. Hudson's proposals mentioned superjacent waters, which had nothing at all to do with the régime of the high seas, whereas the new article 3 spoke of cables and pipelines in connexion with the sea-bed. If the words "the superjacent waters as high seas" were kept, it would be more logical to put article 3 first, since it referred more directly to the sea-bed. The superjacent waters would be mentioned next, and finally the air.

98. Mr. SCELLE did not see the point of the second half of the sentence, beginning with the words "subject . . . to". It stated only too clearly that the right to lay cables and pipelines was dependent on the goodwill of the coastal State. The first half of the sentence proclaimed the freedom of the seas, while the second half cancelled it out. He was in favour of the first half of the sentence, but could certainly not accept the second.

99. The CHAIRMAN and Mr. FRANÇOIS maintained that that attitude was in direct contradiction to the principle of the continental shelf which Mr. Scelle and the rest of the members of the Commission had accepted the previous year.

100. Mr. SCELLE replied that he had thought the matter over since the previous year.

101. Mr. AMADO said he would like to ask his old teacher Mr. Scelle, on what grounds a State should be prevented from reaching agreement with another State.

102. Mr. SCELLE replied that Mr. Amado was envisaging a situation different from that referred to in the text under consideration. If there were agreement between the States, he could accept the text; but the proposed version implied "provided the coastal State permits".

103. Mr. AMADO took the instance of a coastal State installing machinery on the continental shelf, and another State requesting permission to lay a cable. The coastal State would indicate that the pipeline should follow a particular track. There was no reason why a State should wish to lay a cable precisely at the point where another State had installed its equipment.

104. Mr. SCELLE saw no objection to that procedure provided the States concerned were agreed. But the Commission recognized that the coastal State had a priority right over the high seas, and he wanted to know why it should have such a sovereign right. Actually the Commission had just agreed that the régime of the high seas must remain intact, and now it was stated that the coastal State had sovereignty over the high seas. It must be one way or the other. If the coastal State were regarded as having sovereignty over the high seas, the term high seas no longer had any meaning. An attempt must be made to reconcile the régime of the continental shelf with the freedom of the high seas. The members of the Commission seemed inclined to sacrifice the latter concept to the interests of coastal States. That way lay anarchy.

105. He reiterated that a choice must be made between the one concept and the other. If the freedom of the high seas was to be thrown overboard, the Commission should say so. In that case there would be no more high seas, and there would be no progress, but retrogression.

106. Mr. KERNO (Assistant Secretary-General) thought there was no virtue in carrying out a discussion in a vacuum. While in theory it was difficult to reconcile the viewpoints, from the practical point of view it was not so difficult to arrive at a compromise. It would always be possible for a friendly agreement to be reached between a party wishing to carry out drilling and another party anxious to lay a cable or a pipeline.

107. He thought the Commission had discussed the article sufficiently. It had adopted articles 3 and 4 in Mr. Hudson's version, and he suggested that it should adopt a text stating that "the exercise by a coastal State of control and jurisdiction over the continental shelf does not affect the laying and operation of cables and pipelines". He did not think it necessary to add "on the sea-bed".

108. The CHAIRMAN thought the words "on the sea-bed" should be deleted.

*It was so decided.*

109. Mr. SCELLE maintained his point. He could not agree to the second half of the sentence, which contradicted the first half.

110. Mr. HUDSON suggested that the first half of the text, up to the word "subject", be put to the vote.

111. Mr. FRANÇOIS and Mr. CORDOVA said they could not accept the first half of the sentence without the second.

112. The CHAIRMAN asked the members to choose between the expression "reasonable measures" and "necessary measures" to express the idea in the second half of the article.

*On two occasions there was an equality of votes.*

113. Mr. ALFARO thought that, unless the word "measures" were qualified, the coastal State would be given an unconditional right in regard to the laying of cables and pipelines. That was not the Commission's intention. It was proposing "reasonable measures", i.e., measures compatible with law and justice. He was prepared to vote for either word. He had voted against the word "reasonable" because he preferred the word "necessary"; but as a way out of the impasse, he was prepared to vote for the word "reasonable".

114. Mr. HUDSON suggested deleting the second half of the sentence and replacing it by the words: "provided that exploitation of the natural resources is not thereby interfered with unduly".

115. The CHAIRMAN did not feel that that text was any better than the preceding one.

116. Mr. HUDSON said he had submitted it to enable Mr. Scelle to take part in the voting and as a way out of the difficulty. He agreed that the word "unduly" was not very satisfactory.

117. Mr. SCELLE said he would still not vote, though he preferred that the continental shelf should be subject to the principle of the freedom of the seas.

118. The CHAIRMAN asked the Commission to decide on Mr. Hudson's new wording.

119. Mr. AMADO suggested with Mr. Hudson's permission that the wording should not be put to the vote. He did not care for it.

120. Mr. EL KHOURY thought the word "reasonable" was nearer to Mr. Scelle's idea. He had voted in favour of the word.

*The word "reasonable" was adopted by 6 votes.*

*The second half of the sentence was adopted.*

121. Mr. SCELLE said he would constitute a small minority.

122. Mr. HUDSON explained that the exercise by the coastal State of control and jurisdiction over the continental shelf did not prevent the laying of a pipeline by other States. Indeed it was often essential for an operator to have a pipeline. Hence the article should read:

"The exercise by a coastal State of control and jurisdiction over the continental shelf does not preclude the laying or operation of a pipeline or cable by other States."

123. Mr. ALFARO thought it would be better not to refer to other States. The party in question might be a private company.

124. Mr. HUDSON on second thoughts imagined a pipeline running from Brownsville (Texas) to Havana (Cuba). It might cross the Mexican continental shelf, and it would be necessary to state that "the exercise of control and jurisdiction shall not affect the laying of a pipeline".

125. He realized that his formula did not cover such an eventuality, and he suggested discarding it.

The meeting rose at 1.05 p.m.

## 115th MEETING

Monday, 2 July 1951, at 3 p.m.

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*Chairman:* Mr. James L. BRIERLY

*Rapporteur:* Mr. Roberto CORDOVA

*Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto

AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, 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.

**Régime of the high seas: report by Mr. François (item 6 of the agenda) (A/CN.4/42) (*continued*)**

### CHAPTER 11: CONTINENTAL SHELF (*continued*)

#### Article 3 (*continued*)

1. The CHAIRMAN referred to the text of article 3 (to be re-numbered article 5) adopted by the Commission at the previous meeting:

"The exercise by a coastal State of control and jurisdiction over the continental shelf does not affect the establishment or maintenance of cables or pipelines, subject to the right of the coastal State to take reasonable measures for the exploitation of the natural resources."

2. Mr. HUDSON suggested that it was quite useless to consider the question of pipelines. Doubtless the reason why Jonkheer P. R. Feith had dealt with them in his report for the International Law Association was that he was the adviser to a petroleum company. He himself had carefully read Mr. Boggs' article and the letter accompanying it and had come to the conclusion that the Commission was in no way obliged to deal with the question of pipelines outside territorial waters. The only circumstances in which a practical problem arose were when petroleum was extracted from an area of the continental shelf and the producer required pipelines to carry the petroleum to the shore. Mr. Yepes had mentioned the hypothetical case of a pipeline between Mexico and Canada.<sup>1</sup> The example was no more than a figment of the imagination. A pipeline of the sort would be 3,000 miles long. The longest pipeline in the world — in the Middle East — was 1,067 miles in length, and the longest pipeline in Canada was 1,023 miles long. Moreover those were overland pipelines. To conceive of a submarine pipeline from Mexico to Canada, via either the Atlantic or the Pacific, was surely fantastic. At the present time there were no pipelines under the high seas. The one between Dahran and Bahrein was inside territorial waters all the way, and hence did not raise any problem. It might of course be argued that possibly one day a technique would be evolved for laying pipelines in deep waters, but when one considered that pumping stations had to be installed at intervals along the pipeline (for example along the pipeline between Saudi Arabia and Lebanon there were five pumping stations and five others were being planned, all for a pipeline of 1,067 miles) it was a pertinent question how such stations would be constructed in the case of pipelines on the bed of the ocean.

<sup>1</sup> Summary record of the 114th meeting, para. 75.

3. Cables were a different matter. It ought to be sufficient in the case of cables to stipulate that waters superjacent to the continental shelf remained within the régime of the high seas. But a special provision could be added if necessary. He would like to ask Mr. François whether he was prepared to delete the mention of pipelines.

4. Mr. FRANÇOIS thought the text should be retained so far as submarine cables were concerned. The Commission was not drafting a convention at the moment, but establishing a number of principles. It did not greatly matter that the rules laid down were themselves derived from a general principle. He thought it would be useful to draw the attention of governments to the various problems to which the notion of a continental shelf might give rise.

5. With regard to pipelines, Mr. Hudson was much better informed than he was himself. Personally he did not think the matter of any practical importance, though in view of what Mr. Hudson had just said, he wondered whether pumping stations might not give rise to difficulties in the future. It might be preferable not to make any mention of pipelines in the article, and to state in the commentary that, as the consequences would be only hypothetical, the Commission had not felt it necessary to mention pipelines in the text of the article.

6. Mr. YEPES pointed out that the idea of a pipeline between Mexico and Canada was not an invention of his. It was a possibility contemplated by experts. He did not wish to force the example; but since even a country like Colombia had a pipeline 1,000 kilometres long, it was not inconceivable that in the future there might be pipelines of between 3,000 and 6,000 miles long.

7. Mr. AMADO saw no reason why the question should be mentioned in the report. He suggested that it be left until events made it a practical issue.

8. Mr. FRANÇOIS thought that the attention of governments might be drawn to the question, so that they could make their comments.

9. Mr. SCALLE thought that the provision in article 4 would be enough, since it covered the question of pipelines.

10. Mr. EL KHOURY, supported by Mr. CORDOVA, thought it would be better to keep the word "pipelines". After all, it was impossible to say what the future would bring. Supposing petroleum were extracted from below the continental shelf of Syria in the neighbourhood of Cyprus, and it was found convenient to transport it to Cyprus for refining. If the intention was to draw up general rules for future use, it would be better to leave the word "pipelines" as it stood. There seemed no reason to delete it in favour of merely mentioning it in a report.

11. Mr. HUDSON said that by so doing, the Commission would indicate that it had not ignored the question, and would make it clear why it had not been included in the text.

12. The CHAIRMAN saw no very great difference between the two methods.

*It was decided by 4 votes to 1 to delete the word "pipe-*

*lines" from the text of article 3, but to mention it in the comment.*

13. The CHAIRMAN read out the text as it stood, following the decision just taken:

"The exercise by a coastal State of control and jurisdiction over the continental shelf does not affect the establishment or maintenance of cables, subject to the right of the coastal State to take reasonable measures for the exploitation of the natural resources."

14. Mr. HUDSON thought the term "submarine cables" should be used, as in the Convention of 1884.

*It was so decided.*

15. He also considered that if the word "pipelines" were deleted, the last part of the text beginning with the words "subject to" should also be deleted, as they were not concerned with the establishment or maintenance of cables.

16. Mr. FRANÇOIS and Mr. ALFARO thought the last part of the text essential, on the grounds that the establishment of cables might hamper the exploitation of the continental shelf.

17. Mr. CORDOVA suggested the following wording:

"Subject to the right of the coastal State to take reasonable measures for the exploitation of the natural resources, the exercise by such coastal State of control and jurisdiction over the continental shelf does not affect the establishment or maintenance of submarine cables."

18. It was a text referring specifically to cables. It might be wrongly interpreted as constituting an exception to the general rule laid down in the original article 4 — which was not the case. It was a question merely of allowing the coastal State to decide who should have the priority.

19. Mr. HUDSON recalled that Mr. François had agreed to state in the comment that the question of submarine cables was in fact already dealt with in article 4. Admittedly he had supported the insertion of the words which he now wanted to have deleted. But on reflection he had felt that there was no point in keeping them, and that it would be better to explain the situation in the comment.

20. Mr. FRANÇOIS said that clearly the whole thing proceeded from the principle established in article 4, and if that fact were carried to its logical conclusion, there would be nothing left but that article, and the rest of the provisions would be included in the report. He thought it preferable to mention in the articles as well the main consequences arising out of the principle. He was in favour of keeping the latter part of the text beginning with the words "subject to".

21. Mr. HUDSON pointed out that in that case article 4 would have to be subject to the same reservation. The exploitation of the natural resources might be hampered by shipping.

22. The CHAIRMAN thought that, while the words were not absolutely essential, it might be desirable to keep them. There was nothing against doing so. He was in favour of turning the text round, as Mr. Córdova had proposed.

23. Mr. ALFARO was entirely in favour of Mr. Córdova's proposal.

24. Mr. HUDSON said he would not press his point if the Chairman and the Rapporteur preferred to keep the text.

*It was decided to retain the text in the form proposed by Mr. Córdova.*

#### Article 6

25. The CHAIRMAN observed that the words "outside the territorial waters" in the second line had been deleted.<sup>2</sup> He asked what were the seismic operations referred to.

26. Mr. FRANÇOIS explained that he was referring to a prospecting technique. He had borrowed the text from the International Law Association's report.

27. Mr. HUDSON explained that an instrument was used on the surface for recording earthquakes and thus locating the mounds on the sea-bed below which petroleum-bearing sand was to be found. Incidentally that technique alone was not sufficient.

28. Mr. SCELLE added that the question of seismic operations might arise not merely in connexion with the search for petroleum but in prospecting for other mineral resources. The question was whether it was to be made clear that the exploitation of the continental shelf must be carried out in such a way as not to prevent the exploitation of other submarine resources.

29. Mr. KERNO (Assistant Secretary-General), after hearing Mr. Hudson's and Mr. François' explanations, was no longer clear as to what the point was. The text started out with a general statement, after which it was explained that exploration and exploitation must not substantially interfere with shipping and fisheries. He could see the point of the proposal in regard to obstacles to shipping and pollution of waters; but he did not see why it should be necessary to make special mention of seismic operations.

30. Mr. HUDSON likewise saw no reason for the final phrase "or their disturbances by seismic operations". True, it was to be found in Mr. Feith's report, but he did not think it was accurate.

31. Mr. FRANÇOIS said that it was not merely in Mr. Feith's report, but in the report adopted by the drafting committee of the International Law Association.

32. Mr. HUDSON proposed the wording:

"The exercise by a coastal State of the right of control and jurisdiction over the continental shelf must not result in substantial interference with navigation along established traffic routes nor in pollution of the water for animal life."

33. Mr. CORDOVA asked why special mention should be made of established routes.

34. Mr. HUDSON explained that if any installation were set up on the surface of the water to exploit a well which had already been drilled, it must be laid down that no vessel had a right to navigate at that point.

Since the installation in question might be a matter of 100 sq. yards in area, a vessel could steer round it. But in the case of established traffic routes, the coastal State would be required, when exercising its right of control and jurisdiction as laid down for the purposes of exploiting the continental shelf, to avoid interfering with such traffic routes. The question of established sea routes would have to be taken up again when the subject of territorial waters was discussed. They must be taken into account, and he thought the word "established" could be kept.

35. Mr. FRANÇOIS said that if the Commission agreed to Mr. Hudson's proposal, it would be showing a more broad-minded attitude towards the exploitation of the continental shelf than the committee of the International Law Association. Mere deviation did not constitute substantial interference; one could only speak of substantial interference if navigation were hampered. He thought it would be enough to keep the words "substantial interference" without adding the reference to "traffic routes". If the words "traffic routes" were used, it would be argued that the provision did not apply in areas where there were no such routes.

36. Mr. HUDSON was willing to delete the words, which he had included in his text because they were to be found in the text proposed by the Rapporteur.

37. Mr. KERNO (Assistant Secretary-General) thought that all the members of the Commission were agreed that the régime of the high seas must be maintained as the general rule, but that an easement had been established in the interests of the coastal State, though the easement must not result in substantial interference with lawful activities on the high seas, namely shipping and fishing. He suggested the wording "in so far as it does not interfere substantially with shipping and fishing".

38. He saw no point in being more specific. In any case, he wondered whether there might not be other ill-effects besides pollution of the water. The noise of machinery might drive away the fish, for instance; examples might be mentioned in the comment.

39. At the request of Mr. YEPES, Mr. HUDSON amended his text to read: "... substantial interference with shipping or fishing".

40. Mr. ALFARO was in favour of adopting Mr. Kerno's suggestion.. It was always dangerous to include examples in an actual article. The examples could be given in the comment. He thought the article might read: "... substantial interference with navigation or fishing", and leave it at that.

41. Mr. SANDSTRÖM was quite prepared to agree to the use of the wording "navigation along established routes". It was reasonable enough to try to ensure that a right granted should not encroach on an established practice. But that argument would not hold good in the case of a practice which might grow up in the future.

42. He had realized what Mr. François was driving at. The previous articles had started out from the mere general principle of control and jurisdiction. Then, article 6 took up the question of exploration and exploitation. There were sound reasons for referring to more

<sup>2</sup> See summary record of the 113th meeting, paras. 47-48.

concrete measures of that kind; and he would like to see Mr. François' text kept.

43. Mr. HUDSON said he personally was quite willing. After all, article 2 spoke of "the exercise of the right of control and jurisdiction". He would be prepared to accept the wording: "the exploitation of the natural resources of the continental shelf must not create substantial interference...", or perhaps "the exercise by a coastal State of control and jurisdiction over the exploitation of the continental shelf...".

44. Mr. SCELLE did not understand the term "substantial interference". At what point did interference begin to be substantial? It was leaving a loophole for arbitrary action on the part of States. A powerful State would be able to indulge in substantial interference, whereas a minor State could not afford to commit the slightest interference. Any such provision was pointless unless the International Court of Justice were to be constantly intervening.

45. Mr. FRANÇOIS pointed out that if exploitation alone were mentioned, the impression might be given that the Commission did not have exploration in mind, in which case the article would not be applied satisfactorily.

46. In reply to an observation by the CHAIRMAN that the word "exploitation" included the notion of "exploration", Mr. FRANÇOIS, Mr. EL KHOURY, Mr. SPIROPOULOS, Mr. ALFARO and Mr. YEPES maintained that there could be exploration without exploitation, and that both words were necessary in article 6 as well as in article 2.

*It was so decided.*

47. Mr. YEPES pointed out that natural resources were not explored but exploited. What was explored was the sea-bed and subsoil.

48. Mr. HUDSON said that if the wishes of Mr. Yepes were to be met, the text would have to run as follows: "... exploration of the sea-bed and subsoil of the continental shelf and exploitation of its natural resources".

49. Mr. CORDOVA said the Commission was turning itself into a drafting committee. He suggested that it be left to the Rapporteur to draw up a text now that he had ascertained the views of the Commission.

50. Mr. YEPES thought that the Rapporteur should be given directives on a further point. He was thinking of Mr. Scelle's remarks concerning substantial interference. To forestall any difficulties which might arise, it might be as well to give a few examples, as Mr. François had done in the original text of the article, or as the International Law Association's report had done.

51. Mr. HUDSON said that the drawback there would be that the examples would appear to exclude other possibilities.

52. He requested the Secretariat to provide the members of the Commission with the amended text of the articles it had so far adopted. Some of the observations being made were only made because the members of the Commission did not have the adopted versions before them.

53. The CHAIRMAN asked Mr. François to submit a text at the next meeting.

#### Article 7

54. The CHAIRMAN thought the words "outside territorial waters"<sup>3</sup> should be deleted.

55. Mr. HUDSON thought that the article belonged to article 6, and saw no reason why it should be set out as a separate article.

56. He felt that sub-paragraphs (a) and (b) should be worded more generally: "that notice of such installations is given to all concerned and due regard maintained for warning apparatus".

57. The CHAIRMAN, supported by Mr. AMADO, thought that the wording of the text in question greatly depended on the wording of article 6, and that it would be well to wait and see what decision was taken in regard to article 6.

58. Mr. HUDSON, supported by Mr. YEPES, considered that notice should be given and warning apparatus maintained, whether the interference with shipping were substantial or not. The question was what minimum precautions must be taken. They must be specified, whatever was decided about article 6.

59. Mr. FRANÇOIS thought that the latter proposal was rather far-reaching. Should such measures be required even in waters where there was no shipping?

60. Mr. HUDSON said that if the general expression "traffic routes" were used, notice would have to be given to the users of such routes; but if no mention were made of shipping routes, there was no necessity to give notice to all and sundry. The expense involved would be unduly high. The special arrangements in the Persian Gulf for the upkeep of light signals were extremely expensive. Such notice would only have to be given in the case of traffic routes normally followed by shipping.

61. Mr. KERNO (Assistant Secretary-General) asked whether the use of the words "interested parties" did not already meet Mr. Hudson's objection. If there were no traffic routes, there would be no interested parties. It must of course be borne in mind that exploration and exploitation might create new sea routes.

62. Mr. HUDSON corroborated that statement, quoting the examples of Aruba and the coast of Saudi Arabia.

63. Mr. SANDSTRÖM wondered whether the precautionary measures in question ought not to be taken everywhere, even off the regular shipping routes. A vessel sailing by the point in question must equally have protection. A notification might be sent to governments.

64. Mr. SPIROPOULOS said that it was a question of general policy. Obviously if installations were set up at a given point in the sea they would be shown on navigators' charts, and that was all that was necessary. Hence the rule might be that the competent authorities in the various States should be notified.

65. Mr. FRANÇOIS said that he was sufficiently clear as to the views of the Commission to draft a revised text.

#### Article 8

66. The CHAIRMAN read out article 8 and the note to articles 7 and 8.

<sup>3</sup> *Ibid.*

67. Mr. HUDSON asked which were the countries referred to in the note. He wondered whether it referred to underwater drilling.
68. Mr. FRANÇOIS explained that it referred to drilling on dry land.
69. Mr. YEPES wondered whether the Commission was not going into too great detail. He thought it would be better to leave such matters to be dealt with by special police measures by States exploiting the continental shelf. However, he would not wish to stand in the way of the text being adopted.
70. Mr. HUDSON said there were two ideas embodied in the text. In the first place, States must be prevented from claiming that there was a belt of territorial water surrounding the installations on the grounds that such installations were in the nature of islands. He assumed that Mr. François had studied the legislation of Saudi Arabia on that point. Indeed, that legislation had given rise to a good deal of comment, and he thought that Saudi Arabia had been rather drastic.
71. Secondly, the installations must be protected. He felt that it would be going too far to include provisions covering non-permanent installations such as, for example, a platform established for two or three days.
72. Mr. FRANÇOIS argued that even there, protection was called for.
73. The CHAIRMAN said that all questions relating to territorial waters should be eschewed.
74. Mr. HUDSON considered that a safety zone of 500 metres was excessive. He did not think it was necessary to follow the International Law Association's report slavishly.
75. Mr. FRANÇOIS thought it would be a good thing to mention a zone of 500 meters in breadth so as to make it clear that the zone was to be very narrow and not something similar in extent to the territorial waters limit.
76. He did not regard it as a mere point of detail. It was most important to indicate whether the Commission felt that such installations, which were extremely costly, justified the establishment of a safety zone.
77. Mr. YEPES observed that the installations in question did not possess their own territorial waters. The safety question in the case in point was not a matter for the jurist but for the engineer.
78. Mr. EL KHOURY mentioned that, according to Moslem law, if a person sank a well in the desert, which was public property, no other person was entitled to sink a well within a radius of some 350 metre. In the present instance, the point was to prevent the establishment of a similar installation, or navigation or fishing, within a given radius.
79. Mr. AMADO thought the article was extremely important. Its purpose was to warn States having jurisdiction and control over such installations that they must not try to take advantage of the circumstances as a pretext for claiming rights similar to those deriving from territorial waters. All they could claim was the enjoyment of a safety zone, which was something recognized in international law. An island which came about naturally immediately acquired the attributes belonging to its very nature. In the present instance, nothing more was involved than a man-made structure and a safety zone. He could not see how so obvious a matter could give rise to discussion.
80. What principle was to be applied in determining the breadth of the safety zone? The report had adopted the figure of 500 metres, and he wondered whether there were any precedents in international law. The difficulty was that the Commission was dealing with an entirely novel provision. Possibly it would be wise not to mention any actual distance. The International Law Association had seen fit to fix the breadth of the safety zone at 500 metres. Should that figure be accepted, or should the breadth of the zone be left undetermined? He saw no objection to adopting the figure unless very strong arguments were forthcoming against it.
81. Mr. CORDOVA pointed out that, within the safety zone, the coastal State would have full jurisdiction. It was an exception to the principle that the waters in question came within the régime of the high seas. The Commission was laying down the principle that the coastal State would have jurisdiction and control over a given zone. The determination of the extent of the zone was a matter for technical experts.
82. Mr. FRANÇOIS said that the right of jurisdiction and control referred to must be restricted to the purpose intended, which was solely to protect the installations.
83. Mr. SCALLE entirely agreed with Mr. Amado. Unless precautions were taken, States would use the pretext of exploiting the continental shelf in order to set up installations sufficiently close to link them together and even to form a dyke, thus pushing its territorial waters a great distance seawards. Such a proceeding was by no means impossible, and must be guarded against. Napoleon had built a dyke off Cherbourg.
84. Mr. SPIROPOULOS said that the Commission was faced with two proposals. The more far-reaching proposal — Mr. Hudson's — favoured deletion of the whole of article 8, whereas Mr. François' proposal would lay down detailed rules covering every point. He personally considered that, now that the problem of the continental shelf had been tackled, the particular case in point must be settled.
85. The first part of Mr. François' text dealt with a special point. It stipulated that such installations must not be regarded as the equivalent of islands. That was surely obvious. It was feasible to create an island in shallow waters, but the article would state that that must not be done.
86. The second part of the text was equally justified. If provision was to be made for installations, regulations must be laid down for their protection. Hence a safety zone must be allowed for. It was a practical necessity, and must be protected. The coastal State could exercise its jurisdiction all round the installations.
87. As to the rights to be exercised in such zones, they would be such rights as were essential for the protection of the installations. He did not know whether it was desirable to go into detail and to define those rights.

It might be sufficient to call them "the rights necessary for the protection of such installations". A zone 500 metres in breadth, as proposed, struck him as reasonable. Possibly no mention might be made of a figure. But why not suggest one, say 500 or 800 metres? It would still be less than the width of the belt of territorial waters.

88. Mr. SANDSTRÖM liked the passage in the report which stated that installations could not be regarded as islands. The mention of such safety zones added an essential point to article 6. He had the impression that the creation of such safety zones implied some development of the law.

89. Mr. AMADO thought that there was some justification for fixing the distance in view of the fact that the interested parties were to be notified. They would be informed that an installation had been set up at such and such a point, and warned that within such and such a radius the area of the sea was under occupation. The figure could be 500 metres or some other distance, but a definite figure should be mentioned.

90. Mr. HUDSON read out the following text in which he had recast the ideas contained in articles 6, 7 and 8 of Mr. François' draft:

"The exploration of the continental shelf and the exploitation of its natural resources must not result in substantial interference with navigation or fishing.

"Due notice must be given to interests which may be affected of the construction of any installations above sea level, whatever their degree of permanence, and due means of warning of their presence must be maintained.

"No such installation shall have the status of an island for the purpose of delimiting territorial waters, but to reasonable distances safety zones may be maintained around such installations for their protection."

91. Mr. FRANÇOIS was quite willing to agree to the text proposed by Mr. Hudson, though he wondered whether it would not be as well to state in a comment that the extent of the safety zones should not exceed a matter of a few hundred metres.

92. Mr. YEPES was also in favour of Mr. Hudson's proposal, though he considered that the extent of the safety zone should be proportionate to the size of the actual installations and to the volume of shipping.

93. The CHAIRMAN and Mr. CORDOVA wondered who would be responsible for fixing any such proportion or such reasonable distances.

94. Mr. HUDSON suggested the coastal State, while Mr. EL KHOURY thought the interested parties would be more appropriate.

95. Mr. AMADO thought it would be better not to make any reference to the delimitation of territorial waters.

96. The CHAIRMAN held the opposite view. It was essential to make such a reference so as to avoid any misunderstanding.

97. Mr. KERNO (Assistant Secretary-General) thought Mr. Hudson's draft was excellent, as calculated to obviate a difficulty. Actually, article 8 as proposed by Mr.

François dealt with the control and jurisdiction exercised by a coastal State setting up installations of the kind envisaged in article 7. The expression "control and jurisdiction" was already to be found in article 2. But there, what was referred to was control and jurisdiction over the continental shelf, whereas in article 8 the control and jurisdiction concerned were those exercised over a stretch of water. Thus article 8 provided for a sort of easement over the régime of the high seas in favour of the coastal State, and there might be some confusion if the same expression were used in two different places.

98. Mr. FRANÇOIS, while pointing out that he had made it clear in article 8 that the control and jurisdiction in question were those "required for the protection of such installation", admitted that Mr. Hudson's text would avoid any confusion.

99. The CHAIRMAN suggested that the text submitted by Mr. Hudson be left with the Rapporteur, to be borne in mind when articles 6, 7 and 8 were drafted.<sup>4</sup>

*It was so agreed.*

#### *Article 9*

100. Mr. HUDSON found fault with the first sentence of Mr. François' text. The expression "interested in the same continental shelf" did not strike him as very happy, and he proposed that it be replaced by the following: "When the same continental shelf is contiguous to the territories of two or more States, boundaries of the area of the continental shelf should be fixed by agreement between such States."

101. Mr. CORDOVA pointed out that the sentence in question did not refer to a continental shelf contiguous to two or more States, but to continental shelves tangential one to another as for example those in the Persian Gulf. In his opinion there was not the slightest doubt that the extension below the sea of the frontier line between Mexico and the United States constituted the boundary between the continental shelf of the United States and that of Mexico.

102. Mr. AMADO read out the following passage from an article on "Further Claims to Areas beneath the High Seas" by Mr. Young, published in the *American Journal of International Law* (vol. 43 (1949), p. 790):

"In the Persian Gulf, in which there is, strictly speaking, no continental shelf, the claims have generally taken account of this fact and proceeded on a somewhat different theory, based on a concept of contiguity to the claiming State. This was the principle of the Saudi Arabian Royal Pronouncement of May 28, 1949. . . The formula there set forth has since been followed in actions by most of the British protected sheikdoms which lie along the Arabian side of the Gulf. . . It is fortunate that the claims so far advanced, by both Saudi Arabia and the sheikdoms, share a common approach. Each gives notice that some areas beneath the high seas off its coast are under its jurisdiction, but at the same time, it recognizes that boundaries must be determined on equitable principles by agreement with neighbouring Governments."

<sup>4</sup> See summary record of the 116th meeting, para. 106.

103. Mr. SPIROPOULOS considered that the case of two neighbouring States presented no difficulty. The boundary of the continental shelf over which each of them exercised control and jurisdiction was determined by a line perpendicular to the coast, at the point where the frontier between the two States reached the sea.
104. Mr. SANDSTRÖM said that, in his commentary on article 9, Mr. François had alluded to the Permanent Court of Arbitration's award relating to the sea frontiers between Norway and Sweden, and he explained that in Swedish private law, as a general rule the following principle was applied: where the waters extending in front of two properties had to be partitioned or divided, each owner took possession of the waters situated nearest his own territory. In the Permanent Court of Arbitration award, the boundary line had been taken as a line perpendicular to the coast at the point where the frontier between the two territories reached the sea.
105. By analogy one might take the demarcation line of the continental shelf as being a prolongation of the demarcation line of the territorial waters. There were, however, cases in which that would not be possible. In the case of Spain and France for example, where the coastline of the two countries formed an angle, the curve of the demarcation line of the continental shelf would be a diagonal.
106. Mr. CORDOVA suggested wording to the effect that the demarcation line between the continental shelf of contiguous States would be determined by the prolongation of the boundary line of territorial waters.
107. Mr. HUDSON pointed out a significant discrepancy between the two sentences constituting article 9. The first sentence was, as it were, the expression of a wish — the States interested in the same continental shelf should agree in fixing the boundaries of the part of the shelf belonging to each of them. In the second sentence, the Rapporteur endeavoured to provide a method by which the demarcation line could be determined in the event of the parties not reaching agreement. He thought Mr. François' text could stand, provided it was in the form of an expressed wish. After all, State proclamations were frequently in that form.
108. Mr. ALFARO thought the difficulty arose from the fact that Mr. François' text spoke of two or more States "interested in the same continental shelf". It would be better to put it that "where a continental shelf lies beyond the territorial waters of two contiguous States . . .". He would also like account to be taken of the case of two States whose coast lines faced each other.
109. Mr. SPIROPOULOS, supported by Mr. ALFARO, thought that the Commission should not speak of a common continental shelf. It would be better to say, in the case of contiguous States, that the boundary of the continental shelf is marked by the prolongation of the limit of territorial waters.
110. Mr. HUDSON asked what would happen if the States in question wished to establish a different boundary. Would it not be better to express the wish that the demarcation line should be fixed by agreement between the States?
111. Mr. SPIROPOULOS felt that the draft should fix the demarcation line, while at the same time allowing States, if they so desired, to establish it by mutual agreement. If they did not show any such inclination, however, the demarcation line of the continental shelf would automatically be the prolongation of the limit of territorial waters.
112. In the case of States whose coastlines faced each other and were separated by straits, say twice as wide as the limit of territorial waters, it might be agreed that half the continental shelf should belong to each of the two States, in the absence of some other division arrived at by mutual consent.
113. Mr. François' report was quite clear on that point, and all the members of the Commission were fundamentally in agreement on the question.
114. The CHAIRMAN was of a different opinion. The Commission should lay down the essential rule that it was the duty of States to reach agreement between themselves as to the demarcation line of their continental shelves.
115. Mr. SPIROPOULOS, supported by Mr. CORDOVA, did not agree. If States wished to establish the boundary line by common agreement, they might do so; but they should not be forced to proceed thus. The Commission should lay down the rule.
116. Mr. HSU thought that the course advocated by Mr. Spiropoulos, namely, prolongation of the boundary line of territorial waters, might lead to unfairness in the delimitation in the case of continental shelves of considerable extent.
117. Mr. SPIROPOULOS maintained that the geometrical problem involved would not give rise to any additional difficulty.
118. Mr. HUDSON took the example of the Persian Gulf, which had a continental shelf in the sense in which the Commission had defined the term. The waters were about 70 fathoms deep in most of the Gulf. Saudi Arabia and the Principality of Kuwait were two contiguous territories. Actually there was a neutral zone between them, but it could be disregarded for the sake of argument. There was a single continental shelf stretching in front of the two States as far as the coast of Iran opposite. If the demarcation line were traced between Saudi Arabia and Kuwait as Mr. François had suggested in article 9, the line would extend as far as the coast of Iran, while the demarcation line between the continental shelves of Saudi Arabia and Iran would be the median line between the two coasts.
119. The system advocated in article 9 struck him as inadequate, since in actual practice no demarcation of territorial waters was ever made. He knew<sup>5</sup> of only two cases to the contrary. A partial demarcation line had been fixed between the United States and Mexico.<sup>5</sup> The plotting of the line had in fact been the subject of a later agreement. In the case of the sea frontiers between Norway and Sweden referred to in the note to

<sup>5</sup> Treaty of Peace, Friendship, etc., signed at Guadalupe Hidalgo on 2 February 1848 (de Martens, *Nouveau Recueil général de Traités*, vol. XIV, p. 7).

article 9, the Permanent Court of Arbitration had adopted as demarcation line a line perpendicular to the general coastline. But that demarcation line did not constitute a prolongation of the land frontier. Such a prolongation might result in unfairness of delimitation if the land frontier met the coast at an angle. The arbitration award had been dictated by special considerations. He did not think that other States had adopted the method followed by the Permanent Court of Arbitration.

120. In the case of the Persian Gulf, there were several possibilities: either to prolong the land frontier, or to draw a perpendicular from the general line of the coast. Mr. Boggs, in his article on the delimitation of seaward areas,<sup>6</sup> put forward another suggestion, namely to draw a line equidistant from the territory of each of the States concerned. But that hardly seemed possible. At any rate it hardly seemed possible to prolong a crooked line.

121. Mr. SPIROPOULOS, on second thoughts, considered that it was impossible to find a satisfactory solution to the problem.

122. Mr. HUDSON said he had been studying the question for upwards of three years, and he was convinced that there were very few works on international law which dealt with it. The problem had been tackled mainly by geographers. The general tendency was to fix the limits by drawing a line perpendicular to the general coastline. There was no international law text which required States to accept a line constituting a prolongation of the line of demarcation of territorial waters. In any case, no such line existed either in law or in fact. To his knowledge, the sea frontiers between States had not given rise to any dispute with the exception of that between Norway and Sweden. No doubt Mr. Boggs could produce concrete examples in support of the method advocated by Mr. François. But he was still not convinced.

123. He was inclined to think, like Mr. Spiropoulos, that for the time being it was impossible to find a solution to the problem. One might perhaps state as follows: "Two or more neighbouring States to whose territory the same continental shelf is contiguous should (or may) establish boundaries in areas of the continental shelf by agreement between them." Some proclamations even stated that the establishment of such boundaries should be carried out on an equitable basis. For the time being it seemed impossible to go further than that.

124. Mr. YEPES, too, felt that the demarcation of the continental shelf should be fixed by agreement between the States. He cited the example of the delimitation of the continental shelf in the Gulf of Paria, which had been settled by agreement between Great Britain and Venezuela in 1942. The agreement was the first of its kind, and laid down the limit of jurisdiction of each of the parties. The demarcation line ran across the middle of the high sea area.

125. Mr. HUDSON pointed out that the treaty in question made no mention of the continental shelf, and

that the principle of the median line had not been applied in that treaty.

126. Mr. YEPES read out the following passage from the Secretariat memorandum on the régime of the high seas (A/CN.4/32, p. 57, mimeographed English text; para. 178, printed French text):

"This treaty" (Treaty of 26 February 1942 between the United Kingdom and Venezuela relating to the Submarine Areas of the Gulf of Paria) "marks a turning point in the history of the two uses of the continental shelf concept and the beginning of its application to the exploitation of natural resources, instead of as previously to the protection of fishing... The continental shelf concept... is not mentioned at all either in the actual text of the treaty or in the executive orders for its implementation."

127. Mr. FRANÇOIS said that, in making his proposal, he had felt that the course adopted by the Permanent Court of Arbitration could be used as a basis in international law. That viewpoint was challenged by Mr. Hudson, and possibly on good grounds. But unless that course were adopted, it was quite certain, as Mr. Spiropoulos had said, that it would be impossible to fix a boundary between two continental shelves unless agreement were forthcoming as to the demarcation of territorial waters.

128. Mr. CORDOVA pointed out that the United States and Mexico had settled satisfactorily the question of demarcation of their territorial waters, and the demarcation of the continental shelf should be effected in the same way as the demarcation of territorial waters. Possibly no such boundary line existed in a physical sense, but it unquestionably existed in a legal sense.

129. He was inclined to favour the idea put forward by the Rapporteur, that the prolongation of the demarcation line of territorial waters should be adopted in delimiting the continental shelf. That would solve the problem in regard to contiguous States.

130. Mr. HUDSON could not agree with Mr. CORDOVA's argument. The question was dealt with in the last few pages of the Secretariat memorandum on the régime of the high seas (A/CN.4/32). He had particularly favoured the concept put forward there (p. 109, mimeographed English text; paras. 337-338, printed French text) of a protective perimeter as "an indispensable adjunct to the idea of a demarcation of the continental shelf or of a demarcation of the areas allotted to the various States interested in the same shelf".

131. The CHAIRMAN thought the problem was worthy of careful consideration. Actually, it was a matter of geography rather than of law. It seemed to him impossible at the moment to draft a uniform rule which would be acceptable to all States.

132. Mr. HUDSON asked whether the Commission was prepared to report to the General Assembly on the question of the continental shelf.

133. Mr. FRANÇOIS thought that it was desirable, at any rate, to submit to the various governments a report on the question, accompanied by fairly lengthy comments.

<sup>6</sup> "Delimitation of Seaward Areas under National Jurisdiction", *American Journal of International Law*, vol. 44 (1951), pp. 240-266.

134. Mr. YEPES was entirely in favour of that course, in view of the complete novelty of the problem.

The meeting rose at 6.5 p.m.

## 116th MEETING

Tuesday, 3 July 1951, at 9.45 a.m.

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*Chairman:* Mr. James L. BRIERLY  
*Rapporteur:* Mr. Roberto CORDOVA

#### *Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, 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.

#### Régime of the high seas: report by Mr. François (item 6 of the agenda) (A/CN.4/42) (*continued*)

#### CHAPTER 11: CONTINENTAL SHELF (*continued*)

##### Article 9 (*continued*)

1. The CHAIRMAN said that he had just been re-reading the memorandum on the subject prepared by the Secretariat (A/CN.4/32), especially the concluding remarks on page 109 of the mimeographed English text (para. 339 of the printed French text): "in short the allotment should be made by agreements between the States concerned or by amicable arbitration, not by means of hard and fast rules for which the time is not yet ripe".

2. He found that a satisfactory conclusion. Any rule which the Commission laid down was bound to be arbitrary. It would be difficult for example to apply the principle of the median line in the Persian Gulf, since the line would pass through the territorial waters of the islands in the Gulf.

3. Mr. CORDOVA enquired whether the members of the Commission felt that, whatever method were used for determining the boundary of the continental shelf between two contiguous States, there was at any rate an understanding that the continental shelf of State A would terminate where it reached the sea-bed and subsoil below

the territorial waters of State B. That was one point. He would also like to know whether the Commission considered that when two States had defined by treaty or other agreement the boundaries of their territorial waters, it was to be understood that the same boundaries should be observed in respect of the continental shelf. There was for example the 1848 treaty between Mexico and the United States,<sup>1</sup> fixing the boundary between the two countries. In the Gulf of Mexico, the boundary went from the shore to a point three marine leagues out. Whatever system the Commission applied, if those two States had already accepted the principle in regard to their territorial waters, obviously the continental shelf beneath those waters up to a distance of three marine leagues would belong to Mexico or the United States respectively. At the previous meeting it had been argued that if there was an agreement, that agreement must be observed. He could not follow the Commission if it considered that the continental shelf of a given country could encroach on the sea-bed below the territorial waters of another country. From that point of view therefore, the boundaries of territorial waters had an effect on the continental shelf of contiguous States which must be taken into account, especially where the relevant questions had been settled by a treaty stipulating that the territorial waters of a State were delimited by a geographical line. In his view, treaties in such cases *ipso facto* delimited the continental shelves.

4. Mr. HSU said that the question was whether it was equitable to extend seawards the dividing-line between the territorial waters, since that line would vary according to the configuration of the coast. The dividing line would be relatively unimportant in the case of territorial waters, which were a narrow belt, but might take on great significance and cause injustice if applied to continental shelves which were sometimes of considerable extent. It was a problem which the Commission must deal with, for if it were left to the interested parties to determine the boundary-line of continental shelves, injustice would probably be done to the weaker State, and the stronger State would take the lion's share. Either the Commission could state that the continental shelf should be partitioned on an equitable basis, or it could go further and lay down precise rules.

5. Mr. SCELLE said he was sorry he could not entirely agree with the conclusions drawn in the Secretariat's memorandum (A/CN.4/32) to the effect that the continental shelf should be the subject of agreement between the two governments concerned. It was desirable that there should be agreement, but it might very well happen that there was none. The world was now living under a system of law which forbade the settlement of any dispute by force or the threat of force. He suggested that the Commission should state that, if two governments could not reach agreement as to the partition of the continental shelf, neither State was entitled to exploit it. They must either maintain the *status quo* or they would be under an obligation to refer the question to the International Court of Justice. He could not agree to stating bluntly that the two States must reach agreement.

<sup>1</sup> See summary record of the 115th meeting, footnote 5.

His was the pacific mode of settlement. The conclusion reached in the memorandum referred to was a confirmation of the dictum that might is right.

6. The CHAIRMAN pointed out that Mr. Scelle's attitude was not far removed from that of the memorandum. Admittedly the latter made no mention of the jurisdiction of the International Court of Justice, but it did state that, failing agreement, the question should go to arbitration.

7. Mr. SCELLE urged that the Commission state that explicitly.

8. Mr. EL KHOURY said that the International Court of Justice could not deal with such matters, since it had to base its decisions on existing law, and there was no existing law on the subject. He thought that the best way of solving the problem was for the parties to conclude an agreement. Failing agreement, they should be required to have recourse to arbitration with a view to settling their differences equitably without the necessity for falling back on existing law.

9. Mr. YEPES said that, on re-reading article 1,<sup>2</sup> he had noticed that all the difficulties encountered by the Commission in regard to the delimitation of the continental shelf arose because it had started out from a wrong premise. The Commission had started out from the geological concept of the continental shelf, and become involved in endless discussions on the dividing line between continental shelves, etc. What had actually happened was that the Commission had established a juridical notion of the continental shelf which was completely independent of the geological continental shelf. The latter was an extension of *terra firma*, whereas the continental shelf in the legal sense of the term was the sea-bed in areas where the waters did not exceed 200 metres in depth. It was a definition which could apply to the Baltic Sea or the Black Sea where there was no continental shelf proper. He did not think that in the present instance a geological standard which the Commission had not accepted and which was not valid as a legal concept, could be used for delimiting the continental shelf.

10. Mr. FRANÇOIS noted that all were in agreement on accepting the principle of delimiting the continental shelf and recognizing that it was not enough to stipulate that governments must reach agreement. The question was what was feasible at the present time. The Commission could not be expected to produce a complete set of rules governing the continental shelf. It was making a first attempt. The problem was largely dependent on the way in which the Commission dealt with the difficulties arising in connexion with territorial waters.

11. He suggested that study of the question be postponed for the time being until the Commission had settled the question of territorial waters. There could hardly be any drawback to that course, since it was unlikely that in the near future any dispute would arise between two States as to the delimitation of the continental shelf.

12. Mr. SANDSTRÖM supported Mr. François' proposal.

13. Mr. CORDOVA took it that, in the general view, the question could be settled either by agreement between the parties or by arbitration. Agreement was a satisfactory method. As to arbitration, unless it were compulsory, it was no solution. If one of two neighbouring States took measures for the exploitation of a part of the continental shelf which the other State considered as belonging to it, there would be disagreement, but there would be no obligation to resort to arbitration. Since there would be no legal principles to apply, the International Court of Justice would have no occasion to intervene.

14. He agreed with Mr. François. The Commission could not take a decision at present as it had not gone into the question sufficiently thoroughly, and because the question was closely bound up with the delimitation of territorial waters. The Commission should not attempt to delimit continental shelves before delimiting territorial waters.

15. Mr. HSU said that Mr. Córdova evidently feared that if the issue were to be settled by arbitration, the parties might decline to submit their difference to that procedure. If arbitration were to be one of the methods, it must be compulsory, otherwise it was no solution. That was a fundamental problem which the Commission must solve before it could claim that it had done its job. He proposed that the first sentence of article 9 be taken as a basis for discussion, and the following words added: "or failing agreement, by arbitration on a fair and equitable basis".

16. Mr. SCELLE said that the world was living under a system of law in which any method which involved recourse to political power was forbidden. Failing agreement, the parties must either have recourse to the International Court of Justice or to arbitration, or maintain the *status quo*. That meant that neither of the parties was entitled to exert pressure on its neighbour in order to exploit the latter's continental shelf. Supposing there were two States, the one possessing a small section of the continental shelf and the other a large section, and the latter could not gain access to its continental shelf without crossing the restricted area of shelf belonging to the former; it would not be entitled to put pressure on its neighbour on the grounds that it was being prevented from exploiting its continental shelf and that in the interests of the international community it must be allowed a right of way. Did anyone believe they were promoting peace by disregarding such questions? Surely it was more true to describe it as giving the stronger party the right to take advantage of his strength. The Commission must be more explicit and stipulate that in certain circumstances the *status quo* must be maintained, until such time as proper arrangements were made. Merely to exhort States to reach agreement was to leave the strong free to exert pressure on the weak.

17. Mr. AMADO said that the second Communications and Transit Conference held at Geneva in 1923 had gone deeply into the question of the industrial utilization of frontier rivers, and had drawn up a Convention

<sup>2</sup> See summary record of the 113th meeting, para. 118.

relating to the Development of Hydraulic Power affecting more than one State. Under that instrument,<sup>3</sup> which was in force among a small number of countries and territories (Austria, Danzig, Denmark, Greece, Hungary, Iran, Newfoundland, New Zealand, Panama, Thailand and the United Kingdom — including several of its colonies, protectorates and mandated territories) each State remained free, within the limits of international law, to carry out on its own territory any operations it considered desirable for the development of hydraulic power. But the contracting States concerned were to carry out conjointly at the request of any one of them an investigation into the development of available hydraulic power and agree on measures to be taken. At the Pan American conferences, the subject had given rise to profound differences of opinion. The Havana Conference of 1928 had been unable to reach agreement and had referred the question to the committee of jurists it had just set up. In 1932 that committee had submitted to the Pan-American Union a decision which it regarded as fundamental: "For the utilization of the waters of international rivers for industrial or agricultural purposes, it is essential to have agreement between the riparian States in cases where utilization or exploitation may have repercussions of any kind on the other bank if the river is contiguous to, or on the territory of the neighbouring State, if the river intersects the frontier". In the event of it being impossible to reach agreement, the Committee in question suggested in its report that the Pan-American Union should be asked to set up a committee of experts to study the various aspects of the question and to give an opinion, which would not be binding but which would embody data calculated to bring about agreement. A statement by the seventh Pan-American conference which met on 24 December 1933 expanded the contents of the report of the Permanent Codification Committee in Rio de Janeiro. On the basis of those principles, on 20 December 1933 Brazil and Uruguay had signed a convention establishing the legal status of their common frontier. The convention contained the following provisions: "Where there is a possibility that the installation of plant for the utilization of the water may cause an appreciable and permanent alteration in the rate of flow of a watercourse running along or intersecting the frontier, the contracting State, desirous of such utilization shall not carry out the work necessary therefor until it has come to an agreement with the other State". He thought the Commission might bear those precedents in mind.

18. There were countries where life was not entirely dominated by intensive industrial development. Brazil for example was a vast country as yet insufficiently populated, so that not all its territory was inhabited. It looked forward to an increase in population which could exploit the rivers situated in the uninhabited parts of its territory. If the principle of intensive exploitation were put into application immediately, there was a danger of not catering for future generations.

19. Mr. HUDSON, referring to the text he had proposed

for article 9 at the previous meeting,<sup>4</sup> submitted the following amended text:

"Two or more neighbouring States to whose territories the same continental shelf is contiguous, should establish boundaries in the area of the continental shelf by agreement."

20. The Commission's task was not to try to provide States with a way of settling any disputes that might arise among them. It was not for the Commission to stipulate that arbitration was compulsory. Its task was to draw up rules to facilitate the exploration and exploitation of the continental shelf. That was the conclusion arrived at in the Secretariat's memorandum (A/CN.4/32).

21. The CHAIRMAN said that the Secretariat's memorandum recommended recourse to arbitration.

22. Mr. HUDSON saw no point in recommending arbitration if there were no arbitral tribunal.

23. Mr. SCELLE considered that the text proposed by Mr. Hudson served no useful purpose. It amounted to informing States that if they did not agree they should try to agree.

24. Mr. HSU supported Mr. Hudson's proposal subject to the addition of the words: "Failing agreement, they shall have recourse to arbitration on a just and equitable basis."

25. The CHAIRMAN pointed out that that was precisely what Mr. Hudson did not mean.

26. The Commission should decide first of all whether it was in favour of some formula similar to Mr. Hudson's; and if so, whether it wished to add to that formula some provision concerning arbitration on the lines of that suggested by Mr. Hsu.

27. Mr. CORDOVA did not think that was the right approach. Mr. Hudson was putting forward a text which differed radically from that in the report, and Mr. Hsu was proposing an amendment to Mr. Hudson's text. In his opinion, Mr. Scelle's proposal should be put to the vote first as being the furthest removed from the version in the report.

28. There ensued a discussion as to the right procedure — whether Mr. Hudson's text should be treated as an amendment to article 9 or merely as an amendment to the first sentence of that article; and again, whether the first sentence of article 9 should be put to the vote first, then the second sentence, and finally the text as a whole.

29. Mr. YEPES proposed the following redraft of the article:

"In the event of agreement between the States interested in the same continental shelf proving impossible, it shall be compulsory to refer the matter to the International Court of Justice or to such other means of pacific settlement as may be agreed upon by the parties."

30. Mr. SPIROPOULOS said that the Commission had been discussing the same question since the previous meeting and had got no further with it. In fact, it had lost ground. In his opinion, the problem should be considered

<sup>3</sup> League of Nations, *Treaty Series*, vol. XXXVI, pp. 76-79.

<sup>4</sup> See summary record of the 115th meeting, para. 100.

in a general way. Could the Commission really hope to lay down rules for the delimitation of the continental shelf when there was little or no State practice in the matter, and when no solution had as yet been found for the problem in connexion with territorial waters, even though in that respect there was any amount of precedent and extensive literature? The Commission must adopt a fundamental decision. Was the continental shelf to be delimited or not? If it was, the rapporteur's proposal on the subject should be examined.

31. The Commission must specify what the interested parties must do in the event of their not reaching agreement. The problem only arose in those circumstances, Mr. François' view was a tenable one, and called for a decision. He had noted at the previous meeting that a number of members of the Commission expressed doubts. He did not believe that the procedure recommended by Mr. François would be adopted. Some more flexible system was called for, on the lines proposed by Mr. Hsu and Mr. Yepes, namely compulsory arbitration. Should that course be recommended? Once all the texts had been discussed, the Commission would be in a position to examine Mr. Hudson's version and to insert it into the articles already adopted. That proposal should be put to the vote last, since its practical value was negligible.

32. In short, the Commission should decide whether or not the continental shelf was to be delimited. If it was, they should take a decision on Mr. François' proposal, on Mr. Scelle's proposal, and on the proposal that arbitration be made compulsory.

33. Mr. EL KHOURY did not see the value of the first sentence of article 9, and was in favour of deleting it. Parties could not be compelled to reach agreement. The settlement of disputes was a matter for the judge. Article 9 should begin with the second sentence: "In the absence of agreement . . .", and the parties left free to resort to whatever pacific method of settlement they chose.

34. The CHAIRMAN said that the weight of opinion was in favour of examining first of all the second sentence of article 9 and deciding whether it was possible to establish a rule for the delimitation of continental shelves.

35. Mr. FRANÇOIS enquired whether the objection was valid merely in respect of delimitation as between neighbouring States. So far, there had been no question of States separated by sea. He thought such cases might be dealt with separately.

36. Mr. CORDOVA did not see where the difference lay. The question was still the delimitation of the continental shelf.

37. Mr. FRANÇOIS explained that the difference lay in the fact that in the case of neighbouring States, delimitation of the continental shelf would give rise to the same difficulties as the delimitation of territorial waters. Where States were separated by sea, there was no difficulty; the principle of the median line would apply, and there was no need to wait and see what solution would be found for the problem of territorial waters.

38. The CHAIRMAN asked the Commission to make up its mind first of all as to the second sentence of article 9.

*The principle laid down in the second sentence of article 9 was rejected by 7 votes to 4.*

39. Mr. EL KHOURY said that what he had voted against was the method of delimitation proposed.

40. Mr. AMADO, supported by Mr. EL KHOURY, suggested voting by stages. The Commission would decide first of all whether, failing agreement, the delimitation of continental shelves should be carried out by way of arbitration, and would then decide whether arbitration should be compulsory.

41. Mr. YEPES and Mr. CORDOVA were strongly in favour of making arbitration compulsory.

42. Mr. HUDSON said that any suggestion as to arbitration was bound to be nothing more than the expression of a wish. He was convinced that the principle of compulsion was an illusion, unless a tribunal were set up. He had only too often seen that method fail — e.g., in the case of the Locarno treaties between France and Germany.

43. Mr. SCELLE asked what procedure Mr. Hudson proposed in the event of the States concerned not reaching agreement.

44. Mr. HUDSON observed that the parties were required by Article 33 of the Charter to seek a solution for their differences by pacific means. It might perhaps be argued that the Charter was illusory, but it had been accepted and offered appropriate machinery.

45. Mr. SCELLE, supported by Mr. EL KHOURY and Mr. CORDOVA, pointed out that the implication would be that, failing agreement, there would be no exploitation of the continental shelf. That was the logical conclusion.

46. Mr. HSU noted that Mr. Amado had asked that the Commission proceed by two stages. Personally, he had not yet made up his mind what method he would support. He thought that at all events recourse should be had to arbitration, even if arbitration were not compulsory. Indeed, the parties would be forced to resort to arbitration, since otherwise they would be unable to explore the sea-bed. Hence, arbitration automatically became compulsory.

47. Mr. AMADO said he had proposed that the Commission take a decision in stages on the basic principle. He did not regard arbitration in the same light as Mr. Hudson. In his view, it was a matter of engineers taking measurements, drawing plans, etc. If the technicians did not reach agreement, the matter would be transferred to the legal sphere.

48. The CHAIRMAN put to the vote the principle of recourse to arbitration.

*It was decided by 10 votes to 2 to provide for recourse to arbitration in the event of the interested States not reaching agreement.*

49. Mr. SANDSTRÖM said he had voted against the proposal on the grounds that he saw no reason why, at the present stage, an attempt should be made to find a solution for any differences which might arise. The time was not yet ripe. One could quite well await whatever

decision was taken as to the delimitation of territorial waters. In principle, he was in favour of arbitration.

50. The CHAIRMAN pointed out that Mr. Yepes had submitted a text.<sup>5</sup>

51. Mr. ALFARO said that Mr. Yepes' proposal laid down the obligation to submit disputes to the International Court of Justice, with the option of recourse to any other pacific method of settlement. He did not see any point in adopting a text which laid down the obligation to resort to arbitration or any other pacific method of settlement.

52. Mr. EL KHOURY did not think that obligation could be established by offering a choice between two methods. One of the parties might be in favour of submitting the dispute to the Court, and the other in favour of arbitration. The obligation should be confined to one particular course.

53. Mr. HSU did not think the text provided a means of settling disputes, since it left the parties free to resort to any pacific means of settlement.

54. Mr. CORDOVA did not think the Commission could discuss Mr. Yepes' text, since it was not competent to decide that recourse to the International Court of Justice was compulsory. That would mean interfering with Article 36 of the Statute of the Court.

55. Mr. SPIROPOULOS suggested amending Mr. YEPES' proposal as follows:

"In the event of agreement between the States interested in the same continental shelf proving impossible, the matter may, at the request of one of the parties, be referred to the International Court of Justice, unless the parties decide to resort to some other means of settlement."

56. Mr. CORDOVA thought it would be better to state that there was an obligation to submit the question to the International Court of Justice.

57. Mr. SPIROPOULOS pointed out that, under Article 38 of its Statute, the International Court of Justice applied either "international custom, as evidence of a general practice accepted as law", or "the general principles of law recognized by civilized nations". In the present instance, since there was no such law to apply, there would have to be an addition to the text he had just proposed, to the effect that the Court would decide cases *ex aequo et bono* (see Article 38, 2).

58. Mr. AMADO thought it would be more logical to decide first of all as to the principle of compulsory arbitration; then to vote on Mr. Yepes' amendment, which introduced a new notion.

59. The CHAIRMAN asked the Commission to take a decision on the obligation to resort to arbitration.

*It was decided by 8 votes to 2, with 2 abstentions, to provide for compulsory arbitration.*

60. Mr. YEPES agreed to Mr. Spiropoulos' amendment to his own proposal.

*Mr. Yepes' amendment as modified by Mr. Spiropoulos was adopted by 6 votes to 5.*

61. Mr. ALFARO, reverting to the question whether it was advisable to state that the question "may" or "shall" be submitted to the International Court of Justice, put forward another proposal, namely, to state that the question "shall" be submitted to the International Court of Justice at the request of one of the parties.

62. Mr. CORDOVA said that Mr. SCALLE had stated that, in the event of no arbitration taking place, the *status quo* would continue between the interested States, and thus there would be no exploitation of the continental shelf. That appeared to be the only practicable course; he hoped therefore that the Commission would adopt it.

63. The CHAIRMAN pointed out that the Commission had decided that arbitration was to be compulsory.

64. Mr. SPIROPOULOS did not think it necessary to envisage a return to the *status quo*. The Court could after all make provisional arrangements.

65. Mr. SCALLE said he had not submitted any definite proposals; the return to the *status quo* was the logical legal consequence.

66. The CHAIRMAN suggested returning to the discussion of the first part of Mr. François' article 9 and Mr. Hudson's proposed amendment.<sup>6</sup>

67. Mr. YEPES wondered whether Mr. Hudson's amendment added anything to the text adopted by the Commission, which by implication embodied that proposal.

68. Mr. AMADO argued that Mr. Hudson's amendment added one significant point, namely, that States should establish boundaries in the area of the continental shelf.

69. Mr. FRANÇOIS had no objection to Mr. Hudson's amendment, but wondered what was to happen in the case of States separated by an arm of the sea.

70. Mr. HUDSON considered that there also the States concerned would be neighbouring States.

71. Mr. ALFARO suggested the wording: "States which are adjacent to or facing one another".

72. Mr. CORDOVA, supported by Mr. SPIROPOULOS and Mr. EL KHOURY, proposed that the word "neighbouring" be deleted.

*It was so decided.*

*Mr. Hudson's amendment as thus modified was adopted by 11 votes.*

73. Mr. HUDSON read out a text which he suggested might be substituted for the second part of article 9, laying down detailed rules in connexion with arbitration.

74. Mr. CORDOVA, supported by the CHAIRMAN, maintained that the Commission had no need to go into the finer details of the arbitration procedure. It should be enough to state that arbitration was compulsory.

75. Mr. SPIROPOULOS was afraid that the text read out by Mr. Hudson, was out of place in article 9. It would be appropriate in an arbitration treaty, but not in a treaty concerning the continental shelf.

76. Mr. YEPES reminded the Commission that the Convention on Genocide provided for recourse to the International Court of Justice, but did not go into all the details of the arbitration procedure.

<sup>5</sup> See para. 29 above.

<sup>6</sup> See para. 19 above.

77. The CHAIRMAN said that the Commission had provisionally adopted Mr. Yepes' text as amended by Mr. Spiropoulos. It did not seem to him essential that Mr. Hudson should submit his text in the form of an amendment to that of Mr. Yepes.

78. Mr. HUDSON said he had no strong views about submitting his suggestion in the form of an amendment.

79. The CHAIRMAN thought that in those circumstances the Commission should now take a decision on the amended article 9 as a whole.

80. Mr. CORDOVA pointed out that the Commission had accepted Mr. Hudson's text, which would constitute the first part of article 9, as well as Mr. Yepes' text as amended by Mr. Spiropoulos, which would constitute the second part. He saw no reason why it should now take a decision on the complete text consisting solely of those two amendments.

81. Mr. HUDSON formally requested that article 9 as a whole be put to the vote, so that he could express his disapproval of it.

82. Mr. AMADO observed that he had voted in favour of Mr. Hudson's proposal but against Mr. Yepes' proposal as amended by Mr. Spiropoulos.

83. The CHAIRMAN pointed out that under rule 89 of the General Assembly's Rules of Procedure, when parts of a text had been voted on separately, the text as a whole must be duly put to the vote. He therefore put to the vote the entire article 9 as amended.

*As 6 votes were cast in favour and 6 against, article 9 as a whole was rejected.*

84. Mr. HUDSON said that, in view of the equality of votes, the Commission should not decide lightly on so important an issue. Incidentally it had not yet taken a decision on Mr. Hsu's amendment recommending the addition to the text adopted by the Commission for the first part of article 9 of the words: "Failing agreement, they shall have recourse to arbitration on a just and equitable basis."

85. Mr. HSU observed that the amendment he had proposed had in fact never been discussed.

86. Mr. AMADO did not see how any compromise arrangement could be made on a basis which was not equitable.

87. Mr. SCELLE thought the discussion had lost all significance. He was sorry to have to abstain from taking part in the voting.

88. Mr. AMADO maintained that the complication had come about through Mr. Yepes' amendment. Most of the members had actually expressed their approval of the principle of compulsory arbitration. It was on the details that the differences of opinion had cropped up. Hence it would be wise to be content with the principle of compulsory arbitration, and not to try and solve all the problems at once.

89. Mr. SANDSTRÖM thought it might perhaps be a good thing to postpone study of the entire question of boundaries between continental shelves until the Commission took up the question of the delimitation of territorial waters. After all, the Commission could do no more than

admit that at present there was no rule of international law covering the subject. Hence it could be content with the text of the first sentence of article 9 as proposed by Mr. Hudson and approved by the Commission, and explain in the report why it had felt obliged to confine itself to that.

90. Mr. KERNO (Assistant Secretary-General) thought that as the Commission was divided, it should make an effort to reach agreement. Perhaps it would be better therefore to take up the question again at the next meeting. Meanwhile the members of the Commission might try to think out a formula embodying both the idea of recommending agreement and that of recourse to compulsory arbitration in the event of agreement not proving possible.

91. Mr. EL KHOURY proposed that the entire article 9 consist of the text proposed by Mr. Hudson — which had not given rise to any difficulty — along with the following words: "or failing agreement, by arbitration". The Commission had after all decided by a considerable majority in favour of compulsory arbitration.

92. Mr. AMADO, Mr. FRANÇOIS, Mr. CORDOVA and Mr. YEPES considered the proposal as quite acceptable and a satisfactory way out of the difficulty.

93. Mr. HUDSON, supported by Mr. SPIROPOULOS, was against the use of the word "compulsory".

94. The CHAIRMAN pointed out that the Commission would thus be back at Mr. Hsu's amendment.

95. Mr. HSU said it was clear that the Commission was not succeeding in agreeing on any text. He did not consider it necessary to use the word "compulsory" unless a clear definition were given as to what it meant.

96. Mr. CORDOVA could not understand Mr. Hsu's attitude, in view of the fact that the Commission had decided in favour of compulsory arbitration.

97. Mr. HUDSON said that he had come to the conclusion that it would be better to delete article 9 entirely. It was out of the question to force States which were satisfied with conditions as they stood to go to the trouble of determining the boundaries of the continental shelf by agreement or arbitration. He thought Mr. el Khoury's proposal went much too far.

98. Mr. SCELLE, supported by Mr. SPIROPOULOS, maintained that the original text of article 9 had never implied that States should be required to reach agreement as to the delimitation of their respective parts of the continental shelf unless they found it necessary.

99. Mr. CORDOVA agreed. The important point, however, was what was to happen if the parties did not reach agreement. The only way out of the difficulty was compulsory arbitration.

100. The CHAIRMAN asked the Commission to take a decision on Mr. el Khoury's proposal, by which article 9 would read as follows:

"Two or more States, to whose territories the same continental shelf is contiguous, should establish boundaries in the area of the continental shelf, by agreement, or failing agreement, by compulsory arbitration."

101. Mr. HUDSON proposed that the word "compulsory" be omitted.

*It was decided by 6 votes to 5 to keep the word "compulsory".*

*Mr. el Khoury's proposal was adopted by 7 votes to 4.*

102. The CHAIRMAN said that his reason for voting against Mr. el Khoury's proposal was that in his opinion the Commission could not lay down a stipulation as to compulsory arbitration in a document of the kind it was drafting. If it did, it ought to enlarge on the procedure which would apply.

103. Mr. HSU and Mr. HUDSON said they had voted against it for similar reasons.

104. Mr. SPIROPOULOS said that the reason why he had voted against Mr. el Khoury's proposal was that he considered the word "compulsory" to be meaningless in that context.

105. Mr. HUDSON pointed out that the word "should" indicated that it was nothing more than a recommendation.<sup>7</sup>

*Articles 6, 7 and 8 (resumed from the 115th meeting)*

106. The CHAIRMAN asked the Commission to turn to the new text proposed by Mr. Hudson to replace articles 6, 7 and 8.<sup>8</sup> Mr. François had now amended it to read as follows:

"The exploration of the continental shelf and the exploitation of its natural resources must not result in substantial interference with navigation or fishing. Interested parties, which may be affected by the construction of any permanent or non-permanent installations, must be duly notified in advance of the intended constructions, and due means of warning of their presence must be maintained.

"No such installations shall have the status of an island for the purpose of delimiting territorial waters, but to reasonable distances safety zones may be instituted around such installations, where the necessary measures for their protection may be taken."

107. Mr. FRANÇOIS explained that he had retained the words "The exploration of the continental shelf and the exploitation of its natural resources." If those expressions were accepted, the text of some of the earlier articles would have to be changed accordingly. He had also adopted the words "in advance", which were not in Mr. Hudson's version. The words seemed to him very important. Again, he had replaced the word "interests" in Mr. Hudson's text by the words "interested parties" which seemed to him preferable.

108. Mr. HUDSON suggested the expression "groups whose interests".

109. Mr. FRANÇOIS thought the expression was not very clear. Governments for example ought not to be excluded.

110. Mr. HUDSON said that the expression "groups whose interests" would cover navigators etc. as well as governments. He had hesitated for a long time about the words "in advance". It was not always possible in operations for the exploration of the continental shelf to ascertain precisely where the exploitation would be carried out. If those words were introduced into the text they would make it impossible in practice to carry out such explorations. Moreover, navigators' charts were brought up to date every year, so that the position of installations, whether permanent or otherwise, could be marked exactly on such charts without the necessity for notifying the interested parties in advance.

111. The CHAIRMAN suggested studying sentence by sentence Mr. Hudson's new text as amended by Mr. François.

*First sentence*

*The first sentence was adopted by 10 votes.*

*Second sentence*

112. *Mr. Hudson's proposal for the deletion of the words "in advance" was adopted by 8 votes, thus entailing the consequential deletion of the word "intended".*

113. Mr. HUDSON proposed that in the French text the word "constructions" be replaced by "installations".

*It was so decided.*

114. Mr. EL KHOURY proposed that the words "permanent or non-permanent" be deleted.

*The proposal was adopted by 10 votes.*

115. Mr. HUDSON was convinced that the text of the sentence could be improved. He did not like the expression "interested parties", for example.

116. Mr. YEPES thought the Commission might instruct the Special Rapporteur to try to find a better way of putting it.

117. The CHAIRMAN asked the Commission to take a decision on the amended text of the second sentence, which now read as follows:

"Interested parties, which may be affected by the construction of installations, must be duly notified thereof and due means of warning of the presence of such installations must be maintained."

*The second sentence was adopted by 9 votes.*

*Third sentence*

On a proposal by Mr. HUDSON, it was *decided* to replace the word "instituted" by the word "established".

*The third sentence was adopted as thus amended.*

*The entire text to replace articles 6, 7 and 8 was adopted as thus amended.*

The meeting rose at 1 p.m.

<sup>7</sup> See summary record of the 116th meeting, para. 3.

<sup>8</sup> See summary record of the 115th meeting, para. 90.

## 117th MEETING

Wednesday, 4 July 1951, at 9.45 a.m.

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*Chairman:* Mr. James L. BRIERLY  
*Rapporteur:* Mr. Roberto CORDOVA

*Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, 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.

**Régime of the high seas: report by Mr. François (item 6 of the agenda) (A/CN.4/42) (continued)**

## Documentation

1. Mr. HUDSON wished to know whether the documentation which the Secretariat was to supply on the question of the régime of the high seas would soon be available to members. He himself regretted having been compelled thus far to discuss that important question without the help of all the relevant documentation.

2. Mr. LIANG (Secretary to the Commission) said that the documentation in question, which had been promised the previous year, consisted of a collection of laws, rules and conventions relating to the régime of the high seas. Part 1 dealt with the continental shelf, contiguous zones and the policing of the high seas and Mr. François had been given a typewritten copy of it. The documentation was now in the hands of the printers, but publication had been delayed by technical difficulties. He hoped it would be possible to distribute it within the next month or two.

## CHAPTER 11: CONTINENTAL SHELF (continued)

## Article 9 (resumed from the 116th meeting)

3. Mr. HUDSON noted that the word "compulsory" appeared in the text of article 9, as provisionally adopted at the previous meeting, and which had just been circulated to members. In his opinion the use of that word in the article in question was nonsensical.

4. Mr. KERNO (Assistant Secretary-General) was going to say the same thing. The word "compulsory" could

not, in fact, be used in a sentence which already included the word "should". Again, if the clause in question was to be included in a convention having the force of law as far as the States signing it were concerned, the word was useless. Finally, the word "shall" should be substituted for "should".

5. Mr. SPIROPOULOS was of the same opinion. As he had explained at the meeting on the day before, he had voted against the inclusion of the word "compulsory" because he considered that its use in the text in question was absurd.<sup>1</sup> Besides, it was impossible to obtain an arbiter's ruling if one of the parties to the dispute refused to co-operate. What could be done was to obtain a decision of the International Court of Justice, provided it had jurisdiction under the convention.

6. Mr. CORDOVA was surprised to see the Commission constantly reverting to the same questions. He did not think that it was possible to reverse a decision once taken.

7. The CHAIRMAN shared the minority opinion on the article in question, but, like Mr. Córdova, felt that it was not possible to reverse a decision.

8. Mr. YEPES said that the discussions at the previous day's meeting had clearly shown the necessity of studying Mr. Scelle's report on arbitration (A/CN.4/46) at the earliest possible moment.

9. While entirely at the Commission's disposal, Mr. SCELLE considered that it would not be possible to study more than a small part of his report.

10. Mr. FRANÇOIS remarked that doubtless Mr. Hudson did not wish to reopen the whole question, but was only suggesting that article 9 be redrafted.

11. Mr. HUDSON wanted to delete the word "compulsory". To Mr. Córdova, who suggested substituting "shall" for "should", he said that that change would be useless, because a State could not be compelled to accept arbitration.

12. According to Mr. FRANÇOIS and Mr. CORDOVA, Mr. Hudson was thinking of something more fundamental than a redraft.

13. Mr. AMADO believed that, as arbitration was the only other solution, it became *ipso facto* compulsory.

14. Mr. LIANG (Secretary to the Commission) had read the text in question with great care and, in his opinion, it did not make sense. The difficulty arose from the fact that there was confusion between two ideas. The word "arbitration" lacked precision. Prior agreement by the States concerned for recourse to arbitration was a prerequisite for any such procedure. If, on the other hand, it were stated that arbitration was compulsory, it became by that fact automatic. It was therefore a question of principle rather than one of wording. The majority's wishes had not been clearly expressed. He proposed that it be specifically stated that, failing agreement, States were under the obligation to submit their dispute to arbitration, even where there was no prior agreement to that effect. Unless that were done the article would remain obscure and lend itself to criticism by the scientifically-minded.

<sup>1</sup> See summary record of the 116th meeting, para. 104.

15. According to Mr. ALFARO, it was not a question of knowing whether the draft under consideration was to become a convention or not. The whole of the Commission's work in regard to the progressive development of international law led up to the establishment of conventions. Should the General Assembly approve the principles adopted by the Commission in regard to the question of the continental shelf, the draft would result in a convention, rather than in a simple declaration or recommendation.

16. As regards the compulsory character of arbitration, he considered that, where two or more States had accepted the principle of compulsory arbitration, the agreement was not for the purpose of expressing their willingness to arbitrate, but for the specific enumeration of the questions at issue. A number of treaties and conventions contained provisions as to the manner in which the arbitral tribunal should be constituted, when one of the parties to the dispute took no action. At the moment, however, the Commission was only stating the principle of compulsory arbitration, and not an arbitration procedure.

17. Mr. HSU recognized that the majority of the Commission were in favour of the concept of compulsory arbitration, but he felt that it might, perhaps, form the subject of a commentary.

18. The CHAIRMAN did not consider it advisable to reopen the discussion on that question, unless one of the members of the majority were anxious to reverse his vote.

19. Mr. YEPES remarked that the following formula, which was to be found in the section of Mr. François' report dealing with the resources of the sea, might be acceptable: "If a State considers that its interests have been unfairly injured . . . and if the two States are unable to reach agreement on the subject, the dispute shall be submitted to the International Court of Justice."<sup>2</sup>

20. Mr. FRANÇOIS proposed the wording: "Failing agreement, the dispute shall be submitted to arbitration."

21. Mr. YEPES supported Mr. François' proposal but considered that the phrase "by the International Court of Justice" should be added.

22. Mr. EL KHOURY said that the votes cast against the inclusion of the word "compulsory" had not resulted from any dislike of the concept itself, but had been due to the fact that the members concerned had considered that it might offend the dignity of States. Nevertheless, a State refusing to reach agreement had to be put under the obligation of submitting to arbitration.

23. Mr. SPIROPOULOS proposed another formula: "Failing agreement, the parties are under the obligation to have boundaries fixed by arbitration." He considered that the Commission should provide for the contingency of one party refusing to submit the dispute to arbitration.

24. Mr. FRANÇOIS and Mr. YEPES withdrew their proposals in favour of that of Mr. Spiropoulos.

*Mr. Spiropoulos' proposal was adopted by 10 votes to 2. Additional article proposed by Mr. Yepes*

<sup>2</sup> A/CN.4/42, p. 37 (mimeographed English text); para. 80 (printed French text).

25. Mr. YEPES proposed that the draft under consideration be completed by the addition of a new article reading:

"The rights of control and jurisdiction referred to in the present Chapter belong, up to a distance of twenty miles beyond the coast, to all coastal States, even if they do not possess a continental shelf in the geological sense."

26. His reasons for suggesting that additional article were that, at its second session the Commission, after having accepted the first part of a proposal by Mr. Hudson establishing the right of control and jurisdiction, had, by 6 votes to 4 with 2 abstentions, adopted a formula proposed by Mr. Brierly defining the scope of that part in the following terms: "The area for such control and jurisdiction will need definition but it need not depend on the existence of a continental shelf."<sup>3</sup> That meant that in the previous year the Commission had undertaken to do something for States that did not possess a continental shelf in the geological sense.

27. Again, in its report to the General Assembly on its second session, the Commission had said that "it would be unjust to countries having no continental shelf if the granting of the right (of control and jurisdiction) were made dependent on the existence of such a shelf".<sup>4</sup>

28. The Commission had, therefore, given a formal undertaking to advocate provisions for the benefit of States that did not have a continental shelf. Furthermore, the prevailing trend in Latin American countries, and even in the whole of America, was for an extension of State control over territorial waters to the waters beyond. Without being qualified to interpret President Truman's proclamation, he considered that it amounted to such an extension.

29. In his opinion the time had come to fulfil the Commission's promises of the preceding year and that was why he had drafted the article he had submitted to the Commission. That article, moreover, was based on a proposal of the French branch of the International Law Association, and in view of the importance of that branch, he felt that his proposal should receive very careful consideration.

30. Mr. HUDSON maintained that, in adopting article 1 of Mr. François' draft, the Commission had, in fact, complied with Mr. Yepes' wishes, since shallow waters were included in the definition of the continental shelf contained in that article.

31. Mr. YEPES claimed that the article in question did not cover the cases to which his proposal referred. Chile and Peru, for instance, with deep water immediately adjacent to their coasts, had neither a continental shelf nor shallow waters.

32. Mr. HUDSON admitted that the definition in article 1 was not, in fact, applicable to the two countries in question. But it would be of no help to them to grant them a right of control and jurisdiction over the

<sup>3</sup> See summary record of the 67th meeting, para. 75.

<sup>4</sup> *Official Records of the General Assembly, Fifth Session, Supplement No. 12 (A/1316)*, para. 198.

sea-bed, as it was impossible to exploit the subsoil at such depths.

33. Mr. FRANÇOIS did not understand Mr. Yepes' point of view. The latter was mistaken in saying that shallow waters were not included under the definition given in article 1. In his proposal Mr. Yepes was speaking of something quite different, as he wished all States to have a right of control and jurisdiction up to a distance of twenty miles from the coast, even though there were no continental shelf or shallow waters off their shores. That was exactly what the French branch of the International Law Association had proposed and the Commission had rejected.

34. Mr. Yepes had omitted to say that, in the very paragraph of the report on its second session quoted by him, the Commission had stated that "where the depth of the waters *permitted exploitation* (the right of control and of jurisdiction) should not necessarily depend on the existence of a continental shelf". He denied that the Commission had departed from the text it had adopted the year before.

35. Again, exploitation of the continental shelf was technically impossible at a depth of over 200 metres. No continental shelf could therefore be found at a distance of twenty miles from the coast.

36. He regretted to have to say that Mr. Yepes' proposal was not acceptable.

37. Mr. YEPES once more recalled that the Commission had expressed the opinion that it would be unjust to countries having no continental shelf, if the granting of the right of control and jurisdiction were made to depend on the existence of such a shelf. He called on the Commission to make good its undertaking.

38. Mr. EL KHOURY pointed out that Mr. Yepes' proposal was identical with the one he himself had put forward, and which the Commission had rejected. That proposal was for the establishment of a minimum distance for the delimitation of the continental shelf.<sup>5</sup> In his opinion the adoption of Mr. Yepes' proposal could do no harm whether the sea-bed was exploitable or not.

39. Mr. AMADO recalled that, at the Commission's 67th meeting, Mr. Brierly had been chosen as mediator on the question whether the right of control and jurisdiction depended on the existence of a continental shelf. Mr. Brierly had said that if the Commission were to confer the right of control and jurisdiction exclusively on countries which had a continental shelf, it would be committing an injustice towards those which did not have one. It was he, again, who had suggested that the area over which the right could be exercised need not depend on the existence of a continental shelf.<sup>6</sup>

40. It should be borne in mind that technical progress might one day make it possible to exploit the sea-bed at great depths.

41. Mr. HUDSON considered that Mr. el Khoury's suggestion might be studied when the Commission came

to examine the question of territorial waters. He himself could not conceive of States being granted a right of control and jurisdiction for purposes of exploiting the continental shelf, in cases where there was neither a continental shelf nor any possibility of exploitation.

42. Mr. EL KHOURY remarked that he had never considered extending the right of sovereignty over territorial waters up to twenty miles.

43. Mr. CORDOVA considered that the Commission was dealing with a very difficult question. By imposing easements on the principle of the freedom of the high seas in favour of States able to exploit the sea-bed, it was, in practice, merely endorsing the proclamations of certain States, particularly American States. There was however no valid legal basis for such a course. It disregarded the technical possibilities of the future. In his opinion all coastal States had, to a certain degree, the right of exploiting the sea-bed.

44. In the view of Mr. AMADO, the Commission would be taking a very serious and dangerous step if it decided to grant the right of control and jurisdiction to all countries.

45. The CHAIRMAN wished to clarify his statements of the preceding year. What he had wished to say was that if a State had shallow waters off its coasts, but no continental shelf in the geological sense, it should not, merely on that account, be deprived of the right to exploit the natural resources of the sea-bed. States in that position should be given the same treatment as those possessing a continental shelf in the geological sense. It had by no means been his intention to suggest that unfavourable geological conditions, imposed on States by nature, could be remedied by legal enactments. It was completely useless to grant rights of control and jurisdiction to Chile, for instance, which had neither a continental shelf nor shallow waters off its coast.

46. Mr. HSU said that at the time of the discussions of the preceding year, the members of the Commission had not been very sure what definition of the continental shelf they proposed to adopt. In his opinion the one the Commission had adopted the present year was much more equitable. No useful purpose would be served by fixing, as Mr. Yepes had proposed, a distance up to which coastal States could exercise rights of control and jurisdiction, if they were unable to exploit the bed and subsoil of the sea. It would however be justifiable to grant such a right to the States bordering the Persian Gulf, since that gulf was not very deep. The same thing applied to the Gulf of Po Hai in the Far East and to a number of other shallow areas — the sea-bed and subsoil of which might be exploited in the future. The equitable rule was that adopted by the Commission for article 1.

47. Mr. SCELLE had been very much impressed by Mr. Córdova's statement. In his opinion the 200 metre rule, adopted by the Commission, was actually valueless. It was known that it was, at the moment, impossible to exploit the sea-bed at a depth of more than seventy metres. Why, then, had the limit of 200 metres been adopted? If Chile for instance, whose coasts were

<sup>5</sup> Summary record of the 113th meeting, paras. 74, 75 and 107.

<sup>6</sup> See summary record of the 67th meeting, para. 65.

washed by very deep waters, succeeded in finding a means of access to submarine resources from its coasts why should she be prevented? Why make an exception in favour of countries with shallow coastal waters? The entire fabric of the continental shelf seemed to him completely artificial. Furthermore, he was afraid it served the purposes of special interests instead of corresponding to a legal concept, or a geological or scientific fact.

48. Mr. HUDSON replied that the 200-metre rule had been adopted because it conformed to a specific geological formation found along many coasts. It was known, moreover, that it was for the time being impossible to exploit the sea-bed at a greater depth and was not expected that such exploitation would be possible in the future.

49. Mr. AMADO again referred to the discussions at the Commission's 67th meeting and observed that all the members had found the question perplexing. Thus Mr. Sandström had asked why Sweden, for example, a country without a continental shelf, should not have the right of exploring and exploiting the subsoil of the Baltic, in so far as, by so doing, she did not prejudice the freedom of the seas, particularly from the point of view of navigation and fishing.<sup>7</sup>

50. He himself would be very glad to find a solution to the problem, but he wondered whether Mr. Yepes' proposal, which amounted to granting all States a right of control and jurisdiction by extending the zone of territorial waters into the high seas, constituted a satisfactory solution. Supposing the twenty-mile limit were acceptable to States that did not possess a continental shelf, it would be very necessary to add a provision safeguarding the régime of the high seas. Such an exception to the freedom of the high seas required a great deal of justifying.

51. In reply to questions by Mr. Scelle, Mr. SANDSTRÖM said that there was no question of extending easements to the régime of the high seas beyond what was necessary for the purpose in view, which was, specifically, to enable the exploitation of the subsoil. The 200-metre limit went far beyond the existing possibilities of exploitation, but made adequate provision for future developments over a considerable period. They must not go farther than that.

52. Mr. SCELLE, on the other hand, was in favour of going much further. In defining the continental shelf from the legal angle, it was necessary to take into account its resources, which should be exploited in the interests of the international community and not with a view to making profits for some company or other. In his opinion, all States enjoying access to submarine resources from their coasts, or from their territorial waters, should have the right to exploit such resources, irrespective of depth or distance. In his opinion, what was required was an abstract definition of the right of States to exploit all resources of the sea.

53. Mr. FRANÇOIS repeated that the 200-metre rule did not have the arbitrary character attributed to it by Mr. Scelle. Geologically, the continental shelf could not, in general, extend beyond a depth of 200 metres, as it

then reached the continental slope. That was the reason for the adoption of a depth of 200 metres. Should subsequent technical developments make exploitation possible at greater depths, the rules could be revised.

54. Mr. CORDOVA was under the impression that, by making an exception in favour of countries which did not possess a continental shelf, but did have shallow waters, the Commission was favouring certain selfish interests. In his opinion the Commission should aim at a higher ideal, and grant all coastal States, without exception, the right to exploit the natural resources of the sea-bed off their coasts.

55. Mr. YEPES wished to answer Mr. Brierly's charge that his proposal sought to correct inequalities imposed by nature. By approving article 1, the Commission had adopted, for the benefit of countries which did not possess a continental shelf, a criterion other than that of the continental shelf, to wit, that of shallow waters. But it now refused to take similar action in favour of countries with very deep coastal waters. In his opinion, that was contradictory.

56. In reply to Mr. François' statement to the effect that the continental shelf did not, in general, extend beyond a depth of 200 metres, he would say that there were, in fact, three continental shelves. The first extended to a depth of 200 metres; beyond it came another descending to a depth of 600 metres, but still considered as an extension of the land; beyond that, and extending to a depth of approximately 1,000 metres, there was a third continental shelf.

57. In practice, exploitation of the continental shelf was at the moment restricted to a depth of approximately 200 metres, but who could say what the position would be in 100 years' time?

58. Mr. EL KHOURY proposed the substitution in Mr. Yepes' text of the words "twenty miles beyond territorial waters" for the words "twenty miles from the coast". In reply to a question by Mr. ALFARO, he maintained that the above provision would not affect the régime of the high seas.

59. Mr. YEPES accepted the amendment.

60. Mr. CORDOVA wanted to know whether a State whose continental shelf extended beyond the suggested distance of twenty miles would have the right to exploit the whole of the shelf, if it were materially possible to do so.

61. Mr. EL KHOURY replied in the affirmative, but again maintained that the régime of the high seas would not be affected thereby.

62. Mr. HSU also wished to propose as an amendment to Mr. Yepes' proposal, that the last part of the sentence be modified to read: "to all the coastal States which do not possess a continental shelf as defined in article 1".

63. Mr. YEPES accepted Mr. Hsu's amendment.

64. Mr. FRANÇOIS pointed out that the objections had still not been met. There might be a State with a narrow continental shelf. Was that State to have rights of control and jurisdiction up to a distance of twenty miles, even though the continental shelf, in the legal sense of the term, did not extend so far? There was

<sup>7</sup> *Ibid.*

no purpose in accepting a provision which revived all the difficulties which the Commission had already disposed of. He could not urge too strongly that Mr. Yepes' and Mr. Hsu's proposal be not adopted.

65. The CHAIRMAN read out Mr. Yepes' proposal as amended by Mr. el Khoury and Mr. Hsu:

“The rights of control and jurisdiction referred to in the present chapter belong, up to a distance of twenty miles beyond territorial waters, to all the coastal States which do not possess a continental shelf as defined in article 1.”

*The proposal was adopted by 6 votes to 5.*

66. Mr. AMADO explained that he had abstained because the sense of the proposal was not clear to him.

67. Mr. SCELLE explained that he had voted against the proposal because he did not see why the distance should be fixed at twenty miles.

68. Mr. HUDSON said that the adoption of such a text deprived the notion of a continental shelf of all meaning.

69. A discussion followed as to whether the adoption by a small majority of a proposal, the complete text of which had not been circulated, should be considered as final. The proposal was, moreover, contrary to the principle adopted by the Commission on the occasion of previous votes.

70. Mr. CORDOVA, Mr. SCELLE and Mr. YEPES accepted the decision as final. Mr. HUDSON and Mr. FRANÇOIS were doubtful, and the latter reserved the right to bring up the question again after Mr. Hsu's amendment had been circulated in writing.

71. Mr. CORDOVA could understand that the members who had voted against the article, adopted by the Commission, might find it difficult to ask for the discussion to be reopened. As the object of all the Commission's members was to find the most satisfactory legal solution, those who had voted in favour of the text adopted would like to make it known that they were prepared to reopen the discussion. They had not, however, the intention of starting a long exchange of views. He, personally, proposed the establishment of a sub-committee to examine the difficulties arising from the possibility of exploiting the bed and subsoil of the sea, where there was no continental shelf in the legal sense of the term. A country which did not possess a continental shelf because the sea-bed lay at a depth of 250 metres should nevertheless have the right to exploit that sea-bed and its subsoil.

72. He proposed that a sub-committee be set up, composed of Mr. Alfaro, Mr. François, Mr. Hudson and Mr. Scelle, to study those difficulties. The sub-committee should examine the position of the many countries which did not have a continental shelf, but nevertheless wished to be in a position to exploit the sea-bed and its subsoil. Mr. Scelle quite rightly considered that, if a country was in a position to exploit the sea-bed from its mainland for a greater distance than the limits of the continental shelf, it had the right to do so. In fact, if an exception to the general principle was made in favour of shallow

waters, there was no reason why a similar exception should not also be made in some other cases.

73. Mr. AMADO considered that the reason why the Commission was concerned with the continental shelf, and was trying to settle questions related thereto, was that the matter appertained to the régime of the high seas. The questions of which Mr. Córdova had spoken could be dealt with when it came to the discussion of other parts of Mr. François' report. He had noted that the Commission was inclined to examine the whole system of the high seas instead of confining itself to the continental shelf.

74. Mr. Yepes' proposal which had been discussed the year before had very much impressed him, because they were then engaged in a general study of the report. The question was whether the Commission wanted a series of articles dealing exclusively with the continental shelf, or whether it wanted to include under that head all related subjects.

75. Mr. CORDOVA said that the Commission was not, at the moment, dealing with the exploitation of the bed and subsoil of the submarine areas of the high seas, but with the exclusive rights to be given to coastal States. It was necessary to specify the scope of the easements established in the interests of such States. It was not a question, for instance, of examining the possibility of laying a pipeline in the middle of the ocean, but as to whether coastal States had rights over a given submarine area by reason of the existence of a continental shelf or of exploitable resources, which were accessible from their territory.

76. Mr. EL KHOURY said he had voted in favour of Mr. Yepes' proposal, as amended by Mr. Hsu, but after seeing the written text now felt a little uneasy. The proposal referred to coastal states that had no continental shelf and gave them rights of control and jurisdiction up to a distance of twenty miles. On the other hand, States which had a continental shelf of a width of five miles, for instance, would have no rights beyond the limits of that shelf. He wanted rights of control and jurisdiction to be given to all coastal states up to a distance of twenty miles. Only a slight change of wording was required.

77. He proposed that a full stop be inserted after the words “coastal States” and that the rest of the sentence be deleted. He wanted all states to have those rights, irrespective of the depth of the water, or the existence of a continental shelf.

78. The CHAIRMAN had understood that Mr. Córdova proposed the establishment of a sub-committee to draft a text which would be acceptable to all. In his opinion Mr. el Khoury's amendment did not fulfil that condition.

79. Mr. YEPES remarked that Mr. Hsu had stated that his amendment only consisted in changing the last few words of his proposal by referring to the definition in article 1, but he noticed that the text which had been distributed read: “to all coastal states which do not possess a continental shelf . . .”, while his own text said: “to all coastal states, even if they do not possess a continental shelf in the geological sense”.

80. He would not have agreed to the amendment as circulated, and it was therefore in error that he had voted "yes".

81. Mr. CORDOVA considered that the sub-committee's terms of reference should be to study all questions relating to the exclusive right of coastal states to exploit the bed and subsoil of the sea and then to submit a report. He added that its members would doubtless bear in mind what had been said during the discussion, and also Mr. Yepes' and Mr. el Khoury's proposals.

82. Mr. YEPES supported Mr. Córdova's proposal. All efforts to reach unanimity were welcome.

83. Mr. ALFARO explained that the idea in establishing a sub-committee was that it should review the work done up to that time, as the Commission had in some cases taken decisions to which sufficient thought had not been given. There was, no doubt, much in common between Mr. Yepes' article as amended by Mr. Hsu and article 1.

84. It was desirable to be clear as to whether the Commission was dealing with the continental shelf from the geological rather than from the legal angle. All the various points needed prolonged study in a calm atmosphere by those who had expressed opposing views during those discussions. The sub-committee would examine all those questions from Mr. Scelle's point of view as well. All shades of opinion should be represented on the sub-committee, even Mr. Amado's who had said that approval of the article impinged on the question of the high seas.

85. Mr. AMADO referred to the wording of article 2 and observed that, in discussing it, the Commission had disregarded the fundamental problem of the exploration and exploitation of the natural resources of the continental shelf. Talking of the high seas had led to the re-opening of the whole question of territorial waters. Account had to be taken of the point of view of the coastal State and its desire to exploit the resources of the sea. Article 2 did so, but Mr. Yepes' proposal did not, and while granting States, as did that of Mr. el Khoury, an extension of their maritime territory, did not specify the object in view which was the exploitation of the natural resources. He really did not know what instructions should be given to the sub-committee.

86. Mr. CORDOVA said that the Commission had, hitherto, only examined the question whether it was possible to make an exception to the régime of the high seas in favour of coastal States with a continental shelf. But Mr. Yepes had maintained that it was possible to make an exception as well in favour of States that did not possess a continental shelf. Legally speaking, there could be no continental shelf where the sea had a depth of more than 250 metres, but if the exploitable resources were, for instance, at a distance of a kilometre from the coast, the coastal State might attach importance to the possession of a monopoly over the subsoil of the sea-bed in that area. The right to dig a tunnel, for instance, near to the coast should be dependent on the grant of a concession by the coastal State. That should be the basic principle. He was entirely in favour of giving coastal

States rights up to a distance of twenty miles from the coast, where the resources of the subsoil of submarine areas could be exploited.

87. There followed a discussion on the composition of the Sub-Committee.

88. Mr. SCELLE could not in all fairness agree to serve on such a Committee. He did not accept the notion of the continental shelf which in his opinion was nothing but a legal fiction and did not correspond to anything concrete.

*It was decided that the Sub-Committee comprise Mr. François, Mr. Córdova, Mr. Hudson and Mr. Yepes.*<sup>7a</sup>

89. While Mr. HUDSON did not regard the matter in quite the same light as several other members of the Commission, and did not understand Mr. Yepes' point of view, he felt that he must hold himself at the Commission's disposal.

90. He suggested to the rapporteur the inclusion in the comment of the following clause:

"The following paragraphs are not intended to limit exploitation of the natural resources of the continental shelf by means of tunnels from the continent".

91. That clause had been suggested to him by Mr. Scelle's remarks. He had studied under-sea coal mines in many parts of the world. They were to be found in Chile, Nova Scotia and the United Kingdom. Subject to correction, there were none at a greater depth than approximately 600 feet.

92. The CHAIRMAN said the sub-committee would go into the matter.

93. Mr. HSU considered that the term "shallow submarine areas" should be substituted for "continental shelf".

94. Mr. FRANÇOIS recalled that the same proposal had already been rejected on two occasions.

95. Mr. HSU replied that a decision in the matter had only been deferred. He wished to suggest that the change be made as the term employed gave rise to misunderstanding. He would not, however, press the matter.

96. He asked what it was proposed to do in regard to the paragraphs of the report preceding the conclusion. He read out the following sentence from the report:

"The International Law Commission had already discussed this argument and rejected it because of the impossibility of putting it into practice."<sup>8</sup>

97. In his opinion that sentence was not accurate. It would be more correct to say that the International Law Commission had not discussed the exploitation of natural resources by the international community as a whole — the subject of the above-mentioned paragraph — because generally speaking it did not approve of it. It was not accurate to speak of rejection, since the matter had not been put to the vote. Further on the rapporteur spoke of the impossibility of putting it into

<sup>7a</sup> The report of the sub-committee was discussed at the 123rd meeting.

<sup>8</sup> A/CN.4/42, p. 66, para. 3 (mimeographed English text); para. 156 (printed French text).

practice, but how could it be said that it was not possible when the matter had not been discussed. There were, on the contrary, many examples of international control. It might not be possible in certain cases; thus the administration of the Samoan Islands had had to be divided between several countries. In other cases, however, control by the international community was possible. If it were not, neither the International Court of Justice, nor the United Nations would be in existence. It was, therefore, going too far to say that exploitation under international control was impossible. In any case the Commission had not said so.

98. Mr. FRANÇOIS replied by reading out the following clause from the Commission's report on its second session:

“One member of the Commission expressed the view that the exploitation of the products of the continental shelf might be entrusted to the international community; the other members considered that there were insurmountable difficulties in the way of such internationalization.”<sup>9</sup>

He believed that the sentence quoted by Mr. Hsu gave an accurate summary of that clause.

#### CHAPTER 7: RESOURCES OF THE SEA

99. Mr. FRANÇOIS said that the Commission's report on its second session contained the following clause:

“The Commission requested the Special Rapporteur to study the problem of protecting the resources of the sea for the benefit of all mankind by the generalizing of measures laid down in bilateral or multilateral treaties.”<sup>10</sup>

100. He had tried to carry out those instructions and had not suggested any article or convention, as that would be an impossibility as things stood at the moment. The Commission should find a way of reaching a solution to the problem. It was easy to say that the resources of the sea would be kept distinct from the continental shelf, but it could not be denied that in their proclamations a number of States had not drawn that distinction. There was, in fact, a very close relationship between those two questions. In increasing the width of the continental shelf to 200 miles, Chile and Peru had been concerned with the protection of the resources of the sea and of fisheries. If the Commission only intended to lay down rules for the continental shelf and did not recognize fishing rights, it was certain that Chile and Peru would raise objections and state that they could not accept the Commission's rule in regard to the continental shelf, so long as they were left in ignorance of its views in regard to the protection of the resources of the sea. The Commission was, therefore, under the necessity of taking a position in regard to that problem.

101. Mr. Córdova's comment of the year before was very pertinent. The existing rule was not satisfactory. The difficulty arose, not in regard to conventions to

which all States were parties, but where there was no convention, or where some States were not prepared to accede to the existing convention. He had tried to formulate some sort of regulation for the protection of the resources of the sea. It was, in the first place, necessary to make a very clear distinction between the protection of the resources of the sea and the question of fishing in general. The latter question should not be overlooked, but it might well raise more difficulties than that of the protection of the resources of the sea. Actually, as regards the latter, everyone was agreed that measures had to be taken, not only in the economic interests of the various States, but also to prevent the extermination of the marine fauna. He did not think that anyone would object to the establishment of a multilateral regulation to that end, if it were not for the fear that some States would use such a regulation to obtain special advantages for themselves. He had said as much on page 37 (mimeographed English text; para. 81, printed French text) of his report (A/CN.4/42):

“The Rapporteur wishes to emphasize that in his view a very clear distinction should be made between the establishment of a protective zone such as that envisaged above, and the recognition of a contiguous zone for purposes of fishing rights (see page 50). The purpose of establishing a contiguous zone for fisheries is to grant exclusive fishing rights in that zone to the coastal State, whereas the zone envisaged in our proposal is designed to *protect* the resources of the sea, and excludes any preferential treatment for the coastal State with respect to fishing rights.”

102. That was why he had proposed to give the coastal State special and exclusive rights for the protection of the resources of the sea up to a distance of 200 miles from the coast. But there also, it would, of course, be necessary to guard against abuse. He had not been able to do that in any other way than by subjecting the exercise of such rights by States to the control of the International Court of Justice:

“If a State considers that its interests have been unfairly injured by restriction of the kind provided for in the first paragraph, and if the two States are unable to reach agreement on the subject, the dispute shall be submitted to the International Court of Justice” (*Ibid.*, para. 80, printed French text).

103. He had confined himself in the above passage from his report to stating a principle, and he also accepted arbitration in advance. He repeated that if the principle were accepted that the coastal State should have the exclusive right to enact measures of that type, provision should be made right from the beginning for the prevention of abuses.

104. Mr. YEPES remarked that the report said:

“Every coastal State shall be entitled to declare, in a zone 200 sea miles wide contiguous to its territorial waters, the restrictions necessary to protect the resources of the sea . . .” (*Ibid.*).

105. The Rapporteur therefore said that the coastal State had the right to exercise its control and jurisdiction over that area.

<sup>9</sup> *Official Records of the General Assembly, Fifth Session, Supplement No. 12 (A/1316)*, para. 198.

<sup>10</sup> *Ibid.*, para. 193.

106. Mr. FRANÇOIS stated that that right was granted exclusively for the protection of the marine fauna. It was not a right of sovereignty but, just as the coastal State had been acknowledged to possess a right of exploration and exploitation over the continental shelf, so in the case under consideration it was acknowledged to possess the necessary rights for the protection of the marine fauna.

107. Mr. HUDSON had done his best to follow Mr. François' line of thought in regard to the continental shelf but Mr. François would perhaps permit him to say that he found it very difficult in regard to the question under discussion.

108. He could not find that the report made any mention of the very important international convention signed at Washington on 8 February 1949 for the protection of the North-west Atlantic Fisheries.<sup>11</sup> The underlying concept of that convention, signed by eleven States, as well as of many other agreements signed during the last few years, including the agreement between the United States and Mexico signed in Mexico on 25 January 1949<sup>12</sup> (Convention for the Establishment of an International Commission for the Scientific Investigation of Tuna), for instance, was that the protection of marine fauna was in no way a responsibility of the coastal State. He did not wish to examine the question from the angle of the competence of the coastal State, but to start from the basic principles, firstly, that conservation was necessary, and, secondly, that it was incumbent on the States whose nationals engaged in the fishing to provide that protection, irrespective of whether the number of such States were one or eleven.

109. Article VIII of the Convention for the North-west Atlantic Fisheries provided that the Commission it established was to be empowered to take the following measures: establishing open and closed seasons; establishing size limits for any species; prescribing the fishing gear and appliances the use of which was prohibited, and an overall catch limit for any species of fish. That Convention was open to all States whose nationals came to fish in that area.

110. He wished to draw particular attention to article XIII:

“The Contracting Governments agree to invite the attention of any Government not a party to this Convention to any matter relating to the fishing activities in the Convention area of the nationals or vessels of that Government which appear to affect adversely the operations of the Commission or the carrying out of the objectives of this Convention.”

111. He would like to see the notions he had just propounded serve as a basis for the Commission's work. His proposed text followed the lines of the most recent international conventions and read as follows:

“The States whose nationals are engaged in fishing in any area of the high seas may regulate and control fishing activities in such area for the purpose of

conserving its resources against extermination. If only the nationals of a single State are thus engaged in an area, that State may take such measures in that area. If the nationals of several States are thus engaged in an area, such measures shall be taken by those States in concert. In any case, however, no area may be closed to the entry of nationals of other States to engage in fishing activities.”

112. It would be seen that only States whose nationals were engaged in fishing in the area were concerned. If for instance Mexican fishermen came there to fish, Mexico should sign the convention. The States concerned should take the necessary measures of conservation in concert. He preferred to study the question in the light of the most recent international conventions.

113. He asked Mr. François whether the latter had any objection to that approach to the problem and whether he would make room for it in his report, even though he were not prepared to substitute it for his own.

114. Mr. KERNO (Assistant Secretary-General) wished in the first place to make a comment of a general nature, applicable to both Mr. Hudson's and Mr. François' concepts. Rules for the protection of the resources of the sea should be established in the general interests of mankind. Would it not therefore be advisable to include, in any recommendation the Commission might make, a paragraph to the effect that international rules established by States Members of the United Nations or by the States concerned should be brought to the notice of the United Nations, in order that the Economic and Social Council, whose duty it was to watch over the well-being of mankind, might be kept informed of what was being done in that field. Such conventions would, of course, be communicated to it for information only.

115. Mr. SCALLE said that Mr. Hudson's concept was extremely interesting as it approached fairly close to what might be called a regional understanding, in the sense of an agreement between peoples exploiting specific sea areas. Such a concept was just as constructive as that of the continental shelf was anarchic. That was why he was ready to support it.

116. Mr. HUDSON recalled that the President of the United States, at the time of publishing his proclamation on the continental shelf, had also issued a proclamation relating to the question of the resources of the sea.<sup>13</sup> The Secretariat memorandum (A/CN.4/32) did not devote enough attention to the question. He recommended the terms of the proclamation to the attention of the Commission:

“Where such activities have been or shall hereafter be developed and maintained by its nationals alone, the United States regards it as proper to establish explicitly bounded conservation zones in which fishing activities shall be subject to the regulation and control of the United States. Where such activities have been or shall hereafter be legitimately developed and maintained jointly by nationals of the United States and nationals of other States, explicitly bounded

<sup>11</sup> United Nations, *Treaty Series*, vol. 157, pp. 157-183.

<sup>12</sup> *American Journal of International Law*, vol. 45 (1951), p. 40.

<sup>13</sup> Proclamation of 28 September 1945, *American Journal of International Law*, vol. 40 (1946), Appendix, pp. 46-47.

conservation zones may be established under agreements between the United States and such other States ; and all fishing activities in such zones shall be subject to regulation and control as provided in such agreements.”

That was an important statement of policy.

The meeting rose at 1 p.m.

## 118th MEETING

Thursday, 5 July 1951, at 9.45 a.m.

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*Chairman*: Mr. James L. BRIERLY  
*Rapporteur*: Mr. Roberto CORDOVA

#### *Present*:

*Members*: Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCALLE, Mr. J. SPIROPOULOS, Mr. Jesús María YEPES.

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

#### **Régime of the high seas : report by Mr. François (item 6 of the agenda) (A/CN.4/42) (*continued*)**

##### CHAPTER 7 : RESOURCES OF THE SEA (*continued*)

1. The CHAIRMAN recalled that Mr. Hudson had put forward an alternative text. He asked Mr. François to state his views on it.

2. Mr. FRANÇOIS said that Mr. Hudson's text did not seem to him to go far enough, as it left matters very much in the *status quo*. The United States had already gone further than Mr. Hudson proposed to do. The latter, in effect, suggested that it be left to the States concerned to come to an agreement in regard to regulations for the protection of the resources of the sea, but from President Truman's proclamation it would be seen that the United States laid claim to a special zone where American nationals would enjoy special rights. It was true that the proclamation referred to negotiations with a view to an agreement, but that did not alter the fact that a claim was made to a special zone in which the coastal State would have special rights in regard to the protection of the marine fauna. While that point of view was comprehensible, he felt that the Commission should look for something else than the solution proposed by Mr. Hudson.

3. His own text was based on an idea expressed by Mr. Córdova during the second session<sup>1</sup> to the effect that the coastal State, by reason of its special interests, had the right to take measures to ensure the protection of the marine fauna off its coasts. The system he proposed to the Commission provided adequate safeguards against the coastal State exceeding its rights. In addition, it was made an essential condition that, in the case of dispute, the coastal State must be prepared to accept arbitration.

4. Mr. Hudson's proposal, on the other hand, did not contain any reference to arbitration. It only provided that the States concerned should come to an agreement. It was to be feared that, in such case, powerful States would impose their will on weaker ones. Under his system, on the other hand, all States would be on the same level.

5. It was possible that the great Powers would not be prepared to accept that system, but he did not believe that States which related the question of the continental shelf to that of the protection of the resources of the sea would accept a system such as that proposed by Mr. Hudson.

6. In reply to a question by Mr. Yepes, Mr. HUDSON stated that his text was intended to replace the first two paragraphs of Mr. François' proposal (A/CN.4/42, p. 37 mimeographed English text; para. 80, printed French text).

7. He did not understand how Mr. François could say that his (Mr. Hudson's) proposal did not go as far as President Truman's proclamation. Admittedly that proclamation referred to "contiguous zones", which his text did not, but the second and third sentences of his proposal were taken almost word for word from President Truman's proclamation.

8. Furthermore, he had stipulated in the last sentence that in no case should any area be closed to the entry of nationals of other States, to engage in fishing activities.

9. The CHAIRMAN pointed out that neither Mr. Truman's proclamation nor Mr. Hudson's proposal stated specifically what would happen if the nationals of a third State engaged in fishing without conforming to the established rules. It was, doubtless, to be assumed that they would be forced to conform.

10. Mr. HUDSON said that, in the first place, that would be so, but it would then be necessary to include the States in question in the agreement. The rules could, moreover, be amended.

11. He added that the zone 200 sea miles wide laid down in Mr. François' proposal seemed to him much too extensive. He did not see why a coastal State, which was not engaged in fishing outside its territorial waters, should have the right to proclaim restrictions for the protection of the resources of the sea over so vast an area.

12. Mr. FRANÇOIS had a further objection to Mr. Hudson's proposal. It stated that measures necessary for the protection of the resources of the sea would be taken in concert by the States whose nationals were engaged in the fishing. It was, undoubtedly, usual to

<sup>1</sup> See summary record of the 65th meeting, para. 60, *et seq.*

find diverging views where several States were interested in the fishing in a given area. Their respective interests had to be safeguarded, but Mr. Hudson's proposal did not make any provision for possible disagreement.

13. Mr. HUDSON pointed out that the Commission was not at the moment concerned with the question of the settlement of disputes.

14. Mr. SPIROPOULOS thought the problem should be considered from a much wider angle. In the case of the high seas, no State had exclusive jurisdiction to regulate anything whatsoever. But in practice certain States had concluded agreements and had drawn up rules which had been tacitly recognized by other States. The choice lay between accepting that state of affairs, when the International Law Commission would have nothing else to do but leave it to the States concerned to reach agreement between themselves, or to consider the establishment of international rules by all the States concerned.

15. In any case, the system advocated by Mr. François, which would give all coastal States the right to make rules for the protection of the resources of the sea, did not appear to him to be practicable. It was an entirely novel idea.

16. Should the idea of international regulations, to be established by all the States concerned, be adopted, it would mean summoning a conference to draw up rules to be applied universally by a kind of High Seas Board.

17. Mr. SCELLE remarked that there had been similar situations in the past. A number of interested States had, for instance, been entrusted with or had delegated to them the establishment of the necessary regulations for navigation on the Danube and in the Straits.

18. Similarly, Mr. Hudson wanted the various States whose nationals were concerned with the fishing in a given area to come to an agreement for the establishment of regulations for the said area. Why, in effect, should a single State claim to regulate the use of the high seas? If the nationals of other States came to fish in the area in question they should, in the first place, conform to the existing regulations. Thus the Commonwealth countries, although they had never signed the agreements relating to the Straits, had recognized that they were bound by those agreements.

19. Briefly, Mr. Hudson's proposal provided for regional agreements *ratione materiae*, applicable to given areas and for the special purposes of those areas. Similarly, administrative law included the notion of departmental decentralization.

20. From some points of view that proposal was, therefore, very attractive, but it should be supplemented by the idea expressed in the third paragraph of Mr. François' proposal. They were no longer in an age when the organization of the international community was dominated by the right of the stronger. Under existing conditions right prevailed over might. Again, it was not sufficient to say that the States should come to an agreement; provision should be made against their not so doing. It would be usual to provide, in such a case, for recourse to arbitration or the International Court of Justice.

21. It was, unfortunately, not possible at the moment to appeal to an international administrative authority, the need for which had already made itself felt, but which could not come into existence under existing world conditions. There was, however, an International Court of Arbitration and an International Court of Justice.

22. He did not, therefore, see any absolute contradiction between Mr. Hudson's concept and the system proposed by Mr. François. In his opinion the two proposals were complementary.

23. Mr. HSU was entirely of Mr. Scelle's opinion. He did not see the necessity for adopting the concept of a coastal State with exclusive rights over a zone 200 sea miles wide. The Commission, however, proposed to grant coastal States rights over the high seas in connexion with the continental shelf, customs, etc. It would therefore seem logical to grant them such rights for the protection of the resources of the sea.

24. On the other hand, it did not appear to him possible to prevent agreement being concluded between States which had been engaged in fishing a given area for many years. But steps should be taken to see that powerful States did not impose their will on weaker ones. Mr. Hudson's proposal was therefore not adequate. An endeavour should be made to bring it into line with that of Mr. François.

25. Mr. YEPES was in favour of Mr. François' proposal. He considered that the differences between that proposal and Mr. Hudson's were so fundamental as to render them utterly incompatible. Mr. François, in effect, granted the coastal State control and management over regulations for the protection of the resources of the sea over a zone 200 sea miles wide, contiguous to territorial waters. Mr. Hudson, on the contrary, granted any interested State, or group of States, the right of regulation and control in any given area of the high seas.

26. In his opinion the coastal State was best qualified to establish such regulations, but he differed from Mr. François on one point. He felt that if a coastal State did not carry out its duties to the international community, the latter should intervene and decide what measures were to be taken.

27. Mr. SPIROPOULOS said that the reason why he could not accept Mr. François' notion was that, in his opinion, a single State should not have the right to make regulations concerning the high seas. On the other hand, Mr. Hudson's proposal, though it had its disadvantages, did not seem to him acceptable in principle.

28. However, he must repeat that the best solution would be the establishment of an international board for the protection of the resources of the sea. That board might be, in some sort, a specialized agency. Such a course would enable the Commission to achieve its purpose, and he asked the members to give it careful consideration.

29. Mr. SANDSTRÖM asked Mr. Spiropoulos how he thought the machinery of the board he had referred to would be set in motion. For instance, would the board act at the request of an interested State?

30. Mr. SPIROPOULOS replied in the affirmative. The board would lay down rules, which would be binding on all States.

31. Mr. YEPES would be prepared to accept Mr. Spiropoulos' suggestion, provided the board in question only took action when a coastal State had not carried out its duties.

32. Mr. FRANÇOIS was very glad to hear Mr. Hudson say that his proposal was only intended to replace the first two paragraphs of his own proposal.

33. It did not seem to him that the two proposals were so divergent as Mr. Yepes believed. Actually, his text provided that the coastal State should endeavour to enact the regulations in concert with the other countries concerned. It was, therefore, clearly to be understood that the coastal State would not impose regulations enacted by itself alone, but would try and come to an understanding with the other States concerned. But it was incumbent on the coastal State to take the initiative.

34. The two proposals did, however, differ in regard to one point. His text provided a procedure for settling disputes between the coastal State and the other States concerned, whereas Mr. Hudson's did not provide for the contingency of failure to reach an agreement.

35. Mr. Hudson's proposal should therefore be supplemented by a provision on the lines of the third paragraph of his own (Mr. François') proposal.

36. Mr. Spiropoulos' suggestion seemed to him very interesting, but difficult to put into practice, since circumstances varied so much from country to country. The same suggestion had already been made by Mr. Schücking to the League of Nations' Committee of Experts for the progressive codification of international law.<sup>2</sup>

37. Mr. SCELLE observed that the Commission seemed to incline in the same general direction. There were, however, some slight differences.

38. He himself had not dared to go so far as Mr. Spiropoulos. He found it difficult to conceive of a specialized agency concerned only with questions of fishing. The organization of fishing activities varied too much from country to country. The objection did not, however, appear absolutely insurmountable. It was possible to envisage a specialized agency, mainly concerned with the administration of fisheries and largely decentralized.

39. He observed that the Secretariat memorandum on the régime of the high seas (A/CN.4/32) continually referred to the idea of an extension of the jurisdiction of coastal States over the high seas. He considered that notion unacceptable, as it constituted a forthright denial of the régime of the high seas. The high seas were public property, so he did not see how it was possible to base a system on the extension of national jurisdiction over the high seas.

40. The history of international law showed that its rules had often had their origin in that way; but the

application of such a principle would amount to a return to the days when the republics of Genoa and Venice claimed possession of the seas just as far as they could impose their sovereignty. The extension of national jurisdiction over the high seas was therefore tantamount to recognition of the right of the strongest. It was impossible to take that as a starting point.

41. Mr. Spiropoulos' suggestion represented the logical conclusion to that idea. If its realization gave rise to difficulties, Mr. Hudson's notion, supplemented by that of Mr. François, might constitute an intermediate stage towards the achievement of the Commission's purpose. Should the Commission consider that the establishment of a specialized agency would solve the question, he did not see why it should not adopt that course. There was a specialized agency for air matters, where the difficulties were even greater.

42. Mr. AMADO was very surprised to hear Mr. Scelle say that he did not see any appreciable difference between Mr. Hudson's and Mr. François' proposals. While Mr. François said "every coastal State shall be entitled to declare, in a zone 200 sea miles wide contiguous to its territorial waters, the restrictions necessary to protect the resources of the sea", Mr. Hudson's proposal read: "States whose nationals are engaged in fishing in any area of the high seas may regulate and control fishing activities in such area for the purpose of conserving its resources." Whereas, in his proposal, Mr. François followed the slow and natural evolution of law, Mr. Hudson coldly envisaged that a powerful and rich State might establish itself in any area of the high seas and take possession of it. Surely that represented a considerable difference between the two concepts. He himself could not agree to a proposal to grant such unlimited rights to any country having access to some area of the high seas.

43. As regards Mr. Spiropoulos' suggestion, he thought it would be a good idea to consult the Fisheries Division of the United Nations Food and Agriculture Organization, which was doing important work on the subject.

44. Mr. SANDSTRÖM had also come to the conclusion that, for the purpose of reaching agreement, it was necessary to take into consideration something more than the goodwill of States. Mr. Spiropoulos' suggestion seemed to him to be an excellent one. A specialized agency, of the type he had suggested, might constitute an ideal meeting place, where the various States could jointly study the problems with which they were faced and take the necessary decisions. He would, however, like to see a more detailed proposal, on those lines, submitted to the Commission.

45. Mr. KERNO (Assistant Secretary-General) noted with satisfaction that the suggestion he had made at the last meeting<sup>3</sup> that something should be done in the general interests of mankind had borne fruit. It was, of course, for the parties concerned, i.e. the coastal States and those whose nationals were engaged in fishing to take the matter in hand in the first instance, but the necessity of ensuring the co-ordination of their efforts

<sup>2</sup> Report by Mr. Schücking on the law of territorial waters, League of Nations, Legal, document C.P.D.I. 19.

<sup>3</sup> Summary record of the 117th meeting, para. 114.

and safeguarding the common interest must not be overlooked.

46. Mr. CORDOVA recalled that he had already, in the previous year, advanced the idea that the resources of the sea should be protected in the interests of mankind as a whole. At that time, he had suggested that when two or more States had concluded a treaty relating to the protection of the resources of the sea, that treaty should be binding on all other States.<sup>4</sup>

47. The Commission had two proposals before it: that of Mr. François, conferring on the coastal State the right of regulating fishing activities, and that of Mr. Hudson, which disregarded the coastal State entirely, and gave that right to countries whose nationals were engaged in fishing.

48. He was always in favour of regulating fishing activities, but that should not be done for the sole benefit of States possessing large fishing fleets, and to the detriment of those which did not. The Commission should have the courage to say that the right of regulating fishing activities belonged neither to the coastal State nor to those whose nationals were engaged in the fishing. For that reason, Mr. Spiropoulos' suggestion seemed to him excellent. Regulation of the exploitation of the resources of the sea should be carried out by an international organization. Obviously existing conditions had to be taken into account, but only a solution of that sort would permit the development of international law.

49. Mr. ALFARO also drew attention to the fact that Mr. Hudson's proposal completely deprived the coastal State of the right of regulating fishing activities if it were not, itself, engaged therein or only possessed a small fishing fleet. He quoted the case of the Gulf of Panama, where large Costa Rican companies came to fish for sardines, which were used as bait in tuna fishing. The methods employed by those companies had resulted in the practical disappearance of sardines from the Panamanian coast, to the considerable detriment of the inhabitants of the country.

50. The adoption of Mr. Hudson's proposal would have the result of giving the companies in question the right to regulate the fishing in the waters of the Gulf of Panama, whilst Panama itself would be deprived of that right. Such a deprivation seemed to him inadmissible.

51. The CHAIRMAN considered that Panama would be able to take part in such regulation, as its nationals were engaged in the sardine fishing.

52. Mr. ALFARO considered that Panama would have very little say in the matter, when confronted with the other States engaged in intensive fishing activities.

53. Mr. AMADO said that Mr. Hudson's proposal was of considerable theoretical importance. No theorist had hitherto gone as far as he had done in, purely and simply, discarding the principle of contiguous zones. The Secretariat memorandum on the régime of the high seas (A/CN.4/32) however, envisaged two possible courses: "either the littoral State decides to extend its territorial sea and to set its limits some distance further out;

or else, without extending the limits of its territorial sea, claims the right to take measures applicable to all foreigners as well as to its own nationals, in respect of a certain zone of the high seas contiguous to its territorial waters, with a view to preventing depredations and the various practices that are prejudicial to sound conservation of the marine fauna . . . The second course requires the establishment by the littoral State of a contiguous zone in respect of fisheries" (p. 37, mimeographed English text; para. 113, printed French text).

54. Short of taking a very serious decision, he held it to be impossible to abolish the concept of the contiguous zone.

55. Mr. CORDOVA said that a similar situation to that mentioned by Mr. Alfaro obtained in the Gulf of California, where Mexico also had an interest in regulating the protection of the marine fauna. Actually, American fishermen were exterminating the sardines to the detriment of the Mexican people. A treaty provided for regulation, but Mr. Hudson's proposal was much too radical, as it would result in granting the privilege of laying down the law to the countries which had large fishing fleets.

56. Mr. HUDSON remarked that his proposal provided for the necessary measures to be taken in concert with the States concerned. In the case in question, Mexico would be able to take part in the negotiations for an agreement. Moreover, unanimity was required, and there was, therefore, no danger of weak States becoming the victims of the strong.

57. Mr. EL KHOURY said that his preference lay with Mr. Hudson's proposal. The first two paragraphs of Mr. François' proposal provided for the protection of the resources of the sea in a zone 200 sea miles wide contiguous to coastal States, but nothing beyond that area. Mr. Hudson's proposal, on the other hand, covered all fisheries and the protection of the marine fauna in all areas of the high seas.

58. If Mr. Hudson's proposal were supplemented by a provision on the lines of the third paragraph of Mr. François' text, the whole of the problem would be covered. For that reason he was of the opinion that the Commission should take up the examination of that third paragraph, and he would suggest that the words "if agreement cannot be reached in regard to the zone to which the dispute refers" be substituted for "if the two States are unable to reach agreement on the subject".

59. Mr. FRANÇOIS remarked that sight had been lost of the fact that the Commission was not at the moment dealing with fisheries, but with the protection of the marine fauna. Now the destruction of marine fauna in the high seas, but close to the coast, had marked effects on the marine fauna of territorial waters. The formula used by Mr. Hudson "the States whose nationals are engaged in fishing" was not, therefore, suitable. The coastal State was always concerned, even when its nationals were not engaged in high seas fishing.

60. Again, Mr. Hudson's proposal did not deal with the question in relation to the continental shelf, and

<sup>4</sup> See footnote above.

the Commission had recognized the close relationship between the continental shelf and the resources of the sea.

61. Mr. el Khoury's argument that Mr. Hudson's proposal was more advantageous because it had reference to all zones and not only to contiguous ones, was not very convincing; from the practical point of view, the most important point was the regulation of the protection of marine fauna in zones contiguous to the coast.

62. Mr. HUDSON said that it was necessary to start from the principle that the conservation of the resources of the sea was a question of interest to the whole of mankind. The question then arose as to which were the most effective measures to ensure such protection. In his opinion, the most effective conservatory measures would be those instituted by States engaged in fishing.

63. The area of the Newfoundland banks, for instance, constituted one of the principle fishing grounds in the world and was visited by the nationals of a variety of countries: Portugal, Spain, Denmark, Italy, United Kingdom, France, Newfoundland, etc. How could the resources of that area be conserved without the co-operation of all those countries? Similarly, in reply to Mr. Córdova's point, the United States and Mexico had agreed to set up a study commission to report to the two Governments, which would then be in a position to take the necessary measures. He had no doubt that they would be able to reach agreement.

64. Regarding the question as to what should be done if the States concerned were not prepared to take measures for the protection of the resources of the sea, or were unable to agree on such measures, it was obvious that, as the resources of the sea had to be protected in the interests of mankind as a whole, an international organization should be made responsible for carrying out the necessary studies and research. No solution could be found to the problem of the protection of the resources of the sea without prior and detailed study. For that reason, only an international organization, engaged in such studies, would be in a position to say that in such and such an area States were not taking the necessary action. No useful purpose would be served by asking the International Court of Justice to take decisions in such matters.

65. He would like members of the Commission to read the Convention for the Protection of the North-west Atlantic Fisheries, which set up a very complete organization, including a commission and panels of experts. An international organization under the auspices of the Food and Agriculture Organization might be considered, but the question could not be submitted to the International Court of Justice, which had no jurisdiction in the matter. An international organization would be in a position to submit recommendations, where States whose nationals were engaged in fishing were not able to come to an agreement in regard to conservatory measures, or had the intention of exhausting the banks. In the case of the Atlantic, the United States and Canada had set up a joint fisheries commission, which sat for several months each year, and they were, as a consequence, in process of establishing a fisheries code.

66. Briefly, conservation of the marine fauna was in the interests of mankind, and means must be found to bring it about. Any system would be more effective if the measures proposed were drawn up by those who would have to apply them, that was to say, by those engaged in fishing in the area in question. Consideration might also be given to the establishment of an international authority with powers to submit reports and recommendations.

67. Mr. YEPES wondered whether the same results could not be obtained by other means. The coastal State might be made responsible for enacting such regulations; it being provided that failure to do so would entail the intervention of the International Court of Justice.

68. Mr. HUDSON did not believe that a country like Newfoundland, for instance, could undertake the regulation of the fishing on the banks which bore its name. Failing agreement between all the States whose nationals were engaged in large-scale fishing activities in that area, it would be unable to enforce such regulations.

69. Mr. KERNO (Assistant Secretary-General) called the Commission's attention to a document on the régime of the high seas, published by the Secretariat in the previous year (A/CN.4/30). Paragraph 3 of that document, headed "Fisheries", contained the following statement:

"The Food and Agriculture Organization of the United Nations is empowered by article 1 of its constitution to promote and, where appropriate, to recommend national and international action with respect to 'the conservation of natural resources and the adoption of improved methods of agricultural production'. Article XVI of the constitution interprets the term 'agriculture' as including fisheries and marine products... A monthly Fisheries Bulletin and a Yearbook of Fisheries Statistics are published by FAO..."

70. At the last meeting he had mentioned the Economic and Social Council in that connexion. Should the Commission consider that an international organization could be of use in that field, it might conclude that the United Nations Food and Agriculture Organization was a suitable body.

71. Mr. FRANÇOIS said that it was not always advisable to strive after perfection. In that case perfection was, obviously, represented by the international board for the protection of the resources of the sea, proposed by Mr. Spiropoulos. If it were possible to set up such an organization, it would be welcomed on all sides, but there was no use trying to disguise the fact that there were difficulties in the way. Similar institutions were already in existence, but had not yet met with much success. Better results were to be hoped for from the United Nations Food and Agriculture Organization. It should not be overlooked, however, that the organization was only in the early stages of development.

72. Should an international board be set up, it would be preferable to submit all disputes to it, instead of having recourse to arbitration or to the International Court of Justice. In the meantime, was it so unusual a

proceeding to submit a dispute to the Court? Mr. Hudson had said that it would be impossible, as members of the Court did not have the necessary technical knowledge. That objection could be advanced against any Court, and, when judges in the various countries had to deal with subjects with which they were not familiar, they took expert advice.

73. Mr. HUDSON had said that fishing in Newfoundland waters was carried out at more than 200 miles from its coast. His own proposal related exclusively to the continental shelf and was intended to assist coastal States. The proclamation of the President of the United States, Mr. Truman, also related only to the contiguous zone.

74. Mr. HUDSON observed that Mr. François seemed to relate the question to the continental shelf and asked whether it was not in fact a new idea.

75. The CHAIRMAN recalled that Mr. François had already mentioned it.

76. Mr. FRANÇOIS pointed out that President Truman's two proclamations had been published at the same time.

77. Mr. HUDSON stated that there was no connexion between them.

78. Mr. FRANÇOIS went on to say that it was an example that had been followed by other States, which had linked the question of the continental shelf to that of the protection of the resources of the sea. As he had said on more than one occasion, if no account were taken of the fact that the two questions had actually, though perhaps wrongly, been linked together by some States, no course that the Commission might recommend stood any chance of being accepted by them.

79. Mr. HSU considered that there were two situations to be taken into consideration. The first was the situation such as that on the Newfoundland fishing grounds where, after the nationals of a number of states had been engaged in fishing there for centuries, it had been possible to set up international regulations by agreement between the States concerned. There might be coastal States in that part of the world which were not interested in the question. It was therefore entirely justifiable for States that were interested to meet and set up regulations in concert. He was always very much in favour of the internationalization of anything connected with the high seas, as he wished to maintain inviolate the principle of their freedom.

80. Nevertheless, and that was the second situation, where there was a continental shelf the coastal State was permitted to exercise exclusive control and jurisdiction and, in the case of adjacent seas, to extend control for customs, health, etc., purposes beyond its territorial waters. If the coastal State were accorded that sort of privilege, why should it be refused the right to control the fishing for a certain distance beyond its territorial waters? Fishing activities within that area were of interest to the coastal State. Personally he considered that the Commission should take that case into consideration. It was a matter of fundamental principle.

81. He had noted that Mr. Yepes' proposal gave the coastal State the right to proclaim rules. It might be added that an international régime, similar to that for the Newfoundland banks, could also be established.

82. Mr. YEPES said that he had taken the liberty of having a redraft of Mr. François' text circulated. His proposal was that the following text be substituted for the clauses at the top of page 37 (mimeographed English text; para. 80, printed French text) of Mr. François' report (A/CN.4/42):

“Every coastal State shall have the right and the duty — as far as possible in agreement with the other interested States — to declare, in a contiguous zone 200 sea miles wide, the restrictions necessary to protect the resources of the sea against extermination and to prevent the pollution of those waters by fuel oil. Should a coastal State fail to carry out its duties in that respect, the international community shall be entitled to prescribe the necessary measures, through a specialized agency of the United Nations, for example, to ensure such protection. The rules shall not discriminate in any way between the nationals and vessels of the various States, including the coastal State.

“If a State considers that its interests have been unfairly injured by the rules established, and if the interested States are unable to reach agreement on the subject, the dispute may be submitted to the International Court of Justice at the request of the State making the complaint.”

83. The proposal summarized the notions expressed during the meeting. He had borrowed from Mr. Hudson the concept that the conservation of the resources of the sea was a duty as well as a right of the international community. From Mr. François he had taken the notion of attributing the protection of species to the coastal State. He did not believe that it was possible to deprive the coastal State of participation in such conservatory measures. He had added that the coastal State also had a duty to the international community in that connexion. If the coastal State did not fulfil that duty it was, as Mr. Spiropoulos had said, for the United Nations to establish the necessary regulations through the intermediary of a specialized agency. Finally he had borrowed from Mr. François the notion that the settlement of disputes arising when a State considered itself injured should be entrusted to the International Court of Justice, on request by the party making the complaint.

84. The CHAIRMAN considered that it would be very difficult for the Commission to say either yes or no to such a proposal. It should be split up.

85. The first point to consider was whether, in regard to conservatory measures, priority should, in principle, be given to the coastal State. In his report (A/CN.4/42) Mr. François had stated:

“Every coastal State shall be entitled to declare in a zone 200 sea miles wide contiguous to its territorial waters, the restrictions necessary to protect the resources of the sea against extermination and to prevent the pollution of those waters by fuel oil” (*Ibid.*).

86. Mr. CORDOVA considered that the Chairman was right in putting the question of principle first. However, the rules of procedure required the Commission to give Mr. Hudson's proposal priority, as it amended Mr. François' text.

87. The CHAIRMAN and Mr. HUDSON considered that, in the case of a decision on a matter of principle, it was not necessary to follow the rules of procedure in regard to amendments. It was a matter of taking a position in regard to a principle.

88. Mr. AMADO wished to bring the two proposals into line but the CHAIRMAN did not think that would be possible.

89. The CHAIRMAN asked the Commission to vote on the two principles, enunciated by Mr. François and Mr. Hudson.

*There were 6 votes for Mr. François' principle and 6 for Mr. Hudson's.*

90. Mr. SANDSTRÖM said that the answer was to set up a sub-committee.

91. Mr. HUDSON proposed the addition to his text of the following clause:

"If any part of an area is situated within X miles of the territorial waters of a coastal State, that State must be permitted to take part in any concert adopted even though its nationals are not engaged in fishing in that area."

92. He had tried to draft a clause which would be acceptable to the majority of the Commission. The text had the support of Mr. François' contention that conservatory measures, or the absence thereof, in an area situated within X miles of the territorial waters of a State, could affect the fishing within those territorial waters. That contention afforded theoretical justification for the addition of a clause designed to break a landlock.

93. Mr. SCELLE said that it was very difficult to vote for either Mr. François' or Mr. Hudson's principle. The main object was to prevent the destruction of the resources of the sea. It was doubtless preferable that such protection be effected by means of an agreement between the various States, but failing such agreement it was better that the coastal State should take action than allow chaos to subsist. He did not believe that Mr. Hudson could object to such a course. It was in fact equivalent to what Mr. Truman had stated in his proclamation. He did not regard it as a good solution as it was always undesirable to allow a government to extend its jurisdiction in a field which did not belong to it, but it was better to do something than to take no action at all. He would prefer Mr. Hudson's proposal, if the States concerned could reach agreement, and that of Mr. François', failing a better.

94. Mr. SANDSTRÖM explained that his vote had been based on the assumption that the Commission would revert to the idea of setting up a special body; that would be the best solution.

*Mr. Hudson's additional paragraph was adopted by 6 votes to 5.*

95. Mr. FRANÇOIS wished to know whether the vote meant that his proposal had been rejected. Previously the votes had been equally divided, 6 for and 6 against. Mr. Hudson's amendment to his own (Mr. Hudson's) text was an obvious improvement, but he still preferred his own proposal and had voted against Mr. Hudson's text. Nevertheless, if it were held that the last vote related to the second paragraph of Mr. Hudson's text, his own text would thereby be discarded.

96. Mr. YEPES asked whether the formula adopted excluded the contiguous zone.

97. Mr. HUDSON replied that the adopted text had nothing to do with the contiguous zone, but it was possible that the Commission would consider the question of the contiguous zone separately from that of territorial waters, where the coastal State could exercise exclusive control for the purpose of conserving the marine fauna.

98. The CHAIRMAN added that it might even exercise an exclusive right to fish.

99. Mr. HUDSON recalled that the question had been considered at length in a memorandum on the régime of the high seas, drafted by the Secretariat (A/CN.4/32, p. 38, mimeographed English text; paras. 118-121, printed French text). He was glad that Mr. Yepes had raised the question. Should he accept the new approach to the problem, a solution might be reached.

100. Mr. FRANÇOIS again asked the Commission not to confuse the question of the protection of the resources of the sea with that of the regulation of fishing. The great majority of States had always objected strenuously to the adoption of the principle of the contiguous zone, where fishing was concerned. The position had not changed since the 1930 Hague Conference, and it was impossible to come to an understanding in that field. At the moment they were only concerned with the contiguous zone from the point of view of the protection of the resources of the sea.

101. Mr. HUDSON replied that the two questions were not confused in his text. He hoped that Mr. Yepes would be able to adopt it, having regard to the addition that he had just made.

102. Mr. CORDOVA observed that the difference between Mr. François' text and Mr. Hudson's was that Mr. François thought that the coastal State should be considered first.

103. Mr. HUDSON said that, according to Mr. François, the coastal State should be the only one to be taken into consideration.

104. Mr. FRANÇOIS referred to page 37 (mimeographed English text; para. 80, printed French text) of his report (A/CN.4/42): "The coastal State shall endeavour to enact such rules in agreement with the other countries interested in the fisheries in those waters". Failing agreement, recourse should be had to arbitration.

105. Mr. CORDOVA considered that the coastal State was mainly interested in conservation, and the other States in exploitation. Mr. François gave first place to the State most interested in conservation. In his new paragraph, Mr. Hudson only gave the coastal State the

right to be heard. It should be noted that the coastal State would always be in a minority.

106. Mr. HUDSON suggested that, in order to meet that objection, "must take part" be substituted for "must be permitted to take part". He added that decisions had always to be unanimous.

107. Mr. SPIROPOULOS objected that the coastal State might not wish to take part in the negotiations. It was, therefore, preferable to say: "is entitled to take part".

108. Mr. HUDSON accepted that wording. He added that an agreement could only be said to be adopted in concert if there were no dissident opinion. Should there be a State opposed to the agreement, then the regional office of the United Nations Food and Agriculture Organization should intervene.

109. Mr. CORDOVA pointed out that the regional office was not empowered to do so.

110. Mr. HUDSON said that it should be given the necessary powers. He recalled that the convention concluded between the United States and Mexico in 1949 for the scientific investigation of tuna had established a commission with powers to send notifications to the two governments, regarding what it proposed to do. Either of the governments could disapprove such notifications within a period of thirty days. If at the end of that very short period the measure had not been disapproved, it automatically came into force. That was a very satisfactory arrangement. Obviously, if there were opposition the notification was invalid, and the conservatory measure in question was not enacted.

111. Mr. CORDOVA observed that in that case there would be no regulation, but the Commission wished there to be one.

112. Mr. HUDSON replied that it was proposed to provide for recourse to the United Nations Food and Agriculture Organization.

113. Mr. FRANÇOIS maintained that such recourse would not have any practical consequences.

114. Mr. HUDSON replied that it was not possible to dictate to eleven States. He recalled that article XIII of the Convention for the North-west Atlantic Fisheries said: "The contracting Governments agree to invite the attention of any Government not a party to this Convention to any matter relating to fishing activities . . ." It should be the duty of the United Nations Food and Agriculture Organization to draw the attention of States to such matters.

115. Mr. AMADO's main object was to co-operate in the establishment of protective measures in regard to the resources of the sea. Mr. François' text read: "Every coastal State shall be entitled to declare in a zone 200 sea miles wide contiguous to its territorial waters, the restrictions necessary to protect the resources of the sea against extermination" (*Ibid.*). Mr. Hudson's text on the other hand read: "The States whose nationals are engaged in fishing in any area of the high seas may regulate and control fishing activities in such area for the purpose of conserving its resources against extermination." For effective protection it was necessary

that such restrictions or regulations should be enforced, and for that, the co-operation of States whose nationals were engaged in the fishing was necessary. It was for that reason that he had hesitated between the two proposals, though inclined to favour that of Mr. Hudson. The two texts were not very far apart, and he hoped it would be possible to bring them into line.

116. Mr. CORDOVA objected that not all States were interested in the protection of the species. The Californian fishermen had been opposed to the conclusion of an agreement between the United States and Mexico as it was to their interests to exploit the fisheries to the maximum. If they had been allowed to continue on those lines they would have exterminated the tuna. For that reason he was opposed to the idea of giving the right of regulating the fishing to those interested in its exploitation. It should not be forgotten that the State whose nationals were engaged in fishing would favour exploitation of the resources of the sea and would therefore be opposed to any regulation of fishing activities. So far as the fishermen themselves were concerned, their inclination would be to catch as much fish as possible, until such time as it dawned on them that they were killing the goose that laid the golden eggs. They would then be concerned to protect the fish, but in their own interests, and not in that of the coastal State.

117. Mr. HUDSON felt that Mr. Córdova had not stated the problem correctly. His text gave regulating powers to the States and not to the fishermen. He recalled that the Government of the United States had taken its stand against the claims of the Californian fishermen. Again, as it was a question of the resources of the high seas, what State could be empowered to regulate the activities of the fishermen, other than that to which those fishermen belonged?

118. Mr. KERNO (Assistant Secretary-General) asked whether the clause providing for the participation of the coastal State in consultations, which had been adopted as the second paragraph of Mr. Hudson's proposal, meant that the consent of that State was necessary.

119. Mr. HUDSON replied in the affirmative.

120. Mr. EL KHOURY said that the question was, who should take the initiative in drawing up the rules required for the protection of the resources of the sea; the coastal State or States engaged in fishing? The interested States had to be convened by someone. Why should that not be the coastal State?

121. Mr. HUDSON said that any State taking part in the agreement might invite the other States.

122. The CHAIRMAN did not consider it possible to accept a majority of one vote in the case of the principle itself of the rules to be established.

123. Mr. SANDSTRÖM considered that it was a difficult question to discuss, as they did not know what was to follow. If the Commission were to decide that an international agency was to have competence in the matter, the powers given to that body would influence the decisions to be taken on other points.

124. The CHAIRMAN wished to know the Commission's views in regard to intervention by an international

body where the States had not been able to reach agreement.

125. Mr. CORDOVA observed that the members of the Commission were unanimously agreed that the United Nations Food and Agriculture Organization should be empowered to act in the matter.

126. Mr. AMADO said it was clear that, as regards the high seas, its resources did not belong to anyone. They were not considering the continental shelf, nor fishing, but the conservation of the resources of the sea. On the high seas the States were free to do as they liked and their nationals could engage in fishing. But the coastal States, which had no rights over the high seas, maintained that the fishing was exterminating the fauna, and that that affected the resources of their territorial waters. That was the problem in a nutshell: on the one side the high seas and on the other the coastal States. Mr. François took his stand on the principle that the coastal State should be the first to be consulted. Mr. Hudson, on the other hand, laid emphasis on the importance of industrial exploitation. An endeavour should be made to reconcile those two formulae, and it was for that reason that he had voted for Mr. Hudson's latest proposal. The resources of the sea had to be protected, but it was also necessary to consider the interests of the coastal State to whom a legal title should be given, a thing it did not have at the moment. Actually, the sea off the coasts of a State did not belong to it. If they wished to find an answer to the question, they had to vote for Mr. Hudson's text.

127. Mr. CORDOVA said that the notion of freedom of the high seas had its counterpart in the rights of coastal States which had their own special interests. The position was as follows: the freedom of the high seas might, in itself, have been a good system, but fishing on the high seas had to be regulated in the interests of the States themselves, or its resources would be exhausted. It was necessary to modify the regime of the freedom of the high seas, in so far as resources of the sea were concerned, as it led to abuse. The course advocated by Mr. François was to give the right of regulation to the coastal State. Mr. Hudson proposed to give it to those who were exploiting those resources and had shown an inclination to exhaust them. For that reason he could not accept the latter's text.

128. Mr. FRANÇOIS remarked that the main point of divergence between Mr. Hudson and himself was the question as to who was to have the last word. It was not enough to say that the States should come to an agreement. In his proposal the last word belonged to an international organization. If Mr. Hudson could accept that solution, the difference between them would not be very great.

129. In reply to a remark by Mr. Sandström, Mr. HUDSON read out the following text:

"The FAO should confer competence on a permanent body to conduct continuous investigations of the world's fisheries and the methods employed in exploiting them, and such body should make recommendations of conservatory measures to be adopted by the States

whose nationals are engaged in fishing in various particular areas".

130. Mr. FRANÇOIS would have liked to substitute "decisions" for "recommendations", but realized that it was impossible to do so.

131. Mr. CORDOVA said that if Mr. Hudson would substitute "decisions" for "recommendations", his text would be approved unanimously.

132. Mr. Hudson then proposed the following text:

"The FAO should confer competence on the permanent body to conduct continuous investigations of the world's fisheries and the methods employed in exploiting them and such body should have power to notify to the States whose nationals are engaged in fishing in various particular areas the conservatory measures to be adopted in each area. Any notification should come into force in the area to which it relates within 6 months provided no such State makes objection within that period."

The meeting rose at 1 p.m.

## 119th MEETING

Friday, 6 July 1951, at 9.45 a.m.

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*Chairman:* Mr. James L. BRIERLY

*Rapporteur:* Mr. Roberto CORDOVA

*Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi Hsu, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, 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.

**Régime of the high seas: report by Mr. François (item 6 of the agenda) (A/CN.4/42) (*continued*)**

CHAPTER 7: RESOURCES OF THE SEA: (*continued*)

1. The CHAIRMAN announced that the Commission had before it the text proposed by Mr. Hudson as a substitute for the regulations drafted by Mr. François (p. 37, (A/CN.4/42, mimeographed English text; para. 80, printed French text): Mr. Hudson's text, which included the paragraph adopted at the previous meeting (para. 91) read as follows:

"1. The States whose nationals are engaged in fishing in any area of the high seas may regulate and control fishing activities in such area for the purpose of conserving its resources against extermination. If only the nationals of a single State are thus engaged in an area, that State may take such measures in that area. If the nationals of several States are thus engaged in an area, such measures shall be taken by those States in concert. In any case, however, no area may be closed to the entry of nationals of other States to engage in fishing activities.

2. If any part of an area is situated within X miles of the territorial waters of a coastal State, that State is entitled to take part in any concert adopted, even though its nationals are not engaged in fishing in the area.

3. The FAO should confer competence on a permanent body to conduct continuous investigations of the world's fisheries and the methods employed in exploiting them, and such body should make recommendations of conservatory measures to be adopted by the States whose nationals are engaged in fishing in various particular areas."

1a. As an alternative text for paragraph 3, Mr. Hudson proposed the following:

"3. The FAO should confer competence on a permanent body to conduct continuous investigations of the world's fisheries and the methods employed in exploiting them and such body should have power to notify to the States whose nationals are engaged in fishing in various particular areas the conservatory measures to be adopted in each area. Any notification should come into force in the area to which it relates within X months, provided no such State makes objection within that period."

He did not know whether the Commission could arrive at an agreed solution.

2. Mr. HUDSON pointed out that he was not proposing a text, but only principles which would require more precise drafting.

3. He had been thinking over the discussion which had led him to submit paragraph 2 of his proposal. If the X miles referred to were a short distance, the situation contemplated in paragraph 2 would doubtless never arise, since all coastal communities engaged in fishing, and thus coastal States as well came within the scope of paragraph 1. Paragraph 2 was perhaps unnecessary.

4. The CHAIRMAN observed that that was a secondary matter and that the most important points were dealt with in paragraphs 1 and 3.

5. Mr. HUDSON had understood that Mr. François could accept the substance of paragraph 1, but disagreed regarding paragraph 3. To meet Mr. François' objection, he had drafted an alternative text for paragraph 3, which was based on the convention concluded between the United States and Mexico.

The convention for the establishment of an International Commission for the Scientific Investigation of Tuna, signed by the United States and Mexico, (*American*

*Journal of International Law*, vol. 45, (1951), Official Documents, p. 51) contained, in article 1, paragraph 9, which had been supplemented by a subsequent exchange of notes, provisions similar to those which he had drafted as an alternative text for paragraph 3; but in the convention, the scope of those provisions was limited to the conduct of meetings and the performance of the functions and duties of the commission established in accordance with the convention.

6. Mr. HSU said that at the previous meeting he had opposed Mr. Hudson's proposal. He doubted whether it was advisable to rely on the particular régime established by the convention for the protection of fisheries in the north-west Atlantic. His doubts had been confirmed when he had referred to President Truman's proclamation. The rules it established were, indeed, closer to the proposal of Mr. François than to that of Mr. Hudson. The proclamation stated that: "In view of the pressing need for conservation and protection of fishery resources, the Government of the United States regards it as proper to establish conservation zones in those areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been or in the future may be developed and maintained on a substantial scale." The proclamation went on to state that: "The right of any State to establish conservation zones off its shores in accordance with the above principles is conceded. That proclamation was certainly in conformity with Mr. François' proposal.

7. He recognized that, for certain situations, Mr. Hudson's proposal was well founded; but the general rules adopted should be those proposed by Mr. François, which had been established by President Truman.

8. Mr. CORDOVA observed that the second paragraph of the preamble of President Truman's proclamation fully supported Mr. François' view. He emphasized that the proclamation did not limit the zone in which a coastal State could exercise such powers, whereas Mr. François prescribed a limit of 200 sea miles. He did not see why the Commission should adopt Mr. Hudson's proposal, which went beyond existing international law.

9. Mr. KERNO (Assistant Secretary-General) thought that the texts proposed by Mr. Hudson and Mr. François were both in conformity with President Truman's proclamation. Indeed, the latter stated that: "The right of any State to establish conservation zones off its shores... is conceded"; that referred to coastal States, but the words "in accordance with the above principles" were included, and those principles applied where only the nationals of the coastal State engaged in fishing and that State alone had regulatory powers. But if nationals of other States were also engaged in fishing, regulation must be by agreement; that was what Mr. Hudson had proposed.

10. Mr. SANDSTRÖM pointed out, in connexion with President Truman's proclamation, that if a State took measures to safeguard its interests in the absence of any provisions of international law, that did not imply that the Commission should incorporate those provisions in international law.

11. There was a very important difference between the proposals submitted by Mr. Hudson and Mr. François, namely, that Mr. François only solved the problem of conservation of the resources of the sea in areas close to the coast. He entrusted that task to the coastal State. But it was necessary to go further and to consider the whole problem that could better be done on the basis of Mr. Hudson's proposal.

12. Mr. Hudson's text provided two solutions for cases in which States could not agree. In paragraph 3 it was provided that the international body should only make recommendations, whereas in the proposed alternative text that body could, in certain circumstances, take decisions which would enter into force provided that no objections were made within a certain period. He was in favour of giving wider powers to the international body. He thought that there was one case in which that should be done, namely, where there was an obvious duty and where technical rather than political problems were involved.

13. Mr. SPIROPOULOS recalled that, at the beginning of the previous meeting,<sup>1</sup> he had said that the best way to solve the problem was to set up an international organization. He did not think it advisable to rely on President Truman's proclamation, for a perusal of that document showed that it was the lack of regulation of fishing on the high seas which had obliged the President of the United States to issue such a proclamation. The proclamation stated that: "The Government of the United States regards it as proper to establish...". That Government had considered it proper because there were no other rules: it was not a question of law, but of action by a State. If the law were to be codified, it was necessary to seek the best solution. In the case of the high seas, which were not placed under the sovereignty of any particular State, the best solution was regulation by an international body. He preferred Mr. Hudson's system; rules would first be established and there would then be set up an international institution which, in the last resort, could take decisions in case of dispute.

14. Mr. SCALLE fully supported the views of Mr. Spiropoulos and Mr. Sandström, for there was no essential difference between their respective positions. Action by a coastal State was better than no action at all; even admitting that such a State was not necessarily interested, it might enact regulations because it considered that international interests would thus be served. There then arose what he had described as "dissociation of functions". That situation arose, for instance, when, in the absence of government, those holding power took the place of the government. It was not a solution to be recommended, for it was the method of feudalism or anarchy. There could be better solutions, such as that proposed by Mr. Hudson. Still better was the solution of an international organization, which constituted the third stage; that was an excellent result, which he thought the Commission should achieve. But there was even a fourth stage. In a specialized agency it was very rare for an organ to have power to take final decisions;

nevertheless, that was the case with the International Commission for Air Navigation established under the Convention relating to the Regulation of Aerial Navigation, signed at Paris on 13 October 1919. That came back to Mr. François' proposal to reconcile the interested parties when they could not reach agreement, by obliging them to resort to arbitration. By that solution, the international body, which was the third stage, could provide judges, who represented the fourth stage, with the necessary technical information, as in the case of parties appearing before national courts.

15. The Commission must decide how far it wished to go. He found it agreeable and reassuring that the Commission was moving towards those successive stages. He was sure that it was on the way to making progress.

16. He supported Mr. Sandström's proposal, or better still, that of Mr. Spiropoulos; he could give partial support to the proposal submitted by Mr. Hudson if the latter was prepared to go much further in his third paragraph. His proposal in fact stated that agreement must be reached, without providing any means of compelling the interested parties to agree or to accept a judicial or arbitral decision.

17. Mr. ALFARO, speaking on a point of order, said that there were three main questions which the Commission must decide before embarking on further discussion. Firstly, the Commission must decide whether a coastal State took precedence in the regulation of fisheries on the high seas up to a certain distance from its coasts, or whether that power rested with States whose nationals engaged in fishing. That was the essential difference between the proposals submitted by Mr. François and Mr. Hudson. Secondly, in the absence of agreement, should the dispute be submitted to some compulsory procedure for pacific settlement? Thirdly, the Commission must decide whether it was necessary for a specialized agency of the United Nations to take charge of the whole question. The Commission could not settle the third question until it had taken a decision on the first two.

18. The CHAIRMAN pointed out that, at the previous meeting, there had been an equal vote of 6 to 6 on the first question and that, after Mr. Hudson had added a second paragraph to his text, a decision had been reached by the very narrow majority of 6 to 5.<sup>2</sup>

19. Mr. SCALLE did not consider those questions mutually exclusive. The fact of giving certain powers to a coastal State did not mean that it could not be subsequently decided that governments must reach agreement, or even that a specialized agency must be set up. Those were stages of progress. He was prepared to abandon the first stage, as he did not wish to see a government given powers in an international matter. The other stages constituted progress.

20. Mr. CORDOVA did not see how a vote could be taken on the first paragraph of Mr. Hudson's text until the decision on paragraph 2 was known, since that paragraph met the objections to paragraph 1.

21. The CHAIRMAN thought that Mr. Córdova's anxiety was unfounded. If the first paragraph were

<sup>1</sup> Summary record of the 118th meeting, paras. 14-16 and para. 28.

<sup>2</sup> Summary record of the 118th meeting, paras. 89 and 94

adopted and the second rejected, a vote would be taken on the proposal as a whole and those who could not accept the first paragraph without the second would vote against the proposal.

22. Mr. HUDSON asked the Commission to decide whether it preferred the first two paragraphs of Mr. François' text or the first two paragraphs of his own.

23. Mr. HSU observed that there had been an equal vote on the substance. Thus neither text should be taken as a basis for the new rules, or else both should be adopted. Moreover, the principles were not mutually exclusive; hence it could be decided to take both into account.

24. Mr. FRANÇOIS thought that Mr. Hsu could be given satisfaction. The report would state that there had been an equal vote, that the Commission had endeavoured to find common ground and had found it in Mr. Hudson's modified text. If the General Assembly considered that the first proposal should have been submitted and rejected the compromise, everyone would know the Commission's opinion.

25. Mr. YEPES proposed that the first paragraph of Mr. Hudson's proposal be amended to read as follows:

"The States whose nationals are engaged in fishing in any area of the high seas situated within X miles of the coast . . .".

He made that suggestion because from the very general statement of principles submitted by Mr. Hudson, a State might claim the right to regulate fishing right up to the coastal waters of another State. He was disturbed by the words "any area of the high seas". It must be explained that the whole of the high seas was not included.

26. Mr. HUDSON pointed out that that amendment entirely upset the system on which his text was based.

27. Mr. SPIROPOULOS considered that the purpose of Mr. Hudson's proposal was to regulate fishing on the whole of the high seas, although in order to satisfy Mr. François it referred, in paragraph 2, to fishing on that part of the high seas in the neighbourhood of a coastal State. Regulation could not be confined to coastal fisheries, but must cover the whole of the high seas. The Commission should vote for the text which expressed that idea and which, in any case, was not the final text.

28. The CHAIRMAN asked whether the Commission was ready to decide how the principle was to be dealt with. If it was not satisfied with the text as a whole, it would still be able to reconsider its decisions.

29. Mr. YEPES wished to explain his position. He favoured the intervention of an international authority as proposed by Mr. Spiropoulos and had included it in his proposal; but he did not wish the coastal States to be lightly treated and to be practically excluded, as in Mr. Hudson's first paragraph. He could not accept that paragraph as a general basis for discussion. It must be explained that coastal States were best qualified to institute regulation. He proposed that paragraphs 1 and 2 be combined.

30. Mr. AMADO asked Mr. François whether he did

not wish to urge the adoption of the limit he had proposed, namely a distance of 200 miles.

31. Mr. FRANÇOIS believed that, as a result of the equal vote, the Commission had reached a dead-end. It had been necessary to find common ground for agreement and he certainly could not urge his proposal, since it had resulted in an equal vote. Another solution must be sought, and he would therefore vote for Mr. Hudson's text. Nevertheless, he still preferred the solution he had outlined.

*The principles contained in paragraphs 1 and 2 of Mr. Hudson's text were adopted by 8 votes to 4.*

32. Mr. AMADO said that he was not entirely satisfied, but his vote had been based on the considerations advanced by Mr. François.

33. Mr. YEPES said that one of the reasons for his vote was his interpretation of President Truman's proclamation, namely, that it was based on the particular interest of a coastal State in direct participation in the conservation of the resources of the sea. But the formula adopted in principle by the Commission excluded the coastal State and was confined to a very vague statement, in paragraph 2, that the coastal State could take part in any concert adopted. He had voted against the proposed text because he believed that the coastal State had an interest which should prevail.

34. Mr. ALFARO said that he was prepared to vote in favour of the text to be proposed if it were so drafted as not to exclude coastal States. He did not wish paragraph 2 to appear as an addendum to paragraph 1. The text should be so drafted that it did not appear to reject the coastal State.

35. The CHAIRMAN pointed out that Mr. Hudson's principle had been adopted by the Commission and that it only remained to perfect the drafting. Paragraph 3 and the alternative text proposed were based on the same principle. In the absence of agreement between the States concerned, the matter was referred to the Food and Agriculture Organization.

36. Mr. CORDOVA thought that if a vote were taken on the principle, it should be stated that the international body should have power to establish regulations which States must apply.

*The principle that, failing agreement, an international organization should intervene, was unanimously adopted.*

37. Mr. EL KHOURY said that he still approved of the first two paragraphs of Mr. Hudson's text. He proposed the following amendment to the text of paragraph 3: for the word "recommendations" substitute the word "regulations" and for the word "adopted" substitute the word "applied".

That amendment was in conformity with the views of Mr. Scelle, Mr. Spiropoulos and Mr. Sandström.

*The amendment proposed by Mr. el Khoury was adopted by 9 votes to 2, with 1 abstention.*

38. Mr. HUDSON observed that the majority preferred regulation by a specialized agency, and proposed adopting the alternative text for paragraph 3, in place of the original text. That alternative did not in fact go as

far as paragraph 3 as amended by Mr. el Khoury and would be more acceptable to him.

39. The CHAIRMAN, in reply to a question by Mr. ALFARO, explained that the protective measures to be adopted would be notified by the Food and Agriculture Organization and that the text proposed by Mr. Hudson offered two solutions. The alternative text which Mr. Hudson now preferred provided that the conservatory measures notified should come into force if no State made objection.

40. Mr. SCELLE said that if the Commission voted for that text it would be voting for the opposite of what it had just adopted. The Commission had, in fact, decided in favour of regulation.

41. The CHAIRMAN agreed that the essential difference between paragraph 3 as amended and the alternative text was the addition in the latter of the words "provided no such State makes objection within that period"; the alternative text had already been rejected, as a result of the vote just taken.

42. The Commission had adopted the principle; it must now consider how that principle should be drafted.

43. Mr. FRANÇOIS asked for an explanation. Paragraph 1 stated that: "In any case, however, no area may be closed to the entry of nationals of other States to engage in fishing activities". Assuming that the nationals of three States were engaged in fishing in a certain area of the high seas and reached agreement, if the nationals of a fourth State came into the area with a view to engaging in fishing, would the paragraph be applicable or would the new arrivals not be required to conform to the agreement?

44. Mr. HUDSON replied that the new situation would necessitate the conclusion of a new agreement with the fourth State.

45. Mr. FRANÇOIS observed that the system would be very unstable.

46. Mr. HUDSON said that it was bound to be unstable since no State could be excluded.

47. Mr. SCELLE did not believe that the difficulty mentioned by Mr. François could be overcome in the manner Mr. Hudson had described. The fourth State would be joining an international organization having a rule of law which those acceding to it must observe. On the other hand, as soon as it joined the organization, the new State could propose changes and the Food and Agriculture Organization would decide whether, in that particular instance, it should recognize the objections.

48. Mr. HUDSON pointed out that he had drafted the last sentence of paragraph 1 before the idea of introducing the Food and Agriculture Organization had been submitted. If that organization were to intervene, the sentence would not be applicable.

49. Mr. SCELLE did not think that the two questions could be settled at the same time. He believed that the Commission wished to give powers to the Food and Agriculture Organization.

50. Mr. EL KHOURY and Mr. KERNO (Assistant-Secretary-General) agreed with Mr. Scelle. If three or

four States instituted regulations and were joined by a fifth, the latter must observe the rules; if it was not satisfied, it could approach the Food and Agriculture Organization.

51. Mr. CORDOVA said that if a régime were established by an international organization, the newly entering State would have to observe the rules. Moreover, if there were regulation by agreement between the States engaged in fishing, it should be possible for the new State, if it did not approve of such regulation, to submit its objections to an international organization. He wished the report to take account of that point, and to give the international organization powers to intervene when a State joined those already engaged in fishing.

52. Mr. HUDSON suggested setting up a drafting sub-committee.

53. The CHAIRMAN proposed that the Rapporteur be instructed to draft the principle adopted.

54. Mr. FRANÇOIS said that he would endeavour to do so, but wished to discuss the matter with the Sub-Committee previously appointed.<sup>3</sup>

55. Mr. KERNO (Assistant Secretary-General) thought that as a matter of courtesy the Secretariat should inform the Food and Agriculture Organization that the International Law Commission intended to recommend the General Assembly to entrust it with duties in connexion with the conservation of the resources of the sea.

*It was so decided.*

56. Mr. FRANÇOIS observed that there were other questions to be settled. In an article entitled "The Legal Status of Submarine Areas Beneath the High Seas", by Richard Young,<sup>4</sup> it was pointed out that in certain cases the continental shelf had more than one edge. He did not think it necessary to go into all the details, for it was impossible to draft complete rules for the continental shelf forthwith. The Commission should merely consider the main points to be submitted to Governments. He proposed that the question be left aside.

57. Mr. SANDSTRÖM said that he also had read the article and had arrived at the same conclusion as Mr. François.

58. It was stated by Young that: "Actually the edge of the shelf does not appear to be as simple a phenomenon as the maps might lead one to suppose. In some regions it may lie at depths either more or less than 100 fathoms; in others, the edge may be almost imperceptible; in still others, there may be several shelves and edges, or the submarine terrain may be so confused as to make difficult the location of any continuous line."<sup>5</sup>

59. In his opinion it was the latter situation which raised difficulties, but they could not be overcome.

60. Moreover, Young also wrote that:

"A definition of the continental shelf takes care of most but not all submarine areas which may be regarded as appurtenant to land territory. There remain insular

<sup>3</sup> Summary record of the 117th meeting, para. 88.

<sup>4</sup> *American Journal of International Law*, vol. 45 (1951), pp. 225-239.

<sup>5</sup> *Ibid.*, p. 234.

shelves and submarine areas in shallow seas where no shelf edge exists. With respect to the former, it would appear not difficult to apply, *mutatis mutandis*, the principles suggested for the continental shelf... Submarine areas in shallow seas or gulfs — such as the Baltic, the Persian Gulf, and the Gulf of Paria — present perhaps the most difficult situation of all. In addition to due regard for the interests of adjoining States lying along the same coast, the interests of all States facing on such a body of water must be taken into account. In the absence of any large area lying beyond the 100-fathom line — such as is found in the narrow but deep Red Sea — the entire bed and subsoil must be divided equitably among the littoral States.”<sup>6</sup>

61. He thought that in those circumstances it was impossible to fix rules on the subject. If such problems arose, they must be left to the judge to decide.

*Mr. Sandström's view was accepted.*

62. Mr. FRANÇOIS pointed out that the second question remaining to be settled was that of the possibility of establishing a contiguous zone for fisheries. The question of fisheries remained unchanged. For the time being, the Commission did not wish to make any change in the limits within which fishing could be carried on under existing international law, when not only the nationals of a single State were so enjoyed.

#### CHAPTER 10: SEDENTARY FISHERIES

63. The question of the resources of the sea having been provisionally disposed of, Mr. FRANÇOIS observed that the problem of sedentary fisheries also required solution. Mr. Yepes had proposed amending the text of the second article on the continental shelf adopted by the Commission, so as to refer to mineral resources instead of natural resources.<sup>7</sup> That would exclude sedentary fisheries from the régime of the continental shelf, but it would then be necessary to adopt certain rules for such fisheries. The principle he had proposed in his report maintained the *status quo*.<sup>8</sup> The question of principle to be decided was whether it was intended that the State entitled to exploit the sea-bed should have special rights in sedentary fisheries, not by virtue of existing custom, but by virtue of its rights in the continental shelf.

64. Mr. YEPES explained that he had not proposed the exclusion of sedentary fisheries and submarine vegetation from the régime of the continental shelf; he had mostly suggested that the question be examined. He believed that such fisheries should come under the régime of the continental shelf.

65. Mr. FRANÇOIS read out the article on sedentary fisheries which he had proposed.

66. It was a question of principle. The Commission must decide whether it should extend to sedentary

fisheries the régime adopted for the sea-bed. He thought it preferable not to do so and to treat sedentary fisheries as an entirely special subject for which there should be special rules. Nevertheless, the contrary solution might be adopted, regardless of whether ancient custom existed. President Truman's proclamation referred to natural resources in general, but the preamble showed that the President had only had mineral resources in mind.

67. Mr. KERNO (Assistant Secretary-General) pointed out that the Commission was dealing with two exceptions to the principle of freedom of the high seas: sedentary fisheries and the continental shelf. It must be decided whether priority should be given to one or the other. As the regulation of the continental shelf only gave the right to exploit the sea-bed and the subsoil, he considered it logical for sedentary fisheries, although they entailed fixed installations, to be set apart and subjected to special rules.

68. Mr. YEPES observed that any derogations authorized by the Commission would affect the freedom of the seas. Where there was a conflict between the freedom of the seas and a higher interest, namely that of mankind, which required that freedom to be restricted, preference should be given to the higher interest.

69. The CHAIRMAN hoped that the Commission would decide that the question of sedentary fisheries was independent of the continental shelf and that there was no reason to modify existing practice with regard to such fisheries.

70. Mr. YEPES took a contrary view. He did not consider that the two questions could be separated; in approving the principle of the continental shelf, the Commission had at the same time implicitly approved the principle of sedentary fisheries. If it were desired to apply the general rule of law whereby the accessory followed the principal, it must be admitted that sedentary fisheries and submarine vegetation formed an integral part of the continental shelf. That being so, if a coastal State were empowered to regulate the continental shelf, it should also be made responsible for the regulation of sedentary fisheries.

71. Mr. FRANÇOIS pointed out that the Commission had only adopted a legal concept of the continental shelf. It was not necessary to draw the conclusion advocated by Mr. Yepes. The words “natural resources”, in article 2, could possibly be replaced by the words “mineral resources”.

72. Mr. SANDSTRÖM wondered whether the adoption of the formula proposed by Mr. Yepes would not result in acquired rights being impaired.

73. Mr. SCALLE thought that it was the adoption of the concept of the continental shelf that would entail the continual impairment of acquired rights.

74. Mr. KERNO (Assistant Secretary-General) observed that in practice a distinction was continually made between proprietary rights in the surface of the land and those in the subsoil.

75. Mr. YEPES said that that was only done by special contract; when proprietary rights in land were granted, they applied equally to the surface and the subsoil.

<sup>6</sup> *Ibid.*, p. 236.

<sup>7</sup> Summary record of the 114th meeting, paras. 30 *et seq.*, in particular paras. 31, 33, 48 and 53–57.

<sup>8</sup> A/CN.4/42, p. 62 (mimeographed English text); para. 150 (printed French text).

76. Mr. SCELLE explained that in France the question was governed by the mining laws.

77. Mr. AMADO asked why the Commission should try to introduce new provisions into the régime of sedentary fisheries, which was based on a peaceful, stable and lasting tradition. From time immemorial such fisheries had operated under the benevolent supervision of States, without ever having caused any conflict. He pointed out that in his first report Mr. François had stated that: "It should, however, be noted that many sedentary fisheries have never given rise to objection by other States. Hence, it may be concluded that, in so far as sedentary fisheries are concerned, the international community accepts within certain limits this derogation from the principle of freedom of the seas in specific portions of the sea situated outside territorial waters but close to the coast; 'through long usage these banks are regarded as being occupied and constituting property'." <sup>9, 10</sup>

78. The original of the institution of sedentary fisheries might be unjust, but they had now acquired true rights. That being so, he thought it better to apply the old Latin principle *quieta non movere*.

79. Mr. SPIROPOULOS agreed with Mr. Amado, but he pointed out that the Commission had been instructed to codify international law. If it set aside all peaceful matters, what would it codify? In his opinion it would be preferable to ascertain the existing law and codify it.

80. Mr. FRANÇOIS was quite willing for the law of sedentary fisheries to be codified, but he was opposed to Mr. Yepes' suggestion that it be included in the concept of the continental shelf.

81. Mr. AMADO pointed out that States followed a general practice with regard to sedentary fisheries, so that the task of codification would be simple. The question of the continental shelf was entirely new and arose from the development of international law. In his opinion the best course with regard to sedentary fisheries would be to consolidate existing practice where it was considered useful.

82. Mr. YEPES hoped that the Commission would not forget that it must forge ahead and that it was effecting a veritable revolution in international law. In adopting the principle of the continental shelf it had, indeed, denied the doctrine of the freedom of the seas.

83. The CHAIRMAN asked the Commission to decide whether the question of sedentary fisheries should be connected with that of the continental shelf.

*It was decided by 11 votes to 1 that those questions should not be connected.*

84. The CHAIRMAN proposed that the Commission examine, sentence by sentence, the article on sedentary fisheries proposed by the special rapporteur.<sup>11</sup>

<sup>9</sup> Reply by Great Britain to the question asked by the Proprietary Committee of the Conference on Codification, Basis for Discussion No. 2, p. 28.

<sup>10</sup> A/CN.4/17, p. 31 (mimeographed English text); para. 96 (printed French text).

<sup>11</sup> A/CN.4/42, p. 62 (mimeographed English text); para. 150 (printed French text).

85. In reply to a question by Mr. YEPES, Mr. FRANÇOIS stated that the article meant that, with regard to sedentary fisheries, the *status quo* would be maintained.

86. Mr. CORDOVA observed that the article proposed by the Special Rapporteur made no provision for the conservation of the resources of the sea. He emphasized that, since such resources were the inheritance of mankind, States were only entitled to exploit them in so far as they refrained from destruction. He regretted that the article proposed by Mr. François did not prohibit the extermination of marine fauna.

87. Mr. FRANÇOIS said that in the case of sedentary fisheries the question did not arise in quite the same form. In his opinion it was the States using such fisheries that should decide on the measures to be adopted for the protection of marine fauna. The régime for the conservation of resources of the sea might well be extended to sedentary fisheries; but it would then be possible to go even further and to provide that the régime for the conservation of certain resources should be so extended that States were forbidden to waste the resources of their own soil.

88. Mr. CORDOVA thought that, although a coastal State certainly had the greatest interest in conserving the resources of the sea, it must not be forgotten that the nationals of other States frequently came to fish in places where sedentary fisheries were situated. Hence it was important to ensure the protection of marine fauna in such cases.

89. Mr. FRANÇOIS pointed out that, if the system he proposed were adopted, nothing would prevent the Mexican Government, for instance, from adopting the necessary measures to conserve the resources of the sea in the Gulf of Mexico.

90. Mr. AMADO stressed that the régime of sedentary fisheries was based on the fundamental principle of occupation. He pointed out that, at the 66th meeting of the Commission, Mr. Córdova had already expressed the same idea, and Mr. Brierly had considered that the principle of occupation must be adopted for sedentary fisheries. Mr. Scelle had also supported that view.<sup>12</sup> He thought it necessary to distinguish between fishing in general and sedentary fisheries.

91. Mr. CORDOVA feared that those exploiting sedentary fisheries might be granted the privilege of exterminating the marine fauna in such areas. He would prefer the régime adopted for the conservation of resources of the sea in general to be extended to sedentary fisheries.

92. The CHAIRMAN pointed out that in that case the *status quo* would not be maintained. At present, there was no such obligation for States which had acquired rights in sedentary fisheries by prescription. Nevertheless, it was in their own interests not to exhaust such fisheries.

93. Mr. CORDOVA considered that, without wishing to deny States a right acquired by prescription, it was

<sup>12</sup> See summary record of the 66th meeting, paras. 10, 12, 17 *et seq.*

necessary to impose on them the obligation to conserve the resources they exploited.

94. Mr. FRANÇOIS said that he was prepared to satisfy Mr. Córdova by explaining in the article he proposed that the coastal State was entitled to regulate the conservation of resources of the sea.

95. Mr. CORDOVA said that that was not sufficient; it would still be necessary to stipulate the distance up to which protection must be ensured. Moreover, it must not be forgotten that in certain cases it was not the coastal State which exploited sedentary fisheries, but other States; who would then be responsible for regulation? The coastal State certainly had a general interest in ensuring the conservation of resources of the sea, but it had no immediate interest.

96. Mr. FRANÇOIS pointed out that in his text he had only been concerned with the coastal State.

97. The CHAIRMAN emphasized that it was only necessary to recognize existing sedentary fisheries as lawful.

98. Mr. EL KHOURY considered that the first paragraph of the text proposed by Mr. Hudson and adopted by the Commission, regarding resources of the sea, could also be applied to sedentary fisheries. That text provided that a State whose nationals were engaged in fishing in an area could take the necessary measures for regulation and control in that area; if the nationals of several States were engaged in fishing in an area, such measures must be taken by those States in concert.

99. Mr. FRANÇOIS said that that principle could of course be adopted, but the *status quo* would then be changed; he doubted whether that was really necessary.

100. The CHAIRMAN proposed that, in the first sentence of the article submitted by the Rapporteur, the words "by the coastal State" be added after the words "a part of the high seas".

101. Mr. FRANÇOIS accepted that proposal.

102. Mr. CORDOVA wished to know what would happen where a coastal State did not exploit sedentary fisheries.

103. The CHAIRMAN said that sedentary fisheries in which no rights had been acquired by prescription would be subject to the general régime of fisheries.

104. Mr. SANDSTRÖM was not sure that it was advisable to add the words "by the coastal State", as the Chairman had suggested. It must be borne in mind that sedentary fisheries were generally exploited by the coastal State, but other States might have acquired the rights.

105. The CHAIRMAN suggested the words "by a particular State".

106. Mr. CORDOVA could not agree that prescription gave any State the right to exhaust the resources of the sea.

107. Mr. EL KHOURY considered that the question of sedentary fisheries should be examined in conjunction with that of the conservation zones established round ordinary fisheries. He did not think it necessary to make a distinction between sedentary and other fisheries,

provided that the rules for conservation of the resources of the sea in general were observed in sedentary fisheries.

108. Mr. SCELLE thought that the members of the Commission were somewhat confused. Sedentary fisheries must not be understood to mean only sedentary fish, but also areas in which rights had been acquired by prescription. Sir Cecil Hurst went so far as to speak of property in that connexion.

109. For a sedentary fishery to be recognized, there must be establishment and occupation and effective and continued use of a part of the high seas by a State which, moreover, was not necessarily the coastal State.

110. Mr. AMADO pointed out that in his first report Mr. François had stated that: "Fisheries may be described as sedentary either by reason of the species with which they are concerned, that is to say species attached to the soil or irregular surfaces of the sea-bed, or by reason of the equipment employed, for example stakes driven into the sea-bed".<sup>13</sup> He also recalled that at the second session Mr. Scelle had maintained that both conditions must be satisfied, there being both exploitation by means of static equipment and sedentary species.<sup>14</sup>

111. He observed that Mr. Córdova was deeply concerned over the question of conservation of sedentary fisheries. But he wondered whether there was any need to consider it. It was clear that States using such fisheries had every interest in refraining from extermination of the species. In his opinion the Commission was not entitled to introduce rules for the conservation of species. It should merely decide to maintain the *status quo*.

112. Mr. FRANÇOIS said that sedentary fisheries generally began in territorial waters but sometimes extended beyond the limits of those waters. He wondered whether, in practice, there were many sedentary fisheries situated in the high seas.

113. Mr. CORDOVA was prepared to accept the principle of prescription where the coastal State exploited sedentary fisheries and to recognize that that State had powers of regulation. But with regard to the other points, the question remained unsolved. In any case, the general interest of mankind must not be lost sight of. He thought that the Commission considered that only fishing rights were accorded to States using sedentary fisheries, but not proprietary rights or the right to destroy.

114. Mr. SCELLE described how the practice relating to waterways and rivers had been codified in France. The Civil Code had regulated institutions which had been established on waterways and rivers in the same way as sedentary fisheries had been established at sea. Those which had acquired a legitimate title by grant or charter had been authorized to continue, but had been obliged to conform to rules laid down for all such institutions. The legality of organizations had not been considered, but they had been subjected to a general régime.

115. Mr. CORDOVA said that that was exactly what he desired for sedentary fisheries.

<sup>13</sup> A/CN.4/17, p. 31 (mimeographed English text); para. 94 (printed French text).

<sup>14</sup> See summary record of the 66th meeting, para. 22.

116. Mr. SCELLE, supported by Mr. AMADO, added that in view of the generally small scale of sedentary fisheries it might be questioned whether there was any danger of their exhausting the species. He himself was not in favour of connecting them with the concept of the continental shelf, with which he considered them in conflict.

117. Mr. EL KHOURY proposed that, at the beginning of the article submitted by Mr. François, the following words be inserted: "Subject to rules relating to the conservation of resources of the sea".

118. Mr. CORDOVA found that suggestion excellent.

119. Mr. SPIROPOULOS said that in his opinion the problem with which Mr. Córdova was concerned did not arise. He thought it useless to endeavour to establish rules where they were not required. The exhaustion of sedentary species could have no serious consequences either for the interests of the coastal State or those of the international community.

120. The CHAIRMAN thought that the majority of members considered that the Commission should confine itself to codifying existing practice in respect of sedentary fisheries, which Mr. François had endeavoured to formulate.

121. Mr. SCELLE said that he well understood Mr. Córdova's anxiety and admitted that the latter must find his attitude rather illogical. But in international law there was no rule by which a State could be forbidden to destroy its plantations and wheatfields, if it so desired.

122. Moreover the article which Mr. François had proposed to the Commission provided that regulation of sedentary fisheries should ensure maintenance of order and conservation of the beds.

123. Mr. CORDOVA pointed out that other members of the Commission were not prepared to accept that view.

124. The CHAIRMAN asked whether the Commission could accept, in principle, the formula proposed by Mr. François.

125. Mr. EL KHOURY said that he could not accept that formula, since it left the way open for abuses.

126. Mr. YEPES wished the article to be more concisely drafted and proposed the deletion of the words: "Without any formal and repeated protests against such use having been made by other States, and particularly by such States as, by reason of their geographical situation, could have put forward objections of particular weight." He would also prefer the article to refer to "continued and peaceful use" rather than "effective and continued use".

127. Mr. AMADO protested against the deletion proposed by Mr. Yepes. The legal basis of sedentary fisheries was, in fact, occupation recognized by other States.

128. Mr. SCELLE thought that the word "existing" could be added before the words "sedentary fisheries"; that would show that the article only applied to sedentary fisheries with a recognized title, and that prescription would not apply to new fisheries.

129. The CHAIRMAN announced that slight drafting amendments would be made to the text proposed by Mr. François. He put that text to the vote.

*Mr. François' text was adopted by 8 votes to 3.*

130. Mr. HSU said that he had voted against the text. In his opinion the question raised by Mr. Córdova required thorough examination; the discussions had not sufficiently brought out whether users of sedentary fisheries had the right, under positive law, to destroy marine fauna. If they did not possess that right, the codification undertaken by the Commission should state the fact. If they had such a right at present, the Commission should establish new rules to ensure the conservation of sedentary fisheries.

131. Mr. EL KHOURY said that he also had voted against the article proposed by Mr. François, because he could not agree to the maintenance of the *status quo* if that were harmful.

The meeting rose at 1 p.m.

## 120th MEETING

Monday, 9 July 1951, at 3 p.m.

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*Chairman:* Mr. James L. BRIERLY

*Rapporteur:* Mr. Roberto CORDOVA

#### *Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, 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.

#### Régime of the high seas, report by Mr. François (item 6 of the agenda) (A/CN.4/42) (*continued*)

##### CHAPTER 10: SEDENTARY FISHERIES (*continued*)

1. The CHAIRMAN reminded members of the Commission that at the previous meeting they had finished the general discussion on the question of sedentary fisheries. They must now take a decision on the draft article submitted by the Rapporteur at the end of the section of his report dealing with sedentary fisheries (A/CN.4/42, p. 62, mimeographed English text; para. 150, printed French text).

2. Mr. HUDSON pointed out that the draft article did not specify who made "effective and continued use", nor who established the "rules". He wondered whether, without expressly stating the fact, the purpose of the draft article was not the exercise of a certain measure of control by the State whose territory was contiguous to the area of the high seas in which such sedentary fisheries were located. In the case of Ceylon and the coastal principalities of the Persian Gulf, regulation was by the States whose territory was contiguous to the area of the high seas in which the sedentary fisheries were located.

3. Mr. FRANÇOIS did not think that the definition of sedentary fisheries was in dispute. In his first report on the high seas (A/CN.4/17) he had reproduced, at the beginning of the section dealing with sedentary fisheries (p. 31, mimeographed English text; para. 94, printed French text), the definition established by Professor Gidel, which was as follows:

"Fisheries may be described as sedentary either by reason of the species with which they are concerned, that is to say species attached to the soil or irregular surfaces of the sea-bed, or by reason of the equipment employed, for example stakes driven into the sea-bed."

In his second report he had assumed that definition to be known and had merely endeavoured, in his draft article, to qualify the sedentary fisheries with which the Commission specially desired to deal.

4. As a preliminary, however, the Commission could consider whether it was desirable to give a definition of sedentary fisheries or whether that definition could be taken as known.

5. Mr. HUDSON explained that he had only wished to point out that the draft article did not explain either who made "effective and continued use" or who established the "rules". It was a question of drafting.

6. He emphasized that sedentary species must be distinguished from sedentary fishing, which was an operation for the exploitation of sedentary species.

7. Mr. FRANÇOIS observed that Professor Gidel's definition was wider than what Mr. Hudson appeared to understand by sedentary fisheries. According to Professor Gidel there was sedentary fishing when the equipment used was fixed, even though the species fished were not sedentary.

8. The CHAIRMAN remarked that Mr. Hudson only wished it to be explained who made the "use" referred to in the draft article. In most cases it was the coastal State which made such use, but that was not necessarily so and it would be more correct to use the words "by the appropriating State" or, more simply "by a State".

9. Mr. SANDSTRÖM pointed out that at the previous meeting Mr. Scelle had said that the State whose nationals made use of sedentary fisheries might be other than the coastal State.<sup>1</sup> But Mr. Scelle had not explained whether that comment was hypothetical or not; he had given no example.

10. Mr. HUDSON, in support of that remark, cited the pearl fisheries in the Persian Gulf, where the inhabitants of Kuwait and Bahrein exploited sedentary fisheries in waters contiguous to the territorial waters of Iran. In that area a well established rule permitted all coastal dwellers of the Gulf to engage in pearl fishing. Europeans who had endeavoured to participate in the exploitation of those fisheries had, however, been compelled to abandon the attempt.

11. Mr. EL KHOURY said that the fishers of the Persian Gulf had to obtain a licence from the coastal authorities.

12. Mr. HUDSON observed that, in view of the difficulty of delimiting sovereignties on the shores of the Gulf, it might be difficult to ascertain which coastal State was competent. He did not consider that the idea of appropriation could be properly applied to sedentary fisheries and pointed out that the fishers of the Persian Gulf were not all licensed; some ports required licences but others did not.

13. The CHAIRMAN suggested the adoption of the following words: "by permission or acquiescence of the coastal State".

14. Mr. CORDOVA pointed out that, at the previous meeting, Mr. François had expressed the view that only a coastal State could exploit sedentary fisheries.

15. Mr. HUDSON observed that the exploitation of such fisheries was a form of occupation which was not accompanied by any kind of territorial claim.

16. The CHAIRMAN said that in that case the question of defining the occupier would arise.

17. Mr. ALFARO remarked that the draft article implied that "effective and continued use" might be made by a State, since the words "by other States" were included two lines lower. He would prefer the words "being made" to the words "having been made".

18. Mr. SANDSTRÖM said that he approved the addition of the words "by a State".

19. Mr. YEPES pointed out that the sedentary fisheries in question were only those established on the high seas. Moreover, he thought that the draft article could be shortened by using the words "effective and peaceful use", which would make it possible to delete the phrase referring to objections by other States.

20. The CHAIRMAN observed that, however justified that remark might be, it provided no answer to the question who made "effective and continued use".

21. Mr. YEPES said that he approved the addition of the words "by a State".

22. Mr. FRANÇOIS explained that, except in the Persian Gulf, sedentary fisheries were always regulated by a State. In the Persian Gulf, on the other hand, the régime was based on traditions respected by several States. He had given some details in his second report (A/CN.4/42, p. 59, mimeographed English text; para. 144, printed French text). It seemed impossible to bring the system in force in the Persian Gulf within the scope of general rules and to treat that entirely special case in the same way as other cases. The Commission should

<sup>1</sup> Summary record of the 119th meeting, para. 109.

provisionally disregard the régime of sedentary fisheries in the Persian Gulf and deal only with other fisheries, in order to avoid any confusion.

23. In reply to a question by Mr. Córdova, he confirmed that the draft article submitted in his report only applied to exploitation of sedentary fisheries on the high seas by a coastal State.

24. Mr. CORDOVA thought that it would consequently be advisable to add the words "by a coastal State".

25. Mr. SPIROPOULOS pointed out that sedentary fisheries might nevertheless be situated at any distance from the coast.

26. Mr. KERNO (Assistant Secretary-General) pointed out that sedentary fisheries were generally exploited by the nationals of the coastal State. Occupation of such fisheries by a State other than the coastal State remained exceptional. He did not see how the situation in the Persian Gulf differed from that of other sedentary fisheries.

27. Mr. FRANÇOIS considered that, in the case of the Persian Gulf, the term "occupation" could not be applied.

28. Mr. HUDSON regretted that he has used the word "occupation" which, on reflection, he found unsatisfactory.

29. The CHAIRMAN thought that, on the contrary, it was the correct term; he wished it to be retained.

30. Mr. HUDSON pointed out that pearl fishing had been practised in the Persian Gulf for thousands of years. It provided a livelihood for many people living on the coasts of the Gulf, who moved from one sheikdom to another. All natives of the coast could engage in fishing while some pearl fishers came from as far away as Muscat or Zanzibar. Fishers were not subject to any uniform regulations. Many coastal States did not regulate pearl fishing at all, but fishing vessels out of Bahrein were subject to certain regulations governing the sharing of their catch. Germans, Italians and French had tried to engage in fishing in the Persian Gulf by more mechanized methods, but had been obliged to abandon the attempt, which had been discouraged by the British who were anxious to respect the maritime truce.

31. If the Commission considered that case too special for inclusion in a general text, it should nevertheless refrain from making any statement which might appear to conflict with a very old-established practice, thus expressly excluding it from the contemplated codification.

32. In Ceylon, no one could engage in pearl fishing without a licence. The local courts had fixed the extent of the sovereignty of Ceylon over sedentary fisheries in the high seas contiguous to her territorial waters. There was a special administrative department in Ceylon dealing with Arab pearl fishers, who were issued with special licences.

33. He had had no occasion to make a special study of the efforts made by foreigners to engage in fishing in the waters adjacent to Australia and Tunisia; nor did he have any information on similar situations which might arise off the coasts of Venezuela and Panama.

34. Mr. ALFARO pointed out that the Government of Panama subjected foreign pearl-fishers to a licensing system if they used certain kinds of improved fishing equipment.

35. Mr. CORDOVA thought the discussion had shown that the Commission had insufficient information to solve the problem.

36. The CHAIRMAN considered that, if the Commission adopted the draft article submitted by the Rapporteur, it would exclude the system in force in the Persian Gulf.

37. Mr. SANDSTRÖM thought that the adoption of the words "use . . . by a State or group of States" would make it possible to include the Persian Gulf régime in the proposed text.

38. Mr. EL KHOURY said that, in view of the political situation on the coasts of the Persian Gulf, the Authorities there established could not be considered as States in the technical sense of the term. He thought that the draft article should be retained as it stood, except that he proposed the deletion of the words "and repeated".

39. The CHAIRMAN thought that the Commission could explain in its comment that it had no desire to interfere with the régime in force in the Persian Gulf.

40. Mr. KERNO (Assistant Secretary-General) agreed that the Commission had insufficient information. Mr. Hudson, the best informed of its members, had himself admitted that there were gaps in his documentation. That being so, he thought that the article should be retained as a provisional draft and submitted to governments, who could make comments and provide explanations.

41. Mr. FRANÇOIS drew the attention of the Commission to the note at the foot of page 52 of his report (mimeographed English text; footnote 38, printed French text), in which he had indicated that it was thanks to Mr. Hudson that he had been able to assemble most of the data used for his study on sedentary fisheries. The Secretariat had provided very little. Other information had been supplied direct from Tunisia and Ceylon (the latter too late for use in the report).

42. The subject was a very complex one. Since additional information might be available the following year, but it was unlikely that it would be possible to draw any clear-cut conclusions from it.

43. Mr. HUDSON said that Mr. Richard Young, who had made a special study of pearl fisheries in Ceylon and the Persian Gulf, would soon be in Geneva. He proposed putting him in touch with the Rapporteur.

44. Mr. LIANG (Secretary to the Commission) said that he had been surprised by Mr. François' last comment. At the previous session, it was Mr. Hudson who had volunteered to supply the Rapporteur with information on sedentary fisheries. The Secretariat had received no such instructions. If the question was not disposed of at the 1951 session, the Secretariat would carry out any research requested of it.

45. Mr. KERNO (Assistant Secretary-General) pointed out that questions put to governments frequently remained

unanswered. If the Commission adopted a provisional text and submitted it to governments, the latter would be encouraged to give their views if they had any criticisms to make. It would therefore be advisable to adopt a provisional text, the imperfections of which could be pointed out to governments in a comment.

46. Mr. FRANÇOIS thought the question of sedentary fisheries was not of sufficient importance to retain the Commission's attention for three consecutive sessions.

47. Mr. CORDOVA said that, if Mr. Kern's suggestion were adopted, the Commission would have to place the question on its agenda once again.

48. Mr. FRANÇOIS agreed, but pointed out that the question would only be examined after Governments had made their comments.

49. Mr. HUDSON read out the following draft:

"The regulation by a State of sedentary fisheries in areas of the high seas contiguous to the territorial waters of that State is lawful when nationals of that State have long carried on such fisheries without protest by other States, provided, however, that such State does not attempt to exclude altogether the nationals of other States and limits its regulations to the maintenance of order and measures of conservation."

50. It was necessary to sanction regulation by a State of sedentary fisheries contiguous to its territorial waters, without permitting the State to go so far as to exclude the nationals of other States.

51. He was not sure, however, whether such a text could be applied to the fisheries regulations in Ceylon; the Government of Ceylon derived a considerable revenue from fishing. As far as he knew, the régime of the Persian Gulf did not entail any claims to sovereignty over the fishing areas. Panama and Venezuela had only claimed the right to exercise control over fisheries and impose their own regulations. Australia appeared to follow the same lines.

52. In reply to a question by Mr. SANDSTRÖM, Mr. HUDSON explained that in the text he had just submitted he had discarded the idea of occupation.

53. Mr. AMADO said that his impression from the previous meeting was that the fundamental legal principle on which sedentary fisheries were based was occupation and he thought that that principle could be formulated as proposed by Mr. François in his draft article, the opening words of which could, however, be amended to read "Occupation of a part of the high seas by sedentary fisheries . . .".

54. He did not see why the Commission should hold such lengthy discussions on a question which gave no cause for anxiety. Those who were most deeply versed in the subject had doubts. That was the advantage of deep knowledge; the more one delved into a subject the more ignorant one felt. He himself, who was not so well informed, would be satisfied with a text which, apart from the opening words, followed almost exactly the draft proposed by Mr. François.

55. The CHAIRMAN observed that the words proposed

by Mr. Amado defined the "occupant" as the sedentary fisheries themselves. Occupation could only be by a State.

56. Mr. HUDSON said that in theory the high seas were open to everyone. He did not see how, on that principle, a State could protest against the installation of sedentary fisheries on the high seas, if no bounds were set to such fisheries and other States were not excluded. The Commission should state the principle justifying regulation by a State whose territorial waters were contiguous to the areas of the high seas in which sedentary fisheries were exploited; such regulation, however, could not exclude the nationals of other States from using the sedentary fisheries, unless such nationals failed to comply with the rules established by the regulating State.

57. Mr. AMADO considered that the right to exploit sedentary fisheries derived from permanent, peaceful and continued occupation. He regretted that the Commission had devoted so much time to the question. He would vote for Mr. François' text, to which he would propose certain amendments; that text should be submitted to Governments, who would not fail to protest if necessary. If the Commission consulted an expert, as had been suggested, its discussions might be still further prolonged.

58. Sedentary fisheries were a characteristic element of the régime of the high seas. If the Commission referred simultaneously to contiguous zones and the coastal State, it would be merging too many related questions.

59. Mr. YEPES read out the following text which he proposed as a substitute for the opening passage of the Rapporteur's draft article:

"Effective, continued and peaceful occupation by any State of a part of the high seas by means of sedentary fisheries characterized by the presence of species attached to the soil or by the equipment used shall be recognized to be lawful provided that . . ."

60. Mr. HUDSON read out the following draft article amending that which he had just proposed:<sup>2</sup>

"The regulation of sedentary fisheries in areas of the high seas contiguous to its territorial waters may be undertaken by a State, where such fisheries have long been maintained and conducted by nationals of that State, provided that nationals of other States are not excluded from participation in such fisheries."

61. The way must be left open to the nationals of other States, but when they proposed to participate, they must comply with the established régime.

62. He had been most surprised to learn that in Panamanian waters licences were required for fishers using certain equipment whereas others were exempt.

63. Mr. ALFARO explained that the regulation referred to by Mr. Hudson applied to pearl fishers and concerned those using diving equipment.

64. The CHAIRMAN, unlike Mr. Hudson, thought that where rights had been acquired by prescription the nationals of other States could be excluded.

65. Mr. FRANÇOIS was willing to accept the first part of Mr. Hudson's draft, but would prefer to retain the former text as from the words "provided that". In most

<sup>2</sup> See para. 49.

countries no distinction was in fact made between nationals and aliens.

66. Mr. HUDSON was prepared to agree, but wished to delete the final passage of Mr. François' text as from the word "nationality". It was, indeed, necessary to be able to exclude the use of equipment such as trawls. Trawlers had endeavoured on two occasions to engage in pearl fishing in the Persian Gulf, but there had always been opposition from the British authorities.

67. Mr. SANDSTRÖM observed that Mr. Hudson's last formula raised a question. Was it the use of fisheries which gave a State the right of regulation or was it the regulation which gave the right to engage in fishing? He thought that the new texts were based on the second view.

68. Mr. HUDSON agreed that his text required amendment in that respect.

69. Mr. EL KHOURY asked Mr. Hudson whether the "regulation" referred to in his draft included rules laid down for the conservation of resources of the sea.

70. Mr. HUDSON said that among other things the word included that special category of rules.

71. Mr. EL KHOURY proposed that in that case Mr. Hudson's text should be preceded by the words "without prejudice to rules protecting species against extermination".

72. Mr. HUDSON pointed out that the Commission had already considered measures relating to the conservation of species. It was now considering exclusive control of the exploitation of sedentary fisheries, but stopping short of the total exclusion of non-nationals; that was the basic idea of the Rapporteur's draft article and of the reservation included at the end of the article.

73. In view of Mr. Sandström's comment, it would be necessary to amend the formula he had proposed and he would like time to consider the matter. It might for instance be provided that: "The regulation of sedentary fisheries in areas of the high seas contiguous to its territorial waters may be undertaken by a State provided that . . ."

74. Mr. FRANÇOIS observed that that new drafting entirely changed the nature of the article. Mr. Hudson's text had first of all based the right of States on long use. The new version eliminated that basis.

75. The CHAIRMAN also considered that text too restrictive. It placed too great limitations on the powers of the occupying State which could, indeed, legitimately derive revenue from sedentary fisheries and limit their use to its own nationals.

76. Mr. FRANÇOIS did not think that any State had limited the use of sedentary fisheries to its own nationals.

77. Mr. HUDSON said that Ceylon did not impose restrictions in that respect. It even had special provisions relating to Arab fishers from Zanzibar.

78. Mr. KERNO (Assistant Secretary-General) observed that Ceylon was not yet a Member of the United Nations, but that it would nevertheless be desirable to communicate the results of the Commission's work to the Government of that country; that raised a difficulty.

79. Mr. HUDSON considered that public international law as codified under the auspices of the United Nations should be acceptable to all States, whether Members of the United Nations or not.

80. The CHAIRMAN put before the Commission the latest proposal submitted by Mr. Hudson, which read as follows:

"The regulation of sedentary fisheries in areas of the high seas contiguous to its territorial waters may be undertaken by a State where such fisheries have long been maintained and conducted by nationals of that State, provided that nationals of other States are not denied the right to participate in such fisheries."

He pointed out that he preferred Mr. François' text.

81. Mr. YEPES proposed that, after the words "of the high seas", the following words should be added: "characterized by species attached to the soil or by the equipment employed". He explained that that was the definition given the previous year in Mr. François' report (A/CN.4/17, p. 31, mimeographed English text; para. 94, printed French text).

82. Mr. CORDOVA observed that Mr. Yepes was trying to define sedentary fisheries on the basis of the species caught.

83. The CHAIRMAN said that that was not the place to define sedentary fisheries. Moreover, the term was well known.

84. Mr. YEPES said that he would not press the point.

85. Mr. HUDSON said that, after examining the matter with Mr. François, he had agreed with the latter that it would be preferable to say: "The regulation of sedentary fishers may be undertaken by a State in areas of the high seas contiguous to its territorial waters where . . ." and to add the following words at the end of the article: "on an equal footing with its own nationals".

86. Mr. KERNO (Assistant Secretary-General) suggested that the following wording would be preferable: "Provided that nationals of other States are permitted to participate in such fisheries on an equal footing with its own nationals".

87. Mr. HUDSON accepted that amendment. He proposed adding the following sentence to his text: "Such regulations may not affect, however, the general status of the areas as high seas". States must be prevented from claiming the right of sovereignty over such areas by reason of the regulations they enacted. The areas must not lose their status as high seas.

88. Mr. ALFARO suggested that it might be preferable to say "will not affect . . .".

89. Mr. HUDSON approved of that amendment.

90. Mr. YEPES observed that the article excluded sedentary fisheries — perhaps purely hypothetical — which were situated entirely in the high seas. He proposed the words "in areas of the high seas contiguous or not contiguous to its territorial waters".

91. Mr. HUDSON said that that amendment entirely defeated the purpose of Mr. François' text.

92. He had at first been influenced by Mr. Sandström's comments<sup>3</sup> but he finally preferred Mr. François' drafting. The sedentary fisheries must have existed continuously for a certain length of time.

93. Mr. SANDSTRÖM explained that he had not expressed any opinion. He had observed that the Commission no longer took the view that the right in question was acquired by continued use. It was now considering the extension of the rights of the coastal State. He could also accept that idea.

94. Mr. AMADO said that, to his great regret, he could not accept Mr. Hudson's draft, since it excluded a characteristic feature of sedentary fisheries, namely, occupation without protest, or peaceful occupation over a certain length of time. Those were essential elements and in spite of his desire to reach a solution he could not change his views. He pointed out that Mr. Hudson's formula did not correspond to the "institutional" concept of sedentary fisheries.

95. Mr. CORDOVA, on the other hand, approved of Mr. Hudson's text.

96. Mr. YEPES asked whether Mr. Amado would accept the words "peacefully maintained and conducted.."

97. The CHAIRMAN proposed the words "without protest".

98. Mr. HUDSON did not see how there could be any ground for protest where the high seas were concerned. There could clearly be protests against regulation, but not against fishing.

99. Mr. FRANÇOIS did not approve of the proposed formula and preferred the words "without any formal and repeated protests against such use having been made by other states"; he agreed with Mr. Hudson, however, in thinking that there could be no protests, since the high seas were concerned.

100. Mr. AMADO said that sedentary fishing was a fact. The high seas belonged to everyone; they were either *res communis* or *res nullius*. There was appropriation of the area over a certain length of time. The case, in fact, was similar to that of first establishment by a settler, or "squatter". Without the element of acquisition by prescription, sedentary fishing was not explained. If it was a practical solution that was wanted, Mr. Hudson's text should be adopted. If it was desired to formulate a rule of international law, then Mr. François' proposal should be adopted. He would support the latter proposal.

101. The CHAIRMAN did not think it was merely a matter of protecting a right of regulation. Rights in sedentary fisheries were more comprehensive. The areas in question had been appropriated and had become national waters.

102. Mr. FRANÇOIS asked whether Mr. Amado would vote for Mr. Hudson's text if amended as follows: "... where such fisheries have long been maintained and conducted by nationals of that State without any formal and repeated protests against such use having been made by other States, provided that ..."

103. Mr. EL KHOURY asked why the word "repeated" should be included. From the legal point of view he did not consider that repetition added anything to a protest.

104. The CHAIRMAN put to the vote Mr. Hudson's proposal and the various amendments to it.

*Mr. Yepes' amendment (paragraph 96 above) was rejected.*

*Mr. el Khoury's proposal to delete the word "repeated" in Mr. François' amendment was accepted by the latter.*

*Mr. François' amendment was rejected, there being 4 votes for and 4 against.*

*Mr. Hudson's proposal was adopted by 7 votes to 3.*

105. Mr. AMADO explained that he had voted against Mr. Hudson's proposal because, among other reasons, he had wished to vote against the words "contiguous to its territorial waters", which were superfluous and might cause misunderstanding.

106. The CHAIRMAN also explained his negative vote; he considered that sedentary fisheries were based on appropriation of an area which the State should regulate without being obliged to treat the nationals of other States on the same footing as its own nationals.

107. Mr. YEPES said that he had voted against Mr. Hudson's proposed text because it did not include sedentary fisheries situated far from the coast and because the idea of peaceful use was not included.

#### CHAPTER 9: CONTIGUOUS ZONES

108. The CHAIRMAN read out the text proposed for adoption by the rapporteur (A/CN.4/42, page 51).

109. Mr. FRANÇOIS explained that the proposal was limited. It dealt only with the rights of coastal States in respect of customs and sanitary regulations. Similar rights had been claimed for other purposes, including fishing; in the latter case it was not a matter of conserving the resources of the sea but of claiming exclusive fishing rights for the nationals of the coastal State. That claim had always given rise to objections by other States, and the 1930 Codification Conference at the Hague had rejected it. The question was important in connexion with fishing, since it was linked with the question of the continental shelf and States might claim exclusive fishing rights in the area of that shelf. For that reason he thought that the Commission should decide against the recognition of special fishing rights, since aliens might be deprived of the right to fish in the zone in question.

110. After examining the regulations established by various States in that connexion, he had reached the conclusion that most of them did not claim exclusive rights, but merely asked for powers to exercise customs and sanitary control in the contiguous zone; that claim had been admitted by the Hague Conference of 1930 and accepted in principle by the Commission the previous year. It must nevertheless be pointed out that very few States had actually issued sanitary regulations.

111. As a basis for discussion, he had included in his proposal recognition of the contiguous zone, but only for customs and sanitary regulations, and he had stated

<sup>3</sup> See para. 67 above.

that the zone should not extend beyond 12 miles from the coast. He did not consider that distance excessive.

112. The CHAIRMAN said that he was satisfied with that formula.

113. Mr. AMADO said that he also was satisfied. The previous year he had taken the initiative in submitting a formula on that point<sup>4</sup> which provided that beyond its territorial waters a sovereign State might exercise administrative powers for the protection of its fiscal or customs interests. The zone could extend to twice the breadth of the territorial waters. Mr. Hudson had proposed the addition of sanitary interests, and he had accepted that proposal. At the time, he had said that 12 miles was the distance generally accepted and he was glad to note that in his report Mr. François had taken account of the observations he (Mr. Amado) had made the previous year.

114. Mr. LIANG (Secretary to the Commission) thought that while the original text was satisfactory, the English translation was ambiguous. All doubt would be removed if the words "within its territory or territorial waters" and the words "the infringement" were transposed.

*It was so decided.*

115. Mr. SPIROPOULOS wished to put a question to Mr. François. The previous year it had been considered necessary to give the coastal State the right to take protective fiscal measures. The text proposed by Mr. François referred only to customs and sanitary regulations. He asked why fiscal measures had been omitted.

116. Mr. FRANÇOIS replied that in omitting fiscal measures he had not changed the sense of the provision. He had omitted those measures because he had taken the text from the Preparatory Committee of the Codification Conference (Basis for Discussion No. 5). If the Commission thought it necessary to refer to protective fiscal measures he was quite willing to include them.

117. Mr. KERNO (Assistant Secretary-General) observed that in practice it was clear to everyone that customs and exchange control were not always carried out by the same official. It might be wise to include the word "fiscal".

118. Mr. HUDSON pointed out that the régime of free zones in the Haute Savoie and the Pays de Gex (France) provided a good example of the distinction between fiscal and customs control.

119. Mr. FRANÇOIS repeated that he was quite willing to add the word "fiscal".

*It was so decided.*

120. Mr. HUDSON said that the text referred to control of shipping. He asked whether Mr. François could give him any information regarding the control of aircraft. He believed that certain States exercised supervision of aircraft approaching their coast or flying in the immediate vicinity of their territorial waters. He assumed that Mr. François did not intend to refer to control exercised by coastal States over the air above the contiguous zones. He felt some anxiety with regard

to aircraft approaching the coast. In the United States, regulations had recently been enacted on the subject providing for supervision of all aircraft coming within a few miles of the coast. If it were intended to refer only to control of shipping, that should be explained.

121. Mr. SANDSTRÖM asked whether Mr. Hudson was considering the question from the point of view of security or from that of customs, sanitary and police regulations.

122. Mr. HUDSON considered that security considerations certainly increased the importance of the question.

123. Mr. SPIROPOULOS said that the problem raised by Mr. Hudson was most interesting and very important, but was in no way related to the matter which the Commission was considering. The Commission was dealing with the high seas and he did not see how it could examine the régime of the air at that stage.

124. Mr. FRANÇOIS agreed with Mr. Spiropoulos. The air above the continental shelf had certainly been mentioned, and rightly so, for the Commission had wished to explain that the existence of the continental shelf in no way affected the régime of the air. In the case under consideration it was only necessary to recognize the special right of the coastal State in respect of ships within the contiguous zone. Such a measure could only be taken in respect of aircraft, if the law of the air were considered.

125. Mr. HUDSON, supported by Mr. ALFARO, considered that that important problem of the future should be mentioned in the comment.

126. Mr. CORDOVA thought that the Commission should proceed as it had done with regard to the continental shelf. If it had referred to the air in one case, it should do so in the other.

127. The CHAIRMAN pointed out that the Commission had confined itself to the purely negative statement that the continental shelf in no way affected the régime of the air.

128. Mr. SPIROPOULOS thought that, if aircraft which alighted on the sea were to be considered, it should be borne in mind that flying-boats were not covered by the words "foreign ships".

129. Mr. AMADO asked the Commission not to depart from the familiar terminology. He had not so far heard of contiguous air zones. International law derived from facts. A certain significance had been given to the contiguous zone as a result of "prohibition" in the United States. The latter had concluded treaties with the United Kingdom, France and Canada, which had become international law. The Institute of International Law had referred to complementary zones and given them a breadth of 9 miles. It was the stringency of the protective measures brought into force by the United States against contraband traffic in spirits that had given that zone its importance in international law. It was now said that narcotics were brought into the United States by air. That was a fact which would no doubt lead to the enactment of regulations and the Commission could later draft a text with a view to codification.

<sup>4</sup> See summary record of the 65th meeting, paras. 110 *et seq.*

130. Mr. HUDSON felt that the Commission had discussed the question sufficiently. He regretted that his fears were not shared by other members.

131. With regard to the comment by Mr. Spiropoulos, he doubted whether it was necessary to include the words "by foreign ships". If those words were deleted the difficulties would be reduced.

132. Mr. Amado had reminded him of a number of points that he had forgotten. In the days of prohibition a ship had been known to anchor  $11\frac{1}{2}$  miles from the coast of the United States with a cargo of whisky and to announce that it was prepared to sell to all comers. People had thereupon gone out in boats. The ship was outside United States territorial waters so that the offence had not been committed by the foreign ship outside territorial waters, but in association with the small boats which came out from the coast.

133. Mr. FRANÇOIS did not think it necessary to include the words "by foreign ships". He agreed to their deletion.

134. The CHAIRMAN observed that Mr. Spiropoulos' anxiety over the problem of flying-boats would be allayed by that amendment.

*It was decided to delete the words "by foreign ships".*

135. Mr. HUDSON explained that the regulations varied considerably between country and country. The United States prescribed a limit of 3 miles for territorial waters and 9 miles for the contiguous zone. Mexico claimed a distance of 9 miles for territorial waters and if the 12 miles of the contiguous zone were measured from her coasts there would be a very small zone for protection against infringement of Customs regulations. The Soviet Union, having fixed the breadth of its territorial waters at 12 miles, would have no contiguous zone. It was perfectly satisfactory to fix the breadth of the contiguous zone at 12 miles, provided that the limit of territorial waters was known. The Hague Codification Conference of 1930 had shown that no agreement could be reached on the maximum breadth of territorial waters. Nearly all legislation enacted since 1930 in different countries had prescribed a limit exceeding 3 miles for territorial waters. He could cite Greece, Yugoslavia, Syria, Iran and Saudi Arabia, as countries which had adopted a breadth of 6 miles. He doubted whether it would be possible for the Commission to make such a specific provision.

136. Mr. CORDOVA thought that the 12-mile limit should be measured from the limit of territorial waters.

137. The CHAIRMAN observed that Mr. Córdova was introducing the difficulty of territorial waters into the question of the contiguous zone.

138. Mr. CORDOVA thought that the Soviet Union, which had fixed the breadth of its territorial waters at 12 miles, would not accept the limit fixed for the contiguous zone.

139. Mr. FRANÇOIS pointed out that the Soviet Union did not require a contiguous zone, since it had extended the limit of its territorial waters to 12 miles. It was countries with narrow territorial waters which

required a contiguous zone, to exercise the control contemplated.

140. Mr. HUDSON pointed out that the treaties on contraband traffic in spirits concluded by the United States with the United Kingdom and other countries referred to the distance a ship could cover in one hour's sailing.

141. Mr. ALFARO explained that 12 miles was the distance normally covered by a ship in one hour.

142. The CHAIRMAN said that the treaties in question had not been based on recognition of the contiguous zone.

143. Mr. HUDSON explained that they recognized the contiguous zone for that particular purpose.

144. Mr. KERNO (Assistant Secretary-General) thought that the reason for that exception to the régime of the high seas should not be lost sight of. The main purpose to be achieved was to maintain the principle of the high seas as far as possible. Hence exceptions must only be codified where necessary. With perhaps a single exception, States did not extend their claims beyond the 12-mile limit.

145. After several speakers had cited cases of States claiming contiguous zones extending beyond 12 miles, Mr. HUDSON observed that the discussion had provided the Rapporteur with a basis on which to draft a comment. In his opinion, the relationship between territorial waters and the contiguous zone could not be left aside. It might also be necessary to take account of the increase in the speed of ships. He was sure that that question would be raised by governments.

146. Mr. FRANÇOIS said that he was willing for the 12-mile limit to be increased, but was opposed to the question of the contiguous zone being connected with that of territorial waters; that would be an inducement to States to extend their territorial waters further and further. If the Soviet Union had 12 miles of territorial waters, it would be contrary to the aims of the Commission to give that country 12 miles of contiguous zone.

147. The United States had adopted a zone of 12 miles for police and customs purposes and might eventually consider it necessary to extend the zone, but in his opinion the contiguous zone should not be made to begin from the limit of territorial waters.

148. The CHAIRMAN observed that if it did, that would certainly mean abandoning the principle of the high seas.

149. Mr. CORDOVA agreed that the breadth of the contiguous zone should be measured from the coast, but thought that it should be fairly large.

150. Mr. FRANÇOIS proposed laying down a figure of 12 miles and explaining in the comment that that distance might not be sufficient in future.

151. Mr. KERNO (Assistant Secretary-General) observed that the report (A/CN.4/12, p. 49, mimeographed English text; paras. 113-116, printed French text) referred to States which had established one contiguous zone for customs control and another for sanitary regulations. It could be seen that Chile claimed a zone of 100 kilometres and that other States claimed 12 miles

from the coast. Thus Chile was the sole exception. 152. The CHAIRMAN pointed out that the Codification Conference of 1930 had not laid down any uniform rule for territorial waters. If there were any such rule it would clearly be possible to begin the contiguous zone from the limit of territorial waters; but there was no rule. It was obvious that most States were satisfied with the breadth of 12 miles; he proposed fixing that distance and explaining in the comment that States could decide otherwise.

*The 12-mile limit for the contiguous zone was adopted.*  
The meeting rose at 6.15 p.m.

## 121st MEETING

*Tuesday, 10 July 1951, at 9.45 a.m.*

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*Chairman:* Mr. James L. BRIERLY  
*Rapporteur:* Mr. Roberto CORDOVA

#### *Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, 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.

#### **Régime of the high seas: report by Mr. François (item 6 of the agenda) (A/CN.4/42) (*continued*)**

##### CHAPTER 9: CONTIGUOUS ZONES (*continued*)

1. Mr. HUDSON, referring to the discussion at the previous meeting, proposed the insertion of the words "jurisdiction and" before the word "control" in the second line of the draft text (p. 51, mimeographed English text; para. 123, printed French text). He wished to use the same wording as in the case of the continental shelf. He also proposed that the words "over navigation" be inserted before the word "necessary".

2. The CHAIRMAN asked whether the position was really the same in the case of the high seas contiguous to territorial waters as in that of the continental shelf. In the former case he did not think that there was any question of jurisdiction.

3. Mr. SANDSTRÖM thought that that word would include the right to punish.

4. Mr. KERNO (Assistant Secretary-General) thought that the words "jurisdiction and control" might be wrongly interpreted as meaning that the coastal State was competent to try any offences committed within the contiguous zone, whereas the Commission only desired to give that State the right to take police measures.

5. Mr. FRANÇOIS preferred his own text.

6. Mr. HUDSON withdrew his proposal to add the word "jurisdiction". He asked whether the Commission accepted the addition of the words "over navigation".

7. Mr. SANDSTRÖM was not sure whether the control referred to must necessarily apply to navigation. He cited the example of certain forms of contraband traffic in spirits, occurring in Swedish waters. The smugglers came from the open sea and sank containers in the contiguous zone, while accomplices came from Swedish territory and collected them. The police of the coastal State must be able to seize such containers and the use of the words "over navigation" would appear to deny them that right.

8. Mr. HUDSON withdrew his proposal to add the words "over navigation". He then proposed the deletion of the second sentence of the text, which limited the breadth of the contiguous zone to twelve miles from the coast.

9. The CHAIRMAN pointed out that at the previous meeting the Commission had approved that limit.<sup>1</sup>

##### CHAPTER 1: NATIONALITY OF SHIPS

10. The CHAIRMAN asked the Commission to take a decision on the principles formulated on that subject by the Rapporteur, which appeared in document A/CN.4/42, (pp. 7, 8, mimeographed English text; para. 18, printed French text). The English text of rule 1 was confusing and would require amendment.

11. Mr. FRANÇOIS said that the Secretariat had placed very voluminous documentation at his disposal, but it was difficult to know whether the regulations supplied were always the latest. With regard to Panama, for instance, Mr. Alfaro had been able to point out that the documentation used in the report was incomplete. He therefore apologized to the Commission in advance, in case the report had not always taken account of the most recent state of the law.

12. The rules he proposed regarding the nationality of ships were based almost entirely on existing regulations. They constituted a codification. The Commission might find objections to them and consider the result rather meagre. It might consider that such conclusions were of little practical importance and that they added nothing new, since most States already conformed to them.

13. In dealing with that subject, as with the continental shelf, the Commission should consider whether it wished to take a step forward in the progressive development of law and adopt certain rules which it would be desirable for States to apply. If the Commission took that course, it should accept the risk of meeting with some opposition

<sup>1</sup> Summary record of the 120th meeting, para. 152.

from States who were not prepared to subject their sovereignty to further limitations.

14. To turn to another aspect of the question, he had taken as the starting point for his report the existence of a general principle, the formulation of which he had borrowed from the Asser-Reay Report and which was reproduced on page 4 of his own report (mimeographed English text; para. 3, printed French text). That principle was as follows: "In order that the law of a State on this matter may be effective . . . it should not depart too far from the principles which have been adopted by the great majority of States and which may therefore be regarded as constituting the basis of international law on the matter". In other words, there were certain general international directives regarding the nationality of ships, which States were required to observe. That principle had only been formulated by a very few writers. It was rarely stated, because nearly all legal authorities, except Neumeyer and Verdross, recognized States as having complete sovereignty in respect of the nationality of ships. The question might be compared with that of the nationality of persons. It was the Preparatory Committee of The Hague Codification Conference of 1930 which had first stated a similar principle in the following terms: "The legislation of each State must nevertheless take account of the principles generally recognized by States". In the matter under consideration the idea was the same as that formulated by Asser and Reay in their report. The Commission should therefore consider whether it ought to subscribe to that principle. If so, it was important that the fact should be expressly stated.

15. In reply to a question by the Chairman, he explained that the principle in question was that, in regard to the nationality of ships, States were subject to limitations fixed by the law of nations.

16. Mr. HUDSON said that he would prefer to avoid the use of the word "nationality" in connexion with ships and commercial companies. The concept of nationality implied an idea of allegiance, which was possible for a natural person, but not for an inanimate object. He would prefer to use the words "national character". The use of the word "nationality" had been criticized by Niboyet and de La Pradelle.<sup>2</sup>

17. He thought that the report did not sufficiently stress the registration of ships, which might be the criterion for national character.

18. In the North Atlantic, a tendency to seek the advantages of Panamanian legislation had been noted. Many ships were registered in Panama and thus came under more favourable laws with regard to seamen's wages and the nationality of members of the crew. He wondered how far the rules formulated in the Rapporteur's draft were in conformity with Panamanian law. He would like to know the advantages of registering a ship in Panama.

19. Mr. ALFARO said that there were several reasons for that practice. To take the commercial aspect first,

<sup>2</sup> A. de La Pradelle et J. P. Niboyet, *Répertoire du droit international*, Paris, 1929-1931, vol. X, *Navires de mer*, paras. 14-18, pp. 9-10.

registration fees, which were proportionate to tonnage, were very low in Panama. Moreover, the fiscal laws of that country were extremely liberal. The tax on profits only applied to activities carried on in Panamanian territory. Thus ships operating outside the territorial waters of Panama were exempt from all fiscal obligations on that score.

20. It was often alleged that the acquisition of Panamanian nationality placed a ship under social legislation that was far less strict; but that was not true. In fact, seamen were protected almost as fully in Panama as they were in most other countries.

21. With regard to the nationality of crews, the latest Panamanian law required that 10 per cent should be Panamanian by birth or origin. Formerly, the law had required 25 per cent of Panamanian nationals, but made no distinction between original and acquired nationality.

22. There was also a political reason for registering ships in Panama. Owing to the close relations between that country and the United States, there was no danger that, in the event of war, ships so registered would not be available for the defence of the Western Hemisphere.

23. Those various reasons explained why the Panamanian mercantile fleet had steadily increased. For instance, an inquiry carried out by the International Labour Organisation at the request of Panama had shown that between 1946 and 1948 the Panamanian fleet had increased from 406 to 654 ships, and from 1,300,000 tons to about 3,900,000 tons.<sup>3</sup>

24. Referring to the conclusions formulated by the Rapporteur, he said that rule 1 was in conformity with Panamanian law and he would vote for its adoption, provided that the word "either" was inserted after the words "owned by". With regard to rule 2, he would make the necessary comments at the appropriate time.

25. Mr. HUDSON noted that rule 1 fixed the rules for registering ships on the basis of ownership. In his opinion, however, the national character of a ship should be largely dependent on its port of registry.

26. According to rule 1, a ship might be registered by a State when more than one half of it was owned by nationals of that State. The Commission would need to know whether Panamanian law laid down such ownership requirements and whether rule 1 could be applied to that country.

27. Mr. ALFARO read out article 1080 of the Panamanian Commercial Code of 22 August 1916 relating to the conditions which a ship must fulfil in order to be eligible to bear the nationality of that country. The article ran as follows:

"Merchant vessels belonging in whole or in part to Panamanian citizens or to foreigners domiciled in the Republic and with more than five years of residence therein, or to commercial societies having their headquarters in Panama, shall be held as Panamanian, provided they be registered and enrolled as such and

<sup>3</sup> Conditions in Ships flying the Panama Flag (International Labour Office, *Studies and Reports*, New Series, No. 22, Geneva 1950), p. 83.

- their owners submit expressly to the legal provisions of the Republic concerning navigation.”<sup>4</sup>
28. Replying to an inquiry by Mr. SANDSTRÖM, Mr. FRANÇOIS explained that the conditions listed at the end of the part of his report devoted to the nationality of ships were minimum requirements which any State was at liberty to make more stringent.
29. Mr. SPIROPOULOS remarked that the Commission’s task was to determine a rule of international law. The text under examination, however, was just a statement unconnected with any rule.
30. Mr. HUDSON recalled that Mr. François had proposed adopting as an introduction the principle formulated in the Asser-Reay Report and reproduced at the end of the first paragraph on page 4 of his own report (mimeographed English text; para. 3, printed French text).
31. Mr. AMADO considered that, before going any further, it would be desirable for the Commission to be clear in its mind as to whether it was concerned with the nationality of a ship or with its ownership. Although the part of the report by Mr. François with which it was dealing was entitled “Nationality of ships”, the conclusions submitted referred only to ownership. The right to registration and to fly a particular flag followed from the conditions under which such ownership was exercised.
32. The first Report on the High Seas (A/CN.4/17), in 1950, had raised a series of questions which had been left unsolved. The Commission had come to no definite decision either on the nationality of ships, on collisions, on safety of life at sea, on the right of approach, on the exploitation of the resources of the sea, or on sedentary fisheries, and had accordingly requested the rapporteur to submit some positive conclusions at its third session.
33. If, out of that vast range of subjects, in which collective interests were at stake, the Commission chose to concern itself with the ownership of ships, it should say so and give its reasons.
34. Replying to a remark by Mr. SPIROPOULOS, the CHAIRMAN recalled that the Commission was at the moment seeking to establish the conditions in which a State might authorize a ship to fly its flag.
35. Mr. FRANÇOIS, replying to an earlier observation by Mr. AMADO, referred to the instructions given him by the Commission at its second session, as set out in paragraph 185 of its report (A/1316). In pursuance of those instructions, he had studied the manner in which the matter of the nationality of ships was regulated in the various countries and had not confined his researches to the question of ownership. His aim had been to discover what were the rules with which ships must comply in order to be considered as possessing the right to fly the flag of a particular State and to be governed by one or other of the various national legislations. Such an inquiry had inevitably led to the conclusions set forth on pages 7 and 8 of the report.
36. Certain countries had additional rules, such as rules regarding the composition of the crew, but since such rules did not exist in a great many countries, he had thought it best only to include those generally adopted.
37. He did not see what more could be asked. The question of the implications of registration might be raised and it might be asked whether registration conferred nationality or not. In point of fact, in the majority of cases it did, but that was merely a question of detail. The Commission had only to come to a decision on the general principles derived from the laws of all the countries of the world.
38. Mr. KERNO (Assistant Secretary-General) considered that the rapporteur had placed the question very clearly before the Commission. The term “nationality of a ship” was a long-established and very convenient one. It was synonymous with the right to fly a flag and was a consequence of registration. As a preliminary step, the Commission should ask itself whether States were absolutely free to fix the rules for the registration of ships as they pleased. If it decided that they were not, it could then establish the minimum requirements to which the right to fly a flag was subject. That was what the rapporteur had done in singling out certain rules which were regarded as customary law and were capable of codification. In other words, if the Commission, rejecting the principle of absolute freedom, considered it possible to establish certain guiding principles, it should consider one by one the conditions set out by Mr. François in his report. In that connexion it should be pointed out that sub-paragraphs (a), (b) and (c) of rule 1 were separate cases and that ships must fulfil one or other of those requirements which were, in any case, very liberal ones.
39. The CHAIRMAN, returning to the preliminary question, asked whether the Commission considered that international law contained certain principles which made the grant of a nationality to ships subject to certain conditions.
40. Mr. HUDSON wondered whether that question was of any importance for the study of the régime of the high seas. With the exception of the “I’m Alone”, he could not recall any case in which negotiations or arbitral awards had brought to light any difficulties between States arising from differences between the provisions of national laws on the conditions of registration of ships.<sup>5</sup>
41. He thought the following text might perhaps meet Mr. François’ wishes:
- “A State may confer its nationality (or its national character) on a ship (or vessel), in the sense of permitting the ship to fly its flag only if the ownership of the ship is more than fifty per cent in the hands of . . .”.
- The text would be followed by Mr. François’ three sub-paragraphs (a), (b) and (c).
42. Mr. FRANÇOIS said that the text was to his entire satisfaction. If the Commission adopted it, it would be giving an affirmative answer to the question whether there were certain rules with which the legislation of States relating to the nationality of ships should comply.

<sup>4</sup> *Ibid.*, p. 56.

<sup>5</sup> See “Claim of the British ship ‘I’m Alone’ v. United States,” joint interim report of the Commissioners, 30 June 1933, and joint final report of the Commissioners, 5 January 1935, *American Journal of International Law*, vol. 29 (1935), pp. 326–331.

43. The CHAIRMAN remarked that Mr. François, as rapporteur, was perfectly entitled to ask the Commission to decide whether or not certain rules existed before considering what those rules were.
44. Mr. HUDSON said that he was not at all impressed by the wording of the principle quoted from the Asser-Reay report. It was a typical example of a platonic problem.
45. The CHAIRMAN said that the Commission should not confine itself solely to questions of international law giving rise to friction between States.
46. Replying to a question by Mr. HUDSON, Mr. SANDSTRÖM pointed out that the matter in question had given rise to difficulties not in the diplomatic sphere but with trade unions; there had been cases of strikes against ships flying a particular flag. Changing the flag enabled the owner of a ship to avoid meeting certain social requirements.
47. Mr. HUDSON observed that the rules the Commission was proposing to study would not have the effect of reducing the number of such cases of friction.
48. Mr. SPIROPOULOS wondered whether, in existing law, the fact that nationality was granted in violation of the rules thereby deprived ships of the right to fly that flag.
49. Mr. HUDSON declared that a State might refuse to recognize the right of a ship to fly a particular flag when its nationality had been acquired in violation of the rules. He proposed adding to the text under consideration the stipulation that if the necessary conditions were not present, other countries would not be bound to respect the national character of the ship.
50. In the case of the *I'm Alone*, the Canadian nationality of the ship had been regarded as purely fictitious and the Commissioners' refusal to grant compensation had been based on that fact.
51. Mr. ALFARO considered that it was difficult, in an age of international co-operation, to undertake the defence of the principle of absolute sovereignty, nowadays generally supplanted by the concept of the interdependence of States. It was, however, necessary to consider whether the matter under consideration by the Commission should merely be codified or whether it lent itself to progressive development; in other words, whether the Commission should define things as they were, *lex lata*, or things as they should be, *lex ferenda*.
52. It was clear that, as the law stood, the matter was entirely one of national law. There was nothing to show that the international community had concerned itself with it except perhaps in order to affirm, basing itself on the *comitas gentium*, that no country might accept registration of a ship if the country whose flag that ship had formerly flown was opposed to such registration.
53. At the present day, as the report pointed out, only 19 countries required the master to be of the same nationality as the ship. Even taking the most favourable view, then it was merely a question of quite a small minority.
54. The Commission could, however, seek to determine what rules it would be desirable to introduce in order to place the question of the nationality of ships on a sounder basis. Since the main reason behind the choice of nationality was a commercial one, it was possible to maintain that national legislations were free on the question, provided they did not prejudice the interests of other States, particularly in regard to dues and taxes and to industrial legislation.
55. The CHAIRMAN noted that Mr. Alfaro considered the different States absolutely free to fix as they deemed fit the conditions for the granting of their nationality to ships, whereas the rapporteur, on the contrary, considered that certain general rules of international law had to be observed in that connexion.
56. Personally, he considered that the rapporteur was right but it was for the Commission to decide.
- It was recognized, by 8 votes to 1 with 2 abstentions, that the grant of nationality to ships was limited by certain principles of international law.*
57. Mr. ALFARO stated that, although he had voted against the motion because he considered that the rules governing the nationality of ships were a matter of national law, he nonetheless considered that such rules should respect the interests of other States.
58. Mr. SANDSTRÖM explained that he had abstained because he wished it to be possible to challenge the nationality of a ship when acquired in violation of the rules. However, on the CHAIRMAN observing that the principle recognized by the Commission did, in fact, imply the right of third States to challenge the nationality of a ship acquired in defiance of that principle, he declared his support for the majority view.
59. Mr. HUDSON read out the following text:
- “In general, a State may fix the conditions on which it will permit a ship to be registered in its territory, and to fly its flag; yet the general practice of States has established minimum requirements which must be met if the national character of the ship is to be recognized by other States. These minimum requirements are: . . .”.
60. The CHAIRMAN proposed that, pending the distribution of the text in writing to all the members of the Commission, it should proceed to consider the minimum requirements referred to. The first of those requirements related to ownership.
61. Mr. KERN (Assistant Secretary-General) pointed out that the rules stated in sub-paragraphs (a), (b) and (c) were questions to be settled by national law.
62. Mr. HUDSON proposed wording rule 1 as follows:
- “The ownership of the vessel must, to the extent of 50 per cent be vested in:
- “(a) Nationals of or persons domiciled in the territory of the State”.
63. With regard to sub-paragraph (b), he pointed out that a “commandite company” was unknown in Anglo-Saxon law. After Mr. Sandström had explained in detail the nature of that type of commercial company, Mr. HUDSON said he thought the English word “partnerships” covered it adequately.

64. Mr. FRANÇOIS pointed out that the Institute of International Law, in 1896, had referred to "simple commandite companies" in so many words on its work on the nationality of ships and that he had thought it preferable to do likewise in his report.

65. Replying to Mr. HUDSON, he stated that some legislations required 50 per cent national ownership, others more than 50 per cent. The Institute having decided in favour of "more than 50 per cent", he had followed suit. In practice, the difference was slight.

66. Mr. KERNO (Assistant Secretary-General) pointed out that sub-paragraph (b) referred to commercial companies in which the personal element was dominant and, that being so, required the partners to satisfy the necessary nationality conditions. Sub-paragraph (c), on the other hand, related to joint-stock companies in which the significant element was the legal entity of the company itself. In the latter case, the requirements did not bear on the nationality of the directors or shareholders but on that of the company itself. As for the commandite company, a quite common form of commercial organization in Europe, it was half-way between a private company and a joint-stock company.

67. The CHAIRMAN thought it would be better to study the various sub-paragraphs of rule 1 in turn.

68. Mr. HUDSON read out his proposal for sub-paragraph (a) again.

*Mr. Hudson's text for sub-paragraph (a) was adopted.*

69. Mr. HUDSON read out his proposal for sub-paragraph (b):

"A partnership in which more than half the partners are nationals or persons domiciled in the territory of the State".

70. Mr. FRANÇOIS inquired whether Mr. Hudson would accept the addition of the words "with personal liability".

71. Mr. HUDSON thought that that would be going into details which States might interpret as they wished.

72. Mr. SANDSTRÖM said he preferred Mr. François' text containing the expression "commandite company".

73. Mr. HUDSON pointed out that in English there was a danger of the words "commandite company" not being understood. However, following an observation of Mr. ALFARO, he agreed to add to his text the words "or commandite company" and the phrase "with personal liability", to be found in the text of the rapporteur.

*Mr. Hudson's text for sub-paragraph (b) was adopted as thus amended.*

74. Mr. KERNO (Assistant Secretary-General), referring to sub-paragraph (c), remarked that the inclusion of word "national" was essential.

75. Mr. YEPES supported that view.

76. Mr. HUDSON proposed saying "organized in and having its head office in . . .".

77. Mr. AMADO expressed the view, subsequently corroborated by Mr. KERNO (Assistant Secretary-

General), that it was possible for such a company not to be a national one.

78. Mr. LIANG (Secretary to the Commission) pointed out that in English the words "national company" would have no meaning. They could even be interpreted as implying "operating under State control". He thought the only way to render the idea of "société nationale" in English was to say "incorporated and established in the territory of the State".

79. Mr. FRANÇOIS thought that the foregoing remark was not valid for certain other countries. A number of countries regarded joint-stock companies as vested with a nationality.

80. Mr. HUDSON, to avoid the difficulty, suggested using the words "having national character".

81. Mr. SANDSTRÖM suggested using the term "organized under the laws of . . .", adding that, according to Swedish law, a Swedish company could be the owner of a ship only if its shareholders were Swedish.

82. Mr. FRANÇOIS mentioned that a large number of countries did not require the directors of the company owning half a ship to be their own nationals. The Commission was free to lay down more stringent rules, although, in the case in point, it was simply a question of formulating existing law.

83. The CHAIRMAN remarked that the rules proposed by Mr. François would, in their existing form, have enabled the *I'm Alone* legally to fly the Canadian flag, whereas the Arbitration Commission had not recognized as valid her claim to that nationality. It seemed to him that if the Commission adopted sub-paragraph (c) of the report, it would be departing from the award in that case.

84. Mr. SANDSTRÖM noted that a State would be bound by those rules to consider as foreign a ship fulfilling those conditions.

85. Mr. FRANÇOIS recalled that, at Venice in 1896, the Institute of International Law had gone further and had stipulated that, in order to acquire the right to fly the flag of a State, more than half of a ship must be owned by "1. Nationals, or 2. a partnership or commandite company in which more than half the partners with personal liability are nationals, or 3. a national joint stock company in which not less than two-thirds of the members of the Board of Directors are nationals. The enterprise must have its head office in the State whose flag the ship is to fly or in which it is to be registered". (A/CN.4/42, p. 5, mimeographed English text; para. 5, printed French text).

86. Mr. CORDOVA would prefer the nationality of the shareholders to be taken into account.

87. Mr. FRANÇOIS pointed out that their nationality was not known.

88. Mr. CORDOVA replied that it would be sufficient to make it compulsory for all shares to be registered shares.

89. Mr. ALFARO said that any company was entitled to issue bearer shares. The Commission was getting more and more involved in questions of domestic law.

90. Mr. KERNO (Assistant Secretary-General) noted that the Commission was once again confronted with a case which threw into relief the differences in conception between the various legal systems. Principles accepted on the Continent of Europe seemed hardly intelligible to minds trained in Anglo-Saxon traditions. In joint-stock companies, under Continental law, the shareholders yielded in importance to the concept of the company. The nationality of the shareholders was thus a secondary factor, but the State which authorized the formation of the company and regarded it, so to speak, as one of its nationals, always fixed certain conditions; very often it insisted that the head office of the company be established in its territory and that two-thirds or half the directors be of its nationality. Such questions should be left to national legislation.

91. Mr. HUDSON said that that meant that such companies should be organized under the laws of the country whose nationality they bore and should have their head office in that country.

92. Mr. SANDSTRÖM thought that that was a very formalist attitude. Certain countries maintained that the nationality of the shareholders was the principal factor in determining the nationality of the company. Simply to stipulate that the company should be constituted according to the laws of a country and should have its head office in that country was a very liberal provision which would give companies every facility to choose whatever nationality they wished. He noted that other States would be bound to consider a ship as possessing a particular nationality if those requirements were fulfilled by the company to which it belonged.

93. Mr. HUDSON remarked that it was only a minimum requirement. He referred to the following passage from a text which he had proposed on the subject of the nationality of ships:

“Yet the general practice of States has established minimum requirements which must be met if the national character of the ship is to be recognized by other States”.

94. The CHAIRMAN appreciated Mr. Sandström's difficulty. For instance, other States would have had to acknowledge the Canadian character of a ship such as the *I'm Alone*.

95. Mr. SANDSTRÖM added that some States were more exacting.

96. Mr. FRANÇOIS emphasized, in reply to Mr. Sandström, that it was a question of minimum requirements. The State which gave a ship the right to fly its flag must satisfy itself that the ship fulfilled the requirements in question. Each State was, however, free to go further and lay down stricter requirements without any other State having the right to object. In that case, the other States would not have the right to recognize a ship as having the nationality of the State in question if all those requirements had not been fulfilled.

97. Mr. CORDOVA explained that a case might occur in which nationals of one State founded a company in another State, with its head office too in the other State, and then utilized the nationality of the ship to institute

proceedings against their own country. That was what had happened in the case of the *I'm Alone*, the American owners of which had had difficulties with the United States and claimed the protection of the Canadian flag.

98. Mr. ALFARO recalled that, in the case of the *I'm Alone*<sup>6</sup> no attempt had been made to define the right of a State to permit a company to be formed in its territory and in accordance with its laws. If persons took advantage of the laws of a country to form a company which engaged in illegal activities, damage might be caused internationally. The owners of the *I'm Alone* had claimed damages on the grounds of interference by the United States with the activities of the ship, which in fact was engaged in smuggling. The reply to their claim had been that they were not entitled to damages because, though United States nationals, they had made use of the Canadian laws just in order to give their ship Canadian nationality. However, nothing could limit Canada's right to decide how a Canadian company might be set up, provided there was no fraudulent intent.

99. Mr. HUDSON pointed out that the only reference to the *I'm Alone* case in the report was a quotation from Schwarzenberger (pages 4-5).

100. In point of fact, the ship had been recognized as Canadian and, on that ground, the case had been regarded as an international one. Furthermore, the court had awarded more than 100,000 dollars compensation for loss of life among the crew and the United States had paid that sum. It was to be noted, however, that it had awarded no compensation for loss of cargo or for the ship, since, in that case, the damages would have gone to the American owners and that was something the United States Government could not accept. The rule formulated by Mr. François did not conflict with the award in the *I'm Alone* case.

101. He preferred the following formula, which he considered adequate:

“A joint-stock company organized under the laws of the State and having its head office in its territory”.

102. Mr. FRANÇOIS accepted that wording.

*Mr. Hudson's text for sub-paragraph (c) was adopted.*

*After a short intermission, the meeting was resumed at 11.45 a.m.*

103. The CHAIRMAN asked the Commission to pass on to the second of the rules formulated by the rapporteur, namely:

“2. The Captain should possess the nationality of the State to whom the flag belongs.”

104. Mr. HUDSON found it very difficult to decide that a rule regarding the nationality of the master should be included in the articles. A Committee of Enquiry of the International Labour Office had investigated 30 Panamanian ships, a very small proportion considering how many ships had that nationality, and had found that out of those 30 ships, 12 had previously flown the British flag, 2 the French, 2 the Greek, etc., and that of the 30 masters of those ships, 17 were Greeks, 7 Italian, 3 British, 1 Swedish, 1 Estonian, 1 Mexican but not one

<sup>6</sup> *Ibid.*

Panamanian.<sup>7</sup> He did not know whether that sample was representative of the situation in the Panamanian fleet as a whole, but in view of the large number of ships which had recently become Panamanian, he very much doubted whether many of them had a Panamanian master. The situation in the merchant fleets of other countries was similar. If that principle were laid down as a minimum requirement, there would be a complete upset in shipping throughout the world, since a very large number of ships were commanded by foreign masters.

105. Mr. KERNO (Assistant Secretary-General) thought that the underlying idea was that the registration of ships should be a serious formality and not simply a device to obtain the protection of a flag.

106. On page 7 of the mimeographed English text of the report (*para. 13, printed French text*) was a list of the nineteen States, including the United States and the United Kingdom, which had adopted the principle that the master must possess the nationality of the State under whose flag the ship sailed. Seeing that there were seventy or more countries in the world, that was clearly a minority, but if the merchant tonnage of those nineteen countries were considered in relation to the world total, the percentage was impressive. The practice was therefore widespread.

107. Although Norway, Germany and France did not figure in that list of nineteen countries, both Norway and Germany required that ship's masters should hold national certificates, which led in practice to the same result. France went even further: it required that all ship's officers, including the master, should be French.

108. Mr. FRANÇOIS regarded the nationality of the master as a very important question, since the ship was subject to the laws of the State whose flag it flew and the master was therefore bound to apply those laws in his ship. If he were not of the same nationality as the ship he would not be very familiar with the regulations.

109. With regard to Panamanian ships, Mr. Alfaro had said that they were all subject to Panamanian law and regulations. If, however, those ships had not a Panamanian master and furthermore, as often happened, never entered Panamanian waters, how could the master be expected to apply laws of which he was ignorant? Mr. Hudson had referred to the large number of Panamanian ships. The objection to the number of Panamanian ships was based precisely on the fact that there was only a very frail link between them and Panamanian law, especially where the master was not of Panamanian nationality.

110. Mr. Kerno had drawn attention to the fact that the great maritime powers required the master to possess the same nationality as his ship, and had cited in that context the United States of America and the United Kingdom. He himself could add the Netherlands, which had recently adopted the same rule after a number of unfortunate experiences with masters not of the same nationality as their ship. Moreover, in time of war, the fact that a ship was not under the command of a

national might give rise to serious difficulties. Other States had no doubt had the same experience, which was probably why they had adopted the system in question. The case of Panama should not be used as an argument.

111. Mr. YEPES declared himself in favour of the view that the master must possess the nationality of his ship. He thought that that was the law as it existed. It could be seen from the list of countries which had adopted that rule that the greatest maritime powers in the world were included. If it were intended to treat the nationality of ships as a matter of importance, then the Commission should require that the master at least, if not a proportion of the crew, should possess the nationality of the State whose flag the ship flew.

112. Mr. ALFARO was in agreement with Mr. Hudson as regarded rule 2. It would completely upset shipping practice if the rule were suddenly adopted that a master must have the same nationality as his ship.

113. The reason why, in the majority of the Latin-American republics, ships were commanded by masters of various nationalities was that those countries had not had time to train a sufficient number of masters from among their own nationals. He did not consider it would be desirable to adopt a rule on that point which would retard the development of those nations. He recalled the time when the United States had had to employ Swedish and Norwegian masters and ships to carry bananas. That was not so very long ago — in fact only thirty years back. Nowadays, all the ships and all the masters were American. There was no doubt that the list given by Mr. François was an impressive one. Among the nineteen countries were to be found those with the largest merchant fleets in the world but there were still only nineteen countries. Mr. Kerno had pointed out that there were sixty Member States of the United Nations and about seventy States in the world. Nineteen States therefore was less than a third of the total number.

114. It was not a question of international practice but of domestic jurisdiction. The nationality of the master had nothing to do with international relations between States. The fact of a British master being in command of a Panamanian ship was completely irrelevant to the maintenance of good relations between States.

115. It had been maintained by Mr. François that a foreign master could not be familiar with the laws of the flag State. That assertion did not seem to be correct. An Italian master, for example, was required to make himself familiar with Panamanian law and to get in touch with the Panamanian Consul at every port he visited.

116. Reasons were being advanced which were completely unconnected with relations between States. The Commission was considering a question which was a matter of domestic jurisdiction. Only the country of the flag could legislate in such matters. If there were any damage to another State the matter became an international one but that did not arise from the fact that the master of the ship did not possess the nationality of the flag it flew.

117. There was a very important passage in Mr. François' report, which ran as follows:

<sup>7</sup> "Conditions in Ships flying the Panama Flag," *op. cit.*, pp. 74-75.

“The nationality of the captain and crew should not, according to the Institute, be a condition for acquiring the right to fly a flag.” (p. 5, mimeographed English text; para. 5, printed French text).

The members of the Institute of International Law must have had very good grounds in international law for coming to that conclusion.

118. For those reasons, he considered the Commission should not adopt the rule, whether *de lege lata* or *de lege ferenda*.

119. Mr. EL KHOURY reminded the Commission that it was a question of establishing minimum requirements and that, if the latter were not observed, all countries would be bound to refuse to recognize the flag. In particular, if the rule were adopted, when a ship was commanded by a master of a nationality other than that of its flag, the nationality of that ship would not be recognized and that would lead to complications. It would simplify matters if rule 2 were deleted.

120. It was not for the Commission to concern itself with the nationality of the master and it should not compel States to refuse to recognize the nationality of the ship because of the nationality of the master. That would be running counter to a practice followed by many States.

121. Mr. HSU also thought that the rule was too severe. Obviously it was desirable that the master should possess the nationality of the flag and no doubt, one day, all States would have laws to that effect. It was, however, a different matter to lay down such a requirement at that stage. As Mr. Alfaro had pointed out, several countries had merchant fleets but not enough masters for all their ships. At bottom, the nationality of the master did not create difficulties under international law. Another principle should be established.

122. Mr. SPIROPOULOS shared the views of those who had spoken just before him. The important thing was that there should be an economic link between the ship and the country whose flag it flew. It would be going too far to require that the master must be of the same nationality as the ship. That was, after all, a secondary matter. It must not be forgotten that some countries had not sufficient trained staff. The Commission was dealing with minimum rules. States were free to prescribe any further rules they wished.

123. Mr. AMADO was also in favour of deleting the rule. The principle was clearly one recognized by numerous States. The nationality of the master was bound up with the interests of the country. He hesitated however to prevent countries having foreign masters to command their ships. The historical reasons which had led certain States to ensure that the masters of their ships were their own nationals were well known. He would like the principle to be universally recognized but the Commission would be going too far if, at that stage, it laid it down as a minimum requirement.

124. Mr. SANDSTRÖM was hesitant for reasons of logic. The condition was independent of the question of the nationality of the ship, but it was desired to prescribe

it because the same result could not be obtained by any other condition. He supported Mr. Hudson's view.

125. Mr. FRANÇOIS observed that there was scant support for the provision. He wished, though without any great hope of success, to stress the importance of the rule and could not agree that, from the logical point of view, it had no place in the code. Its reason for being there was that it was felt that there should be a close link between the nationality of the ship and the law of the State.

126. According to Mr. Spiropoulos, it was the economic link that was important. He himself did not think that it was only the economic link. It was very important that whoever commanded the ship should be familiar with the law of the State whose flag it flew and one could not expect a foreign master to apply properly the law to which his ship was subject. He therefore considered that the nationality of the master was very important and that it would be of great value to mention as a minimum requirement, in the rules under consideration, that the master should possess the nationality of the flag State.

127. There was of course the argument that certain States could not recruit masters of their own nationality. He wondered whether there were any good reasons for going out of their way to help such States whose merchant fleets had grown to abnormal proportions for very special reasons.

*It was decided by 8 votes to 3 to delete rule 2.*

## CHAPTER 2: PENAL JURISDICTION IN MATTERS OF COLLISION

128. Mr. FRANÇOIS said that he had very few general remarks to offer. The question was, however, one which deserved some attention. If the Commission adopted the proposal he submitted (p. 16, mimeographed English text; para. 31, printed French text), it would be departing from the view taken by the Permanent Court of International Justice.<sup>8</sup> Admittedly it had done that before, but in different circumstances. In the case in point, a decision opposed to the judgment of the Court was justified by the very small majority by which that judgment had been reached, by the time which had since elapsed, and, finally, by the criticisms which that judgment had aroused. The Commission should nevertheless consider whether it wished to go against a judgment of the Court.

129. Mr. KERNO (Assistant Secretary-General) appreciated the gravity of the situation. He was sure that all the organs of the United Nations and all jurists would always do everything in their power to enhance the prestige of The Hague Court and it was certain that the Commission would not lightheartedly arrive at any solution other than that of the Court in the *Lotus* case.

130. Mr. AMADO said he was convinced that the Court would not give the same judgment at the present day.

131. Mr. HUDSON thought that the Court's decision in the *Lotus* case had been reached as a result of the President's casting vote but one of the judges, Judge

<sup>8</sup> Judgment in the *Lotus* case, 7 September 1927. Publications of the Permanent Court of International Justice, *Collection of Judgments*, Series A, No. 10.

J. B. Moore, who had expressed a dissenting opinion, had agreed with the Court's judgment on the main point at issue. Out of twelve judges, therefore, seven had voted in favour of the judgment and five against.

132. Mr. FRANÇOIS recalled that, the previous year,<sup>9</sup> the Commission had decided to study the problems of international law raised by collisions. It had considered it important to determine which court was competent to give judgment on criminal liability arising out of collision.

133. Mr. SPIROPOULOS said that since the Commission had, the previous year, requested the rapporteur to study the matter, the latter had been right in submitting his conclusions. He made no secret of the fact that he himself did not at all approve of the idea of including the question in the code of the high seas. It had nothing to do with codification of the régime of the high seas but was a matter of domestic jurisdiction. The act having been committed on the high seas, the question was whether it came within the criminal jurisdiction of a State. If such an act had been committed on land, they would not be dealing with it. If it had not been for the *Lotus* case, the matter would never have been discussed.

134. The judgment in the *Lotus* case had provoked criticism and it had been felt that a principle must be adopted on the question. Personally, he thought that the question whether the judgment in the case had been good or bad was a separate one. He would repeat, the text should not be included in the code of the high seas, since what was involved was a question of the extension of the criminal jurisdiction of a State. The problem could be examined in connexion with something else.

135. He was not sure that the judgment of the Court had in fact been at fault. Originally States enjoyed full jurisdiction and the latter had only been limited by the progress of international law. It had not been possible to prove the existence of any rule of international law limiting the jurisdiction of States. The Turkish court had, therefore, in the absence of any provisions limiting its competence, been right in punishing the author of the damage.

136. He did not believe that the rule proposed by the rapporteur existed. Furthermore, the Commission was not bound by that rule, even if it did exist. The Commission was codifying and if it judged a rule to be bad, whether recognized by the Court or not, it could set it aside.

137. Mr. HUDSON said that, if a provision similar to the text proposed by Mr. François were adopted, the Commission would be placing an obstacle in the way of the application of the penal codes of a number of countries. He believed the Austrian Penal Code was the first to include a provision on the lines of that of the Turkish Code. It had been followed by the Italian Penal Code of 1930, by the Turkish Penal Code and by the penal codes of a number of other countries. The Italian Penal Code enacted that Italian courts were competent to judge any person who had committed, in any part of

the world, an act prejudicial to an Italian. It was a sweeping provision. He did not know, however, of any principle of international law which was violated by such provisions in penal codes.

138. He readily understood that a maritime body solely interested in maritime law, such as the International Maritime Committee, should study the question without concerning itself with penal codes. The Commission could not do so. It must realize that, if it adopted the text, it would be placing an obstacle in the way of the application of those penal codes. He was not sure whether, in that particular situation, the establishment of such an obstacle was called for.

139. The majority of the States of northern Europe had received the Court's judgement in the *Lotus* case with consternation. If the Commission adopted a provision such as that proposed by the rapporteur, it should add a comment noting the criticism of the judgment in the countries of northern Europe, and indicating, at the same time, that the provision was adopted for the future. He would not like it to be said that the majority of the Court had been mistaken. It was not for the Commission to say so and it would be bad for the prestige of the Court if it did. The comment should indicate that the Commission was not in a position to criticize what the Court had decided in 1927. It would thus lay down a principle for the future.

140. The CHAIRMAN recalled that Judge Moore had expressed a dissenting opinion.

141. Mr. HUDSON confirmed that Judge Moore disagreed strongly with the decision because of the Cutting case,<sup>10</sup> in which he had supported the Mexican argument.

142. Mr. LIANG (Secretary to the Commission) noted that some members of the Commission had expressed the fear that the latter might take a decision criticizing, by implication, the judgment in the *Lotus* case. Such fears seemed to him to be somewhat exaggerated. The judgment in question had been criticized both in maritime circles and by lawyers.

143. The *Lotus* case, had, in his opinion, been settled by Professor Basdevant, for the French, who had endeavoured to prove the existence of a principle of international law prohibiting the application of the Turkish Penal Code. The Court had not accepted that view but, on the other hand, it had made no attempt to find the law applicable to the question. Charles de Visscher had written in that connexion:

“The case brought before the Court offered it a chance to give some guidance towards the solution of conflicts of criminal jurisdiction by basing its decision on precedents which in our opinion were clear enough. The Court missed that chance.” (A/CN.4/42, p. 15, mimeographed English text; para. 30, printed French text).

144. Any formulation by the Commission based on international law would seem to be justified by that quotation from C. de Visscher. The Commission might

<sup>10</sup> See “Cutting Case”, “Mexico, Bravos District Court of Chihuahua, 1886”, in M. O. Hudson, *Cases and other Materials on International Law*, 2nd ed., St. Paul, Min., 1936, pp. 575-580).

<sup>9</sup> See summary record of the 64th meeting, paras. 104-113.

also formulate the principle and say that it was not sure whether any rule of international law existed but that it wished to submit that rule. It was clear that, whatever the Commission did, it might appear to be criticizing the Court, but that fear was perhaps exaggerated.

145. Mr. SANDSTRÖM said that the reasons given in the report against the judgment in the *Lotus* case were weak. On page 9 of the mimeographed English text of the report (para. 21, printed French text), it was stated that:

“This decision makes ships’ officers liable to prosecution in a great variety of countries. Furthermore, if the captain is arrested, the ship itself is arrested for the purposes of local enquiry, and if he is imprisoned the ship is immobilized till arrangements have been made to replace him. Thus, quite apart from inconsistencies of judgment, the security of navigation and international trade is prejudiced.”

The passage stressed the fact the ship might be immobilized but if damages could be claimed, it would not only be the imprisonment of the master which would entail the immobilization of the ship, the latter itself might be arrested.

146. The CHAIRMAN noted that Mr. Spiropoulos was alone in proposing to go back on the decision taken the year before. He inquired whether the Commission wished to deal with the question of penal jurisdiction in matters of collision.

*It was decided by 10 votes to 1 to deal with the question*

147. The CHAIRMAN declared that it was quite clear that if the Commission adopted the rule proposed by Mr. François it would not necessarily be saying that the Court was wrong. It would be suggesting that, in future, it would be preferable to adopt such a rule. It was a question of the progressive development of law. Numerous criticisms had been made of the judgment in the *Lotus* case and particular importance should be attached to the opinion of the seafaring community.

148. Mr. HUDSON doubted very much whether it was desirable to refer in the rule to any “other accident of navigation”. He did not know what that term could imply. The case the Commission had in mind was that of collision on the high seas between ships flying different flags. He wondered what sort of accident the International Maritime Committee had in mind when it had used the words: “or other accident of navigation.”

149. Mr. CORDOVA, Mr. FRANÇOIS and Mr. KERNO, (Assistant-Secretary General) suggested, in turn, collision with an iceberg, running aground and deliberate stranding.

150. Mr. HUDSON did not want to concern himself with such accidents. He could conceive of an accident of navigation due to failure to observe international rules compelling another ship to carry out some manoeuvre and damage its engines thereby. He thought it better for the Commission to confine itself to collisions between ships flying different flags.

151. Mr. FRANÇOIS thought that was too limited a view. The Commission should also envisage cases of

loss of life arising out of an accident attributable to the master of a ship, without any collision having taken place.

The meeting rose at 1 p.m.

## 122nd MEETING

Wednesday, 11 July 1951, at 9.45 a.m.

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*Chairman:* Mr. James L. BRIERLY

*Rapporteur:* Mr. Roberto CORDOVA

*Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, 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.

**Régime of the high seas: report by Mr. François (item 6 of the agenda) (A/CN.4/42) (*continued*)**

CHAPTER 2: PENAL JURISDICTION IN MATTERS OF COLLISION (*continued*)

1. Mr. HUDSON was not convinced that the changes proposed in Mr. François’ text to what he felt to be the law were either necessary or desirable. Personally he shared the view of those judges of the Permanent Court of International Justice who had voted for the judgment in the *Lotus* case.<sup>1</sup> He was aware that that judgment had been criticized by certain writers, but he suspected that they had merely been repeating what Mr. Brieryly and Mr. Charles de Visscher had written. Among writers in English, the great prestige surrounding the name of Lord Finlay had played a decisive part.

2. The amount of criticism which had come from shipping circles was certainly impressive, but the case touched on a broader issue, namely State jurisdiction in criminal matters, and shipping circles did not take that into consideration. He himself saw no reason to find fault with the general provisions to be found in, for example, the Italian, Greek or Swedish codes.

3. If the Commission accepted Mr. François’ way of thinking, it would state that the present instance constituted an exception to the general rule in regard to juris-

<sup>1</sup> Publications of the Permanent Court of International Justice, *Collection of Judgments*, Series A, No. 10.

diction. To demonstrate that it was necessary and desirable, Mr. François had shown that ships' officers were liable to be brought before the criminal courts in many countries. He himself did not know whether in practice that happened frequently. He hesitated to state that a new principle of law should be formulated creating an exception to the general rule in regard to jurisdiction. He would be glad to have Mr. Brierly's opinion.

4. The CHAIRMAN disagreed entirely with Mr. Hudson. It would be most unfortunate if the Commission were to encourage the extravagant claims to universal jurisdiction made by certain codes. He did not feel either that the Commission was called upon to answer yes or no to the question, or that the rule formulated by the Rapporteur established an exception to a rule of international law. It was feasible to tackle the subject without declaring that the Permanent Court of International Justice had been in the wrong. The Commission might state that, whatever the law in force at present it considered that the law in the future should be as formulated by it. He attached great importance to the views of shipping organizations, whose members had realized the danger with which they were threatened as a result of the judgment in the *Lotus* case, if the rule laid down by the Court were to become the general rule. He would be content for the Commission to adopt a text on the lines of that of Mr. François.

5. Mr. HUDSON recalled that a majority of the Court had decided that no rule of international law had been violated. He did not maintain that the codes in question represented international law, but no international law provision forbade countries to declare their courts competent in the matter, as Turkey had done.

6. The CHAIRMAN argued that there certainly was a rule of international law which forbade action such as that taken by the States which had issued those codes.

7. Mr. HUDSON made a distinction between a code claiming universal jurisdiction and one which provided for the jurisdiction of the State where the interests of that State were impaired by an act committed outside its territory.

8. The CHAIRMAN said that the Italian code went further than that. It covered every Italian national to whom injury was done abroad. The United Kingdom would never recognize any such jurisdiction.

9. Mr. SPIROPOULOS said he would like to add to what he had said the day before,<sup>2</sup> that he was prepared to accept the Commission's decision; but he did not agree with the Chairman's view. The penal codes in question did not go too far. In the eyes of continental jurists, the provision seemed quite natural. There were of course differences in that respect between the continental countries and the Anglo-Saxon countries. The latter extradited their nationals, on the grounds that only the court in the place where a criminal act had been committed had jurisdiction. The continental countries did not. If a Greek was injured abroad and the person responsible for the injury entered Greece, it was quite normal that he should be arrested and tried by a Greek court.

10. He did not consider that the relevant provisions of a number of national codes were at variance with international law, which did not contain any principle preventing a State from extending its jurisdiction in that direction. For shipping circles the rule might be awkward. In the event of collision, the ship's master would wish to continue the voyage, but he could not avoid being held responsible. Moreover, his ship could be seized. It was certainly unpleasant for a master to be arrested, but the rule was based on historical precedent; why should it be changed for the benefit of a handful of people?

11. If the Commission decided that it was desirable to establish a new rule, he was prepared to examine it and possibly he would change his mind.

12. Mr. FRANÇOIS said he had found Mr. Hudson's remark of the previous day very much to the point, namely, that the task in hand was not to criticize the Court's decision, but to establish a rule applicable in the future.<sup>3</sup> That was the job the Commission must tackle. Its terms of reference were not merely codification, but also the progressive development of the law.

13. Most of the parties concerned, and most jurists as well, considered that the rule in regard to jurisdiction recognized by the Court was not applicable to collisions on the high seas. There was no call for considering whether the principle of international protection of nationals should be applied in a general way. What the Commission had to do was to consider the feasibility of drawing up, within the framework of the progressive development of the law relating to the high seas, the rule he had proposed and which had been advocated by shipping circles. Incidentally the Court's decision had greatly worried the shipping people.

14. Mr. AMADO observed that the Chairman had been one of the writers who had contested the judgment in the *Lotus* case. He had been very surprised to hear the Chairman's lucid criticisms referred to as slight. Admittedly a considerable body of qualified opinion had supported The Hague Court judgment too.

15. Mr. Hudson was always anxious to hear the views of specialists on every subject, but not in the present case, where specialization could not be improvised. Why should the opinion of the experts be rejected now when it had been invoked in other matters?

16. Mr. François' text was a sound one, and he would vote in favour of it.

17. Mr. EL KHOURY said that, on re-reading Mr. François' report, he noticed that the criticisms of the Court's award were based mainly on the opinion of the International Maritime Committee, whose members were experts on shipping affairs, but not legal experts. It was natural enough that ship's masters should be reluctant to be tried in foreign countries for any mistakes they might have made in navigation. But that was not a valid argument. Shipping circles recommended that a ship's master should be judged by a court in his own country; and in so doing they were defending their own interests.

<sup>2</sup> Summary record of the 121st meeting, paras. 133-136.

<sup>3</sup> *Ibid.*, para. 139.

18. The place where a crime had been committed was, of course, the proper place for the trial of the accused party. In the present instance, where a crime had been committed on the high seas, the usual principle could not be applied. Hence the best plan would be to have the accused tried by a court in the country of the victim. He was not in favour of the course advocated by Mr. François.

19. Mr. CORDOVA considered that the courts in the country where the criminal was apprehended had jurisdiction. He saw no reason why sailors should be brought before courts in their own countries. It was going back to the days of the special courts established to try special crimes and to the capitulations system. Shipping circles wanted to carry the jurisdiction of their own countries round the world with them.

20. Mr. FRANÇOIS, referring to Mr. el Khoury's implication that only circles which had an axe to grind had been opposed to the Court's decision, pointed out that the publicists had also criticized it. Names like those of Gilbert Gidel, Albert de La Pradelle and Charles de Visscher, etc. could be mentioned — writers who had not been influenced by shipping interests, and who had criticized the Court's award on general principles. The impression must not be given that it was only those with something to gain who had advocated that persons responsible for collisions at sea should be judged by the courts of the country whose flag their ship wore.

21. The Commission should not under-estimate the interests of shipping on the grounds that legal principles must come first. International shipping was a matter of vital importance, and to hamper it would be doing a disservice to mankind.

22. Mr. SPIROPOULOS noted that, in Mr. François' opinion, international trade might be hampered in that way. But after all, trade went on in spite of the principles of criminal jurisdiction laid down in certain codes.

23. At Mr. Hudson's request, Mr. SPIROPOULOS read out the following paragraph from the report (A/CN.4/42, p. 14, mimeographed English text; para. 29, printed French text):

“As far as the Rapporteur is aware, the Court's decision in the *Lotus* case has not encouraged other States to prosecute in respect of collisions on the high seas officers or members of the crews of ships sailing under a foreign flag.”

24. In the event of a collision on the high seas, the person solely concerned was the master or officer in charge, and the question was whether the officer in question was to break off his course and make for a port in the country of which a national had been killed, or whether he should return to his own country to stand trial. As stated in the report, no complication had arisen. If there were sound reasons for so doing, the interested State would try the accused parties.

25. Mr. YEPES supported Mr. François' conclusions. All the pros and cons had already been advanced. The views of those who were against Mr. François' proposal appeared to have been influenced by the judgment of the Permanent Court of International Justice, which should

not be accepted unreservedly. In the first place it had been given only by the President's casting vote, and anyway, the authority of the Court was no argument for adopting a course contrary to that proposed by Mr. François. All the leading authorities on international law had come out against the Court's award. The French Government representative, Mr. Basdevant, who was now President of the International Court of Justice, had contested the majority argument and almost won the day with purely scientific reasoning. Another judge of the International Court of Justice, Mr. de Visscher, had expressed an opinion which differed considerably from that of the Permanent Court of International Justice, when he wrote as follows:

“It would perhaps be hard to find in all the annals of international arbitration a judgment betraying such profound disagreement between the judges. The Court's ruling leads to consequences that show the weakness of its system and entail unfortunate practical results.” (A/CN.4/42, p. 15, mimeographed English text; para. 30, printed French text).

26. The reason why the Court had decided against the principle now upheld by Mr. François was simply and solely because — as was explained by Judge Moore — it had been unable to find any such principle in international law current at the time. Subsequently, a principle of law had been established on the authority of all the most eminent writers on international law, who had denounced the Court's award, and of all shipping circles, who were after all the people best qualified to assess the problem. He would vote in favour of Mr. François' proposal.

27. Mr. FRANÇOIS said it would be well to consider exactly what the problem was. It was not a question of murder or manslaughter. Collision was a result of negligence, and it was invariably very difficult to decide whether the master of a ship involved in a collision had committed a punishable offence. Hence there was no strong reason against leaving the matter to the judges in the country of which the master was a national rather than to those of the country of the ship rammed or of the victim of the accident. Hitherto the question had not given rise to any difficulty, precisely because the *Lotus* case had aroused so much criticism that States had been reluctant to legislate in conformity with the Court's award. If, in the face of that, the Commission declared that the award in the *Lotus* case was entirely in harmony with international law, there was the danger that States might review their normal practice in such matters.

28. Mr. SPIROPOULOS said he had never maintained that the Commission should adopt a course different from that recommended by the Rapporteur. What he had said was that it should leave the question aside as being a matter for specialists in maritime law. Generally speaking, works on international law did not deal with the question of the criminal jurisdiction of States; the award of the Permanent Court of International Justice had, however, provided writers with an opportunity of giving their views. But the Commission's field was the codification of the law relating to the high seas, and it

had very cogent reasons for leaving aside a problem of criminal responsibility.

29. The CHAIRMAN reminded Mr. Spiropoulos that at its previous meeting the Commission had decided to examine the problem.<sup>4</sup>

30. Mr. SCELLE was afraid that at the present stage of international relations the question could not be settled by mere logic. The very reason for the present lively discussion in the Commission was that there was a feeling of mutual suspicion between the country whose jurisdiction would ordinarily be involved and the country which might intervene. There appeared to be no solution to that particular problem. Obviously the crime, being committed on the public international ocean highway, might be regarded as an international crime, and the punishment for it placed in the hands of an international jurisdiction. But such a procedure was impracticable as the law stood at present, and it seemed hardly likely that the situation would be more favourable in the near future. Hence the best course was to choose the lesser evil.

31. The rule of law in force prior to the award in the *Lotus* case derived from the fact that shipping on the high seas had been carried on by the States best able to carry it on. It was very much in the interest of those countries to see that shipping proceeded efficiently; hence it was reasonable for them to claim that a privilege should be maintained in their favour. It was after all a privilege. He could well appreciate the anxiety to have that privilege maintained, and he thought it was in the interest of the international community to take a sympathetic view.

32. There was of course something to be said for the opposite view, which was based on the general principle of equality amongst States; but the criticisms levelled against the award arose from the fact that their authors considered that there was no such equality in fact. Collision involved an offence, and most of the critics started out from the principle that such offences would be better judged by certain States which had greater competence than others in shipping matters. From the point of view of the absolute, theoretical equality of States, it would amount to privilege. He was in favour of maintaining that privilege until such time as the international community had evolved, and recourse could be had to a tribunal which was both international and had unquestioned jurisdiction. The Rapporteur's recommendation should be accepted, even though logically it hardly seemed satisfactory.

33. He supported Mr. Basdevant, not because the latter had been the French Government's representative, but because he had argued that custom could evolve from the absence of action. There was no doubt that at the time when the issue came before the Court, the majority of States had recognized the tendency of local jurisdictions to hold aloof in such cases. That was a perfectly tenable view and it strengthened Mr. François' conclusions.

34. Mr. SANDSTRÖM thought Mr. Scelle had put the problem admirably, but he doubted whether any

such privilege existed. The judgment in the *Lotus* case denied any such privilege.

35. Mr. SCELLE replied that the judgment had been mistaken in denying it. Moreover, it had been almost a victory for the losing side, as the voting had been six for and six against.

36. Replying to a remark by Mr. HUDSON that the result of the voting had actually been 7 to 5, Judge Moore being in agreement with the Court on the principle involved, he said that that did not greatly alter the situation.

37. Mr. SANDSTRÖM said that the problem had been solved by giving the accused party the benefit of the doubt. But the interest of the community generally must be taken into consideration too; and that demanded the punishment of the person responsible for the accident. He was not sure that the accused person should be shown favour.

38. Mr. HSU said that Mr. Scelle's argument struck him as the most acceptable. The type of crime in question should be brought before an international court. Until such a court existed, there were two distinct principles to be considered. It must be decided which course was preferable. So far as he was concerned, the rule recommended by Mr. François was easily preferable, and he would vote in favour of it.

39. The CHAIRMAN put to the vote the question whether the Commission wished to reject or to adopt the principle laid down by Mr. François (A/CN.4/42, p. 16, mimeographed English text; para. 31, printed French text).

*There were 6 votes for and 6 against. Mr. François' principle was therefore not adopted.*

40. Mr. HUDSON said that the issue was whether the Commission wished to lay down a new rule of international law. In the *Lotus* case, the Court had decided that at that particular moment there was no provision in international law to prevent Turkey from claiming jurisdiction.

41. Mr. EL KHOURY also pointed out that the Court's decision was a negative one. He was convinced that there was no new rule of law. One might very well feel disposed to establish one, but the Commission had just concluded that it was not competent to do so. He supported Mr. Spiropoulos in asking the Commission to put the question aside and postpone it until the next session.

42. Mr. HUDSON could not get a clear picture of the best way of voting to ensure that there should be no more split votes. He did not want his vote to tie the Commission to pursuing the discussion of the issue.

43. He could not accept the arguments put forward by Mr. Scelle, whose conception of the problem was different from his own. In a number of countries there were laws governing criminal jurisdiction which had not given grounds for protest by other States. They existed, and it could not be said that they were bad. The fact that such laws existed in the world did not justify the argument that international law was evolving in the direction of Mr. François' proposal. At the same time, he was prepared to consider whether it was desirable to proceed

<sup>4</sup> *Ibid.*, para. 146.

in that direction, and he was willing to be convinced, if sufficiently good grounds were forthcoming, that the master of a ship colliding with another should be treated differently from the way the predominant trend in criminal jurisdiction suggested. It was not the equality of States or general criminal jurisdiction that was at issue, but the special case of collision on the high seas. Mr. Scelle's argument, based on the way certain States had sent out navigators to the four corners of the earth, was certainly very persuasive, but the interests of States whose nationals were victims of collisions must not be forgotten.

44. He was anxious that his vote should not help to divide the Commission. If it were felt that a new rule should be established, he would vote in favour of that decision.

45. He drew attention to the following passage in the report (p. 13, mimeographed English text; para. 28, printed French text):

"The International Maritime Committee in 1937 requested the Belgian Government to convene a diplomatic conference in order to have the principle advocated in the resolution adopted by way of convention. For reasons having nothing to do with the merits of the proposal, the Belgian Government has not yet complied with this request."

Possibly the diplomatic conference referred to would be in a better position to draft such a rule. He would be glad to have his colleagues' views on that. Possibly the Commission's terms of reference entitled it to anticipate the decision of such a diplomatic conference. Fourteen years had elapsed since that decision was taken by the International Maritime Committee, whose authority he fully recognized. It was a question which had given much food for thought. It might perhaps be a good thing to recommend that the diplomatic conference in question be convened to deal with the Commission's proposal.

46. Mr. SCELLE thought there was much to be said for Mr. Hudson's observations. There was no doubt that the question whether any custom existed merited discussion. He, personally, thought it did exist, but it was no more than a personal conviction. He was inclined to favour Mr. François' proposal. If the Commission merely turned down that proposal, it would be getting nowhere.

47. He did not believe in the equality of States. For him, a State's importance was a matter of relative status in the various spheres, historical, cultural, etc. The notion of absolute equality among States led to chaos and nothing more. The matter under discussion was a case in point. States would decide to act as they thought fit, just as Turkey had done. To solve the problem by bringing the party responsible for a collision before an international tribunal was impracticable; but the procedure recommended by Mr. Hudson was feasible — a diplomatic conference could be convened. He feared, however, that such a conference would produce no results, as had been the case with the Codification Conference held at The Hague in 1930. The Commission might make a request to that effect in the report, but he

did not think the request would achieve any positive result.

48. The best thing to do would be to continue to follow the practice established over the years by the States with most experience in shipping matters. That was the best plan — or perhaps the least unsatisfactory.

49. Mr. CORDOVA; referring to Mr. Scelle's disbelief in the equality of States, said that the Commission had already taken a decision on that point in the declaration on the rights and duties of States. The equality of States from the legal standpoint was a fundamental principle. True, the present issue was a very special one, and shipping was hampered by the fact that crews might be subject to a variety of laws of which they were ignorant; but he did not feel that it was fair to establish a capitulations system in respect of sailors, which constituted an exception to the general rules of jurisdiction.

50. He would throw in his lot with Mr. Hudson. The best solution was to state that the Commission proposed to wait until the Belgian Government convened the diplomatic conference.

51. Mr. ALFARO explained his reason for voting against Mr. François' proposal. The decision taken by the Commission was bound to be regarded as either an expression of customary law, or as progressive development of international law. In regard to customary law, obviously there was no decided opinion either way throughout the world. As to the progressive development of international law, Mr. François' text did not seem to him sufficiently acceptable to warrant its being adopted, and he had therefore voted against it. The only possible procedure was to set up an international tribunal. It must be borne in mind too that collision was nothing more than a matter of negligence, and indeed was often unavoidable so that the utmost that could be alleged was that the captain had not taken due care.

52. The Commission might express a wish for an international jurisdiction to be set up, and he would support any such decision. But he certainly could not accept a proposal which was not obviously and fully satisfactory, either as a statement of what was the customary law or as a measure for the progressive development of international law.

53. Mr. FRANÇOIS said that he had inquired why the Belgian Government had not convened the conference advocated in 1937. He had been given the answer that it had been decided to wait until other subjects were ripe for discussion. Actually, at the present moment the conference would only be able to deal with the question of collision. When a diplomatic conference was convened, there would still be the same difficulties in the way of a convention. States would, in all probability, decline to sign the convention, and in the circumstances that might create a dangerous situation. The States unwilling to sign would be those which did not possess large merchant navies; and it was precisely those States which constituted the major peril to shipping as lacking experience of navigation, and which would wish to punish those responsible should any of their nationals be killed owing to an error in navigation. The countries with large merchant navies were in a better position to judge such

cases than States lacking experience of the problems involved. He was by no means sure that, from the point of view of justice, it was preferable to allow an accused party to be judged by the latter than by States possessing such experience.

54. He drew the Commission's attention to what Professor Gidel had written :

"In fact the *Lotus* case shows the advisability of governing competence in the matter of collision by definite rules (conventions or codification) and, perhaps better still, of giving jurisdiction in this matter to special courts." (A/CN.4/42, p. 14, mimeographed English text; para. 30, printed French text).

Thus Professor Gidel had had in mind an international tribunal — the ideal solution. The Commission might decide that the question should be studied with a view to the possibility of recommending the creation of an international jurisdiction. Pending the establishment of such a jurisdiction, he still favoured the solution he himself had proposed.

55. Mr. SANDSTRÖM thought that the importance of the problem had been overstated. There had been no case since the *Lotus* affair, which was some 25 years old ; and Mr. Hudson had rightly drawn attention to the passage in which the Rapporteur stated that the court's decision had not encouraged other States to prosecute in similar instances. Hence, following the vote just taken, the question might be left where it stood.

56. Mr. HUDSON said he had been looking carefully at the list (p. 13, mimeographed English text, para. 26, printed French text, of the report) of organizations which had concurred with Mr. François' own opinion. He noticed that in the case of Italy, the organization was the Corporation of Shipping and Aviation Personnel. He would be interested to know, in the event of the recommendation being approved, what the repercussions would be on the responsibility of aviators, and also whether the International Civil Aviation Organization had any legislation in mind to cover aviators. He did not think the Commission could deal with the question until it knew what the position of aircraft pilots would be. Suppose, for example, that a pilot landing at Cointrin (Geneva) were charged with negligence while flying over Italy en route from Damascus. The Civil Aviation Convention contained no provision covering such an eventuality. He was under the impression that the Legal Committee of the International Civil Aviation Organization had studied the question, but he did not know what the exact position was, and he wondered whether the Commission agreed with him that the responsibility of aviators should be borne in mind.

57. Mr. FRANÇOIS fully appreciated the significance of Mr. Hudson's remarks, and in that connexion reminded the Commission that what it was engaged upon was nothing more than a first reading. He suggested that it might leave on its agenda for the next session the question of penal jurisdiction in matters of collision, instructing him, as Rapporteur, to go rather more deeply into the question in connexion with parallel questions affecting civil aviation. Discrepancies between the relevant

regulations governing navigation by sea and by air respectively must be avoided.

58. Mr. SPIROPOULOS was not in favour of Mr. François' suggestion that the question of penal competence in matters of collision be left in abeyance for the time being. The Commission had covered a good deal of ground in its discussions ; and he suggested that its report should mention that the question had been examined, that various members had expressed doubts, and that on the whole the Commission had been of the opinion that an *ad hoc* conference of shipping experts and jurists should be convened with a view to preparing a convention. A recommendation on those lines to the General Assembly would surely have a favourable reception. The Assembly would take whatever action it thought fit on the recommendation.

59. Mr. AMADO pointed out that collisions on the high seas were frequent. Prior to the *Lotus* case, collision cases were settled in accordance with a traditional practice existing from time immemorial. The award in the *Lotus* case had deviated from that practice, and had consequently aroused public opinion. It had given rise to heated discussion, but since 1927, when the award was made, no further case appeared to have been settled by the same procedure as in the *Lotus* case.

60. Mr. CORDOVA was prepared to support Mr. Hudson's proposal. He wondered what sort of conference the Belgian Government proposed to convene. It should surely include representatives of every country, not merely those with shipping interests.

61. Mr. SPIROPOULOS agreed with Mr. Amado that collisions had always been a common occurrence, but more often than not there was no way of ascertaining how the question of criminal responsibility was dealt with. Since the *Lotus* affair, was the master of the ship which caused the collision arrested? Did the States which had advocated international regulation apply that principle? The only reason why the problems had been brought to public notice in the *Lotus* case was because France had taken the case to the Permanent Court of International Justice.

62. The CHAIRMAN, answering Mr. Spiropoulos' questions, said that it was rare for cases of collision to give rise to criminal proceedings.

63. Mr. HUDSON drew attention to article 8 of the Treaty on International Penal Law signed at Montevideo on 19 March 1940,<sup>5</sup> the preparatory work for which went back to the conference held at Montevideo in 1902. The treaty had been signed by a number of Latin-American States. The article in question stipulated that "crimes committed on the high seas, whether on board airplanes or on men-of-war, or on merchant ships, must be tried and punished according to the law of the State whose flag the vessel flies". Pilots of aircraft had been placed on the same footing as the captains of merchant vessels. Hence, the Commission could not disregard the effect its decisions were bound to have on the development

<sup>5</sup> See M. O. Hudson, *International Legislation*, vol. VIII, pp. 482 *et seq.*

of aviation law, nor could it disregard any such development in connexion with its own studies.

64. Everyone was aware of the complications which arose from the use in ships of equipment which infringed a patent, when the ships put into port in the country where the patent had been taken out. Those complications had led to measures for the protection of industrial property being taken in respect of nautical equipment,<sup>6</sup> and the measures had been applied to aviation law in the Convention on Civil Aviation signed at Chicago on 7 December 1944.<sup>7</sup> That example, to which others could be added, should be sufficient demonstration that maritime law and aviation law were closely bound up.

65. It seemed likely that the Legal Committee of the International Civil Aviation Organization had gone into the question of criminal responsibility of aircraft pilots.

66. Mr. LIANG (Secretary of the Commission) did not think the general rule relating to crimes committed on board ships, as laid down in the Treaty on International Penal Law just mentioned, had any connexion with the question of collisions. As to aircraft collisions, they seldom involved the trial of pilots on criminal charges. He was inclined to think that aviation law was derived from different principles and followed a different procedure from maritime law.

67. Mr. CORDOVA wondered whether the Commission should not consider the advisability of merely recommending that a diplomatic conference be convened. A decision in favour of that course would automatically exclude the possibility of solving the problem of substance.

68. The CHAIRMAN and Mr. HUDSON pointed out that that would not necessarily be the case. Any decision on the substance of the issue taken by the Commission would be valuable for future reference and could be used as a basis for the new report to be examined in 1952.

69. Mr. HUDSON further argued that the object of the Commission's deliberations was to provide the Rapporteur with a series of directives. He was in favour of the Commission voting again on the principle laid down by Mr. François in his report. He was prepared to abstain so as not to stand in the way of a vote by six members of the Commission in favour of continuing the examination of the problem.

70. Mr. SPIROPOULOS said that he would do the same.

71. The CHAIRMAN again put to the vote the principle embodied in the Rapporteur's recommendation (A/CN.4/42, p. 16, mimeographed English text; para. 31, printed French text).

*Mr. François' principle was adopted by 6 votes to 4, with 2 abstentions.*

72. The CHAIRMAN remarked that the second vote had been taken at the request of members who had voted against the principle the first time. It was an unusual vote, but he noted that none of the members of the Commission challenged it.

<sup>6</sup> See Article 5 (3) of the Convention for the Protection of Industrial Property, revised at The Hague on 6 November 1925, in Hudson, *International Legislation*, vol. III, pp. 1761 *et seq.*

<sup>7</sup> See Article 27, *ibid.* vol. IX, pp. 168 *et seq.*

73. The CHAIRMAN put before the Commission a text submitted by Mr. Hudson to replace that of Mr. François. It read as follows:

"In the event of a collision on the high seas between vessels flying different flags, the master or any other person in the service of either vessel may be prosecuted in penal or disciplinary proceedings only before the courts of the State whose flag that vessel was flying at the time; the arrest or detention of the vessel may not be ordered as a penal sanction by the authorities of any State other than that of the vessel's flag."

74. The main alteration which the new proposal made to the Rapporteur's text was the deletion of any reference to accidents of navigation.

75. Mr. HUDSON pointed out further that in his text he had cut out the expression "wholly or partly responsible", first of all because it was not clear from the French text whether the words "*qui est*" referred to both the master and any other person, or only to that other person, and secondly because the use of the expression appeared to dispose of the question of responsibility in advance, before any inquiry or prosecution had taken place. He had replaced the words "at the time of the collision or other accident of navigation" by the words "at the time".

76. He had no strong objections if the Commission felt that the words "or other accident of navigation" should be kept.

77. He had inserted the words "between vessels flying different flags" so that collisions between two vessels flying the flag of one and the same country would not come under the rule.

78. Mr. EL KHOURY argued that neither Mr. Hudson's nor Mr. François' draft covered possible conflicts of jurisdiction between the courts of various countries. Since the conduct of the masters of the two vessels would be subject to the jurisdiction of different countries, it might well happen that two courts would regard one and the same case differently and make contradictory awards. It seemed essential that there should be an international body to settle any conflicts of jurisdiction. In such instances, the procedure laid down in article 7 of the convention prepared by the commission appointed by the Oslo Conference of the International Maritime Committee in 1933 (see A/CN.4/42, p. 11, mimeographed English text; para. 22, printed French text) might be followed. That article stipulated that: "In the event of a conflict of jurisdiction between the courts of various States, each of the States... shall be at liberty to submit the conflict to the Permanent Court of International Justice..."

79. He drew the Rapporteur's attention to the shortcoming, and suggested that he remedy it when drafting his new text.

80. Mr. HUDSON said he did not agree with Lord Finlay's opinion in the "Lotus" case (A/CN.4/42, p. 15, mimeographed English text; para. 30, printed French text) that "Criminal jurisdiction for negligence causing collision is in the courts of the country of the flag, provided that, if the offender is of a nationality different

from that of his ship, the prosecution may alternatively be in the courts of his own country." Incidentally, that view was also to be found in article 1 of the draft produced by the commission appointed by the Oslo Conference in 1933. It read:

"In the event of a collision on the high seas the master, as well as any other person in the service of the ship, can only be prosecuted under penal or disciplinary proceedings in respect of such collision, before the courts of the State of which he is a citizen or of which the ship was flying the flag at the time of the collision."

81. The final draft adopted at the Paris Conference had dropped the mention of the nationality of the person prosecuted (A/CN.4/42, p. 13, mimeographed English text; para. 27, printed French text) and Mr. François had quite rightly also omitted it.

82. With regard to Mr. el Khoury's point, at the present time there could be no question of a conflict of jurisdictions, since the only jurisdiction recognized was that of the courts of the State whose flag the vessel was flying.

83. Following an exchange of views in which the CHAIRMAN and Mr. HUDSON took part, Mr. EL KHOURY reminded the Commission of the complications which might arise for third parties victims of a collision, from verdicts pronounced by two different courts in respect of two ships' masters, if both verdicts acquitted both the persons concerned.

84. Mr. AMADO pointed out that the responsibility of a master whose ship collided with another was in the first instance towards the shipowner whose interests he had neglected, since his negligence would have considerable economic consequences. Similar considerations justified the courts in the State of the vessel's flag in holding the ship's master responsible. The penal responsibility of the master must not be put on the same footing as that of a common malefactor. He would be obliged to return to port and there the case would be tried and where necessary he would be punished. The same would apply to the master of the other vessel. That was a simple, logical statement of the position, and in making it he could not help feeling that there was a certain amount of confusion in the Commission's deliberations.

85. Mr. KERNO (Assistant Secretary-General) could not make out why Mr. Hudson had included in his draft the words "between vessels flying different flags".

86. Mr. HUDSON explained that he had inserted the expression so as to make it quite clear that the Commission was concerned exclusively with collisions of an international character, i.e., collisions between vessels of different nationalities.

87. Mr. KERNO (Assistant Secretary-General) supported by Mr. HSU, could not see why, if for example an Italian were the victim of a collision between two French ships, the jurisdiction of the Italian courts should not be ruled out in the same way as if there were a collision between two ships of different nationalities. The reasons against giving jurisdiction to the courts of the country of which the victim was a national were equally valid in both cases.

88. Mr. CORDOVA said he would like to second Mr. el Khoury's argument. According to the text under consideration, the masters of two ships involved in a collision would be brought before two different courts. The two courts might separately acquit both ships' masters, and third parties suffering damage as a result of the collision would obtain no redress whatever. It was essential therefore that jurisdiction should be in the hands of one court only.

89. Mr. HUDSON said that the implication in Mr. Córdova's remarks was that, in the event of a collision, someone must always be punished.

90. Mr. CORDOVA explained that all he was asking was that competence should be given to an international jurisdiction which would judge the entire case, so that any responsibility would be brought out.

91. Mr. AMADO noted that some members of the Commission appeared to assume that, in the event of collision, the shipowner and the State would naturally tend to champion the ship's master and to take sides against the other State and the other vessel. That was an astonishing state of affairs.

92. Mr. ALFARO said that Mr. Hudson's text demonstrated how difficult it was to deal with the question satisfactorily.

93. The Commission must admit that collision was not a premeditated crime, but an accident arising either out of negligence on the part of one or both ships' masters or without any negligence, out of circumstances beyond human control.

94. Clearly the restriction made by Mr. Hudson in using the expression "between vessels flying different flags" fully justified Mr. Kerno's comment.

95. Moreover, Mr. el Khoury had rightly demonstrated that it might be essential for the whole of a case to be tried by a single judge. The strength of national sentiment must not be disregarded, and some means must be found of counteracting it. To take the example of a collision on the high seas between an American vessel and a Norwegian vessel, in which each master blamed the collision on the other, and supposing each master were tried in his own country; in either case the judges might be influenced by national prejudice, or it might be impossible for them to obtain all the evidence, since the passengers in the Norwegian ship would testify before the Norwegian court, while the American court would hear only the passengers from the American vessel. Hence the Norwegian court might establish the responsibility of the American master, and the American court that of the Norwegian master. Surely it could not be argued in such circumstances that justice had not been done to the parties concerned. Penal responsibility for collision was practically impossible to determine if the proceedings were entrusted to a court in the State of which either of the vessels carried the flag. Clearly then, it was desirable to recognize an international jurisdiction as competent in the matter.

96. The CHAIRMAN thought the Commission would be more or less bound to agree that such a prospect was still far off. It was not in its power to establish an

international jurisdiction of the kind. It must take the law as it found it, however imperfect and temporary it might be. Until such time as the law developed to the point of perfection, it had decided to accept the principle drafted by Mr. François. All that remained was to delimit the principle, and Mr. Hudson had proposed stating it in a different form.

97. Mr. EL KHOURY said that he had proposed that any possible conflict of jurisdiction should be solved by the method laid down in article 7 of the draft convention prepared by the commission set up by the Oslo Conference of the International Maritime Committee, namely, to make the International Court of Justice competent in such matters.

98. The CHAIRMAN pointed out that the International Court of Justice had no jurisdiction in criminal matters.

99. Mr. LIANG (Secretary of the Commission) said that the expression "conflict of jurisdictions" was out of place if applied to the instance referred to by Mr. Alfaro. In the example given, both the courts were trying different persons and applying their own particular law. Hence there was no conflict of jurisdictions in the technical sense of the term.

100. Mr. CORDOVA agreed that the expression was inappropriate in the case in point; but the fact remained that difficulties might arise from judicial decisions taken concurrently. The system advocated by Mr. el Khoury should be taken into consideration.

101. The CHAIRMAN admitted that unfortunate consequences might arise from the effect of decisions taken by two separate tribunals. But as the law stood at present, such consequences were inevitable.

102. Mr. SANDSTRÖM pointed out to Mr. el Khoury that article 1 of the draft convention he had quoted laid it down that two jurisdictions would be competent simultaneously, namely, that of the State of which the ship's master was a national, and that of the State of which the ship was flying the flag. It might well happen therefore that the courts of two different countries would regard themselves as competent to try one particular master. In that case, there would be a real conflict of jurisdictions, and article 7 had provided a method of settling such conflicts. On the other hand, in the circumstances with which the Commission was concerned, the conflict involved was not a conflict of jurisdictions, but rather a conflict of evidence.

103. Mr. SCALLE said that the Commission was inclined to disregard the fact that it was concerned exclusively with cases in which the responsibility for collisions was not provided for in a convention, and in which there was no provision for the jurisdiction of an international tribunal. He suggested that wording to that effect should be inserted at the beginning of the text, which would then start off: "In the absence of . . .". It was impossible to overcome the difficulties pointed out by Mr. el Khoury except within the framework of a convention or by appeal to an international court.

104. Mr. CORDOVA, supported by Mr. SCALLE, thought that the Commission might state in its commen-

tary that it recommended the establishment of an international tribunal or the preparation of a convention.

105. The CHAIRMAN said that both those courses were favoured by all the members; and they also represented the wishes of the Belgian Government.

106. Unlike Mr. FRANÇOIS, who saw no objection to that procedure, Mr. HUDSON thought that his proposed text would be too drastically changed if the wording suggested by Mr. Scelle were inserted at the beginning.

107. Mr. FRANÇOIS, summarizing the discussion, said that the Commission had adopted the principle on which the conclusions contained in his report were based, and Mr. Hudson had put forward a new version of the text. In the draft he proposed to submit to the Commission in 1952, he would bear in mind the discussions which had just taken place. He thought, therefore, that the Commission might leave aside the finer points of drafting, since the whole issue would come up for discussion again a year hence. No report would be made at present.

108. The CHAIRMAN considered that to be the best solution. The Commission would ask the Rapporteur to produce a more carefully studied draft on the basis of the two existing versions.

109. Replying to a question by Mr. CORDOVA, Mr. FRANÇOIS said that, in its general report, the Commission would merely inform the General Assembly that it had given a first reading to this or that subject, which it proposed to re-examine at its next session. The only report and commentaries would be those referring to the problem of the continental shelf and closely related subjects. On the other subjects — nationality of ships, penal competence in matters of collision, and safety of life at sea, there would be no detailed report.

*It was so decided.*

### CHAPTER 3: SAFETY OF LIFE AT SEA

110. The CHAIRMAN asked the Commission to consider the draft principle on the subject of safety of life at sea suggested by the Rapporteur and appearing on page 19 of his report (mimeographed English text; para. 37, printed French text).

111. Mr. FRANÇOIS pointed out that the Commission was likely to find itself in difficulties. At the second session, he had been asked to study the question and to try to deduce from the rules contained in annex B to the Final Act of the London Conference of 1948 principles which the Commission might examine.<sup>8</sup> In compliance with his instructions, he had tried to formulate a general principle. If the Commission wished to examine it, it would need to have before it the complete text of the Final Act of the London Conference. That was essential if it wished to satisfy itself that the draft principle he had produced was a faithful and comprehensive summary of the rules in question. The same was true of the questions of the right of approach and the slave trade.

112. The CHAIRMAN wondered whether it would not be advisable to report to the General Assembly that

<sup>8</sup> See summary record of the 66th meeting, paras. 2-5.

the question of the safety of life at sea was a technical point which had been thoroughly examined by the London Conference, and that the Commission was not called upon to deal with it.

113. He agreed with Mr. FRANÇOIS, who observed that if the Commission adopted that course it would be going back on the decision it had taken at its second session.

114. Mr. HUDSON said that the Rapporteur had reviewed the international regulations concerning navigation and the relevant texts, which did not constitute a convention. If they wished to bind themselves on the strength of those texts, States would have to enact a uniform national law on the subject. That being so, there was no occasion to deduce a principle from annex B to the London Final Act, even though that document laid down a number of important rules on equipment and signals, which the Rapporteur had carefully reproduced on page 18 (mimeographed English text; para. 34, printed French text), of his report. Turning to the Brussels Convention of 1910, from which he quoted extracts on page 19, (*ibid*, para. 35, printed French text), the Rapporteur had deduced a principle which he had submitted to the Commission.

115. If the Rapporteur concluded that there was no general principle to be deduced from annex B to the London Final Act, he personally would support that view, but a satisfactory formula could be extracted from the Brussels Convention, even though there had been only a small number of ratifications; and the text submitted by the Rapporteur would be useful in drafting that formula.

116. Mr. FRANÇOIS wondered whether Mr. Hudson had fully understood his previous remarks, the main point of which was that the Commission would be hampered in its study of the relevant section of the report by not having the complete text of the Final Act of 1948 before it.

117. Mr. HUDSON said he was quite willing that examination of the question should be postponed until the following session; but he saw no reason why the Commission should not try there and then to discover the principle behind the Brussels Convention. The rules on navigation contained in the Washington Convention of 1889, and the London rules of 1929 and 1948, could not be subjected to the same scrutiny, but that did not apply to the Brussels Conference. He hoped, therefore, that the members of the Commission would make known their views on the principle which the Rapporteur had deduced from that instrument.

118. Mr. KERNO (Assistant Secretary-General) said that as Mr. François' report had been available for several months, all members who had read it could have obtained the complete text of the London Final Act. If asked to do so, the Secretary could perfectly easily provide members with the text. That was no good reason for postponing until the following session the study of the question of safety of life at sea.

119. Mr. FRANÇOIS said that the Commission would find itself hampered for want of time. He did not think

members could possibly carry out the necessary checking of the text by the end of the session, either on the topic under discussion or on the other two topics. Hence, he suggested that the Commission take a cursory glance at the topic, reserving the possibility of studying the texts in question between sessions.

120. Mr. SPIROPOULOS pointed out that, at the beginning of the section devoted to the safety of life at sea, the Rapporteur had quoted a paragraph from the Commission's report on its second session to the effect that "the Commission ascribed great importance to the international regulations for preventing collisions at sea, which constituted Annex B to the Final Act of the London Conference of 1948". Was that question actually one which lent itself to codification? It was a purely technical matter, unrelated to the international régime of the high seas. While it was important that a question of that kind, relating to national laws, should be unified, the unification should surely be left to legislators. A code of international law should contain only general principles. An international convention could perhaps be drawn up for the purposes of standardizing the rules relating to the safety of life at sea; but such rules had nothing in common with the other topics dealt with by the Commission, and hence had no place in the code.

The meeting rose at 1 p.m.

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## 123rd MEETING

Thursday, 12 July 1951, at 9.45 a.m.

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*Chairman:* Mr. James L. BRIERLY

*Rapporteur:* Mr. Roberto CORDOVA

*Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, 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.

### Programme of work

1. On the CHAIRMAN's proposal, the Commission agreed to consider items 8, 9, 10 and 11 of its agenda (A/CN.4/40) at its meeting on the following day.

#### Régime of the high seas: report by Mr. François (item 6 of the agenda) (A/CN.4/42) (continued)

##### CHAPTER 11: CONTINENTAL SHELF (resumed from the 117th meeting)

2. The CHAIRMAN asked Mr. François to report on the findings of the sub-committee set up at the 117th meeting in connexion with the study of the continental shelf.<sup>1</sup>

3. Mr. FRANÇOIS recalled that, at its 117th meeting the Commission had, by a small majority, adopted a text submitted by Mr. Yepes and amended by Mr. Hsu<sup>2</sup> granting coastal States not having a continental shelf as defined in article 1 of the draft, rights of control and jurisdiction up to a distance of 20 miles beyond territorial waters. Since the text had been severely criticized by the minority and had been regarded by the majority as poorly worded, a sub-committee had been set up to prepare a new draft which would take into account the case mentioned by Mr. Córdova and not covered by article 1 as adopted by the Commission, where the sea-bed lay at a depth of 250 metres so that its mineral resources could not be worked vertically, but could be worked from a point on the mainland. Such a part of the sea-bed would not belong to the continental shelf as defined in article 1.

4. The sub-committee had reached the conclusion that the best way of avoiding any difficulty would be to omit from article 1 the reference to a depth of 200 metres and to substitute for the phrase "does not exceed 200 metres" the phrase "is such as to permit the exploitation of the natural resources of the sea-bed and subsoil". That solution had been unanimously approved by the sub-committee. Mr. Yepes had withdrawn the text he had previously submitted and Mr. Córdova had expressly intimated his agreement. The comment on article 1 would contain the necessary explanations.

5. Mr. YEPES said that he had welcomed that solution, which had been proposed by Mr. Hudson. He was fully satisfied with the new draft, which granted the same rights to States having no continental shelf in the geological sense of the term as to other States, and restored equality among all States, whatever their situation in that respect. Whether a continental shelf existed or not, under the text adopted all States would be entitled to exercise control and jurisdiction over the stretch of sea contiguous to their shores, so long as it was possible for them to exploit the resources of the subsoil.

6. Mr. SCELLE said that since he rejected the concept of the continental shelf, he did not accept the new definition of it.

*The sub-committee's draft for the new article was adopted.*

##### CHAPTER 3: SAFETY OF LIFE AT SEA (resumed from the 122nd meeting).

7. Mr. YEPES said that, while he did not underrate the importance of the Final Act of the London Conference of 1948, he thought that the rules which it contained could not be included in a code of international law. Those rules concerned navigation signals and other technical points, but did not constitute principles of international law. It would be a retrograde step for the Commission to discuss the regulation of shipping at sea after dealing with such comprehensive questions as the continental shelf and the exploitation of the resources of the sea.

8. Mr. SANDSTRÖM also doubted whether such rules were really principles of international law.

9. The CHAIRMAN pointed out that the proposed rules applied to individuals. It was not customary to enunciate principles of international law in the form of obligations imposed on individuals. He was impressed by the observations of Mr. Yepes and by those of Mr. Spiropoulos at the end of the previous meeting.<sup>3</sup>

10. Mr. HUDSON proposed that the principle derived by the Rapporteur from article 11 of the Brussels Convention of 1910 should be introduced by some such phrase as: "Each State is bound to provide by its legislation that..."

11. The United States had laws under which such obligations were imposed on masters of vessels. Similar regulations were to be found in the laws of other countries. A study of national laws should be made; if they were found to be concordant, the text which he had just proposed would be fully justified.

12. Mr. EL KHOURY observed that no sanction would be applied for non-observance of such international rules. Observance would be dependent upon the goodwill of States.

13. In the CHAIRMAN's view, Mr. el Khoury's observation supported the conclusions of other speakers, from another angle.

14. Mr. SPIROPOULOS, stressing the importance of the point made by Mr. el Khoury, said that whereas all the principles so far formulated by the Commission were to be binding on States, the rules then before the Commission concerned instructions to masters of vessels. Such provisions did not specify the rights or duties of States, nor were they designed to delimit the latter's sovereignty; responsibility for non-observance of them would lie solely with the master of the vessel. It was a question of administrative international law and, while that particular branch of international law might, of course, also be codified at a more advanced stage of the work, he thought that the Commission should meanwhile confine itself to determining the rights and duties of States, and delimiting their sovereignty. The reader would be surprised to find technical rules of a purely administrative character in a code of international law.

<sup>1</sup> See summary record of the 117th meeting, para. 88.

<sup>2</sup> *Ibid.*, para. 65.

<sup>3</sup> See summary record of the 122nd meeting, para. 117.

15. Mr. FRANÇOIS, supported by Mr. SCALLE, disagreed with Mr. el Khoury and Mr. Spiropoulos. The Brussels Convention itself had merely imposed an obligation on masters of vessels, and all that had to be done was to give general application to a provision of that Convention.
16. It might of course be asked, as Mr. el Khoury had asked, who would be liable should the master of the vessel fail to observe the regulations. In his view, international law not only applied to States; obligations under it could be imposed directly on individuals. He could see no objection of principle to the inclusion in a code of international law of provisions directly imposing obligations on individuals.
17. Mr. ALFARO agreed. He thought that the Commission should define the rules concerning the safety of life at sea and formulate the principle that States were bound to include them in their laws so that, as rules of a humanitarian character, they might be compulsorily implemented throughout the world.
18. The preamble and Article 1, paragraph 3, of the Charter of the United Nations specifically referred to problems of a humanitarian character, so that a stipulation that States should include in their laws minimum rules governing the safety of life at sea, such as those proposed by the Rapporteur, would be in accordance with the provisions of the Charter.
19. Mr. HSU, supporting Mr. François and Mr. Alfaro, said that international law contained many rules of a humanitarian character. It was untrue to say that States were not bound by the rules proposed; they would, in fact, be obliged to enact the necessary legislation. If any States had not yet legislated on those questions, it was time they were asked to repair the omission. He thought that the Commission need have no misgivings in framing such a recommendation.
20. Mr. EL KHOURY said that he had not intended to suggest that the Commission refrain from dealing with the codification of rules concerning the safety of life at sea, but merely to emphasize that no sanctions corresponding to such rules so far existed and that it was desirable, if possible, to provide some form of sanction for non-observance. Generally speaking, he thought that no obligation could exist where there was no sanction.
21. Furthermore, the liability of the master of a vessel increased if his vessel had caused a collision endangering human life. The same applied to collisions between motor vehicles, where failure to stop was regarded as an aggravating circumstance.
22. Mr. YEPES pointed out that the actual principle of the proposals was not at issue. All members of the Commission agreed in recognizing their very lofty humanitarian character. He thought that shipping regulations should properly be included in a special convention, but did not come under international law and were on a lower level than the code which the Commission was drafting. It was as if rules concerning road signs and signals were to be incorporated in a civil code. Could rule 16 of Annex B to the Final Act of the London Conference of 1948, as reproduced by the Rapporteur (A/CN.4/42, p. 18, mimeographed English text; para. 34, printed French text), be regarded as a principle of international law? No common denominator existed between such a rule and the principles adopted by the Commission with respect to the continental shelf, for example. The difficulty was one, not of substance, but of method, of *modus operandi*.
23. Mr. CORDOVA said that the Rapporteur did not propose the inclusion, in the draft international code, of technical rules such as those just quoted by Mr. Yepes. He merely proposed that the Commission adopt the general principle concerning safety of life at sea which he had enunciated in his report. Since the Commission was dealing with the régime of the high seas, its study could include navigation rules, the high seas being mainly used, after all, for navigation.
24. He had no objection to the re-casting of the text proposed by the Rapporteur in accordance with the suggestions submitted by Mr. Hudson and Mr. Alfaro.
25. Mr. SPIROPOULOS repeated his view that the general principles of public international law and special rules should be carefully differentiated. It would be just as abnormal to mix them together as, for example, to include road traffic regulations in a civil code. For the time being, at any rate, the Commission was solely concerned with the codification of principles of public international law and all the rules which it formulated must define relations between States. Having no desire to open a discussion as to whether the master of a vessel could be the subject of international law or not — a question which he himself would answer in the negative — he would merely point out that such special rules had no place in the code to be drafted by the Commission.
26. Mr. SCALLE thoroughly disagreed with the point of view just expressed by Mr. Yepes and Mr. Spiropoulos and considered the rules governing safety of life at sea so important that they could be included in the code. Regulations were just as much a part of international law as any principle.
27. It was still too early to consider whether, as he himself believed, there were other subjects of international law besides States. The question was whether the master of a vessel could allow human beings whom he might have saved to perish at sea. In view of the humanitarian bearing of the problem he fully supported the views expressed by the Rapporteur.
28. The CHAIRMAN thought that it might be of value to ascertain the nature, from country to country, of the laws governing the responsibility of the master of a vessel for safety of life at sea, in order to bring out the general practice of States. He asked whether the Rapporteur would accept a formula binding States to legislate.
29. Mr. SPIROPOULOS and Mr. YEPES said that they would be prepared to accept that procedure.
30. Mr. FRANÇOIS, speaking as Rapporteur, said that the information requested by the Chairman could be compiled, but he doubted the need for it. The rules concerned had already been included in a convention. Must the Commission study the legislation of all the countries in the world before assuming the right to

codify rules which were so important and so natural? He would be surprised if the Commission requested him to undertake such research.

31. Mr. LIANG (Secretary to the Commission) pointed out that collation of the texts whereby States had implemented the 1948 Convention was recognized as a part of the documentation work of the Secretariat.

32. He doubted, however, whether the existence of such a convention could be said to constitute a principle of international law under which States were bound to enact legislation, and whether States that were not parties to the convention would be guilty of a breach of international law if they failed to do so. It was a moot point whether it was the existence of domestic regulations that had led to the preparation of conventions or whether it was diplomatic instruments that had inspired domestic legislation.

33. But the Commission might consider whether, apart from the relevant conventions, a principle of international law did exist.

34. Mr. HUDSON thought that, for the guidance of the Rapporteur, the Commission might adopt a formula on the lines of article 11 of the Brussels Convention; but it would be advisable to study State practice in the matter.

35. Mr. FRANÇOIS was not clear as to the Commission's intentions. While the desirability of including the principles under discussion in the code to be drafted by the Commission might be questioned, there was no doubt that they were principles of international law, and he himself regarded them as provisions which any code of international law should naturally contain.

36. Furthermore, he did not see the necessity for ascertaining whether similar provisions existed in the laws of the various States. Whereas, when studying the question of the continental shelf, the Commission had adopted decisions, although but little national legislation on the subject existed, it now wished to make any action it might take conditional upon research into national laws and would include rules in its code only if they were to be found in all such bodies of law. In his view, the Commission's attitude was illogical.

37. Mr. KERNO (Assistant Secretary-General), agreed with the Rapporteur that the Commission should not be too pusillanimous. International rules for the safety of life at sea were less open to discussion than rules concerning the continental shelf. They had given rise to the Brussels Convention of 1910 and to the Final Act of the London Conference of 1948, which was likely to come into force in the near future. The Commission would be doing useful work if it stated the principle brought out by the Rapporteur.

38. Mr. ALFARO thought that the Commission should ask the Rapporteur to prepare a draft binding States to enact legislation to ensure safety of life at sea and stating the minimum provisions that such legislation should contain.

39. Mr. HUDSON thought that Mr. e Khoury's request might be met by a provision that any master of a

vessel who failed to observe the relevant regulations could be prosecuted in the State of which he was a national.

40. Mr. SPIROPOULOS asked what purpose such refinements would serve. The Brussels Convention laid no direct obligation on the master of a vessel. It provided for the enactment of domestic legislation which made the master liable and, hence, subject to prosecution in his own country. To make the master directly answerable under international law was an entirely new departure.

41. The CHAIRMAN put Mr. Alfaro's proposal to the vote.

*Mr. Alfaro's proposal was adopted by 8 votes to none with 4 abstentions.*

42. Mr. FRANÇOIS pointed out that the only further action the Commission would have to take on the recommendation just adopted would be to add an "umbrella clause" to its conclusion in 1952.

43. Mr. KERNO (Assistant Secretary-General) thought that a more optimistic view was possible. The decision adopted showed that the Commission was in favour of the principle, that it recognized it as a principle of international law, and that it recommended the ratification of the Final Act of the London Conference of 1948.

44. Mr. FRANÇOIS asked whether the Commission wished him to go into details in his report, or merely to state a vague principle, which would, in his view, not be worth the paper on which it was written.

45. Mr. HUDSON hoped that the Rapporteur's subsequent work would bring out the substance of the relevant articles of the Brussels Convention. He would even go so far as to hope for the drafting of a declaration providing a compulsory framework for domestic legislation on shipping regulations, and stipulating that the regulations for shipping on the high seas prescribed by any maritime State for its own vessels should be prepared in consultation with all other maritime States, in order to avoid contradictory sets of regulations.

46. It could not be stated that any particular set of rules, such as those reproduced on page 18 of the report (mimeographed English text; para. 34 printed French text) should be recommended; but in order to prevent chaos in maritime traffic it could be stated that maritime States must bring the law applicable to their own vessels into conformity with that applicable to the vessels of other States. Without going so far as to codify the principles of 1948 or of 1929, the Commission should take steps to avoid the confusion that would prevail and the dangers that would arise if every maritime State established whatever regulations it thought fit for its own vessels.

47. Mr. SCALLE considered Mr. Hudson's proposal of great value. France and the United Kingdom, though they had not always maintained friendly relations through the ages, had nevertheless long recognized that it was highly desirable that the shipping of both countries should be subject to the same rules.

48. There was an element of danger in following Mr. Hudson's suggestion, which might, however, be avoided by careful drafting, namely, that the main maritime powers might set themselves up as shipping controllers. There was less danger of such an eventuality at the

present time, since seaborne trade was shared among a fairly large number of countries. At all events, who could be entrusted with the task of preparing such rules, if not those who possessed the necessary experience?

49. The text suggested by Mr. Hudson was in line with the principle of "dissociation of functions" to which he (Mr. Scelle) had often referred. That was always the method, although not an ideal method, by which international law was made. Mr. Hudson's proposal should be adopted and examined later with complete objectivity and without regard to the fears which it might arouse from the political aspect.

50. Mr. ALFARO thought that Mr. Hudson's proposal would provide an excellent basis for the Rapporteur. In his view, most of the articles taken by the Rapporteur from the Final Act of the London Conference of 1948, apart from rule 16 (*ibid.* p. 18, or para. 34), were of an international character and could be adopted. That was particularly true of rule 1, under which vessels upon the high seas were obliged to carry internationally recognized lights and shapes. The articles in question would provide a sound and logical basis for the principles governing safety of life at sea.

51. The CHAIRMAN pointed out that the Commission had given an affirmative answer to the question whether the principle of safety of life at sea should be incorporated in the code, and that it apparently supported Mr. Hudson's idea. It remained to be decided for the benefit of the Rapporteur, whether technical details should also be codified. His own view was that such details were a matter for maritime experts.

52. Mr. KERNO, (Assistant Secretary-General) thought that the Rapporteur should pay special attention to the activities of the competent bodies either already in existence or about to be established. It was stated in a memorandum by the Secretariat (A/CN.4/30) that the Economic and Social Council had recommended the co-ordination of the activities of the International Civil Aviation Organization, the Intergovernmental Maritime Consultative Organization, the World Meteorological Organization and the International Telecommunication Union. Information from the Rapporteur as to the progress so far achieved by those organs would help the Commission to decide what part it could play in the joint effort.

53. Mr. FRANÇOIS, referring to the suggestion by certain members of the Commission that the technical data reproduced in his report were too detailed, considered that a general rule by itself would be too vague. The Commission's objective was true codification, and not just the drafting of recommendations concerning the development of international law and co-operation between States.

54. Mr. HUDSON thought that a recommendation to States to refrain from issuing regulations which conflicted with regulations jointly agreed by other maritime States would come under the head of codification. A recommendation of that kind, which had never been made hitherto, would be of real value.

55. Mr. SANDSTRÖM said that, in that connexion,

it would be particularly useful to know whether there was much difference between the various sets of national shipping regulations.

56. Replying to an observation by Mr. CORDOVA, Mr. ALFARO explained that his suggestion was that the negative rule recommended by Mr. Hudson should be supplemented by obligations of a positive character. The Commission's draft should state the minimum rules to be included in the laws of all countries, and select for that purpose certain essential rules such as rule 1, which he had previously quoted.

57. Mr. AMADO pointed out that the Secretariat memorandum (A/CN.4/32) contained material exactly on the lines of Mr. Hudson's idea, including the following passage on page 19 (mimeographed English text; para. 53, printed French text):

"... It is essential, on some points at least, that there should be strict uniformity in the regulations adopted — sailing routes, navigation lights, signals between ships etc.

"Even in the case of matters already covered by regulations which, by their nature, do not require that those regulations shall be absolutely uniform, uniformity is always desirable.

"On a considerable number of points which concern the regulation of the use of the high seas, it is thus either necessary or desirable that States should establish identical rules and that those rules should if possible be binding upon all who use the sea. Marked progress would be achieved if a single agency could be entrusted with the task of establishing, or causing to be established, common regulations.

"Hitherto, such common regulations have been established by two different procedures: Conventions ... Concordant national regulations ..."

58. The Rapporteur might be guided by the above passage, which covered all the questions before the Commission, in extracting a conspectus of international rules from conventions or concordant national regulations.

59. Mr. KERNO (Assistant Secretary-General) replying to an observation by Mr. SCELLE, pointed out that the General Assembly had already approved the agreement entered into between the Economic and Social Council and the specialized agency responsible for maritime questions.<sup>4</sup> The composition of the latter had been worked out by a Preparatory Committee, and its very title "Intergovernmental Maritime Consultative Organization", showed that it was perhaps less developed than the International Civil Aviation Organization. Information as to the present and future programme of the new organ would be of value in connexion with the question then before the Commission.

60. The CHAIRMAN said that, in the absence of adequate information, further discussion of the question should be postponed until the Commission had Mr. François' later report.

<sup>4</sup> General Assembly resolution 204 (III) of 18 November 1948.

## CHAPTER 4: RIGHT OF APPROACH; and

## CHAPTER 5: SLAVE TRADE

61. Mr. FRANÇOIS had misgivings with regard to the right of approach and wondered whether the importance of the question was such as to warrant the kind of rule which he had submitted at the end of the section on the subject (p. 22 or para. 43). The Commission had asked him to formulate a rule and he had done so;<sup>5</sup> it was now up to the Commission to decide whether the rule should be included in the code.

62. Mr. AMADO thought that with modern means of communication the right of approach had lost much of its importance. The possibility should be explored of framing a minimum provision which would not create the impression that the Commission was behind the times. The Rapporteur had very shrewdly stated that "wireless telegraphy has almost eliminated the reasons for which formerly vessels were induced to make material contact with each other on the high seas" (p. 19 or para. 40).

63. He did not go so far as to suggest the deletion of the text. He submitted preliminary comments to show the doubts in his mind. He had not yet reached a conclusion.

64. He would add that in the history of international law the right of approach was linked with piracy and the slave trade. Legislation in that field must take into account the comparative rarity of piracy at the present day. He could see no reason for seriously suspecting a vessel of being engaged in piracy or the slave trade; nor did he believe that a warship would expose itself to the risk of paying damages for wrongly stopping a merchant ship.

65. Mr. HUDSON said that he personally saw no objection to adopting the principle stated by Mr. François on page 22 (or para. 43, printed French text). He even thought it advisable, but would like the question to be linked if possible with the question of the slave trade.

66. He did not believe that piracy had entirely disappeared. A very important case had recently been tried in Hong Kong, and he could recall another.

67. The CHAIRMAN pointed out that warships were not normally entitled to stop merchant ships. Piracy was exceptional. It was less frequent than formerly, but it had not entirely disappeared. It was advisable to state that the general principle still held and that warships were not entitled to undertake the general policing of the high seas.

68. Mr. YEPES, while agreeing that the right of approach was out-of-date and that piracy was tending to disappear, thought that the article proposed by Mr. François was so well drafted that its absence would leave a gap in the code. It was not essential, but it was valuable.

69. Mr. ALFARO agreed with his colleagues that piracy was less common than in the 17th and 18th centuries. It had disappeared, at least from the Atlantic and Pacific; but it still occurred in other seas. The rule

proposed by Mr. François was very well drafted. It was based on the ruling of Judge Story in the *Marianna Flora* case (A/CN.4/42, p. 20 or para. 41). The right of approach only applied where there was a very strong suspicion that the vessel was engaged in piracy. If interference by the warship was not justified, damages would have to be paid in compensation for the loss sustained by the merchant vessel as a result of being compelled to stop. That was a perfect example of a principle of customary international law which should be included in the code.

70. Messrs. AMADO and YEPES agreed.

71. The CHAIRMAN asked the Commission, since it approved the principle, to proceed to draft the text of the rule.

72. Mr. HUDSON said that he did not like the first sentence and preferred the French text.

73. Mr. YEPES proposed that the first sentence be re-arranged as follows:

"A warship which encounters a foreign merchant vessel at sea is not justified in boarding her or in taking any further action unless there is reasonable ground for suspecting that the vessel is engaged in piracy, except where acts of interference are done under powers conferred by treaty."

74. The CHAIRMAN said that he preferred the wording proposed by Mr. Yepes.

75. Mr. CORDOVA asked whether the right of approach should not also be regulated in relation to the slave trade.

76. Mr. FRANÇOIS explained that States were not prepared to go nearly so far in the case of the slave trade as in the case of piracy. In the one case they had limited the right of approach to specified zones, but not in the other. He did not think that the two questions could be lumped together, unless the law governing the slave trade were substantially widened, in which case the Commission would no longer be codifying existing law.

77. The CHAIRMAN thought it would be preferable to discuss the slave trade before adopting a decision on the right of approach. The Rapporteur had treated the two questions differently and, in particular, had proposed a very elaborate text in regard to the slave trade.

78. There would have to be some discussion as to whether the right of approach in regard to the slave trade and piracy could be dealt with in one and the same text. Both cases were exceptions to the general rule that a warship should not board a merchant vessel belonging to another power.

79. Mr. FRANÇOIS explained that, as the Chairman had already said, the provisions which he proposed with regard to the slave trade were basically different from those which he had proposed for piracy, because unlike the slave trade, piracy was universally recognized as a crime. So far as concerned the slave trade, the right to stop a ship was limited to a specific maritime zone and had, as was well known, been the source of many difficulties. Some States, among them France, had never been willing to permit unrestricted boarding of vessels suspected of being engaged in the slave trade.

<sup>5</sup> Summary record of the 64th meeting, paras. 120-138; and of the 65th meeting, paras. 1-20.

80. He had taken the view that, if it were intended to include in the code a provision concerning the application of the right of approach to the slave trade, that right should be limited to a special zone, a definition of which, based on article XXI of the General Act of Brussels of 2 July 1890,<sup>6</sup> was contained in article 2 (p. 27 mimeographed English text or para. 56, printed French text, of the report). Perhaps, however, that zone should be modified, now that circumstances had changed. Members of the Commission were not experts on the subject, which was why the same objection might be raised to those articles as to the article proposed in the preceding section of the report. Nevertheless, he thought that the Commission was at least entitled to state a principle. It was to be noted that, like piracy, the slave trade was no longer of much practical importance.

81. Paragraph 191 of the *Report of the International Law Commission covering its second session (A/1316)* stated that:

“The Commission requested the special rapporteur to study treaty regulations in this field with a view to deriving therefrom a general principle applicable to all vessels which might engage in slave trade”.

He had performed that task, the importance of which had been urged by Mr. Hudson.<sup>7</sup>

82. Mr. HUDSON hoped that a generally applicable principle might be derived from the many conventions concluded on the subject. Between 1815 and 1890 the United Kingdom Government had signed many treaties on the slave trade. He himself would be opposed to restricting the application of the system to a specific zone. He might add that the zone in question had been the subject of a protest by the Iranian Government.

83. North Africa and Central Africa might be quoted as examples of areas where certain forms of slavery were still practised. He did not see why control should be confined to the Persian Gulf, for that would be tantamount to suggesting that the Gulf was the only place in the world where the slave trade existed. He did not know whether the United Kingdom Government, which had endeavoured to suppress the slave trade in the Persian Gulf, was taking similar steps in the Red Sea. The further question arose whether it would have any legal basis for doing so. He had no information as to the situation in Madagascar waters.

84. In view of the attitude of world opinion to slavery, he thought it should be laid down as a principle that the high seas might not be used by vessels of any State for the transport of slaves. Discussions on that question, which had been proceeding for thirty years, showed the extreme difficulty of defining what was meant by “slavery”.

85. The text proposed by the Rapporteur took the form of an international convention. He was opposed to the Commission drafting such a convention, except on a practical basis. He had studied the deliberations of the Geneva Conference of 1925 and of the various Committees of the League of Nations. He considered that the

Commission lacked the information required to prepare a convention based on such principles and that it should treat the subject more simply, by drafting a text on the lines of the section relating to piracy. The measures concerned had met with considerable opposition in the 19th century; but he doubted whether opposition was quite so strong at the present time.

86. The CHAIRMAN pointed out that the Economic and Social Council had set up an *ad hoc* Committee on Slavery, to which Mr. François referred on page 25 (para. 50, printed French text) of his report. Detailed proposals could hardly be submitted until the findings of that Committee were known.

87. Mr. YEPES considered that the question was one of regional international law. Action was limited to the shores of the Indian Ocean, the Persian Gulf and the Red Sea. The Commission might confine itself to general principles, on the lines of articles 1 and 4 of the text submitted by the Rapporteur. That was all that could be done in a general code of international law. The settlement of questions of detail, such as the tonnage of vessels etc. should be left to a special convention.

88. Mr. SPIROPOULOS said he would repeat what he had said on the question of safety of life at sea.<sup>8</sup> The question before the Commission was one which lent itself to the preparation of a special convention; but it would be out of place in a general code of laws concerning the high seas. The text proposed by the Rapporteur suggested a convention; but all that was required was a few very general rules which would be binding on States. He thought that the Commission should give the Rapporteur some guidance that would enable him to bring out basic principles for the treatment of the question of slavery within the régime of the high seas.

89. Mr. KERNO (Assistant Secretary-General) pointed out that Mr. François referred, on page 25 of his report (para. 50, printed French text), to a General Assembly resolution of 13 May 1949, which requested the Economic and Social Council to study the problem of slavery at its next session. The Council had set up an *ad hoc* Committee on Slavery, which had decided that some time would have to be devoted to interpreting and evaluating the documentary material, before specific recommendations could be submitted. The *ad hoc* Committee had met again in April 1951, so that its conclusions could not have been included in Mr. François' report, which had been published on 10 April 1951; but they were summarized in the *United Nations Bulletin* of 15 May 1951 (vol. X, No. 10). The *ad hoc* Committee had made certain recommendations, among them (1) that the International Slavery Convention of 1926 be brought, as soon as possible, within the framework of the United Nations, and (2) that a supplementary convention be drafted by the United Nations (page 487).

90. Mr. FRANÇOIS agreed with Mr. Kerno that information as to the decisions of the *ad hoc* Committee on Slavery would be of considerable value. He thought that the Commission should adjourn its discussion of the

<sup>6</sup> De Martens *Nouveau Recueil Général des Traités*, 2nd series, vol. XVI, p. 3.

<sup>7</sup> See summary record of the 65th meeting, para. 22.

<sup>8</sup> See paras. 14 and 25 above.

paragraph until the Committee's findings were known. Only a few principles should be adopted.

91. Replying to Mr. Yepes, who had proposed the retention of two articles and who had charged him with a fondness for detail, he would point out that, since his draft convention contained only 11 articles, there was not much difference. In the said articles he had dealt with the right of approach in regard to vessels suspected of being engaged in the slave trade, a question which was linked with the one previously discussed. It should, however, be understood that the right of approach in regard to the slave trade was more limited in nature, which explained why he had been obliged to deal more fully with it. The hesitancy of States to accept the right of approach as applicable to all seas and all vessels must not be overlooked. The tendency to widen the concept of slavery would have the effect of enabling vessels to be boarded at all times and in all places. The grounds for such action would be not only piracy, but the claim that a given ship was suspected of carrying persons who might be deemed to be slaves. There would be many difficulties in the way of the adoption of one and the same general formula to cover both piracy and slavery.

92. Mr. YEPES pointed out that his comments did not imply a criticism of the work of the Rapporteur, to which he paid full tribute. The question before the Commission, which he regarded as coming under regional international law, should be the subject of a convention confined to the States concerned, and the code which the Commission was to draft should include only a general principle.

93. The CHAIRMAN explained that the proposal concerning the right of approach provided for two exceptions to the general rule prohibiting warships from boarding merchant vessels, the one in the case of piracy and the other in pursuance of a treaty. The right of approach in the case of piracy was an exception to customary law. The same did not apply to the right of approach in the case of a vessel suspected of being engaged in the slave trade, since the latter was governed by conventions which gave warships the right to board merchant vessels. It might, therefore, be said that one example of the second exception to the general rule was precisely the slave trade.

94. Mr. FRANÇOIS observed that other conventions accorded the same right and that, from the practical point of view, texts relating to the slave trade were not the most important.

95. The CHAIRMAN thought that the Commission should display great caution on questions of detail. In his view, the best solution would be to state in the comment, without going into details, that the right of approach in regard to the slave trade was regulated by treaties.

96. Mr. HUDSON asked whether, in that case, it would suffice to state that the slave trade had been dealt with for centuries and had been the subject of several hundred treaties.

97. The CHAIRMAN replied that the question only

arose at the regional level and was rather unimportant at the present time.

98. Mr. SANDSTRÖM thought that the best solution might be a quite general article, of the type proposed by Mr. Hudson, stating that the slave trade was forbidden on the high seas.

99. Mr. FRANÇOIS said that he was prepared to delete the section of his report concerning the slave trade. He would nevertheless point out that the adoption of the principle which he had propounded would make it possible to bind States which were unwilling to accept a convention.

100. Mr. YEPES proposed that articles 1 and 4 of the Rapporteur's draft be retained for inclusion in the Code and that the settlement of details be left to special conventions.

101. Mr. ALFARO supported Mr. Yepes' proposal, with the reservation that it should remain open to Mr. François to review his text and propose another. He preferred article 3, paragraph 1, of the Slavery Convention of 25 September 1926, which read as follows:

"The High Contracting Parties undertake to adopt all appropriate measures with a view to preventing and suppressing the embarkation, disembarkation and transport of slaves in their territorial waters and upon all vessels flying their respective flags."

102. Mr. YEPES accepted the amendment proposed by Mr. Alfaro, who had voiced his own thoughts. It had also been his intention to leave the Rapporteur completely free on the basis of those principles.

103. Mr. FRANÇOIS asked whether the right of approach would be recognized in all seas.

104. Mr. ALFARO thought that it should only be recognized in the specified zone.

105. Mr. YEPES drew attention to the reference in article 1, as proposed by the Rapporteur, to the "maritime zone" in which the slave trade still existed.

106. Mr. FRANÇOIS pointed out that he had defined the zone in article 2 of his draft, so that if that article had to be deleted, the reference to the maritime zone in article 1 would also have to be deleted.

107. Mr. YEPES said that the special zones would be defined in individual conventions.

108. Mr. AMADO asked what conclusion had been reached by the Commission on Human Rights.

109. Mr. KERNO (Assistant Secretary-General) said that it was stated in the issue of the United Nations *Bulletin* which he had already quoted<sup>9</sup> that the *ad hoc* Committee on Slavery had also mentioned that, "In the Universal Declaration of Human Rights proclaimed by the United Nations on December 10, 1948, there is an article which reads: 'No one shall be held in slavery or servitude; slavery and slave trade shall be prohibited in all their forms'. This principle, in the Committee's opinion, was considerably more far-reaching in its implications than that which inspired the League of Nations to formulate the 1926 Slavery Convention." (p. 487).

<sup>9</sup> See para. 89 above.

110. Mr. HUDSON asked whether it would not be possible, on similar lines, to add to the paragraph concerning the right of approach a provision to the effect that the said right existed everywhere in respect of vessels suspected of being engaged in the slave trade. He saw no reason why warships should not be permitted to approach merchant vessels for that purpose.

111. The CHAIRMAN did not think that could be done, in view of the very strong objections which had been raised.

112. Mr. HUDSON pointed out that France, which had been the main objector in the past, now favoured such a provision.

113. Mr. HSU thought that the Commission should first decide whether it would deal with the slave trade separately, or in conjunction with the right of approach. In his view, the slave trade was a regional rather than a world problem. It was always regulated by special conventions. While he was naturally opposed to slavery, he thought that the Commission, in its work of codification, should not treat slavery separately, but examine it in connexion with the inspection of or approach to vessels on the high seas. The problem could easily be settled within the régime of the high seas. He was in favour of the Chairman's proposal.

114. Mr. KERNO (Assistant Secretary-General) thought that the Commission was generally agreed that the question of slavery as a whole could be left to the conventions in force or to the *ad hoc* Committee on Slavery. The Commission would deal only with areas of the high seas where regulations were required. The only point at issue was the bearing of the problem of slavery on the régime of the high seas, one aspect of which was the right of approach.

115. Mr. SPIROPOULOS said that the Commission was now making progress. The report submitted by Mr. François was excellent; but perhaps only a few of the general principles stated therein need be adopted, such as those stated in articles 1 and 4. Article 4, for example, read: "The signatory States undertake to adopt efficient methods to prevent the unlawful use of their flag and to prevent the transportation of slaves on vessels authorized to fly their colours". That general principle imposed a duty on States and should be included in the code.

116. So far as concerned piracy it should be noted that it was a general problem, like slavery. The Commission was solely concerned with the right of approach, and not with the problem of piracy as such. In his view, the latter should be included in the high seas code, in the form of a few very general rules in keeping with the structure of the code. That was the appropriate place to refer to piracy and the slave trade, which should be dealt with and dealt with together and in connexion with which the right of approach and inspection would be mentioned.

117. Mr. EL KHOURY asked to what the "aforesaid" right, mentioned in article 3, referred.

118. Mr. FRANÇOIS explained that the intention had been to recognize the right to approach vessels suspected of being engaged in the slave trade only if such vessels

were of a tonnage less than 500 tons, so that the right might apply only to natives' vessels, and not to large vessels which could not be forced to stop. In the case of piracy the solution was different. The right of pursuit applied to all vessels. He would repeat that he was prepared to delete that section of his report. The beginning of article 3 should read: "The exercise of the right of approach shall be limited...".

119. Mr. SANDSTRÖM said that article 3 was redundant since article 8 contained the same provision.

120. The CHAIRMAN recalled Mr. Yepes' proposal that only articles 1 and 4 should be retained. The Rapporteur was entitled to ask for guidance as to his treatment of the right of approach.

121. Mr. HUDSON agreed with Mr. François that the maritime zone could hardly be mentioned in article 1 unless it were defined later.

122. Mr. SPIROPOULOS thought that the reference should be deleted.

123. The CHAIRMAN asked the Commission to take a decision on Mr. Hudson's proposal that the right of approach in respect of the slave trade, as in that of piracy, could be exercised without restriction as to tonnage or zone, which would mean that any warship had the right to inspect merchant vessels which it suspected of being engaged in the slave trade. He did not know whether the Commission could go any further, but he himself would be glad to do so.

124. Mr. HUDSON said that the high seas could not be used for the exercise of that nefarious trade, in view of the texts which had been adopted. His proposal was quite compatible with the extract which Mr. Kerno had read from the Universal Declaration of Human Rights.

125. The CHAIRMAN suggested that the proposal be tentatively adopted and the comments of States awaited.

126. Mr. HSU proposed that the provision be expanded. The slave trade was only practised in one area. If the right of inspection was extended to cover the whole world the concept of the trade that it was intended to suppress should also be expanded.

127. Mr. FRANÇOIS also pointed out that, in that case, all vessels suspected of committing the crime in question could be stopped. To recognize that the slave trade was prohibited was one thing, to recognize the right to stop the suspected vessel was another. The argument did not strike him as very convincing.

128. Mr. SPIROPOULOS agreed with Mr. François. Mr. Hudson's argument did not apply. There was no relation between the Universal Declaration of Human Rights and the boarding of vessels. The conventions condemning slavery did not permit States to have merchant vessels inspected by their warships. The Commission might attempt to frame a uniform rule covering the slave trade and piracy; precedents were few in the practice of States.

129. Mr. LIANG (Secretary to the Commission) thought that it was still more important to ascertain whether the Draft International Covenant on Human Rights contained an article on the slave trade.

130. The Universal Declaration of Human Rights stipulated co-operation between States in ensuring respect for such rights. In addition, even a text like the Draft Covenant would require the enactment of legislation before it could be implemented.

131. He would like to point out that article 4 of the Universal Declaration of Human Rights was not sufficient ground for dealing with the special problem in connexion with the régime of the high seas and the right of approach. The problem was very fully examined in Mr. François' report. He was afraid that the Commission would have to await a decision by the General Assembly on the text of the Draft International Covenant on Human Rights. The Assembly might perhaps add some more positive provisions, which could be considered by Mr. François.

132. The CHAIRMAN asked the Commission to decide whether it wished to retain or to delete the text. He recalled Mr. Hudson's proposal that no distinction be drawn between the right of approach in the case of a vessel suspected of piracy and the same right in the case of a vessel suspected of being engaged in the slave trade.

*Mr. Hudson's proposal was adopted by 7 votes to 4.*

133. Replying to Mr. YEPES, the CHAIRMAN said that the Commission had not approved the two basic articles (articles 1 and 4).

134. Mr. KERNO (Assistant Secretary-General) pointed out that the decision just adopted by the Commission eliminated the special zone and the tonnage limit of 500 tons, and recognized an absolute right of approach in the matter of piracy.

135. Mr. CORDOVA pointed out that a vessel wrongfully stopped would be entitled to compensation.

136. Mr. EL KHOURY noted that the Commission did not intend to state that the Persian Gulf and the Red Sea were the only zones where the slave trade was practised.

137. The CHAIRMAN said that the Commission would continue discussion of the right of approach.

The meeting rose at 1 p.m.

## 124th MEETING

*Friday, 13 July 1951, at 9.45 a.m.*

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*Chairman:* Mr. James L. BRIERLY

*Rapporteur:* Mr. Roberto CORDOVA

*Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, 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.

**Economic and Social Council resolution 319 B III (XI) requesting the International Law Commission to prepare the necessary draft international convention or conventions for the elimination of statelessness (item 8 of the agenda) (A/CN.4/47 and E/AC.32/4)**

1. The CHAIRMAN recalled that, on 11 August 1950, the Economic and Social Council had adopted a resolution (319 B (XI), section III) inviting "States to examine sympathetically applications for naturalization submitted by stateless persons habitually resident in their territory and, if necessary, to re-examine their nationality laws with a view to reducing as far as possible the number of cases of statelessness created by the operation of such laws" and requesting "the Secretary-General to seek information from all States with regard to the above mentioned matters and to report thereon to the Council."

2. In accordance with that resolution, the Secretary-General had requested States to supply him with information on the matter, and up to 5 March 1951 had received replies from seventeen Governments. In its resolution 352 (XII) of 13 March 1951, the Economic and Social Council had noted that only a limited number of Governments had replied to the Secretary-General's inquiry of 27 September 1950, and had requested "the Secretary-General to address another communication to Governments inviting them to submit their observations at latest by 1 November 1951" (A/CN.4/47, paras. 5-6).

3. It would not appear that anything further could be done at the moment.

4. Mr. HUDSON said that, if a layman were to examine carefully the Commission's three reports and its agenda, he would probably come to the conclusion that the

agenda of the Commission's permanent activities was not overloaded.

5. It was considered, in the quarters directly affected, that the question of statelessness was one of great urgency, and the time limit laid down by the Secretary-General for the receipt of observations from Governments, *viz.* 1 November 1951, showed that he was of the same opinion. It was no answer that the Commission proposed to study the problem of nationality as a whole. It was not in fact intended to do so before 1953, and the Economic and Social Council had said that the question was urgent. The Commission should therefore attach just as much importance to that resolution as to a resolution by the General Assembly.

6. He suggested that the Chairman appoint a rapporteur to take over the work of preparing a draft convention on the question of statelessness, so that the Commission might be in a position to submit a proposal to the Economic and Social Council in 1953.

7. The CHAIRMAN said that, if a rapporteur was to be appointed, it should be done forthwith, and by the Commission itself, not by the Chairman. The rapporteur would not be able to make a start before 1 November 1951.

8. Mr. HUDSON pointed out that seventeen Governments had already sent in their observations and that, furthermore, summary records were available of the meetings of the *ad hoc* Commission on Statelessness, set up by the Economic and Social Council.

9. Mr. ALFARO and Mr. SANDSTRÖM considered that the Commission should follow Mr. Hudson's suggestions.

10. Mr. EL KHOURY asked whether it would not be preferable to study the question of statelessness at the same time as that of nationality. It was, in fact, not easy to discuss the one without the other.

11. Mr. SPIROPOULOS observed that, since the Economic and Social Council had expressed its desire for a draft convention for the reduction as far as possible of the number of cases of statelessness, the problem should be studied together with that of nationality.

12. The CHAIRMAN read out the following passage from Council resolution (319 B (XI), Section II) :

“Considering that statelessness entails serious problems both for the individual and for States; and that it is necessary both to reduce the number of stateless persons and to eliminate the causes of statelessness . . .”

13. Mr. LIANG (Secretary to the Commission) thought that due account should be taken of the Commission's statute. The question should be considered in its proper context. It was related to the progressive development of law, both under the Commission's terms of reference, since the Council had requested it to draw up a convention for the elimination of statelessness, and as regards substance, since there were not many rules of international customary law concerning statelessness.

14. It therefore appeared to him that the Commission should apply article 17 of its statute,<sup>1</sup> as it was a question

of a request by one of the principal organs of the United Nations. So as to obviate unnecessary criticism, and avoid wasting the General Assembly's time, he suggested that a paragraph be inserted in the general report to the effect that the Commission was well aware of the urgency of the work with which it had been entrusted by the Council and hoped that replies would be received from all Governments by 1 November 1951, when it could proceed with the drafting of a convention on statelessness. The General Assembly would, in all probability, give the Commission the approval referred to in article 17, paragraph 2 (*d*), and the Commission could then carry out the procedure laid down in article 16. By so doing, the Commission would protect itself against all criticism. He doubted whether it would be advisable to appoint a rapporteur before the provisions of article 17 had been complied with.

15. Mr. SCELLE did not consider it advisable to take on further work until a decision had been arrived at regarding the Commission's future status. A good deal of the criticism directed against the Commission was on the grounds that it had taken up a large number of questions and not pursued any of them to a conclusion. If it continued on that course it would never get definite results. Contrary to the opinion expressed by Mr. Hudson and Mr. Liang, who considered that the Commission's work was clearly laid down in article 17, he himself considered that the provisions of that article were amongst those most open to criticism.

16. Mr. HUDSON felt that article 17, paragraph (*d*) could hardly be a source of embarrassment to the Commission, as all it had to do was to state in its report that it had the matter in hand. He considered that the Commission had the opportunity of doing useful work and that it could be accomplished within two years.

17. He agreed with Mr. EL KHOURY that it was difficult to consider statelessness and nationality independently, but the problem could be examined. He would not like to see the Commission wait for a request from the General Assembly before taking the question in hand at its next session. A year would not be long enough to reach any result.

18. Mr. FRANÇOIS asked what, apart from Mr. Scelle's report on arbitration and the second reading of that part of his own report which had not yet been examined, would be the items for the 1952 session's agenda.

19. The CHAIRMAN pointed out that there was still a great deal to be done in the field of treaties.

20. Mr. SCELLE recalled that the code of offences against the peace and security of mankind would again be before the Commission. He agreed with Mr. Hudson that the statelessness problem was one of the most important subjects with which they had to deal, as it concerned the whole social order of the human race. Bearing in mind the work of the codification conferences, it would seem prudent to wait and see what the Commission's new statute was to be, instead of relying on the existing statute, particularly article 17.

21. Mr. LIANG (Secretary to the Commission) said

<sup>1</sup> United Nations publication, Sales No. 1949.V.5.

that, in his opinion, the Commission should follow a more diplomatic course and keep more rigidly to its statute. Article 17 enabled it to continue its work, while awaiting the General Assembly's permission to proceed with the study requested by the Economic and Social Council. The Department of Social Affairs had already published a study on statelessness<sup>2</sup> and the Secretariat had received a number of replies from Governments, which would be very useful. The preparatory work could go on but should conform with article 17, paragraph 2 (d).

22. Mr. CORDOVA feared that the General Assembly and the Economic and Social Council would be at a loss to understand the Commission's inaction in the matter. The question had been referred to the Commission the previous year, but it had not yet even appointed a Rapporteur. Why should they not make a start, while waiting for replies from Governments, and appoint a Rapporteur to study the question and submit a report for consideration in first reading at their next session? If that were done, the Commission would probably be in a position to adopt a proposal during the last year of its term of office. If, on the other hand, no Rapporteur were appointed that year, the Commission would not be able to do anything.

23. So far as the other items on the agenda for the next session were concerned, the code of offences would be referred back to the Commission after examination by the Assembly. The régime of the high seas and the study of arbitration procedure would have to be concluded. He hoped that in 1952 the Commission would be able to devote a certain amount of time to the study of the question of nationality.

24. Mr. FRANÇOIS was also of the opinion that the agenda was not so overloaded as to make it impossible to include any other question. He recalled that the General Assembly had requested that priority be accorded to another problem, to wit, the régime of territorial waters.

25. In reply to an observation by Mr. SCALLE, who had again said that the question should be considered in connexion with the revision of the Commission's statute, Mr. HUDSON pointed out that the new statute could not come into force before the 1954 session. They had therefore two years to deal with the matter.

26. He proposed the following draft resolution:

"Having before it the two resolutions of the Economic and Social Council, the Commission have now proceeded under paragraph 2 of article 17, and deem it is appropriate to proceed with the preparation of the draft Convention on statelessness, and request Mr. X to act as special Rapporteur on the subject, and present a report for the next session."

27. An exchange of views followed between Mr. HUDSON, Mr. KERNO (Assistant Secretary-General) and Mr. LIANG (Secretary to the Commission) on the various procedural stages to be gone through under articles 16 and 17, particularly on the question whether the Commission could appoint a rapporteur on the

question of statelessness (article 16, sub-paragraph (a)) without waiting for a formal invitation from the General Assembly to take the matter up under article 17, paragraph 2 (d).

28. Mr. SPIROPOULOS said that the question could be considered either from the point of view of procedure or from that of substance. There could be no doubt that, from the point of view of procedure, the Commission was not entitled to appoint a rapporteur at that stage. That was, of course, the purely procedural point of view, and in practice the formalistic aspect could be disregarded. The Commission could, therefore, appoint a rapporteur provisionally, pending the General Assembly's decision.

29. There was, however, one conclusive point to be considered. Had the Commission the time to study the problem? It had, first of all, to complete the study of Mr. François' report and draw up a code for the high seas. It had also to examine Mr. Brierly's report on treaties, and that of Mr. Scelle on arbitration procedure which had, as yet, not received much attention. Its principal task was the conclusion of the study of those three reports. He did not believe that his report on the Code of Offences against the Peace and Security of Mankind would be sent back to the Commission in 1952.

30. They would then have to consider whether it was possible to take a position on the problem of the elimination of statelessness, without, at the same time, laying down rules in regard to nationality. In his opinion it could not be done, as it was not possible to abolish statelessness without establishing rules on nationality which would leave no room for it. It was a very wide problem and could not be solved in two years.

31. The above considerations seemed to him decisive; he added that it was necessary to take up the question of the régime of territorial waters, in regard to which the General Assembly had already taken a decision.

32. Mr. HUDSON recalled that the General Assembly had only decided to include that question in the list of priorities for subjects for codification.

33. Mr. HSU asked why the Secretariat should not be requested to submit a proposal. It must not be overlooked that the Commission had only two years to run, and that the Assembly might, in the meantime, ask it to undertake other work. If a rapporteur were appointed, he would probably not be able to finish the work before the expiration of his term of office as a member of the Commission. On the other hand, if the Secretariat were made responsible for putting up a proposal and if the study of the question had not been concluded before the expiry of the Commission's term of office, it could be put on one side and taken up again after the appointment of the new Commission. The Secretariat had already undertaken the study of a number of questions, particularly during the first year of the Commission's existence.

34. Mr. KERNO (Assistant Secretary-General) pointed out that the Commission was not required, under article 17, to draw up a detailed plan. It was only a question of a decision on principle. The Commission should state that it considered it desirable to comply with a request from a United Nations organ other than the

<sup>2</sup> *A study of statelessness*, United Nations publication, Sales No. 1949.XIV.2.

General Assembly, decide that article 17, sub-paragraph (d), was applicable, and request the General Assembly to instruct it to proceed. It was not necessary, for that purpose, that the Secretariat carry out a study or the Commission appoint a rapporteur.

35. The question of the elimination of statelessness was closely linked to that of nationality. When the General Assembly's authorization had been received, the Commission should examine the problem of statelessness in conjunction with that of nationality. That consideration led him on to another idea. He was concerned at the fact that the interval between sessions was not fully utilized. Perhaps the Commission could ask the Secretariat to begin preliminary studies on certain subjects, such as nationality, including statelessness, and the régime of territorial waters. That would enable the Commission to make more rapid progress.

36. Mr. EL KHOURY said that the Commission should deal with the problem of statelessness under article 17. It was now at the stage referred to in sub-paragraph (c) which read: "The Commission shall submit a report with its recommendations to the General Assembly...". Briefly, it was a question of asking the Assembly for permission to carry out a study that the Commission considered desirable. If the reply were in the affirmative, a rapporteur would be appointed under article 16. That was clearly the procedure to follow, but the question of statelessness was so closely connected with that of nationality that no rules could be drawn up for it without consideration of the latter question. But the problem of statelessness came under the progressive development of law, whereas that of nationality was included under codification. The latter subject was therefore governed by article 18.

37. Should the Commission consider that the question of nationality was ready for codification, it might propose to deal with it under article 18, paragraph 2. It might also ask the Assembly to authorize it to examine the problem of statelessness in conjunction with that of nationality. If the Assembly agreed, the Commission would appoint a rapporteur to study both problems; that was quite feasible, even though the two questions belonged to different spheres of the Commission's activities. The Secretariat could, in the meantime, be asked to prepare the necessary documentation.

38. Mr. Spiropoulos' and Mr. Kerno's remarks had led Mr. SCELLE to speak again. He was not interested in the question as to whether the Commission should comply with articles 16, 17 and 18. A matter of principle was involved. Was the Commission prepared to take on still more work?

39. If it were considered advisable to examine the Commission's working methods in detail, it could be done. Consideration could be given to the question whether it would not be possible to make better use of the interval between sessions, and whether the principle that members of the Commission devote their whole time to it should not be regarded from a slightly different angle, and interpreted to mean continuous work, but not necessarily continuous attendance. If the Commission had more

time and means available in future, Mr. Hudson's proposal would, in his opinion, be less open to objection.

40. The Commission had before it the problem of treaties, and Mr. Hudson was well aware of the amount of work that topic had imposed on the Harvard Group, even with the co-operation of nearly all the law professors in the United States. The Commission had also to finish with Mr. François' study on the high seas and should study the régime of territorial waters, about which the 1930 Conference had not been able to reach agreement. He proposed that the study of the question of statelessness be deferred until such time as there were reasonable prospects of being able to finish it.

41. Mr. YEPES said that a narrow interpretation of the rules of procedure might be held to bar the Commission from applying Mr. Hudson's solution, but the problem was so important, and the Economic and Social Council's resolution so urgent, that the Commission could not disregard it. He supported Mr. Hudson's proposal to appoint a rapporteur and then submit the question to the Assembly. He was sure that the latter would endorse the decision to study the problem.

42. Mr. SPIROPOULOS wondered whether the Economic and Social Council really expected the Commission to draw up rules which would enable statelessness to be abolished, or whether it had not in mind rather special measures for dealing with existing cases of statelessness. There were at the moment many cases of statelessness which resulted from withdrawal of nationality. That was a very different question from the other and quite unconnected with the problem of nationality. He was afraid that the Council might have had the second question in mind, i.e. that of providing a nationality for persons who did not at the moment possess one. That would be a practical problem, to be solved by Governments after a general conference of the interested parties, and did not concern the Commission in any way.

43. Mr. AMADO said that Mr. Spiropoulos had clarified his ideas on the subject; he wondered whether the Commission was a suitable body to settle the question with the necessary speed, seeing that the characteristic features of its work were inevitably slowness and meticulousness.

43a. If it were possible to find an answer to that urgent problem, so much the better, but if the Commission were not able to solve it rapidly it should state the reason. If there were any certainty that the appointment of a rapporteur would lead to a rapid solution of the problem and that it could be dealt with apart from that of nationality; if a political — that was to say, a practical — solution could be found, by all means let the Commission appoint a rapporteur. But, if it were doubtful of being able to find a speedy solution, it should state as much and leave the matter alone.

44. The CHAIRMAN felt that the Commission might submit a proposal on the subject of the abolition of statelessness, a problem that came under the progressive development of law.

45. Mr. KERNO (Assistant Secretary-General) had thought the Commission was considering article 17,

sub-paragraph (d), but realized that it had only got as far as the first sentence of paragraph 2. It had to decide whether or not to take up the question.

46. He wished to draw the Commission's attention to the Economic and Social Council's resolution on the work of the Committee on Statelessness. The Secretary-General had submitted a memorandum on the elimination of statelessness (E/AC.32/4), the first page of which contained the following statement:

"The problem of statelessness raises two questions. If statelessness is to be eliminated, the causes of statelessness must be removed and the number of persons now stateless must be reduced. The first question is the more important and the more complicated."

47. The matter of reducing the present number of stateless persons was in hand. The International Refugee Organization was still functioning and a conference was at that moment engaged in regulating the legal status of refugees. What the International Law Commission was asked to do was to remove the causes of statelessness and that could only be done in conjunction with a study of nationality laws. The Commission could reply to that effect.

48. Mr. FRANÇOIS thought that the Commission could not refuse to begin the study of a question merely because it would not be finished before the expiry of the members' term of office.

49. Mr. AMADO believed that the Commission would assume a very grave responsibility if it decided not to tackle the question. A great deal was said about public opinion, but public opinion was not very much concerned with the questions with which the Commission had so far dealt. The problem of statelessness was, however, quite a different matter. The Commission could not leave it on one side.

*It was decided by 11 votes to 1 that the Commission should study the question of statelessness.*

50. After a discussion, in which the CHAIRMAN, Mr. HUDSON, Mr. AMADO, Mr. SANDSTRÖM and Mr. ALFARO took part, it was decided to appoint a rapporteur.

51. The CHAIRMAN said that it would be preferable for the appointment of the rapporteur to be decided in informal discussion.

52. Mr. SCELLE noted that the question had been decided, but wished to point out that, as he had been opposed to the question being taken up, he could not approve the appointment of a rapporteur.

53. The CHAIRMAN thought the Secretariat might be asked to prepare appropriate documentation on nationality.

54. Mr. LIANG (Secretary to the Commission) pointed out that if the Commission decided to proceed with the study of nationality, including statelessness, there would be no further difficulty. It could then go ahead even without consulting the General Assembly. Since it had included nationality, inclusive of statelessness, in the provisional list of topics for codification given in its

report on its first session (A/925, para. 16), it would be a matter of codification and a rapporteur could be appointed immediately. His objection was only valid if the Commission decided to study statelessness separately.

55. He also drew attention to the previous decision, contained in paragraph 20 of the Commission's report on its second session (A/113). If the Commission confined itself to endorsing that decision, no difficulty was to be expected.

*It was agreed* that the decision the Commission had just taken meant that it would begin to study the question of nationality, including statelessness.

#### **Co-operation with other bodies (item 9 of the agenda)**

56. Mr. KERNO (Assistant Secretary-General) said that every time he had attended a meeting of an international non-governmental organization, whose work had points of contact with that of the Commission, he had found a real desire to assist the latter's work in every possible way. That applied particularly to the Copenhagen session of the International Law Association, and to the International Bar Association. The Commission could rest assured that, whenever it had occasion to consult such associations, it would meet with a most cordial response.

57. In reply to a question by Mr. CORDOVA, he recalled that, at its last session, the Commission had asked rapporteurs and the Secretariat to get in touch with international non-governmental organizations whose work might be of interest to the Commission, whenever they considered that a useful purpose would be served thereby. Mr. François, as rapporteur on the question of the régime of the high seas, had made considerable use of the International Law Association's work on the continental shelf. He himself had considered it his duty to attend the Copenhagen session of that Association with a view to strengthening existing ties, and had taken the opportunity to say that, whereas in its initial stages the codification of international law had been the work of private bodies, the situation had changed in that the work done by the Commission under the auspices of the United Nations was on parallel lines to that of the non-governmental organizations. He considered that the Commission should make more use of the said Associations for the future.

58. Mr. HUDSON wished the Secretariat to be instructed to prepare the text of a resolution, acknowledging the assistance the Commission had obtained from certain non-governmental organizations. He was of the opinion that the resolution in question should express the wish that copies of all reports published by such organizations on subjects connected with the Commission's work, be sent to the members of the Commission.

59. Mr. LIANG (Secretary to the Commission) pointed out that it would be less burdensome to those organizations if they were asked to communicate their reports to the Commission's Secretariat which would then circulate them to members. That was the procedure adopted by the International Law Association.

60. Mr. ALFARO hoped that the organizations concerned would be able to see their way to supply a sufficient number of copies of their reports, so as to facilitate the Secretariat's work.

61. The CHAIRMAN was of the opinion that the International Law Association, in particular, would greatly appreciate a resolution acknowledging the value of its work to the Commission.

*It was decided* to instruct the Secretariat to prepare a draft resolution for examination when drafting the report to the General Assembly.<sup>3</sup>

**General Assembly resolution 494 (V): development of a twenty-year programme for achieving peace through the United Nations (item 10 of the agenda)**

62. Mr. HUDSON considered that the Commission should take note of General Assembly resolution 494 (V) of 20 November 1950.

63. The CHAIRMAN read out a draft which, after a number of amendments had been made to it at the suggestion of Mr. HUDSON and Mr. LIANG (Secretary to the Commission) *was adopted* in the following form:

“The Commission took note of resolution 494 (V), adopted on 20 November 1950 by the General Assembly, and pursuant to paragraph 2 thereof, gave consideration to point (10) of the ‘Memorandum of points for consideration in the development of a twenty-year programme for achieving peace through the United Nations’ (A/1304) submitted by the Secretary-General.

“As related in the present report, as well as in its previous reports to the General Assembly, the Commission is making every effort to speed up its work on the progressive development and codification of international law.”

**General Assembly resolution 485 (V): Amendment to Article 13 of the Statute of the International Law Commission (item 11 (a) of the agenda)**

*It was noted* that there was no occasion to take a decision in the matter.

**General Assembly resolution 486 (V): extension of the term of office of the present members of the International Law Commission (item 11 (b) of the agenda)**

65. Mr. HUDSON said that, as a matter of courtesy, members of the Commission should be given the opportunity of stating whether or not they accepted the extension of their term of office as provided for by General Assembly resolution 486 (V) of 12 December 1950. He himself did accept the extension.

66. Mr. KERNO (Assistant Secretary-General) proposed that members follow the same procedure as at their election by the General Assembly.

67. Mr. HUDSON pointed out that the Commission must not prejudice the decision of those of its members who had not been able to attend the present session.

68. Mr. HUDSON, Mr. CORDOVA and Mr. ALFARO proposed that it be stated in the Commission's report on its third session that the members taking part therein accepted the extension of their term of office on the conditions laid down by the General Assembly.

68a. Other members thought that the report was not the proper place to make such a statement.

*It was decided to make no mention of the point in the report on the third session.*<sup>3a</sup>

**General Assembly resolution 487 (V): ways and means for making the evidence of customary international law more readily available (item 11 (c) of the agenda)**

69. Mr. KERNO (Assistant Secretary-General) pointed out that General Assembly resolution 487 (V) of 12 December 1950 instructed the Secretary-General to submit a report to the General Assembly.

70. From that the CHAIRMAN inferred that there was no need for the Commission to take a decision in the matter.

71. A discussion followed during which Mr. LIANG (Secretary to the Commission) expressed the view that the Commission ought to take note of the General Assembly's resolution in order to show that it was aware of the decision — a view with which Mr. HUDSON disagreed — and Mr. KERNO (Assistant Secretary-General) remarked that there had really been no necessity for the Secretariat to include the item in the agenda. It had only wanted to remind the Commission of the action taken by the Assembly in regard to its own proposal.

72. Mr. ALFARO, supported by the CHAIRMAN, considered that, as a matter of courtesy, the Commission should take note of the resolution.

*It was so decided.*

**Régime of the high seas: report by Mr. François (item 6 of the agenda) (A/CN.4/42) (resumed from the 123rd meeting)**

**CHAPTERS 4 AND 5: RIGHT OF APPROACH AND THE SLAVE TRADE (resumed)<sup>4</sup>**

73. The CHAIRMAN recalled that, at its last meeting, the Commission had decided to put the slave trade on the same footing as piracy.<sup>5</sup>

74. Mr. YEPES proposed that the following text be substituted for the draft articles contained in the report (pp. 27–29, mimeographed English text; para. 56 printed French Text):

“All States are required to co-operate for the more effective repression of the slave trade, particularly in areas in which it still exists, such as the shores of the Indian Ocean, including the Persian Gulf and the Red Sea and the coast of Africa.

“To this end the signatory States undertake to adopt

<sup>3a</sup> See however summary record of the 133rd meeting, para. 37.

<sup>4</sup> See summary record of the 123rd meeting paras. 61–137.

<sup>5</sup> *Ibid.*, para. 132.

<sup>3</sup> See summary record of the 125th meeting, para. 1.

efficient measures to prevent the unlawful use of their flag and to prevent the transport of slaves on vessels authorized to fly their colours.

“In order to facilitate the repression of the trade on the high seas and to prevent the abuse of a State’s flag, a right of approach is recognized under the same conditions as in the case of pursuit for piracy.

“Any slave who has taken refuge on board a ship of war or a merchant vessel shall be *ipso facto* set free.”

That text was in part borrowed from articles 1, 2 and 4 of the report, but the latter part contained new matter.

75. He asked the Commission not to take a vote on the text, but to treat it as a guide for the rapporteur in drafting the new report to be submitted to the Commission at its 1952 session.

76. The CHAIRMAN said the Commission should decide whether it desired to tie the rapporteur to that extent, or whether it preferred just to state the principle of the assimilation of the slave trade to piracy.

77. Mr. HUDSON thought Mr. Yepes’ proposal, if adopted, would have the effect of obliging all States, whatever their size or geographical position, to send warships to the Persian Gulf.

78. The CHAIRMAN proposed that the Commission ask the Rapporteur to consider what action should be taken on Mr. Yepes’ proposal.

*It was so decided.*

79. Mr. KERNO (Assistant Secretary-General) referred to his remarks at the last meeting<sup>6</sup> in regard to the *ad hoc* Committee on Slavery and read out the following extract from the recommendations made in the Committee’s report on its second session (E/1988, p. 20):

“That slave raiding and slave trading on the high seas should be declared to be a crime similar to piracy in international law and that States acceding to the supplementary Convention should bind themselves to enact laws within a prescribed time declaring that all the attributes of and penalties for piracy shall attach to them.”

80. The CHAIRMAN was of opinion that the articles relating to the right of approach and to the slave trade should be combined.

81. Mr. SANDSTRÖM, supported by Mr. SPIROPOULOS, said that if the slave trade were included in the cases justifying the right of approach, the special draft articles relating to the slave trade became unnecessary.

82. Mr. HUDSON considered that the recommendation of the *ad hoc* Committee on Slavery read out by Mr. Kerno was very interesting. It might be embodied as a second paragraph.

83. Mr. FRANÇOIS agreed that the assimilation of slavery to piracy, from the point of view of the right of approach, rendered articles 8, 9, 10 and 11 of his report superfluous. The same could not be said, however, of the first few articles, in regard to which Mr. Yepes had proposed a new draft. The substance of those

articles should be included in any general principles adopted by the Commission.

84. He drew attention to the penultimate paragraph of the section in his report on the right of approach (p. 22 mimeographed English text; para. 43, printed French text). Most authors seemed to consider that the exercise of the right of approach did not give rise to any liability for compensation, provided there were reasonable grounds for suspicion. In his opinion, if that principle were admitted, it would render the right to compensation illusory. Since some reasonable ground for suspicion could always be found, he proposed a text by which the right to compensation was retained wherever suspicion proved to be unfounded, and unless the stopped vessel had itself given grounds for suspicion.

85. Mr. ALFARO supported Mr. François’ contention and considered that any dispensation from liability for compensation should be based on concrete facts.

86. The CHAIRMAN agreed with the Rapporteur that reasonable suspicion was not, in itself, sufficient to discharge a warship exercising the right of search from all liability for compensation to the stopped vessel. He asked the Commission whether it was prepared to accept the Rapporteur’s conclusions in regard to the right of approach.

*It was so decided.*

87. Replying to a question by Mr. HUDSON, the CHAIRMAN said that the Commission left it to the Rapporteur to give due consideration to the extract from the *ad hoc* Commission on Slavery’s recommendations, which Mr. Kerno had read.

88. Replying to Mr. HSU, he also confirmed that, in accordance with the decision taken by the Commission at its last meeting,<sup>7</sup> the right of approach in regard to the slave trade was recognized in respect of all warships and in all waters.

89. Mr. SPIROPOULOS and Mr. HUDSON wondered whether the Commission ought not to define piracy.

90. The CHAIRMAN, on the other hand, considered that the notion of piracy was sufficiently well established and familiar to States.

91. Mr. HUDSON considered that there was no pressing need for an international convention on piracy. To his knowledge, and that included the investigation made by the Harvard Research into national legislation in regard to piracy,<sup>8</sup> cases where an international dispute hinged on the question whether or not a case was one of piracy were rare. He did not think that it would be particularly difficult to define piracy, which was the use of violence at sea without a political motive as, for instance, for purposes of plunder or robbery. Nevertheless, in the *Ambrose Light* case, an American court had ruled that it was dealing with a case of piracy, even though the actions of the vessel named as a pirate had been inspired by political motives.<sup>9</sup>

<sup>7</sup> *Ibid.*, para. 132.

<sup>8</sup> *Research in international law*, Harvard Law School Cambridge, 1932, parts IV and V.

Cf. Fauchille, *Traité de droit international public*, Paris, 1925. Vol. 1, part, 2, bottom of p. 76.

<sup>6</sup> *Ibid.*, para. 89.

92. He hoped that the Rapporteur would be requested to deal with the subject of piracy without going into details, as the work of the Harvard Research had shown how difficult it was to draw up a definition applicable to all conceivable cases of piracy.

93. Mr. FRANÇOIS was prepared to study the question of piracy, although that had not hitherto been asked of him. In his opinion, the fact of having placed the slave trade on the same footing as piracy, from the point of view of the right of approach did not, in itself, make such a study necessary.

94. The CHAIRMAN proposed that the Commission should not give the Rapporteur any special instructions but simply ask him to go into the question of piracy.

*It was so decided.*<sup>9a</sup>

#### CHAPTER 6: SUBMARINE TELEGRAPH CABLES

95. Mr. FRANÇOIS recalled that, at its last session, the Commission had adopted the principle that all States had the right to lay submarine cables in the high seas and had asked him to extend that rule to pipelines and also to go into the question of protective measures.<sup>10</sup>

96. The Convention of 14 March 1884 concerning submarine cables was no longer completely satisfactory. Technical developments had made it necessary to widen its provisions. The *Institut de droit international* had adopted certain recommendations for completing the Convention. It was questionable whether it was not a matter for a new convention rather than for the Commission. Consequently, in addition to leaving on one side certain factors which could only be dealt with in special conventions, he had only taken from the 1884 Convention and the resolutions of the *Institut de droit international* a number of provisions of a general nature, which appeared to him suitable for inclusion in the regulations the Commission proposed to adopt.

97. Mr. SPIROPOULOS complimented the Rapporteur on his study of the question, but considered that the Commission might follow the same procedure as adopted for other questions and keep strictly to general rules without going into detail. It might also refer to the obligation on States to punish offenders against those rules.

98. Mr. HUDSON wondered whether the preparation of a new convention on the question was really necessary under existing world conditions. The only dispute which, to his knowledge, had given rise to arbitration was one between the United States and the United Kingdom arising out of the cutting, during the Spanish-American War in 1898, of a cable between Manila and Hong Kong. The company owning the cable had claimed compensation from the United States but its claim had been disallowed by the arbitrator.<sup>11</sup> As to submarine

pipelines, there were none in existence at the moment. 99. It might be added that it was presumed that a State laying a cable had at its disposal the necessary landing points, either under its own sovereign rights or by previous agreement with the competent State.

100. The CHAIRMAN remarked that they were only dealing with the high seas. There was nothing to prevent a State laying a cable in the high seas.

101. Mr. HUDSON asked that the principle laid down in article 1 of the report should in that case be qualified by the words "on the bed of the high seas".

102. Mr. FRANÇOIS remarked that, while recognition of the right of all States to lay cables was nothing new, the extension of that right to pipelines had never before been envisaged.

103. Mr. AMADO said that the right in question had its origin in the principle of the freedom of the high seas. He was of the opinion that that principle should be proclaimed in a preliminary article followed by a list of the various consequences deriving therefrom.

104. According to the CHAIRMAN that method corresponded more or less to the one adopted by the *Institut de droit international*.

105. Mr. SCELLE was prepared to support Mr. Amado's proposal. He also considered that it should be stated that the freedom to lay cables and pipelines extended to the continental shelf as an integral part of the high seas.

106. Mr. SPIROPOULOS considered that the Commission should, at the end of its study of the régime of the high seas, correlate the special decisions taken on various points. A study of the régime of the high seas could not logically start with the question of the nationality of ships. If the exposition of the question were not stated in logical order, the Commission could only submit to the General Assembly "loose-leaves" of international law.

107. Mr. FRANÇOIS differed from Mr. Spiropoulos and considered that the Commission had decided against the systematic codification of the law of the high seas as a whole; it had simply adopted a number of points which appeared particularly suitable for codification. The order in which that work was done was of little importance.

108. The CHAIRMAN said that the question raised by Mr. Spiropoulos was of such importance that the Commission should come back to it at a later date.

#### Programme of work

*In view of the short time available it was decided, with the agreement of the Rapporteur (Mr. Scelle) not to take up the examination of the report on arbitral procedure (A/CN.4/46) during the present session.*

The meeting rose at 1.10 p.m.

<sup>9a</sup> See however summary record of the 133rd meeting, para. 27.

<sup>10</sup> See summary record of the 65th meeting, paras. 29-52.

<sup>11</sup> Award of 9 November 1923: case of "The Eastern Extension, Australia and China Telegraph Co. Ltd.", *American Journal of International Law*, Vol. 18 (1924) (pp. 835-842).

## 125th MEETING

Monday, 16 July 1951, at 3 p.m.

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*Chairman:* Mr. James L. BRIERLY  
*Rapporteur:* Mr. Roberto CORDOVA

*Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, 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.

**Co-operation with other bodies (item 9 of the agenda)**  
(resumed from the 124th meeting) <sup>1</sup>

1. The CHAIRMAN read out the following paragraph submitted by Mr. Hudson :

“The Commission again gave consideration to the co-operation with other bodies which is envisaged in articles 25 and 26 of its Statute (item 9 of the agenda). It was highly gratified by the willingness expressed by many international and national organizations specially interested in international law to co-operate with the Commission in its work. Indeed, such co-operation has already been of great aid to the Commission; reports and studies supplied to the Commission by a number of such organizations have been immensely valuable in the course of the Commission’s endeavours, particularly in its work on the régime of the high seas. It has become apparent that in the future the Commission will probably need to rely to an even greater extent on the contributions which are being made by unofficial groups.”

2. Mr. AMADO questioned the desirability of referring to such organizations without naming them. He also thought that the word “immensely” was too strong.

*It was decided to delete the word “immensely” and to adopt the text as thus amended.*

**Régime of the high seas : report by Mr. François (item 6 of the agenda) (A/CN.4/42)** (resumed from the 124th meeting)

## CHAPTER 6: SUBMARINE TELEGRAPH CABLES

3. Mr. FRANÇOIS recalled that at the end of the previous meeting the Commission had been discussing the question, raised by Mr. Spiropoulos, as to whether it should undertake a general codification of the law of the high seas or merely select subjects which appeared ripe for codification.<sup>2</sup> He himself had supported the latter alternative and a perusal of the report of the Commission covering its second session (A/1316) showed that the Commission had taken the same view. According to paragraph 183 of that report the Commission “was of the opinion that it could not undertake a codification of maritime law in all its aspects and that it would be necessary to select the subjects the study of which could be begun by the Commission as a first phase of its work on the topic”. That text answered the question asked by Mr. Spiropoulos. No systematic codification of maritime law could be contemplated, and Mr. Spiropoulos’ objection that the Commission could not begin with the continental shelf or with some other subject was not a serious one if the task of the Commission was deemed to be that expressed in paragraph 183 of the above report.

4. The CHAIRMAN said that certain members had thought that the Commission should begin with an introduction on the régime of the high seas and thereafter deal with the various subjects, emphasizing that the Commission’s proposals followed from the principles applicable to the high seas.

5. Mr. SCELLE, supporting that view, said that the Commission’s choice of an initial subject was of no immediate importance. A full and systematic account of the régime of the high seas was unnecessary. When the Commission submitted a final report, it would have to state basic principles, such as the principle of the freedom of the high seas and the principle that the high seas were common property. If the Commission subsequently undertook more complete codification, it would then have to go into details.

6. Mr. FRANÇOIS fully agreed with Mr. Scelle’s view. The immediate concern was something other than systematic codification. The Commission had passed over many subjects which it did not consider ripe for codification. For example, it had dealt with the question of collisions only in its penal aspects and only in so far as concerned the jurisdiction of States. Should the Commission codify all the laws of the high seas, the question of collisions would have to be fully examined.

7. The CHAIRMAN asked whether the Commission wished to deal at length with the question of submarine telegraph cables, as proposed in his report by Mr. François, or to devote a shorter text to the subject. He himself favoured the latter procedure.

8. Mr. YEPES thought that, as in the case of other topics, the Commission should merely state general principles

<sup>1</sup> Paras. 56-61.

<sup>2</sup> *Ibid.*, paras. 106-108.

and leave detailed regulations to be covered by conventions. The Commission could not at that stage aim at a complete codification of the régime of the high seas.

9. Mr. FRANÇOIS agreed that it was perhaps unnecessary to go into great detail, since that had not been done for other topics.

10. Mr. YEPES proposed that the Commission retain only article 1 of the provisions proposed by the Rapporteur (p. 34, mimeographed English text; para. 76 printed French text), which stated the general principle.

11. Mr. SANDSTRÖM proposed the retention of articles 1 and 2.

12. Mr. FRANÇOIS asked whether article 3 was not equally essential.

13. Mr. SANDSTRÖM replied that, although article 3 was clearly important, the basic principle was stated in article 2 and later articles merely concerned the effects of the principle.

14. The CHAIRMAN asked whether the Commission thought it enough to say:

“The breaking or injury of a submarine cable shall be a punishable offence”.

15. If the Commission went beyond the provisions of article 1 it would be going into detail. He himself was prepared to accept Mr. Yepes' proposal that only article 1 should be retained.

16. Mr. HUDSON pointed out that the Commission had already decided to add to article 1 the words “on the sea-bed of the high seas”.

17. Mr. FRANÇOIS, stressing the extreme importance of article 7, said that the Commission had directed him not only to formulate the principle of that first phase of the régime, namely, that all States were entitled to lay cables, but also to study measures for the protection of cables. If the Commission adopted only article 1, there would be no provision for protective measures.

18. Mr. EL KHOURY thought that articles 1, 2, 3 and 5 were necessary, but that articles 4, 6 and 7 were not.

19. Mr. KERNO (Assistant Secretary-General), while agreeing with Mr. el Khoury, thought that if the Rapporteur submitted a new formula the Commission should not go back on what was already established. International treaty law had existed on the subject since the Convention for the Protection of Submarine Cables of 14 March 1884.<sup>3</sup> The doctrine had been examined by the Institute of International Law as early as 1879. It should be explained in the comment that the Commission had no intention of limiting existing treaty law.

20. Mr. FRANÇOIS was still rather confused as to the Commission's intentions with regard to submarine cables. According to Mr. el Khoury's proposal, most of the articles would be retained. Again, as Mr. Kerno had said, the Commission should not be too timorous. If it stated a vague principle in a field in which a convention was much more explicit, the point of its work of codification would not be clear.

21. Mr. SCELLE agreed that the Commission could not go back on what was already established.

22. Mr. HUDSON questioned whether the points concerned were already established and asked how many States had ratified the Convention for the Protection of Submarine Cables.

23. The CHAIRMAN said that the names of the States which had ratified the Convention were given on page 31 (mimeographed English text; para. 63, printed French text) of the report by Mr. François.

24. Mr. SCELLE pointed out that the number of States was very high, especially if it was considered that there were many States which could not be expected to lay submarine cables. In fact, all States that were in a position to do so had ratified the Convention.

25. The CHAIRMAN said that he would deplore any decision by the Commission that put difficulties in the way of Mr. François.

26. Mr. FRANÇOIS said that he was not wholly satisfied with the guidance he had received. If the Commission stated clearly that it preferred one single general principle he would conform with its wishes, but for the moment he was without instructions, since the Commission told him, on the one hand, not to go into details and, on the other, not to restrict himself to one principle. Given such guidance, he might well return in the following year with a draft similar to the one which he had submitted that year.

27. The CHAIRMAN said that, if the Commission deemed it unnecessary to repeat the terms of the Convention, it need merely state the principle that the laying of cables was free and refer the reader for details to the Convention for the Protection of Submarine Cables of 1884.

28. Mr. FRANÇOIS thought that one of the very purposes of codification was to embody in the code the actual rules adopted by all States. If it were decided that such rules need not be inserted he failed to see what purpose codification would serve. The topics under consideration were ripe for codification. The question of principle must be settled. The Commission should decide whether it considered codification unnecessary where the subject was regulated by a convention. If the Commission held that view, he could comply with it although he did not share it.

29. Mr. SCELLE thought it desirable that the Commission should know what attitude to adopt with regard to a topic that had been the subject of a convention which had been found satisfactory, that was to say, whether to refer the reader to the convention or to include the latter in the text which it was drafting. He himself thought that it should adopt the latter procedure. When the Civil, Commercial and Forestry Codes were drafted in France customary law texts were included *in extenso*. That was part of the work of codification.

30. Mr. HUDSON noted that it was 65 years since the drafting of the Convention for the Protection of Submarine Cables and that there had been only two recent accessions to it, namely, those of Poland and Czechoslovakia. He thought that the Convention had

<sup>3</sup> See *British and Foreign State Papers*, vol. LXXV, p. 356.

perhaps become out-of-date. He could see no objection to an attempt to review the question.

31. Mr. AMADO thought that it should be laid down as a general principle that any State was entitled to lay cables on the bed of the high seas and that any cables so laid should be protected against breaking and injury, which would be preferable to stating that the breaking of a cable would entail the punishment of the offender. The Commission must avoid, as inadmissible, the textual reproduction of the articles of the Convention. If an article stated a principle the Commission should formulate that principle, if it was opposed to the adoption of an excessively general article like article 1.

32. Mr. FRANÇOIS said that he had endeavoured to do precisely what Mr. Amado proposed. He had not reproduced articles textually, but stated the principle on which the articles were based.

33. Mr. ALFARO thought that the special rapporteur should accordingly be at liberty to present the whole question on that basis. The aim should be to make it possible for any person seeking information on the application of international law to submarine telegraph cables to find a complete statement on the question in the text adopted by the Commission. He thought it preferable that the Commission should supply too much rather than too little information.

34. Mr. KERNO (Assistant Secretary-General) pointed out that the Commission was once more divided on the fundamental question of the precise meaning of codification. Jurists trained in Anglo-Saxon countries naturally took a different view from Continental European jurists, who regarded the purpose of codification as being not only to repair omissions, but to formulate all existing provisions — apart, of course, from minor provisions, which were set out in special regulations. The Commission could deal with the main points and refer the reader for details to already existing Conventions, such as the Convention of 1884.

35. The CHAIRMAN trusted that Mr. François would receive any further guidance which he might require.

36. Mr. FRANÇOIS said that he now felt better equipped to proceed with his study of the question.

#### CHAPTER 8: RIGHT OF PURSUIT

37. Mr. FRANÇOIS said that the right of pursuit was the last topic of his report due to be examined by the Commission. Although he had proposed an article (pp. 43-44, mimeographed English text; para. 102, printed French text) embodying principles which were not disputed in international law, he thought that his proposal should perhaps be discussed on the basis of the debatable points which he had enumerated.

(a) *At what moment can the pursuit be deemed to have begun?*

38. Mr. FRANÇOIS said that neither that point nor point 2 had been settled by the Codification Conference held at The Hague in 1930.

39. Mr. ALFARO favoured the rule contained in the second paragraph of the article proposed by the rappor-

teur. He considered that the pursuit had begun when the pursuing vessel had given the signal to stop.

40. The CHAIRMAN explained that the signal in question should be visible or audible, but that it could not take the form of a wireless message. He was prepared to accept the text proposed.

*The Rapporteur's text was adopted.*

(b) *Must the patrol vessel giving the order also be within the territorial sea?*

41. The CHAIRMAN agreed with the Rapporteur's statement that "It is not necessary that, when the foreign vessel receives the order to stop, the vessel giving the order should be within the waters indicated in the first paragraph".

*The Rapporteur's text was adopted.*

(c) *Can the pursuit be commenced when the vessel is already in the "adjacent zone"?*

42. Mr. FRANÇOIS pointed out that the *I'm Alone* had been in the contiguous zone, but that the arbiters had expressed no opinion on the point. In his view, the recognition of the existence of a special contiguous zone for the purposes of Customs, revenue and public health regulations entailed certain consequences, such as the extension of the right of pursuit when the vessel was in those waters.

43. Mr. KERNO (Assistant Secretary-General) asked whether, since the contiguous zone was established solely for the purposes of Customs, revenue and public health regulations, any pursuit beginning in that zone must arise out of an infringement of such regulations.

44. Mr. FRANÇOIS replied that such was normally the case, but that it would be splitting hairs to draw any distinction.

45. Mr. SCELLE nevertheless thought that Mr. Kerno's question was entirely to the point. The contiguous zone was established in order to specify certain interests, as was also the right of pursuit. It was inadmissible that the right of pursuit should begin at the furthest limit of the contiguous zone in connexion with an offence committed in territorial waters. There must be a link between the reason for the establishment of the contiguous zone and the grounds for the pursuit.

46. Mr. FRANÇOIS said he was prepared to consider the practicability of drawing such a distinction.

47. Mr. HUDSON thought that pursuit begun in an area where the vessel could be seized was hot pursuit.

48. The CHAIRMAN said that, summarized, Mr. Scelle's observation meant that, where pursuit concerned an offence unconnected with the reason for the establishment of the contiguous zone, it was illogical to allow it to begin in that zone.

49. He agreed with the Rapporteur as to the practical difficulty of drawing such a distinction. It would perhaps be an excessive refinement to stipulate that the right of pursuit began in territorial waters for certain offences, but could begin in the contiguous zone for other offences.

50. Mr. SCELLE agreed that the complication existed, but said that it would be for the judge to decide whether

pursuit had begun where it could legally begin. The Commission could adopt a decision to that effect.

51. The CHAIRMAN asked whether the Commission should state the zone in which pursuit could begin, and point out that the Commission had adopted a 12-mile limit for the contiguous zone.

52. Mr. SCALLE considered that the contiguous zone was an easement on the high seas in favour of the coastal State, and one that varied with the particular interests involved. He thought that the concept of contiguous zones should replace that of territorial waters.

53. Mr. FRANÇOIS pointed out that the Commission had decided that the only interests to be safeguarded in the contiguous zone were Customs, revenue and public health interests, for which it had adopted a twelve-mile limit.

54. Mr. SCALLE was afraid that, in consequence, his own remark and that of Mr. Kerno became pointless.

55. Mr. KERNO (Assistant Secretary-General) pointed out that his observation had been based on strict logic. It was perhaps illogical to permit the right of pursuit to begin in the contiguous zone for reasons other than those for which that zone had been established.

56. Mr. CORDOVA thought that, where a vessel had been fishing in but had left territorial waters, pursuit could begin in the contiguous zone.

57. Mr. KERNO (Assistant Secretary-General) disagreed. In his view, pursuit should begin in territorial waters.

58. The CHAIRMAN said that Mr. Córdova's argument was logical but impracticable.

59. Mr. SCALLE pointed out that a decision would remain difficult so long as the Commission had not considered the régime of territorial waters.

(d) *Can the pursuit be commenced in the case of the constructive presence of a vessel in territorial waters?*

60. Mr. FRANÇOIS thought that, to justify pursuit, the boats used in committing the offences must be the boats of the offending vessel itself. As to the other cases, he had rejected the concept of constructive presence. He had stated in his report that he felt "that this opinion has not received enough support to entitle it to appear in the text to be adopted by the Commission" (p. 43, mimeographed English text; para. 99, printed French text).

61. The CHAIRMAN noted that Mr. FRANÇOIS rejected the view of certain authorities that "even if the vessel uses not its own but other boats to commit offences in foreign waters, its guilt is nevertheless established" (*ibid.*). In his own view, a vessel selling liquor on the high seas to boats which then proceeded to the mainland was committing no offence. It was for the coastal State to control its own boats.

62. Mr. HUDSON pointed out that the adoption of such a principle might give rise to considerable difficulty. For example, off the coast of California vessels fitted out as gaming-houses catered for gamblers less than twelve miles from the mainland. It was very difficult to find

any legal provision under which such a case could be dealt with.

63. The CHAIRMAN thought that if such vessels were in the contiguous zone the coastal State could deal with their activities; but if they were more than twelve miles from the coast, they could hardly be said to be committing an offence.

64. Mr. KERNO (Assistant Secretary-General) said that gambling had nothing to do with the contiguous zone, since it did not concern revenue, Customs or public health.

65. Mr. HUDSON asked whether it might not concern revenue.

66. Mr. SANDSTRÖM thought that the best example was to be found in the liquor laws. Boats came from the shore to vessels standing outside the contiguous zone, so that such vessels were aiding and abetting an offence in territorial waters.

67. The CHAIRMAN thought that such an activity was merely a commercial transaction on the high seas.

68. Mr. HUDSON asked whether it was not a fact that British courts had declared it illegal for any British vessel to cause a violation of the laws of another country. He seemed to remember a finding of some twenty-five years ago which recognized the existence of a principle of international law under which any such operation by a vessel flying the British flag was prohibited.

69. The CHAIRMAN pointed out that the decision in question concerned the fitting out of vessels to break the American Anti-Liquor Laws. He did not think that point was a matter for the Commission.

*The principle proposed by the Rapporteur was adopted.*

70. Mr. FRANÇOIS then referred to the very debatable case of the *Martin Behrman* (*ibid.*).

71. The CHAIRMAN failed to understand why a captured vessel should be set at liberty if, after being arrested in waters subject to the jurisdiction of a captor State, it had to cross a portion of the high seas in order to be taken to another port of that State.

72. Mr. HUDSON agreed that in such circumstances a vessel could be taken across the high seas. The case was very exceptional, but the principle formulated by the Rapporteur in the last paragraph of the section of his report concerning the right of pursuit was in line with the provisions of extradition treaties covering similar cases.

73. Mr. FRANÇOIS added that there had been no court decision in the case of the *Martin Behrman*. The United Kingdom Government had reserved its future position, but the United States Government had agreed with the Netherlands Government.

74. The CHAIRMAN said that he was not familiar with the case and asked how it came to concern the United Kingdom Government when the vessel involved was a United States vessel.

75. Mr. FRANÇOIS explained that the United Kingdom Government had made a general observation on that subject.

76. The CHAIRMAN said that he agreed with the text proposed by the Rapporteur, which read as follows :

“ A vessel arrested within the jurisdiction of a State and escorted to a port of that State for delivery to the competent authorities shall not be set at liberty solely on the grounds that a portion of the high seas was crossed in the course of that voyage.”

*The Rapporteur's text was adopted.*

*The preceding paragraph, which read as follows, was also adopted.*

“ The right of pursuit ceases as soon as the vessel which is pursued enters the territorial sea of its own country or of a third State.”

77. The CHAIRMAN pointed out that the Commission had completed consideration of the report by Mr. François (A/CN.4/42).

78. Mr. KERNO (Assistant Secretary-General) referring to the desirability of having the reports for submission to the Commission at its next session drafted more or less on the same model, said that such reports should consist of articles, each followed by a comment, like the report by Mr. Spiropoulos on the Draft Code of Offences against the Peace and Security of Mankind, so that they would be ready for submission to Governments or to the General Assembly.

79. He thought that all members of the Commission were agreed that the Commission could not prepare an absolutely complete code on the régime of the high seas ; but he hoped that the text submitted in the following year would be an integral whole. The Commission might then proceed to deal with one or two topics which it had not yet considered.

80. Mr. SCELLE, agreeing with Mr. Kern's suggestion, said that his own report had been submitted in that form, except that the comments preceded the articles ; but the order could easily be changed.

81. He would like to ask Mr. François whether it might be possible to deal with the question of territorial waters in the following year. In his view, the question of the high seas could hardly be discussed without mentioning territorial waters. He himself could find no material distinction between territorial waters and the high seas.

82. Mr. CORDOVA, agreeing with Mr. Scelle, thought that the limit of territorial waters should be stated in relation to the high seas and vice versa. He might add that the General Assembly had specially stressed the question of territorial waters and he did not see how the Commission could abstain from considering the question.

83. The CHAIRMAN pointed out that the subject was a wide one to entrust to Mr. François before it had been examined by the Commission.

84. Mr. FRANÇOIS said that he had understood that the Commission intended to direct another special rapporteur to study the question.

85. Mr. KERNO (Assistant Secretary-General) said that the majority of the members of the General Assembly regarded the high seas and territorial waters as related

topics, which explained why the Assembly, on the proposal of Iceland,<sup>4</sup> had requested the Commission to give priority to the study of the régime of territorial waters. The original proposal had, of course, been whittled down so as not to compel the Commission to deal with the two questions simultaneously. But after the lapse of two years it would be in accordance with the spirit of the General Assembly resolution<sup>5</sup> to take up the study of the question of territorial waters in the interval between the present session and the following one. He hesitated to make such a suggestion ; but in view of the close link between the two problems he thought it essential that the same Rapporteur should deal with both. The Rapporteur could rest assured that he would receive every possible assistance from the Secretariat.

86. Mr. EL KHOURY, recalling a suggestion at the last session that the study on territorial waters should be entrusted to Mr. François, said that the time was ripe for the decision which had not been taken then.

87. Mr. YEPES thought that the Commission should request Mr. François to agree to undertake the report on the régime of territorial waters, since the two subjects were so closely interwoven that they must on no account be treated from different points of view. Mr. François had already acted as Rapporteur on the régime of territorial waters at the Codification Conference held at the Hague in 1930.

88. The CHAIRMAN noted that the Commission was unanimous in requesting Mr. François to undertake the report.

89. Mr. FRANÇOIS replied that he would do his best.

#### Examination of the draft report of the Commission covering its third session

##### CHAPTER II: RESERVATIONS TO MULTILATERAL CONVENTIONS (A/CN.4/L.22)<sup>6</sup>

90. Opening the discussion on document A/CN.4/L.22, the CHAIRMAN said that the first five paragraphs should evoke little comment from members, since they stated facts and reproduced texts.

91. Mr. YEPES thought that chapter II of the draft report was merely a repetition of the decisions adopted by the Commission. Although it should be a true reflection of the Commission's proceedings, it did not report discussions. While no error was to be found in the document before the Commission, it dealt with only one aspect of the question. It did not contain the arguments in support of the procedure followed by the Pan-American Union, and a perusal of it would suggest that the Commission had regarded that procedure as absurd.

<sup>4</sup> *Official records of the General Assembly, Fourth session, Sixth committee, 163rd meeting, para. 19.*

<sup>5</sup> General Assembly resolution 374 (IV) of 6 December 1949.

<sup>6</sup> Mimeographed document only, the text of which corresponds with drafting changes to chapter II of the “ Report of the International Law Commission covering the work of its third session ”. (See vol. II of the present publication.) The drafting changes are indicated in the summary records of the 125th and 126th meetings.

91a. The Commission's report covering its previous session had reproduced the arguments in support of the various viewpoints, without naming the advocates of those viewpoints, which was as it should be. But the General Assembly would not be aware from chapter II of the present report that a discussion had taken place, but would gather that the Commission had unanimously agreed that the procedure followed by the Pan-American Union, although suited to the needs of countries maintaining close relations with each other, was not such as to secure universality. Yet the contrary view had been defended and it had also been held that the formula adopted by the Commission implied the introduction of the veto, although that argument had been described as ridiculous by other members.

92. In the previous year the Sixth Committee of the General Assembly had stated the opposing arguments and explained the attitudes of the various delegations in its report on the same subject (A/1494).<sup>7</sup> The text before the Commission seemed to suggest that there had been but one school of thought in the Commission; it was a truthful account but it did not state the whole truth.

93. Mr. CORDOVA, speaking as General Rapporteur, pointed out that the Commission had examined, amended and approved every paragraph of the draft report.<sup>8</sup> The final text had been given the form of a chapter for the Commission's general report.

94. Mr. HUDSON pointed out that the Commission's proceedings were recorded in detail in the summary records. In his view, the rapporteur should report only the conclusions reached by the Commission.

95. Mr. KERNO (Assistant Secretary-General) thought that a distinction should be drawn between the reports of the Commission and those of the Sixth Committee. Mr. Yepes' remarks were largely true of the reports of the Sixth Committee; but it should be emphasized that the reports of the International Law Commission had been differently arranged from the outset, a fact which, he might add, had at times led certain members of the Commission to submit individual comments for insertion as footnotes. For example, in Part III of the report of the Commission covering its second session devoted to the formulation of the Nürnberg Principles,<sup>9</sup> the particular views of Mr. Alfaro, Mr. Hudson and Mr. Scelle had been given in footnotes. Members who did not approve certain parts of the present report would be entitled to submit reservations in that way.

96. Mr. AMADO observed that, if certain personal views dissenting from the Commission's findings were given in the report, all members would doubtless feel compelled to request the insertion of additional passages explaining their own views in detail. The problem was different for the Committees of the General Assembly, whose members were representatives of States, which sometimes wished to clarify their respective viewpoints in order to obviate misunderstandings during subsequent

negotiations. Moreover, delegations acting on instructions from their Governments expected the report to show that they had expressed views in accordance with their instructions.

97. The insertion in the report of the International Law Commission of any individual opinion, however interesting, would tend to introduce a note of ambiguity into what was an absolutely clear text. The report should only record the conclusions reached by the Commission in its corporate capacity. Other opinions were best given in the form of footnotes.

98. Mr. SANDSTRÖM proposed that, in accordance with Mr. Kern's suggestion, members who so desired should have their dissenting opinions included in the report as footnotes.

99. Mr. YEPES said that he would not care to have to adopt such an offensive procedure. He had no desire to dissociate himself from the decisions adopted, but merely requested that the Commission present both sides of the question. In its present form the draft report was a one-sided argument, a report by the majority of the Commission.

100. Mr. HUDSON pointed out that the report was, in fact, an apologia, but one in defence of the Commission's standpoint.

101. Mr. SCELLE, supported by Mr. CORDOVA and Mr. ALFARO, thought that those members who wished to submit amendments should do so progressively as the Commission proceeded with the reading of the draft report. At all events, the Rapporteur could not be asked at the outset to abandon the drafting method which he had used.

102. The CHAIRMAN proposed that the Commission proceed to a detailed study of the draft report, paragraph by paragraph.

*Paragraphs 1 and 2 (paragraphs 12 and 13 of the "Report")*

*Paragraphs 1 and 2 were adopted without comment.*

*Paragraph 3 (paragraph 14 of the "Report")*

103. Mr. SANDSTRÖM questioned the point of the words "at least", in paragraph 3, line 7.

104. Mr. SCELLE thought the expression was meaningless. To say "at least of all parties" was, in a way, tantamount to saying that the minimum requirement was the maximum.

105. Mr. HUDSON pointed out that, apart from States parties to a treaty, there were also the signatory States which had not ratified.

106. Mr. SANDSTRÖM was satisfied with Mr. Hudson's explanation.

*Paragraph 3 was adopted.*

*Paragraph 4 (paragraph 15 of the "Report")*

*Paragraph 4 was adopted without comment.*

*Paragraph 5 (paragraph 16 of the "Report")*

107. Mr. HUDSON proposed the deletion of the words "foregoing" before "advisory opinion", "of four and one judge respectively", of "all" and "great" in the

<sup>7</sup> Official records of the General Assembly, fifth session, Annexes, agenda item 56, pp. 24-29.

<sup>8</sup> From its 100th to 106th meetings.

<sup>9</sup> Official records of the General Assembly, Fifth Session, Supplement No. 12 (A/1316).

phrase "all these opinions with great care" in the final sub-paragraph of paragraph 5.

108. The CHAIRMAN said that it was of value to state the number of dissenting judges.

109. Mr. HUDSON proposed, having regard to the Chairman's observation, that the words "of four and one judge respectively", the deletion of which he had proposed, be retained with a slight amendment, namely, the insertion of the word "judges" after the word "four".

*Paragraph 5 was adopted as amended.*

*Paragraph 6 (paragraph 17 of the "Report")*

110. Mr. HUDSON requested that the reference to the advisory opinion of the International Court of Justice, following the two quotations be made more precise. In addition, he proposed the deletion of the word "naturally" in line 1 of the final sub-paragraph, and of the words "irrespective of" in line 6 of the same sub-paragraph.<sup>10</sup>

*Paragraph 6 was adopted with the above amendments.*

*Paragraph 7 (paragraph 18 of the "Report")*

111. Mr. HUDSON proposed the deletion of the introductory words "It is to be noted that, . . .".

*It was so agreed.*

*Paragraph 7 was adopted as amended.*

*Paragraph 8 (paragraph 19 of the "Report")*

112. Mr. YEPES proposed the addition of the following text to paragraph 8:

"The view was expressed in the Commission that the practice followed by the United Nations — which is the same as that formerly followed by the League of Nations — implies the introduction of the veto in a sphere where it would be inadmissible, namely, the General Assembly. This view was not shared by the majority of the Commission."

113. Mr. KERNO (Assistant Secretary-General) pointed out that paragraph 8 was not a record of the discussions which had taken place in the Commission concerning the practice followed by the Secretary-General. Paragraph 8 did not concern the Commission's criticisms of or comments on that practice, so that the addition requested by Mr. Yepes would be out of place.

114. Mr. YEPES, while agreeing with Mr. Kerno's interpretation, reserved the right to request the insertion at a later stage of the text he had proposed.

115. Mr. SCALLE thought that before paragraph 9 was discussed, which concerned the practice followed by the Pan-American Union, mention should be made of

<sup>10</sup> The last sub-paragraph of paragraph 6 read as follows:

"In the second place, the Court naturally gave its advisory opinion on the basis of its interpretation of the existing law. The Commission, on the other hand, has been asked to study the question 'both from the point of view of codification and from that of the progressive development of international law'. The Commission therefore feels that it is at liberty to suggest the rules which it considers the most convenient for States to adopt for the future, irrespective of whether or not such rules represent rules of law existing today."

the practice followed with regard to reservations to the Conventions included under the auspices of the International Labour Organisation, which had been the subject of a memorandum from the International Labour Office to the International Court of Justice.<sup>11</sup> It had been held that the said practice made no allowance for reservations. In his view, however, the introduction of "exceptions" into conventions enabled States to achieve the same results as if they had made reservations, but with the immense improvement that their reservations were approved by all the negotiators. The same situation arose where the text of a law contained saving clauses in favour of certain categories of persons. In accordance with the practice to which he had referred, it was the organ responsible for preparing the draft convention that judged whether or not the reservations were compatible with the object of the convention. The practice was, in some respects, an ideal one and might be recommended both to organs of the United Nations and to the specialized agencies, if the aim was to promote international legislation. Conventions concluded under the auspices of those international organizations frequently came into force after the second ratification. When that was so, the tender of reservations would disturb the whole economy of the convention. It was therefore preferable to provide for the right to include exceptions in the text of conventions rather than to permit the tender of reservations. That practice was so valuable that it was strange that the draft report made no mention of it.

116. The draft report recommended, and very rightly, that in the specialized agencies any signatories to a Convention should if possible agree beforehand as to reservations. That would be following in the footsteps of the International Labour Organisation. It should therefore be stated in the report that the practice adopted by the latter had been carefully examined by the Commission.

117. Mr. KERNO (Assistant Secretary-General) thought that the best place for a reference to the practice followed by the International Labour Organisation with regard to reservations might perhaps be in paragraph 15, sub-paragraph 1, which concerned a similar procedure. The reference could be included by means of a mere drafting change.

118. Mr. SCALLE said that he favoured the insertion of the reference concerned at that point in the report, the more so since the Commission would thereby be compelled to express a valuable opinion on the practice in question and to state that it was an ideal system which seemed to be gaining ground and resulted in the promotion of legislation that was equal for all parties.

119. Mr. HUDSON, supported by Mr. AMADO, requested Mr. Scalle to submit to the Commission a draft text amending paragraph 15.

*Paragraph 8 was adopted.*

*Paragraph 9 (paragraph 21 of the "Report")*

120. Mr. HUDSON requested the deletion of the word "best" in "as best described" in the first sub-paragraph,

<sup>11</sup> *I.C.J. Distr.* 51/10, pp. 212-278.

and of the word "only" in "may only delay" in the third sub-paragraph. He also proposed the insertion, after the words "the proposed reservation" in the third sub-paragraph of the phrase:

"... and until the reserving State has an opportunity to consider any observations made by other States."

121. The addition he proposed was designed to complete the commentary accompanying the preceding quotation. When the reserving State had considered the objections submitted, it might be inclined to withdraw its reservation.

*After some discussion, the three amendments proposed by Mr. Hudson were adopted.*

122. Mr. YEPES, having drawn the Commission's attention to the sentence beginning "Thus the tender of a reservation . . .", in the third sub-paragraph, pointed out that the aim of the system followed by the Pan-American Union was not merely to delay the deposit of the instrument of ratification, but also to induce the reserving State to consider the advisability of withdrawing its reservations.

123. Mr. HUDSON said that the phrase added by the Commission allowed for that eventuality.

124. Mr. LIANG (Secretary to the Commission) pointed out that the word "become" after "and thereby" in the third sub-paragraph should read "becoming".

*Paragraph 9 was adopted as amended.*

*Paragraph 10 (paragraph 22 of the "Report")*

125. Mr. SCELLE pointed out that the second sentence of paragraph 10 gave the impression that the practice followed by the American State was the opposite to what it should be. In view of the close bonds existing between those States they should, apparently, be able to refrain from making reservations. In that respect the report expressed what would appear to be an illogical idea. He thought that the second sentence of the paragraph should be abbreviated to read as follows:

"The States of the Pan-American Union have adopted the procedure which they regard as suited to their needs."

126. The CHAIRMAN suggested that Mr. Scelle's requirements could be met by a mere change of punctuation, namely, the substitution of a comma for the full stop after the phrase "a special position", and the substitution of a full stop for the comma after the phrase "the general body of States".

127. Mr. SCELLE, although doubtful as to the effect of those changes, accepted the Chairman's proposal.

*It was so agreed.*

128. As a result of an observation by Mr. LIANG (Secretary to the Commission) *it was decided* to substitute the phrase "to ensure the greatest possible number of ratifications" for the phrase "to increase the number of ratifications", in the third sentence.

129. Mr. YEPES proposed the following amendment:

"The view was expressed in the Commission that if the system followed by the Pan-American Union was practicable for a community of States such as the Organisation of American States, the bonds between

which were very close, it might *a fortiori* be applied to a wider and more loose-knit community such as the United Nations. It had also been held that the system followed by the Pan-American Union might be deemed to represent the existing law on the subject since it is accepted by the majority of the States Members of the United Nations. This view was not shared by the majority of the Commission."

130. Mr. SCELLE thought that it would be dangerous to present the system followed by the Pan-American Union as the only existing system in international law.

131. Mr. HUDSON, pointing out that Mr. Yepes merely requested a reference to the fact that such an opinion had been expressed, hoped that Mr. Yepes would be prepared to withdraw his proposal. He himself did not consider it necessary that all the opinions expressed should be mentioned in the report. The reader could obtain all the information he required from the summary records.

132. Mr. YEPES requested that his opinion be included in the report in a footnote.

133. Mr. HUDSON pointed out that Mr. Yepes' request for such a footnote would suggest that he was opposed to chapter II of the report as a whole.

134. The CHAIRMAN thought it was only after reading the whole report that members could decide, in full knowledge, what footnotes they wished to add.

135. Mr. YEPES said that he did not request a vote on his amendment.

136. Mr. HUDSON proposed the substitution of the phrase "are more important considerations" for the phrase "is a more important consideration" in the sixth sentence.

*It was so agreed.*

137. Mr. SCELLE proposed the substitution, for the fifth and sixth sentences of the following: "There are cases where the integrity of the convention is a more important consideration and others where its universality is more important". The importance of the integrity and the universality of a convention varied, not with the type or subject of the convention, but with circumstances. Political considerations were sometimes responsible for the desire for universality gaining the day over the desire for uniformity.

138. Mr. HUDSON and the CHAIRMAN emphasized that the substance of the convention itself and external circumstances were alternately responsible for considerations of universality gaining the day over considerations of uniformity. The text proposed excluded neither of those possibilities.

139. Mr. SCELLE did not press his point.

140. Supported by Mr. YEPES, he requested the deletion of the word "often" in the phrase "These conventions are often . . .", in the seventh sentence. In his view, conventions prepared under the auspices of the United Nations were always of a law-making type. He had formed that opinion, which was a purely personal one, as a result of his investigations. He would ask those members who disagreed with him when such conventions

were not of a law-making type, and, in that case, of what type they then were.

141. After some discussion, in which Mr. LIANG (Secretary to the Commission) and Mr. KERNO (Assistant Secretary-General) took part, Mr. SCALLE requested a vote on the deletion of the word "often".

*It was decided, by 5 votes to 3, to delete the word "often".*

142. Mr. YEPES requested the deletion of the last two sentences in paragraph 10, which he regarded as a criticism of the practice followed by the Pan-American Union in the matter of reservations.

143. Mr. CORDOVA, speaking as General Rapporteur, observed that the sentences in question explained the grounds for the Commission's rejection of the Pan-American Union practice.

*The proposal for the deletion of the last two sentences in paragraph 10 was rejected.*

144. Mr. YEPES requested the Commission to add to the end of the paragraph the text concerning the practice of the veto, which he had previously read out.<sup>12</sup> Other members of the Commission had also supported the same idea.

*Mr. Yepes' proposal was rejected by 4 votes to 2.*

*Paragraph 10 was adopted with the various amendments above-mentioned.*

The meeting rose at 6.15 p.m.

## 126th MEETING

Tuesday, 17 July 1951, at 9.45 a.m.

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*Chairman:* Mr. James L. BRIERLY

*Rapporteur:* Mr. Roberto CORDOVA

*Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCALLE, 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.

<sup>12</sup> See para. 112 above.

## Examination of the draft report of the Commission covering its third session (*continued*)

### CHAPTER II: RESERVATIONS TO MULTILATERAL CONVENTIONS (A/CN.4/L.22)<sup>1</sup> (*continued*)

#### *Paragraph 11 (paragraph 23 of the "Report")*

1. Mr. HUDSON suggested deleting the word "Moreover" in the third sentence, and that the sentence run: "It was left to each State party to the convention to apply the criterion of compatibility" instead of "Moreover, it was for each State . . .". He also suggested deleting the word "indeed" in the last sentence, after the phrase "In its answer to question II, the Court . . .".

*The above amendments were adopted without comment.*

#### *Paragraph 12 (paragraph 24 of the "Report")*

##### *First sentence.*

2. Mr. HUDSON suggested the wording: "The Commission believes that the criterion . . . is not suitable . . ." instead of "The Commission does not believe that the criterion . . . is suitable".

3. Mr. SCALLE thought the words "applied by the International Court of Justice to the Convention on Genocide" should be deleted. He saw no reason why that should be repeated.

4. Mr. KERNO (Assistant Secretary-General) agreed that the proposed change made the sentence less ponderous, but he thought it might be a good idea to reiterate that the Court had given an opinion on an actual case.

5. Mr. SCALLE thought that the Commission would hardly wish to run counter to the Court's Opinion so obviously.

##### *Second sentence*

6. Mr. HUDSON did not think the latter part of the sentence was very convincing. A convention might have protocol clauses which could not be regarded as contributing to effect its object and purpose. In his opinion, the sentence should stop after the words "from part of its object and purpose".

7. The CHAIRMAN proposed that the first part of the sentence, as far as the words "and those which do not form part of its object and purpose", be fused with the third sentence to be introduced by the word "but".

*It was decided to delete the second part of the second sentence<sup>2</sup>; the Chairman's proposal was not adopted.*

##### *Third and fourth sentences*

8. Mr. HUDSON suggested that the word "however" after "even", at the beginning of the fourth sentence, be deleted.

*It was so decided.*

9. Mr. SCALLE said he did not like the words "and those which do not" in the third sentence. It had after all just been stated that it was quite unusual for the

<sup>1</sup> See summary record of the 125th meeting, footnote 6.

<sup>2</sup> The second part read as follows: "and the Commission finds some difficulty in understanding why the parties should include in a convention provisions which they do not regard as contributing to effect its object and purpose."

provisions of a convention not to be directly connected with the object and purpose of the convention, and that in principle the purpose of all the provisions was the same. He would have been in favour of deleting the words "ordinarily at least" at the beginning of the third sentence after the phrase "It seems reasonable to assume that", since the statement was invariably true; but he would not press the point. The report appeared to imply that there were some provisions which contributed towards the object and purpose of the convention, and others which did not. He would be glad to have Mr. Kerno's view on that point.

10. Mr. HUDSON pointed out that the French text did not follow the English sufficiently closely.

11. Mr. KERNO (Assistant Secretary-General) corroborated that Mr. Scelle's objection did not apply to the English text, and that the French text called for revision.

#### *Fifth sentence*

12. Mr. HUDSON proposed deleting the end of the sentence beginning with the words "it can only".<sup>3</sup> It was sufficient for the sentence to read: "... there is no objective test by which the difference may be resolved".

13. Mr. SCELLE thought that actually in most instances there would be a judicial decision.

14. Mr. KERNO (Assistant Secretary-General) thought that might be so, though the Court had emphasized the possibility of a judicial decision being taken, and had argued that subjective discretion was unsatisfactory. It had stated that compromise was possible, or that, as provided for in the Convention on Genocide, the case might be submitted to the Court for a ruling.

15. Mr. HUDSON recalled that the Court had stated in reply to Question II put by the General Assembly<sup>4</sup> that it was for the parties to decide. Hence there was no room for a judicial decision.

16. Mr. SCELLE pointed out that a judicial decision had nevertheless been envisaged in the case of the Convention on Genocide. For the interpretation, reference could be made to the Court. He thought that whenever the Court provided some way out of the impasse resulting from the sovereignty of two States, the fact should be emphasized.

17. The CHAIRMAN read out the following passage from the Court's opinion. He regarded it as very important:

"It may be that the divergence of views between parties as to the admissibility of a reservation will not in fact have any consequences. On the other hand, it may be that certain parties who consider that the assent given by other parties to a reservation is incompatible with the purpose of the Convention, will decide to adopt a position on the jurisdictional plane in respect of this divergence and to settle the dispute which thus arises either by special agreement or by

the procedure laid down in Article IX of the Convention."<sup>5</sup>

18. Mr. HUDSON suggested:

"Even when a solution of the difference can be sought on the jurisdictional plane, this might not be attempted and it would in any case involve delay."

19. The CHAIRMAN thought Mr. Hudson's version amounted to the same thing as the original text; and the expression "jurisdictional plane" struck him as less satisfactory than "judicial decision".

20. Mr. HUDSON suggested the following alternative "When a solution of the difference can be sought by a judicial decision, this might not be resorted to and it would involve delay". He was reluctant all the same to stating that reference to the Court would involve delay.

21. The CHAIRMAN pointed out that during the time it would inevitably take to obtain the Court's opinion, it would not be known who were the parties to the convention.

22. Mr. YEPES considered that the two sentences in question stated clearly what the Commission wished to say. In the event of a dispute, it could only be settled by the intervention of international justice, and that implied a certain delay.

23. Mr. HUDSON thought it should not be stated that the dispute could only be settled by judicial decision. There might after all be a compromise solution. He suggested:

"Even if States B and C should seek a solution of the difference by judicial decision..."

24. The CHAIRMAN asked why Mr. Hudson mentioned States B and C only. State A too might intervene.

25. Mr. HUDSON did not think so.

26. Mr. KERNO (Assistant Secretary-General) also felt that State A might intervene. That had been the Court's view. Moreover, article IX of the Convention on Genocide presupposed the status of party to the convention. If States B and C decided by a compromise agreement to apply to the Court under article IX, the judgment given by the Court in the dispute between States B and C did not bind the other parties. Would that settle the dispute? What about the depositary of the Convention? He would not yet be sure whether State A must be included among the States whose ratification was necessary before the Convention could come into force. The judicial method did not appear to solve the problem decisively.

27. Mr. SCELLE said that the other parties to the convention might invoke article 63 of the Statute of the Court and intervene in the proceedings.

28. Mr. KERNO (Assistant Secretary-General) replied that that was not an obligation; it was merely a right.

29. Mr. HUDSON then proposed the following text: "Even when it is possible to refer the difference of views to judicial decision this might not be attempted and, in any case, would involve delay".

*Mr. Hudson's text was adopted.*

<sup>3</sup> The end of the sentence read as follows: "it can only be resolved by judicial decision, which at the best must involve delay and in most cases would probably not be resorted to at all."

<sup>4</sup> Resolution 478 (V) of 16 November 1950.

<sup>5</sup> *I.C.J. Reports 1951*, p. 27.

*Sixth sentence*

30. Mr. HUDSON thought the text went too far. The Court had decided that a State making a reservation could become a party to the convention, and in reply to Question II, had stated that each State took its decision from its own standpoint.

31. The CHAIRMAN said that there would be no way of telling whether the reserving State was a party or not. The Court had ruled that a reservation must be compatible with the object and purpose of the convention. In his opinion the text represented the consequence of the Court's opinion.

32. Mr. HUDSON thought it would be better to delete the second part of the sixth sentence.

33. Mr. YEPES thought the Commission had decided that it must differ from the Court's opinion. It had strong grounds for doing so, and he saw no reason why those grounds should not be stated in the report. It seemed to him that the words "it cannot be known" were a clear and concise explanation of the previous sentence.

34. Mr. HUDSON replied that, however clear and concise, according to the Court that explanation was incorrect.

35. There ensued a discussion in which the CHAIRMAN Mr. HUDSON, Mr. ALFARO, Mr. EL KHOURY and Mr. CORDOVA took part, on the question whether it was necessary to keep the second part of the sixth sentence, or whether the drawback involved in the Court's judgment was sufficiently clearly shown in the examples following the sentence.

36. The CHAIRMAN asked the Commission to take a decision on Mr. Hudson's proposal that the words "it cannot be known whether the reserving State has or has not become a party to the convention" should be deleted, the following sentence to begin with the words "For example . . .".

37. The voting having twice resulted in four votes for and four against, Mr. HSU said he would change his mind about abstaining and would vote for the deletion of the words.

*Mr. Hudson's amendment was adopted.*

*Seventh sentence*

38. There were no objections to the sentence.

*Eighth sentence*

39. Mr. HUDSON considered it incorrect to speak of "States parties". It would be better to say that "the entry into force or the termination of a convention depends on the number of ratifications or denunciations deposited" instead of "depends on the number of States parties".

*Mr. Hudson's amendment was adopted.*

*Paragraphs 13 and 14 (paragraphs 25 and 26 of the "Report")*

40. Paragraphs 13 and 14 did not give rise to any comment.

*Paragraph 15 (paragraph 27 of the "Report")*

41. The CHAIRMAN described what had happened in the sub-committee consisting of Mr. Hudson, Mr. François and himself.<sup>6</sup> The sub-committee had considered the question of model articles on reservations<sup>7</sup> and had very quickly come to the conclusion that that was not the best way of tackling the problem. The possibilities were too many to warrant making advance provision for them by means of model articles. He had been of the opinion that the Commission should propose urging drafters of conventions to face the question squarely so as to avoid difficulties later on.

*New paragraph proposed by Mr. Scelle (paragraph 20 of the "Report")*

42. Mr. SCELLE said that, at the end of the previous meeting,<sup>8</sup> he had raised the question of how to make reference to the memorandum submitted by the International Labour Office<sup>9</sup> to the International Court of Justice at the time when the advisory opinion on reservations to the Convention on Genocide was given. Mr. Kerno had pointed out that paragraph 15 would be the most suitable place for inserting such a reference. All reservations should as far as possible be taken into account at the time when the convention was drawn up. He had drafted a text which the Commission might add to paragraph 15 (1), but he had no preference as to where his proposal should go. He read out the following text:

"It will be recalled in this connexion that the International Labour Conference has adopted a procedure by which reservations are replaced by regulations peculiar to this or that State, thus achieving a system sufficiently flexible to be compared to that of domestic law. At the present stage of international organization, the Commission did not see its way to advocating universal application of this ideal system, but it examined with great interest the memorandum submitted on 17 January 1951 by the International Labour Office to the International Court of Justice when the Court gave its advisory opinion on the Convention on Genocide."

43. In the draft conventions which were the outcome of the discussions in the International Labour Conference there were no reservations. The Written Statement submitted to the Court by the International Labour Organisation had stressed that point on the grounds that of recent times a tendency had been seen in the International Labour Conference to introduce reservations.

44. Actually, while in the International Labour conventions there were no reservations, there was something corresponding exactly to reservations made prior to signature. There were exceptions in favour of particular States. In point of fact they did amount to reservations, but they had the tremendous advantage of being accepted by all signatories, and hence they could not give rise to

<sup>6</sup> Summary record of the 106th meeting, paras. 104-107.

<sup>7</sup> See Annex to Document A/CN.4/L.18.

<sup>8</sup> Summary record of the 125th meeting, paras. 115-119.

<sup>9</sup> *I.C.J.*, Distr. 51/10, pp. 212-278.

disputes. The system could be compared to that of domestic law, since that was the procedure followed by legislators in the various countries. It might be necessary to make certain changes in respect of some particular category of citizens, by means of a stipulation to the effect that that particular category should have the benefit of such and such a provision.

45. His text would fit in appropriately after paragraph 15 (1), since the sub-paragraph in question dealt with the European Broadcasting Convention of Copenhagen, which excluded all possibility of reservations. The reference in sub-paragraph (1) to the Charter of the United Nations was quite in order, since reservations were not possible in the case of constitutional instruments, whereas for other instruments the ideal solution to the problem of reservations was to replace them by stipulations in the convention itself.

46. The Commission had before it the standard procedure followed by the International Labour Conference. It should make mention of it, indicating that it constituted the nearest approach to perfection that could be hoped for in the attempt to get rid of reservations and to counteract their destructive effects.

47. He asked the Chairman and Mr. Kernö whether they agreed that the particular place in the report was the most appropriate for the insertion of the text he had proposed.

48. Mr. HUDSON said he had before him the document to which Mr. Scelle was referring. The International Labour Office's conclusions were given on pages 231 and 232, and Mr. Scelle's text did not tally with them. On page 214 of the same document, the following passage from article 19, paragraph 3, of the Constitution of the International Labour Organisation was quoted:

“ In framing any Convention or Recommendation of general application the Conference shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organization, or other special circumstances make the industrial conditions substantially different and shall suggest the modifications, if any, which it considers may be required to meet the case of such countries.”

49. Thus the procedure involved modifications to be embodied in labour conventions to make them applicable to particular countries. If Mr. Scelle's argument was that that procedure amounted to replacing reservations, he could not follow the argument. He did not think there was any question of a system to replace reservations. The reason why the International Labour Organisation did not admit reservations was the incontrovertible one that once the conventions were drafted, no reservation was feasible because the main concern was to achieve the uniformity provided for in the convention.

50. Hence the provision in article 19, paragraph 3, of the Constitution, which took into account varying circumstances and obviated the danger that the conventions would inevitably not be applicable in an entirely uniform manner in every country. He disputed Mr. Scelle's statement that the procedure in question took

the place of reservations. Any such suggestion would greatly surprise the International Labour Organisation.

51. He saw no objection to inserting a general statement on the labour conventions in sub-paragraph (1), which quite properly referred to the European Broadcasting Convention of 1948, one of the most recent.

52. The CHAIRMAN did not see how a reference could be made in sub-paragraph (1) to the ILO conventions, seeing that the provision relating to reservations was derived from the International Labour Organisation Constitution.

53. Mr. HUDSON said that in the text he was proposing to submit to the Commission he had made allowance for the point raised by the Chairman. In practice, the International Labour Organisation encouraged uniform application of conventions by getting rid of reservations, but its Constitution contained the clause he had read out, making provision for special circumstances. He would not call that an ideal alternative to reservations, and he suggested that Mr. Scelle's proposal be recast.

54. Mr. SCELLE thought that Mr. Hudson's argument amounted to the same as his own. Hence they were entirely at one, apart from a few drafting points.

55. He joined issue with Mr. Hudson's statement that the labour conventions aimed at uniformity. It would be absurd for them to do so. On the question of the eight-hour day, for example, an Indian industrialist had said he would be prepared to agree to it provided it could be arranged to ship the climate of Sheffield over to India. In the labour conventions the best that could be done was to achieve equivalent treatment and due balance; uniformity was out of the question. The International Labour Conference was aware that certain principles it was anxious to get accepted by every State could only be adopted by many such States subject to modifications, often substantial ones. Take for example night work, which was the only possible method in certain countries, but extremely arduous in France or England. He reiterated that what it was desirable to obtain in all countries was equilibrium, not uniformity.

56. In his view, when States made a reservation to an ordinary convention, they were doing precisely the same as the drafters of a labour convention, who provided that trimmers in coal-mines could be employed from such and such a minimum age in one country and some other age in another country. That was what the Court had had in mind when it declared that reservations should be in keeping with the object and purpose of a convention.

57. The difference between the technique of the labour convention and that of other conventions was that in the former case a reservation on the part of the State was only possible when the parties which helped to draft the convention agreed to accept that reservation. That obviated any difficulty, whereas under the Commission's system, a State which was prepared to fall in with the convention but considered that it could not accept all its terms, was obliged to make a reservation. Prior examination of reservations was a step in the right direction, since it made it possible to accept only such reservations as were compatible with the object and

purpose of the convention. There was a great difference between reservations made before the instrument was drawn up and those made subsequently.

58. The fact that the provision in question was embodied in the International Labour Organisation Constitution was nothing more than a difference of approach. He did not doubt that Mr. Hudson could find a better version than his own, but on the substance of the problem he did not think Mr. Hudson's view differed from his.

59. Mr. KERNO (Assistant Secretary-General) also felt that on the substance there was no difference between Mr. Hudson and Mr. Scelle. When he had suggested the previous day that the ILO conventions might be mentioned in paragraph 15 (1)<sup>10</sup>, it was on the strength of Mr. Hudson's idea that the International Labour Organisation's system did not involve reservations but a different procedure. Mr. Scelle's idea was that reservations reflected special circumstances and the special circumstances of a given State could be provided for by a procedure other than that of a reservation, e.g. the colonial clause or the federal clause. To state that such and such a provision would not apply to such and such a country did not constitute a reservation.

60. Mr. SCELLE thought the ultimate result was the same.

61. Mr. KERNO (Assistant Secretary-General) agreed that it might be. He suggested that paragraph 15 (1) read "... as was done in the European Broadcasting Convention, Copenhagen, 1948, and as is done in the conventions of the International Labour Organisation", with an asterisk reference to a foot-note explaining briefly Mr. Scelle's proposal, and adding that the International Labour Organisation's method allowed for the peculiar circumstances of certain States to be taken into consideration.

62. The CHAIRMAN said that in paragraph 15 the Commission was recommending that the problem of reservations should be squarely faced by the drafters of convention texts. Actually, the drafters of the labour conventions had no need to face that problem, since it was provided for in the ILO Constitution.

63. Mr. HUDSON was glad to find that Mr. Scelle, Mr. Kerno and he were fundamentally in agreement, and that the only difference between them was a matter of drafting.

64. Mr. SCELLE was willing to have the commentary on the ILO practice in connexion with reservations inserted at the end of paragraph 8 of Chapter II of the report, and while he reserved the right to propose variants, he had no objection to the text which Mr. Hudson intended to submit being used as a basis for discussion. His only concern was that a method as well thought out as that of the International Labour Conference and providing so satisfactory a solution to the difficulties encountered by the Commission should not be ignored.

65. Mr. HUDSON put forward the following text:

"Because of its constitutional structure, the established practice of the International Labour Organisation excludes the possibility of reservations to labour conventions, thus placing emphasis on uniformity of application of their provisions. However, the texts of labour conventions frequently take account of the special conditions prevailing in particular States by placing them in such exceptional circumstances as will admit of their proceeding to ratification; indeed this course is enjoined on the International Labour Conferences by article 19 (3) and other articles of the Constitution of the Organisation."

66. Mr. SCELLE was prepared to agree to the text with the exception of the word "uniformity", which was not in line with the facts. He imagined that Mr. Hudson had had in mind the "universality" of application.

67. Mr. HUDSON said that the word "uniformity" was taken from the memorandum of 12 January 1951 by the International Labour Office to the International Court of Justice on the occasion of the advisory opinion on reservations to the Convention on Genocide.<sup>11</sup>

68. Mr. SCELLE said that uniformity of conditions must not be confused with uniformity of provisions. The terminology used by the International Labour Office might itself be defective. The peculiarity of the labour conventions lay precisely in the fact that the provisions were not uniform in respect of all parties.

69. Mr. CORDOVA proposed that the expression "on universality of application..." be used in the text.

70. The CHAIRMAN suggested deleting the expression "thus placing emphasis on uniformity of application of their provisions".<sup>11a</sup>

*It was so decided.*

71. Mr. YEPES thought it was a pity that the notion expressed in Mr. Scelle's draft<sup>12</sup> by the expression "At the present stage of international organization, the Commission did not see its way to advocating universal application of this ideal system" had gone by the board.

72. The CHAIRMAN pointed out that the words in question did not meet with the approval of all members. It was preferable to keep to the facts.

73. Mr. SCELLE said that the International Labour Conference procedure was in fact the most highly-developed and the most convenient. However, he would not make comparisons.

74. He requested that the text to be inserted at the end of article 8 include a reference to the International Court of Justice publication which reproduced the ILO memorandum. The reference in question would be found at the end of the text he had put before the Commission.

75. Mr. HUDSON suggested that Mr. Scelle's point be met by adding to his own proposal, after "practice of the International Labour Organisation" the words "as described in the Memorandum by the International Labour Office to the International Court of Justice" (*I.C.J. Distr. 51/10, Part II, Section 8*).

<sup>11</sup> *I.C.J. Distr. 50/10 bis.*

<sup>11a</sup> See also summary record of the 133rd meeting, para. 44.

<sup>12</sup> See above, para. 42.

<sup>10</sup> Summary record of the 125th meeting, para. 117.

76. He also asked for the word "countries" to be substituted for the word "States" in the expression "the special conditions prevailing in particular States...".

*It was so decided.*

*Subject to the above amendments the text to be inserted at the end of paragraph 8 was adopted.*

*Paragraph 15 (paragraph 27 of the "Report") (resumed)<sup>13</sup>*

*Sub-paragraph (1)*

77. Mr. YEPES said that reservations were a necessary evil, but the Commission should try to avoid them as far as possible. Hence it would be better at the beginning of the sub-paragraph to replace the words "it may be desirable" by "it is desirable".

78. Mr. SCELLE was in favour of the change.

79. Mr. ALFARO said that the change was entirely a question of form, since the hypothesis implied in "may be" was already in the draft in the words "in some cases".

80. Mr. HUDSON pointed out that it was not the expression of an opinion held by the Commission, but a reference to a decision which might be taken by those negotiating a convention.

*It was decided by 6 votes to 5 to keep the words "may be".*

81. Mr. HUDSON suggested replacing the words "to exclude" by "that the text should exclude", and the words "is likely to be particularly" by "is particularly".

*It was so decided.*

82. Mr. SCELLE proposed that, in the third line of the sub-paragraph, the word "desirable" be replaced by the word "necessary".

83. Mr. YEPES supported the proposal. The Commission should do its utmost to avoid the introduction of reservations into international instruments of a constitutional character.

84. The CHAIRMAN said that the passage referred to by Mr. Scelle had been based on the case of reservations made by the United States, and accepted, to the convention by which the World Health Organization was set up.

85. Mr. HUDSON argued that the Commission could not lay down directives for the drafting of future conventions.

86. Mr. SCELLE withdrew his proposal. He merely asked that in the French text the word "*souhaitable*" be replaced by "*désirable*".

87. Following a comment by Mr. LIANG (Secretary to the Commission) and a discussion in which Mr. KERNO (Assistant Secretary-General) pointed out that the Charter of the United Nations made no express stipulation excluding the possibility of making reservations, although in practice they were not permitted, *it was decided* to delete the words "such as the Charter of the United Nations" at the end of the sub-paragraph.

*Sub-paragraph (1) was adopted as thus amended.*

*Sub-paragraph (2)*

88. Following an observation by Mr. HUDSON, *it was decided* to replace the words "as was proposed in" by "as provided in".

*Sub-paragraph (2) was adopted as thus amended.*

89. Mr. KERNO (Assistant Secretary-General) informed the Commission that the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, then meeting at Geneva, was considering a draft convention, one of the provisions of which listed the articles on which the parties were not at liberty to make reservations.<sup>14</sup>

90. Mr. SCELLE said that that practice was gaining ground, and was the most suitable for conventions concluded under the auspices of the specialized agencies.

*Sub-paragraph (3)*

91. Mr. HUDSON proposed that the words "it should establish" be replaced by the words "the text should establish".

*It was so decided.*

92. Mr. KERNO (Assistant Secretary-General) explained the precise scope of point (c). It raised the question of tacit consent.

*Sub-paragraph (3) was adopted as thus amended.*

*Paragraph 16 (paragraph 28 of the "Report")*

93. Mr. HUDSON suggested the words "the text of a convention" rather than "the text of their convention" in the first sentence. He also suggested changing the punctuation in the second sentence to read as follows: "... arbitrary results. Hence the Commission..." instead of "... arbitrary results, and the Commission...".

*It was so decided.*

*Paragraph 16 was adopted as thus amended.*

*Paragraph 17 (paragraph 29 of the "Report")*

94. Mr. HUDSON proposed that the first sentence of the paragraph be altered to read: "The tender of a reservation constitutes, insofar as relations with the reserving States are concerned, a proposal of a new agreement, the terms of which will differ from those of the agreement embodied in the text of the Convention" instead of "... constitute, in substance, a proposal of a new agreement...".

*It was so decided.*

95. Mr. LIANG (Secretary to the Commission) suggested replacing the words "will differ" by "would differ".

*It was so decided.*

96. Mr. HUDSON also suggested deleting the words: "it may not object to reservations tendered after the Convention has entered into force", at the end of the sixth sentence, as being repetitive.

*It was so decided.*

<sup>13</sup> See para. 41 above.

<sup>14</sup> See document A/CONF.2/1, Article 36.

97. Apropos of the reference in the seventh sentence to the Geneva Conventions of 12 August 1949<sup>15</sup> Mr. HUDSON thought it would be clearer if the general titles of the Conventions were reproduced in full.

*It was so decided.*

*Paragraph 17 was adopted as thus amended.*

*Paragraph 18 (paragraph 30 of the "Report")*

98. Mr. HUDSON suggested that the first sentence of the paragraph be replaced by the following: "The Commission does not contemplate that a signatory State would advance an objection to a reservation from motives unrelated to its merits" instead of "... does not believe that a signatory State would be likely to advance...".

*It was so decided.*

99. Mr. LIANG (Secretary to the Commission) suggested that the first sentence stop after "its merits" to read, "to its merits. Yet in order...", instead of "to its merits, but in order...".

*It was so decided.*

100. Following an observation by Mr. FRANÇOIS, it was decided to replace the words "it, suggests" in the second sentence, by the words "the Commission suggests".

101. Mr. YEPES pointed out that countries where the procedure for ratification was long drawn out, and where parliament met only once a year, would find it difficult to observe the time-limit of 12 months, and he suggested making it 18 months.

*The proposal was rejected by 8 votes to 4.*

102. Mr. FRANÇOIS proposed that the word "it" in the last sentence and the words "a signatory State" in the following line, be transposed.

*It was so decided.*<sup>16</sup>

*Paragraph 18 was adopted as thus amended.*

*Paragraph 19 (paragraph 33 of the "Report")*

103. Mr. HUDSON asked the Commission to alter the first sentence of the paragraph to read as follows: "... should consider the insertion therein of provisions relating to the admissibility and effect of reservations", instead of "... consider the suitability of inserting therein...".

*It was so decided.*

104. Mr. YEPES thought the paragraph might be interpreted as an encouragement to make reservations, and was in favour of adding some expression like "if necessary".

105. After some discussion, in which Mr. KERNO, the CHAIRMAN and Mr. CORDOVA took part, Mr. YEPES withdrew his proposal.

<sup>15</sup> "Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field." "Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Armed Forces at Sea." "Geneva Convention relative to the Treatment of Prisoners of War." "Geneva Convention relative to the Protection of Civilian Persons in Time of War." (International Committee of the Red Cross, *The Geneva Conventions of August 12, 1949*, Geneva, 1949).

<sup>16</sup> See summary record of the 127th meeting, paras. 105-109.

*Paragraph 19 was adopted as thus amended.*<sup>17</sup>

*Paragraph 20 (paragraph 34 of the "Report")*

106. Mr. HUDSON asked that the first sentence of the paragraph be altered to read, "... the following practice should be adopted" instead of "the following rules of practice...".

*It was so decided.*<sup>18</sup>

107. Mr. HUDSON suggested that the various sub-paragraphs of paragraph 20 be renumbered 21, 22, 23, 24, 25 and 26, with the object of stressing their importance.

108. After Mr. CORDOVA, supported by Mr. EL KHOURY, had pointed out that the sub-paragraphs in question were closely linked, Mr. HUDSON withdrew his proposal.

*Sub-paragraph (1) (sub-paragraph (4) in the "Report")*

109. Mr. HUDSON suggested that in the last line of the sub-paragraph the words "which may become" be replaced by "which becomes".<sup>19</sup>

*It was so decided.*<sup>20</sup>

*Sub-paragraph (2) (sub-paragraph (5) in the "Report")*

110. The CHAIRMAN asked for the deletion of the words "or should merely sign", in the 12th line of the sub-paragraph.

*It was so decided.*

111. After some discussion, in which Mr. YEPES, Mr. HUDSON, Mr. SCELLE and Mr. ALFARO took part, Mr. KERNO (Assistant Secretary-General) noted that the Commission was unanimously in favour of the substance of sub-paragraph 2, though admitting that the wording could be improved. He proposed that the Chairman and Mr. Hudson be asked to consult together to see what improvements could be made in the wording, and to submit a new draft to the Commission.

*It was so decided.*<sup>21</sup>

*Sub-paragraph (3) (sub-paragraph (1) in the "Report")*

112. On a proposal by Mr. HUDSON, it was decided to add the word "which" before "may become".

*Sub-paragraph (4) (sub-paragraph (2) in the "Report")*

113. To avoid repetition, Mr. HUDSON proposed that the words "the consent of which is required for the reserving State to become a party to the Convention" be replaced by "which is entitled to object".

*It was so decided.*

114. Mr. HUDSON also suggested that in the first sentence the words "within a specified period" be placed after the words "towards the reservation".

*It was so decided.*

<sup>17</sup> *Ibid.*, para. 110.

<sup>18</sup> *Ibid.*, para. 105.

<sup>19</sup> A similar change should be made in sub-paragraph (2). See also summary record of the 133rd meeting, para. 48.

<sup>20</sup> See summary record of the 127th meeting, para. 65.

<sup>21</sup> *Ibid.*, paras. 66-80.

115. At the suggestion of the CHAIRMAN, it was decided in the last sentence to delete the word "specified" before "period".

116. Mr. SCALLE considered that the expression "such period may be extended" was vague. In paragraph 18, the Commission was proposing that the time-limit within which an objecting State could effect its ratification be fixed at 12 months. Surely the extension which could be granted by the depositary under paragraph 19 (4) should not in any circumstances exceed a further 12 months.

117. Mr. KERNO (Assistant Secretary-General) said that it would be very difficult to fix in advance a time-limit appropriate to all circumstances. In any case, the period in question must necessarily be short. The Convention on Genocide, for example, allowed a time-limit of 90 days after ratification for entry into force. It was something of that sort that appeared to be called for in the present instance. Reliance must be placed on the depositary, on the assumption that in each particular case he would bear in mind the interests of the State concerned, as well as those of the international community generally in regard to the treaty.

118. He suggested that the passage of the draft report be left as it stood. The summary records would make it clear that the Commission had raised the question and had intended that the time-limit was to be short.

119. Mr. SCALLE thought it was important for the length of the time-limit to be specified. He could not help feeling that governments might consider that they were laying themselves open to arbitrary decisions.

120. Mr. CORDOVA supported Mr. Scelle. There must be no question of giving the Secretary-General discretionary powers in the matter. The General Assembly would hardly agree to that.

121. Mr. HUDSON pointed out that, more often than not in the sense in which the expression was used, the "Secretary-General" was not an individual, but an organ which by its very nature offered adequate safeguards.

122. Mr. SCALLE withdrew his proposal.

*Sub-paragraph 5 (sub-paragraph 3 in the "Report")*

123. The CHAIRMAN thought it would be better in the third line to say "which are or which become..." instead of "which are or may become...".

124. Mr. HUDSON preferred "which are or which are entitled to become...". The same would apply to the last line of sub-paragraph 6. He also asked for the words "its communications" to be substituted for "his communications".

*It was so decided.*

*Sub-paragraph 6*<sup>22</sup>

125. The CHAIRMAN, replying to an observation by Mr. LIANG (Secretary to the Commission) noted that

<sup>22</sup> Sub-paragraph 6 read as follows:

"(6) A duly accepted reservation to a multilateral convention limits the effect of the convention in the relations between the reserving State and the other States which have become or may become parties to the convention."

the text of the sub-paragraph did not constitute part of the practice which the Commission was recommending for adoption. It was a statement of fact.

126. Mr. HUDSON agreed that it was simply a principle of law which the Commission had felt that it would be useful to mention, and suggested either devoting a separate paragraph to it or else deleting it on the grounds that all it did was to recall that when State A made a reservation and State B accepted it, that reservation would have to be observed in the relations between State A and State B.

127. After a discussion, in which Mr. KERNO (Assistant Secretary-General), the CHAIRMAN and Mr. SANDSTRÖM took part, Mr. HUDSON suggested that the Commission revert to the subject at a later stage.<sup>23</sup>

*It was so decided.*

128. Mr. HUDSON was of the opinion that the study which the Commission had devoted to reservations would be considered by the General Assembly as one of the most important pieces of work accomplished at the present session.

The meeting rose at 1.20 p.m.

## 127th MEETING

*Wednesday, 18 July 1951, at 9.45 a.m.*

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*Chairman:* Mr. James L. BRIERLY

*Rapporteur:* Mr. Roberto CORDOVA

*Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCALLE, 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.

<sup>23</sup> See summary record of the 127th meeting, para 97.

### Examination of the draft report of the Commission covering its third session (continued)

#### CHAPTER III: QUESTION OF DEFINING AGGRESSION (A/CN.4/L.20, A/CN.4/L.25)<sup>1</sup>

1. Mr. HUDSON pointed out that the form given to the chapter was entirely in line with the views expressed by Mr. Yepes at the 125th meeting,<sup>2</sup> in connexion with the examination of chapter II of the report, dealing with reservations to multilateral conventions (A/CN.4/L.22). The phrase "some Members of the Commission were of the opinion . . ." occurred several times. The theses not accepted by the majority of the Commission had, therefore, been discarded. If he had seen that chapter of the report at the time when Mr. Yepes was advocating such a drafting method, he would, no doubt, have been more disposed to support his point of view.

2. Mr. YEPES thanked Mr. Hudson for his remarks. He considered that the drafting procedure adopted for chapter III of the report was the most suitable for that type of document. He regretted that chapter II on reservations to multilateral conventions had not been presented with the same objectivity. The General Assembly would not fail to note the difference in method.

3. Mr. AMADO compared the draft of chapter III (A/CN.4/L.25) with a previous text on the same subject, dated 21 June of the same year (A/CN.4/L.20).<sup>3</sup> The first text recorded, in some detail, the opinions expressed by the various members of the Commission, whereas the second had been severely cut.

4. It was not pique that prompted him to point out that the memorandum which he himself had contributed to the discussion (A/CN.4/L.6) was quoted only once in the second draft, and then only indirectly. No great harm would, however, have been done if the sense and scope of that memorandum's conclusions had been adequately reported; but paragraph 5 of the second report merely mentioned the existence of the formula contained in the memorandum, whereas in the previous draft it had been reproduced in full.

5. The draft report did not treat his study any differently from the formulae evolved during the discussion.

6. He was surprised to find the term "abstract definition" used in the report. That might make the General Assembly smile, but would not make it any the wiser. The fact that it had been used, for the sake of convenience, during the discussions was no reason to use it in a written report.

7. Similarly, the formula submitted by Mr. Scelle had not been reproduced in its entirety. It was only referred to in general terms in paragraph 17. That formula, however,

<sup>1</sup> Mimeographed document only, the text of which corresponds, with drafting changes, to chapter III of the *Report of the International Law Commission covering the work of its third session*. (See vol. II of the present publication.) The drafting changes are indicated in the summary records of the 127th to 129th meetings.

<sup>2</sup> See summary record of the 125th meeting, para. 91.

<sup>3</sup> Mimeographed document only, of which paras. 1-4 are identical to paras. 1-4 of doc. A/CN.4/L.25, paras. 5-9 are identical to paras. 40-44 of the Report of the Commission, and paras. 10-19 are identical to paras. 7-16 of doc. A/CN.4/L.25.

represented a contribution to the study of the question which should have been recorded, as characteristic of the attitude of a professor with an established reputation in international law.

8. No more was said of his own definition in paragraph 5 than that it was "in general terms". No mention was made of its substance. In such circumstances, the General Assembly could hardly be well informed.

9. It was a matter of indifference to him whether the texts were reproduced in the form of footnotes, or included in the body of the report. He reserved the right to supplement those observations of a general nature by others on points of detail.

10. Mr. CORDOVA, speaking as general Rapporteur, recalled that the preparation of the two documents was his work, and that he took full responsibility for it. He did not wish to leave the Commission under the impression that certain of the proposals made in the course of the discussion had been given preferential treatment in one or other of the reports. Document A/CN.4/L.20 had been prepared as far back as 21 June, as it then appeared that the Commission had ended its discussion on the question of defining aggression. When its resumption,<sup>3a</sup> at Mr. Scelle's request, had led to the decision to include a new text in the draft code of offences against the peace and security of mankind,<sup>3b</sup> it had become necessary to amplify the first report. As a result, some cuts had had to be made in order to find room for the statements of certain members. Thus, for instance, his own formula (A/CN.4/L.10), which had appeared in paragraph 9 of document A/CN.4/L.20, was no longer to be found in document A/CN.4/L.25. The same applied to the formula proposed by Mr. Yepes (A/CN.4/L.7). On the other hand, he had retained the text of Mr. Alfaro's formula (A/CN.4/L.8) as it was the one on which the Commission's work and decisions had been mainly based.

11. It was only fair to add that Mr. Amado's memorandum had also proved a very valuable contribution to the work of the Commission.

12. Mr. ALFARO associated himself completely with Mr. Amado's remarks, which were also in line with those made previously by Mr. Yepes. The report should supply an accurate record of what had taken place during the meetings. At the very least, those proposals should be reproduced that had served as a basis for the Commission's decision. The General Assembly would not be able to appreciate correctly the results of the vote taken by the Commission, if it had no knowledge of the various proposals that had been rejected by that vote.

13. Mr. Amado had, in the first place, submitted a brilliant memorandum on the definition of aggression (A/CN.4/L.6) in which he had suggested the adoption of a formula, the substance of which, apart from some differences of wording accurately reflected the point of view of some others of the members. Similarly, Mr. Yepes' formula was of historical value and was an example of

<sup>3a</sup> Summary record of the 108th meeting, paras. 115 *et seq.* and of the 109th meeting, paras. 1-91.

<sup>3b</sup> Summary record of the 109th meeting, para. 89.

the spirit of conciliation obtaining amongst members of the Commission. It, also, should be reproduced in chapter III. The same applied to Mr. Scelle's proposal (A/CN.4/L.19 and Corr. 1); it was illuminating, original and of real intrinsic value.

14. He made a formal proposal that the various formulae, submitted to the Commission, be reproduced in the report.

15. Mr. YEPES pointed out that his formula had not been reproduced in the draft, although he had specifically asked that it should be mentioned in the report.<sup>3a</sup>

16. In Mr. HUDSON's view such a procedure would have been justified if the members of the Commission had been the delegates of Governments. Its purpose would then have been to provide evidence that they had carried out their instructions. He had himself proposed a text, but had no desire whatsoever to see it reproduced.

17. So far as he was concerned, he would have preferred chapter III of the report, on the question of the definition of aggression, to be much shorter. By cutting out the definitions proposed and all details regarding the votes, the chapter could be reduced to approximately a page and a half.

18. Mr. SANDSTRÖM, supported by Mr. SCELLE and the CHAIRMAN, did not see any necessity for giving all the chapters of the report the same form. In the case of the definition of aggression, the various attempts made by the Commission might well go on record. In his opinion, the draft report provided a satisfactory basis for discussion.

19. Mr. KERNO (Assistant Secretary-General) recalled that the United Nations Secretariat often brought pressure to bear on committees to refrain from including in their texts extracts from previous documents. They maintained that it was sufficient to give the reference to the document in question. On the other hand, a document that was self-sufficient had many advantages.

20. Mr. ALFARO observed that the elimination of the various formulae proposed had been justified on the grounds that the report would otherwise be too long; but, he would point out, in support of his previous proposal document A/CN.4/L.20 was only one page longer than document A/CN.4/L.25.

21. Mr. SCELLE asked whether it would not be sufficient to include the various formulae in footnotes. The Commission's object of saving the members of the General Assembly the trouble of looking up back references would thereby be fully attained.

22. It would be advisable to submit all the texts to the General Assembly, so that it could appreciate what the Commission had done; otherwise he was afraid that the readers' laziness would get the better of their curiosity. Fortunately the Assembly would find that the various formulae were not very far apart.

23. Mr. YEPES thoroughly approved of Mr. Scelle's proposal and would support it.

24. Mr. ALFARO preferred that the formulae should be inserted in the body of the report.

25. Mr. CORDOVA stated that formulae which had not directly contributed to the solution adopted by the Commission had not been included in the report. He admitted, however, that it would be a good thing to bring those proposed definitions to the notice of the members of the General Assembly.

26. On the CHAIRMAN's proposal, *it was decided* to examine the draft of chapter III paragraph by paragraph.

*Paragraph 1 (paragraph 35 of the "Report")*

*Paragraph 1 was adopted without comment.*

*Paragraph 2 (paragraph 36 of the "Report")*

27. Mr. KERNO (Assistant Secretary-General) pointed out that the Soviet Union proposal was not given in full. The General Assembly might consider it inconvenient not to have a complete text.

28. Mr. HUDSON was also of the opinion that the Soviet Union delegation would probably wish to see its proposal reproduced in full, but Mr. YEPES observed that the complete text was to be found in one of the General Assembly's own documents.

*Paragraph 2 was adopted without amendment.*

*Paragraph 3 (paragraph 37 of the "Report")*

29. *Paragraph 3 was adopted after substituting the words "in that connexion, studied" for the words "in that connexion, had reference to".*

*Paragraph 4 (paragraph 39 of the "Report")*

30. Mr. YEPES pointed out that the synopsis of Mr. Spiropoulos' report, given in the paragraph in question, omitted his observations on *animus aggressionis*. That could be remedied by a short sentence.

31. Mr. SPIROPOULOS agreed to suggest to the general Rapporteur after the meeting a very brief text to cover the point raised by Mr. Yepes.

*Paragraph 4 was adopted subject to the above-mentioned addition.<sup>4</sup>*

32. Mr. HSU pointed out that the report passed from paragraph 4, which stated Mr. Spiropoulos' point of view, to paragraph 5, which referred to Mr. Amado's and Mr. Alfaro's memoranda, without any sort of transition. He asked for the insertion between the two texts of a clause, recording the position taken by those members who had opposed Mr. Spiropoulos' conclusions. Such an addition appeared to him necessary, to counter-balance the amount of space given to Mr. Spiropoulos' opinion, and to ensure that the two theses were treated alike.

33. The subsequent paragraphs of the report encouraged the view that a definition of aggression could be found, so it should be stated why it was considered that was so. The report seemed to indicate that the Commission had

<sup>4</sup> The text of paragraph 4 was shorter; after "... legal constructions", it read "He further expressed the opinion that this 'natural notion' of aggression is a 'concept *per se*', which 'is not susceptible of definition'. A 'legal' definition...".

<sup>3a</sup> Summary record of the 94th meeting, para. 5.

ended by admitting that aggression could not be defined. Actually, the Commission's efforts had failed, not because the definition of aggression was intrinsically impossible, but for quite other reasons.

34. Unless the statement of Mr. Spiropoulos' views were omitted (A/CN.4/44, chapter II), the contrary view expressed by other members should also be included in the report. He proposed the addition of a paragraph 4 (a), wherein the contrary view, advocated by Mr. Scelle, himself, and other members could be expounded in the well-chosen and clear terms used by Mr. Scelle.

35. Mr. SCELLE thought that Mr. Hsu was right. The Commission, as a whole, had never accepted Mr. Spiropoulos' negative hypothesis. It had made every effort to find a definition, but had not succeeded.

36. Mr. KERNO (Assistant Secretary-General) understood Mr. Hsu's concern, but considered the answer was to be found in the succeeding paragraph as a whole. The fact that solutions other than that advocated by Mr. Spiropoulos were mentioned in paragraph 5 showed, in itself, that divergent opinions had been expressed. The very existence of those other proposals constituted a rebuttal of Mr. Spiropoulos' thesis.

37. Mr. CORDOVA pointed out that paragraphs 4, 5 and 6 of the draft report were concerned with the various proposals; it was only from paragraph 7 onwards that reference was made to the work of the Commission.

38. It would be difficult to adopt Mr. Hsu's suggestion. Paragraph 7 and the first sentence of paragraph 8 made it clear that the Commission had not adopted Mr. Spiropoulos' views.

39. The CHAIRMAN considered that Mr. Spiropoulos' thesis had not been rejected; the Commission had merely tried to find another solution.

40. Mr. SPIROPOULOS proposed the insertion of a paragraph 7 (a) to include the sentence: "The Commission considered that it might attempt to define aggression."

41. After consultation with Mr. ALFARO, Mr. CORDOVA proposed the addition of the following text at the end of paragraph 4: "The majority of the members of the Commission expressed a contrary opinion, and it was decided that the Commission should try to find a definition of aggression."

42. Mr. HSU said that such an addition would meet his point completely. Mr. SCELLE and Mr. AMADO concurred, and the latter added that, without such an addition, the Commission would be giving the impression that it had allowed itself to be convinced by the eloquence of one of its members.

*Mr. Córdova's proposal was adopted.*

*Paragraph 5 (paragraph 40 of the "Report")<sup>5</sup>*

43. Mr. AMADO said that he had nothing to add to

<sup>5</sup> Paragraph 5 read as follows:

"5. The Commission had also before it memoranda on the question submitted by Mr. G. Amado (A/CN.4/L.6) and Mr. R. J. Alfaro (A/CN.4/L.8). Each of these memoranda expressed the opinion that a definition of aggression based on an enumeration of aggressive acts would not be satisfactory, and contained a formula for a definition of aggression in general terms."

his earlier comments on the paragraph during the general discussion.

44. Mr. KERNO (Assistant Secretary-General) pointed out that Mr. Amado had not asked for his formula to be reproduced in full, but had only said that the exposition of his definition was inadequate. He suggested that Mr. Amado submit an amendment to paragraph 5, providing for fuller treatment of his formula.

45. Mr. YEPES considered that the paragraph in question should be entirely redrafted. The memoranda presented by Mr. Amado and Mr. Alfaro deserved more than a three-line commentary covering them both.

46. Mr. ALFARO considered that a course which would satisfy both Mr. Amado and himself would be to substitute paragraph 5 of document A/CN.4/L.20 for the existing paragraph 5 of document A/CN.4/L.25.

47. Mr. AMADO accepted Mr. Alfaro's suggestion, which would fill an obvious gap.

*It was decided to replace paragraph 5 of the draft by paragraph 5 of document A/CN.4/L.20.<sup>6</sup>*

*Paragraph 6<sup>7</sup>*

48. Mr. YEPES urged the adoption of the proposal put forward earlier by Mr. Scelle to include in a footnote all the proposed definitions mentioned in paragraph 6.

49. Mr. FRANÇOIS asked why the Commission should not adopt the same course as with the previous paragraph, and replace paragraph 6 by paragraphs 6, 7, 8 and 9 of the first draft report (A/CN.4/L.20).

50. Mr. CORDOVA pointed out how important it was to treat all the proposed definitions alike. If some were included in the text and others in footnotes, the Commission would give the impression that it drew a distinction between them.

51. Mr. SPIROPOULOS did not consider that there was any harm in the interpretation suggested by Mr. Córdova. A distinction should be drawn between proposals for definitions formulated in memoranda, and texts submitted to the Commission during the discussion itself. A difference in printing was therefore entirely justified. He supported Mr. Yepes' proposal.

52. In reply to a question by the CHAIRMAN, Mr. CORDOVA thought that a distinction, such as the one referred to by Mr. Spiropoulos, was only justifiable if explained in the report.

53. Mr. AMADO believed that the problem of the definition of aggression would take up more of the General Assembly's time than the Commission's work

<sup>6</sup> See footnote, 3, above.

<sup>7</sup> Paragraph 6 read as follows:

"6. Mr. J. M. Yepes submitted a proposal (A/CN.4/L.7) for the determination of the aggressor based on the enumerative method. This proposal was subsequently superseded by another proposal (A/CN.4/L.12) of the same author which defined aggression in general terms. A further draft definition (A/CN.4/L.11 with Corr. 1) was presented by Mr. Shuhsi Hsu in which particular stress was laid on indirect aggression. Mr. R. Córdova, finally, submitted a proposal (A/CN.4/L.10) which had in view to include aggression and the threat of aggression as crimes in the draft code of offences against the peace and security of mankind."

on treaties, or on the régime of the high seas. The members of the Sixth Committee would all be tempted to express their opinion on the matter. He himself, should he represent Brazil on the Sixth (Legal) Committee of the General Assembly, would find it necessary to inform his colleagues of the conclusions contained in his memorandum. He would approve any decision by the Commission for the inclusion in the report of the proposed definitions.

54. Mr. EL KHOURY recalled that, during the discussion of the question of the definition of aggression, he had made a proposal<sup>8</sup> which Mr. Hudson had slightly amended, whereafter its underlying principle had been finally adopted by the Commission. That proposal was for the inclusion of the definition of aggression in the draft code of offences against the peace and security of mankind.

55. He did not see why texts which did not bear any direct relation to the final resolution should be reproduced *in extenso*. If they were reproduced, all other proposals should also be included.

56. Mr. CORDOVA recalled that Mr. Hsu, in his formula (A/CN.4/L.11 and Corr. 1), had attempted to introduce a new factor, to wit the definition of indirect aggression, whilst he himself had wished to include the idea that aggression was a crime. Those points might also be the subject of a footnote.

57. Mr. SANDSTRÖM pointed out that those matters were already mentioned in the Report, it being stated that Mr. Córdova had submitted a proposal (A/CN.4/L.10) for the inclusion of aggression and the threat of aggression as crimes in the draft code of offences (A/CN.4/L.25, paragraph 6).

58. The CHAIRMAN recalled that Mr. Scelle, supported by Mr. Yepes, had suggested that all proposals for definitions should be included in the form of footnotes. He was under the impression that Mr. Alfaro proposed to include them in the body of the report.

59. Mr. YEPES was prepared to accept Mr. Alfaro's proposal, provided that a comment on the proposals submitted were included in the report. He noted the failure to implement the decision taken by the Commission to include his enumerative definition of aggression (A/CN.4/L.7). If the Commission would agree to the inclusion of that definition, either in a footnote, or in the body of the report, thus enabling the Assembly to take cognisance of all the notions that had been advocated in the Commission, he would accept the text.

60. Mr. ALFARO supported Mr. François' proposal<sup>9</sup> to substitute paragraphs 6, 7, 8 and 9 of document A/CN.4/L.20 for paragraph 6 of the report (A/CN.4/L.25).

*Mr. François' proposal was adopted.*

*Paragraphs 6, 7 and 8 (A/CN.4/L.20) (paragraphs 41-43 of the "Report")*

*Paragraphs 6, 7 and 8 were adopted without comment.*

<sup>8</sup> See summary record of the 94th meeting, paras. 32-36, and of the 96th meeting, paras. 34-36.

<sup>9</sup> Para. 49 above.

*Paragraph 9 (A/CN.4/L.20) (paragraph 44 of the "Report")*

61. At the suggestion of Mr. LIANG (Secretary to the Commission) the following text was adopted:

"With a view to making aggression an offence and to having a definition of it included in the draft code of offences against the peace and security of mankind, Mr. Córdova submitted the following text . . ."<sup>10</sup>

CHAPTER II: RESERVATIONS TO MULTILATERAL CONVENTIONS (A/CN.4/L.22)<sup>11</sup> (resumed from the 126th meeting)

62. Mr. YEPES said that, during the discussions at previous meetings, he had done what he could to improve the chapter of the report in which the Commission dealt with the question of reservations to multilateral conventions. A great deal, however, still remained to be done in that connexion, and the Commission should continue to give the text its most careful attention, as the General Assembly would take it as the outstanding example of the value of the Commission's work.

63. He desired to make it clear however that, while he had taken an active part in the discussion in a spirit of solidarity, he was not, basically, in agreement with the statements and conclusions of that chapter of the report.

*Paragraph 20 (paragraph 34 of the "Report") (Resumed from the 126th meeting)*

*Sub-paragraph (1) (sub-paragraph (4) in the "Report")*

64. The CHAIRMAN said that the Commission had before it the proposals which Mr. Hudson and he himself had submitted at its request in regard to chapter II. Section I merely dealt with mention of redrafting and read as follows:

"Paragraph 20 of Document A/CN.4/L.22, sub-paragraph (1), line 4; delete the words 'if not' and substitute the words 'in the absence of' and delete the words 'is made'. In line 5 of the same paragraph delete the word 'or' and substitute the word 'and'."

65. The text of sub-paragraph (1) should therefore read as follows:

"(1) If a multilateral convention is intended to enter into force as a consequence of signature only, no further action being requisite, a State which offers a reservation at the time of signature may become a party to the convention only in the absence of objection by any State which has previously signed the convention, and, when the convention is open to signature for a limited fixed period, if no objection is made by any State which may become a signatory during that period."

*Sub-paragraph (1) was adopted.*

*Sub-paragraph (2) (sub-paragraph (5) in the "Report")*

66. The CHAIRMAN read out section II.

"Proposed text of paragraph 20, sub-paragraph (2), of the same document:

<sup>10</sup> However the text of paragraph 44 of the "Report" is identical to that of paragraph 9 of document A/CN.4/L.20.

<sup>11</sup> See summary record of the 125th meeting, footnote 6.

“(2) If ratification or acceptance in some other form, after signature, is requisite to bring a multilateral convention into force,

“(a) A reservation made by a State at the time of signature should have no effect unless it is repeated or incorporated by reference in the later ratification or acceptance by that State;

“(b) A State which tenders a ratification or acceptance with a reservation may become a party to the convention only in the absence of objection by any other State which, at the time the tender is made, has signed, or ratified or otherwise accepted the convention, and when the convention is open to signature during a limited fixed period, also, in the absence of objection of any State which signs, ratifies, or otherwise accepts the convention after the tender is made but before the expiration of this period; provided, however, that an objection made by a State which has merely signed the convention should cease to have the effect of excluding the reserving State from becoming a party, if within a period of twelve months from the time of the making of its objection, the objecting State has not ratified or otherwise accepted the convention.”

67. Mr. HUDSON said he had thought over Mr. Yepes' comments and was more and more convinced of their rightness. He felt that Mr. Kerno had been well-inspired in suggesting that the various points in sub-paragraph (2) should be brought out clearly. Mr. Alfaro also had been kind enough to communicate to him some carefully considered suggestions, of which due account was taken in the above provisions.

68. Mr. KERNO (Assistant Secretary-General) said that under a new practice conventions were very often left open to signature during a limited fixed period, specifically stated in each individual case. Not only States that had signed, ratified or otherwise accepted the convention before the reservation was tendered, but, also, States signing before the expiration of the above period, had the right to present an objection. Where a time limit was not stated, it was the time of presenting the reservation that counted. The point had been discussed during the first reading of the text, and the Commission had taken the above position.

*Sub-paragraph (2) was adopted.*

68a. Mr. YEPES pointed out that the formula for sub-paragraph (2) (b) was precisely the same as the Pan-American formula he had advocated. Thus the Commission, after contesting that formula in its report, had ended by adopting it.

69. Mr. EL KHOURY pointed out, in connexion with sub-paragraph (2) (b), that no objection could be lodged at the time when a State formulated its reservation and that it was, therefore, necessary to lay down a time limit, during which it would be possible to object to the reservation, since otherwise the formulating State would become a party immediately. It should be stated that the State did not become a party until the formalities laid down in sub-paragraphs (3) and (4) had been completed.

70. Mr. KERNO (Assistant Secretary-General) said that in practice, if a State came forward and accepted or ratified the convention subject to reservation, the procedure laid down in sub-paragraph (4) was applicable, and the words “in the absence of objection” should be understood to mean in the absence of objection after completion of the formalities mentioned in sub-paragraphs (3) and (4).

71. Mr. HUDSON said that it should be stated that the objection was not reasonable if submitted after the expiration of the time limit laid down in sub-paragraph (4).

72. The CHAIRMAN pointed out that there could be no objection to the reservation at the time of its tender.

73. Mr. CORDOVA explained that the State entitled to submit an objection was informed by the Secretary-General of the tender of the reservation and given a time-limit within which to make known its attitude. Sub-paragraph (4) stated a general rule.

74. Mr. EL KHOURY suggested the addition to sub-paragraph (2) (b) of the phrase “without prejudice to the formalities mentioned in sub-paragraph (4) below”.

75. Mr. ALFARO had to admit that he had had great difficulty in understanding sub-paragraph (2) (b). He was under the impression that the opening sentence of sub-paragraph (2) served as an introduction to sub-paragraphs (2) (a) and (b), but (2) (b) envisaged two different situations: the first being that of the absence of objection by a State which, at the time of the tender of the reservation had signed, ratified or otherwise accepted the convention, and the second, that where the convention was open for signature during a limited fixed period.

76. Mr. KERNO (Assistant Secretary-General) gave a concrete example of the latter situations, a convention open for signature from 1 January to 31 December 1951. A State came forward on 1 July and ratified it subject to a reservation; that reservation might be the subject of an objection, not only on the part of all States that had accepted the convention before 1 July, but also of those signing, ratifying or otherwise accepting it between 1 July and 31 December.

77. Mr. ALFARO observed that sub-paragraph (2) (b) introduced a different rule, that of limitation. An objection by a State which had merely signed the convention would be excluded, if the State did not ratify it before the expiry of the time limit. In his opinion sub-paragraph (2) (b) should be re-numbered (3) as it referred to the whole of the situation described in sub-paragraph (2).

78. Mr. HUDSON explained that the sub-paragraph (2) (b) had no reference to sub-paragraph (1). It had therefore been drafted in its existing form in order to make it clear that it referred to sub-paragraph (2). He said that the period of twelve months ran as from the tender of the reservation.

79. Mr. SANDSTRÖM proposed that, to meet Mr. el Khoury's objection, sub-paragraphs (3), (4) and (5), which consisted of rules of procedure, should be placed at the beginning, and that sub-paragraphs (1) and (2), which comprised the basic rules, should follow them, since they pre-supposed the completion of the procedure described in sub-paragraphs (3), (4) and (5).

80. Mr. HUDSON thought that was a very good solution.

*It was decided to place sub-paragraphs (3), (4) and (5) in front of sub-paragraphs (1) and (2).*

*New sub-paragraph (3)*

81. The CHAIRMAN read out section III of the text :

“ Insert after sub-paragraph (2) a new sub-paragraph (3) with the following text :

“ 3. If a multilateral convention is not open to signature but is open only to accession, a State which tenders an accession with a reservation may become a party to the convention only in the absence of objection by a State which, at the time the tender is made, has acceded to the convention.”

82. He said that he had proposed the above text in order to satisfy Mr. Liang, who had pointed out that the case of conventions that did not require signature, and to which States became parties by accession, had not been provided for.

83. Mr. HUDSON quoted, as examples, the Geneva General Act of 26 September 1928 and the Convention on the Privileges and Immunities of the United Nations.

84. Mr. KERNO (Assistant Secretary-General) pointed out that paragraph 20, sub-paragraph (2), commencing with the words: “ If ratification or acceptance in some other form, after signature, is requisite to bring a multilateral convention into force . . . ” did not cover such cases as the Geneva General Act.

85. Mr. SCELLE said that the text meant that any State which was the first to accede to a convention could make any sort of reservation and thereby prevent the accession of any other State.

86. Mr. YEPES considered that such a State could veto the accession of all other States.

87. Mr. SCELLE observed that he was not concerned so much about the veto, as by the fact that, in the case of a convention prepared by the United Nations General Assembly, one of the Member States might tender a reservation on the morrow of the convention's acceptance, which would have the effect of wrecking it completely. Such a solution was unacceptable.

88. Mr. KERNO (Assistant Secretary-General) said that it was quite true that the first State could formulate a reservation without any other party being able to object to it. He admitted that the system was not perfect but feared that if too much attention were paid to very exceptional theoretical cases, it would be impossible to achieve anything. He did not think that it would do any harm if Section III were omitted. The loop-hole would only be small. Actually, the great majority of cases would be covered by the paragraphs already adopted.

89. Mr. LIANG (Secretary to the Commission) recalled that the most recent case was that of the Convention on the Privileges and Immunities of the United Nations. Section III merely recorded existing practice.

90. Mr. SCELLE would prefer to discard the article and leave practice to develop as it wished.

*It was decided, by 7 votes to 2 with 3 abstentions, to include section III.*

91. Mr. SCELLE pointed out that the decision taken in regard to Section III ran completely counter to the International Labour Organisation's practice; for him that was an incredibly retrograde step. He, himself, would, in the case in question, have prohibited all reservations instead of giving them free rein. In the case of a law passed by an assembly, it would be out of all reason for it to be possible for one of those who had voted for it to be in a position to take immediate steps to wreck it. In his opinion, the decision arrived at was entirely unacceptable.

*New paragraph 18 (a) proposed by Mr. Hudson.*

92. Mr. HUDSON proposed the insertion after paragraph 18 and before the conclusions (A/CN.4/L.22) of a paragraph 18 (a) worded :

“ 18 (a). The case is relatively rare in which a multipartite convention is not open to signature, but is open only to accession or acceptance, in some other form, as, for example, the Convention on Privileges and Immunities of 1946. The Commission has therefore refrained from any special mention of such possible cases.”

There would then be a passage in the report preceding the conclusions and explaining section III.

93. Mr. KERNO (Assistant Secretary-General) wondered whether Mr. Hudson's text was really necessary.

94. Mr. AMADO said that, while it had, up till then, been relatively rare for a multilateral convention not to be open to signature, cases might become more frequent. He did not see why Mr. Hudson was pressing for the inclusion of those words.

95. Mr. LIANG (Secretary to the Commission) thought that if the text proposed by Mr. Hudson provided for acceptance, it was not enough to mention only the 1946 Convention, which provided for accession. There were conventions which provided for acceptance; in fact, they were fairly numerous.

96. Mr. HUDSON was prepared to delete the word “ acceptance ”; he added that he had been studying the subject for thirty years and was aware that the case was exceptional. It was, in his opinion, advisable to adopt the text in order to provide in the body of the report an explanation of the Section III which the Commission had just adopted.

*There being 4 votes for and 4 against, Mr. Hudson's proposal was not adopted.*

*Sub-paragraph (6) (resumed from the 126th meeting)*

97. The CHAIRMAN asked the Commission where it thought sub-paragraph (6) should appear. Mr. Liang had expressed the opinion that it was out of place where it stood.<sup>12</sup> It might be turned into a paragraph 21, or put somewhere else in the report.

98. Mr. SANDSTRÖM proposed that, as it had been decided that sub-paragraph (3) was to become sub-paragraph (1), sub-paragraph (4) sub-paragraph (2),

<sup>12</sup> Summary record of the 126th meeting, paras. 124-126.

sub-paragraph (5) sub-paragraph (3), sub-paragraph (1) sub-paragraph (4), and sub-paragraph (2) sub-paragraph (5), sub-paragraph (6) should remain where it was.

99. Mr. KERNO (Assistant Secretary-General) recalled that the Commission had adopted Section III of the proposal submitted by the Chairman and Mr. Hudson, which would therefore become the last sub-paragraph relating to procedure.

100. Mr. HUDSON was unable to agree to Mr. Sandström's proposal, in view of the fact that the introduction to paragraph 20 read: "The Commission suggests that, in the absence of contrary provisions relating to reservations in any multilateral convention, especially one of which the Secretary-General of the United Nations is the repository, the following rules of practice should be applied."

101. That introduction had no reference to sub-paragraph (6), which should therefore have a place of its own. Mr. Liang's remarks at the last meeting had been very much to the point. If it were not desired to keep the sub-paragraph where it was, it might be inserted before the conclusions by way of a commentary. They might say: "The Commission points out that a duly accepted reservation . . ."

102. Mr. LIANG (Secretary to the Commission) agreed with Mr. Hudson.

103. Mr. SANDSTRÖM observed that, in paragraph 20, the Commission recommended certain rules which would be applicable in the absence of contrary provisions. He wished to know whether those rules included the Pan-American system.

104. The CHAIRMAN explained that, under Pan-American practice, contrary provisions were not included in individual agreements, but were provided for in an overriding convention.

105. At Mr. HUDSON's suggestion, *it was decided* to redraft the introduction to paragraph 20 to read:

"The Commission suggests that, in the absence of contrary provisions relating to reservations in any multilateral convention, and of any organizational procedure applicable, the following procedure should be applied, especially in a convention of which the Secretary-General of the United Nations is the repository."

*Paragraph 18 (paragraph 30 of the "Report") (resumed from the 126th meeting)*

106. Mr. YEPES wished the time-limit laid down in paragraph 18 to be increased from twelve to eighteen months. In view of its constitutional and administrative structure, twelve months was not sufficient for a country such as his own. He proposed that the decision which the Commission had taken at its last meeting be reviewed.<sup>13</sup>

107. The CHAIRMAN recalled that under the rules of procedure a decision to re-open a discussion required a two-thirds majority.

108. Mr. CORDOVA was against re-opening the discussion but considered that it was not fair to apply the provision for a two-thirds majority as the Commission had often re-opened questions without a two-thirds majority decision.

109. Mr. YEPES observed that it was the first time that the rules of procedure had been invoked against a member of the Commission. He would not, however, press for avote.

*Paragraph 19 (paragraph 33 of the "Report") (resumed from the 126th meeting)*

110. Mr. YEPES felt it his duty to point out that, in his opinion, paragraph 19 contradicted what was said elsewhere in the report and might be interpreted in a way the Commission had not intended. An ingenious commentator might maintain that the paragraph encouraged the tender of reservations. He had previously proposed the addition of the words "if necessary"<sup>14</sup> alternatively the phrase might be worded: "relating to admissibility or inadmissibility, and effect of reservations".

111. In view of Mr. Yepes' wish to avoid anything that might encourage the formulation of reservations, Mr. HUDSON asked for the question to be reconsidered. Contrary to the course he had adopted on the day before, he would vote for the insertion of the word "inadmissibility".

112. Mr. CORDOVA had been in favour of the insertion of that word but had been convinced by the argument put forward by Mr. Hudson the day before, that consideration of admissibility involved consideration of inadmissibility.

113. Mr. AMADO was of the opinion that the reader might experience the same doubts as Mr. Yepes and gain the impression that the text was an invitation to formulate reservations. Mr. Yepes' hypothesis was not purely imaginary. He had voted against the latter's proposal, but was now disposed to reverse his vote.

114. Mr. SANDSTRÖM would also vote in favour of the proposal.

115. Mr. YEPES was pleased to note that four of his colleagues agreed with him in considering that paragraph 19 lent itself to an undesirable interpretation.

116. After an exchange of views between Mr. KERNO (Assistant Secretary-General), Mr. HUDSON, Mr. YEPES and the CHAIRMAN, *it was decided to adopt the wording: "the suitability of inserting therein provisions relating to the admissibility or inadmissibility of reservations and the effect to be given to them"*.

117. The CHAIRMAN ruled the discussion on chapter II of the draft Report (Reservations to Multilateral Conventions) closed.

118. Mr. YEPES announced that he would submit his reservation in regard to that chapter of the report at the next meeting.

The meeting rose at 1.15 p.m.

<sup>13</sup> Summary record of the 126th meeting, para. 101.

<sup>14</sup> Summary record of the 126th meeting, paras. 104-105.

## 128th MEETING

Thursday, 19 July 1951, at 9.45 a.m.

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*Chairman:* Mr. James L. BRIERLY

*Rapporteur:* Mr. Roberto CORDOVA

*Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, 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.

**Examination of the draft report of the Commission covering its third session (*continued*)**

CHAPTER II. RESERVATIONS TO MULTILATERAL CONVENTIONS (A/CN.4/L.22)<sup>1</sup>

*Footnote submitted by Mr. Yepes (footnote 15 of chapter II of the "Report")*

1. Mr. YEPES wished to assure the Commission before reading the text of the note which he wished to have inserted in the report, that his attitude on the question of reservations was completely sincere. He was absolutely convinced that the Commission had made a mistake. He had already explained his reasons, but he wished them to be inserted in the report — on his sole responsibility, of course — as had been done at the first session in the case of Mr. Hudson and Mr. Koretsky.

2. Mr. HUDSON pointed out that, in the case of a report by the Commission, anything it contained must be approved by the latter. He did not consider that a member of the Commission could state that any passage of the report was presented on his sole responsibility.

3. Mr. YEPES said that he had before him the report of the Commission covering its first session (A/925), in Part II (Draft Declaration on Rights and Duties of States) of which there was a footnote (3), which had been inserted at the request of Mr. Koretsky and which occupied a whole column.

4. Mr. HUDSON said that, if he remembered rightly, the Commission had given special permission on that

occasion. The Commission had decided that the footnote should be inserted in the report.<sup>2</sup>

5. The CHAIRMAN said that the Commission should hear Mr. Yepes' text before taking a decision.

6. Mr. YEPES proposed the addition of the following text as a footnote to paragraph 9 (paragraph 22) of the report:

"Mr. J. M. Yepes declared that he deeply regretted having to vote against this paragraph for the following reasons, which he had explained at length during the Commission's discussions:

"(1) If the so-called Pan-American system of making reservations could be successfully applied to a complex of States closely linked together and in intimate relations such as the Organization of American States, it could *a fortiori* be applied to a much vaster organization more loosely linked together such as the United Nations, whose universal character makes it less exacting in this respect than a purely regional organization such as the Organization of American States.

"(2) As the Pan-American system was, in his opinion, used in practice by the majority of the members of the United Nations, it could be regarded as the existing law in the matter and, for that reason, should have been adopted by the Commission.

"(3) As he had maintained during the Commission's discussions (see Summary Records Nos. . . .), the system proposed in the report — which was applied by the United Nations and had formerly been applied by the League of Nations — implied, in his view, the introduction of the veto in a sphere where it would be inadmissible, namely, the General Assembly.

"(4) The system recommended by the Commission might give rise to flagrant injustices, in the event, for example, of reservations tendered by a State to a multilateral Convention being accepted by the great majority or even by all of the signatory States except one, and that one would still not be obliged to give the reasons for its refusal. In that event, the State tendering a reservation, even a reservation concerning only a minor point, would be arbitrarily excluded from the benefits of the Convention although its reservation had been accepted by almost all the States parties to the Convention. In view of such abnormal situations Mr. Yepes concluded that the system recommended by the Commission was tantamount to the acceptance of the veto in that field. While agreeing that his reasoning might be wrong, he was sincerely convinced that he had done no more than his duty in drawing the attention of the Commission to that danger.

"(5) In a spirit of complete solidarity with the Commission, Mr. Yepes had endeavoured to offer constructive criticism of the Commission's proposal and to that end had proposed several amendments of substance on the lines indicated above. But since the majority of the Commission had opposed those amendments he was very regretfully obliged to vote

<sup>2</sup> See summary record of the 36th meeting, paras. 14–20; see also summary record of the 37th meeting, paras. 42–59.

<sup>1</sup> See summary record of the 125th meeting, footnote 6.

against one part of the report of the Commission whilst declaring his support for the remainder."

7. He requested that the above statement be included in the report as an explanation of his attitude, which he wished to bring to the notice of the General Assembly.

8. Mr. HUDSON did not consider that the report of the Commission was a suitable vehicle for an attack on a decision by the Commission. It would be preferable to state that Mr. Yepes had voted against the decision in question because he regarded the Pan-American system as more suitable.

9. Mr. CORDOVA thought that the Commission, while deploring Mr. Yepes' insistence on the insertion in the report of something in the nature of a case against its decision concerning reservations to multilateral conventions, could not deny him the right to have it inserted. He must be granted the same privilege as Mr. Koretsky.

10. Mr. YEPES, in support of his case for the insertion of the footnote, quoted the following passage from the footnote by Mr. Koretsky:

"Mr. Koretsky declared that he voted against the draft Declaration because of its many shortcomings including, in particular: . . . (3) that it did not set out the most important duty of States to take measures for the maintenance of international peace and security, the prohibition of atomic weapons, and the general reduction of armaments and armed forces, and that, further, the draft Declaration did not proclaim the duty of States to abstain from participation in any aggressive blocs such as the North Atlantic Pact and the Western Union, which under the cloak of false phrases concerning peace and self-defence were actually aimed at preparing new wars; (4) that the draft Declaration ignored the most important duty of States to take measures for the eradication of the vestiges of fascism and against the danger of its recrudescence; . . ." <sup>3</sup> (Part II).

11. Mr. SPIROPOULOS considered that every member of the Commission was entitled to criticize its findings, but that it would be wise to ensure that any texts so added were not too long. An exception had been made in favour of Mr. Koretsky. At the time he himself had regarded Mr. Koretsky as representing a separate legal system and therefore to be accorded exceptional treatment.

12. But if permission were granted, it should be granted to everyone. He himself would be glad to have the same right in connexion with the definition of aggression. Minority opinions might be included in the report, as was done by the International Court of Justice.

13. Mr. CORDOVA suggested that, as in the case of Mr. Koretsky, the text before the Commission should be discussed and abridged.

14. Mr. FRANÇOIS thought that the Commission had established a disastrous precedent in permitting Mr. Koretsky to have such a long reservation inserted in the report, since its effect was to upset the whole economy

of the report. When one member was permitted to explain his point of view and his arguments the latter must be refuted in the report, otherwise a quite false impression was created of the views of the members of the Commission. He was regretfully obliged to displease Mr. Yepes by stating that, although the Commission had agreed to insert Mr. Koretsky's very full statement in the report covering its first session, it should reverse that decision and should permit only a note to the effect that a member did not approve a particular passage in the report for the reasons explained in the summary records of the Commission's proceedings.

15. Mr. AMADO said that he felt obliged to intervene, with his customary frankness, in order to state that he did not agree that Mr. Yepes was entitled to put forward the proposal which he had just submitted to the Commission. Leaving aside his political feelings and general sympathies towards his friends, he would point out that Mr. Yepes might have noted the patience with which he had listened to his long statement on the Pan-American system, which was intended to place in an unfavourable light those other members of the Commission who had been fortunate enough to be born in America.

16. But in order to preserve the Commission's high sense of the importance of its work everything that was of no practical utility in that work must be discarded. He would vote against Mr. Yepes' request and ask the Commission to have the courage to do likewise. He hoped that, as Mr. François had proposed, members of the Commission would merely be permitted to mention in the report that they had voted against a particular passage.

17. Mr. SCALLE fully understood the desire of a member of the Commission to wash his hands of all professional or even political responsibility, if he regarded a vote by the Commission as conflicting with his personal convictions. But a statement which took the form of a minority report should not be included in the Commission's report; otherwise ten or more of them would have to be inserted. The report would then contain notes filling whole pages, like the one by Mr. Koretsky. At the same session as Mr. Koretsky, Mr. Hudson had certainly stated that he did not share the opinion of the Commission; but he had done so in a few lines. It was a question of measure.

18. The CHAIRMAN said that there was no question of any right belonging to members, since, in permitting the insertion of such notes in its first report, the Commission had adopted a special decision.

19. Mr. ALFARO said that, if memory served, he had voted against acceptance of the note by Mr. Koretsky, because it was purely and simply an attack by the Soviet system on the democratic ideas shared by all members of the Commission, save Mr. Koretsky. He had stated that, if Mr. Koretsky were granted the right to say why he had voted against the draft Declaration on the Rights and Duties of States, then every member who had voted for it should be entitled to say why he had voted for it. The underlying idea of those notes was doubtless to emphasize that a member had voted for or against a proposal for some general reason; but the insertion of

<sup>3</sup> See "Report of the International Law Commission covering its first session", part II, in the *Yearbook of the International Law Commission*, 1949.

a statement as long as Mr. Yepes' would entitle members holding different views on certain points to explain their views. He thought that Mr. Yepes had the right to say why he had voted against that passage in the report and that, if the Pan-American system was applicable in America, it was *a fortiori* applicable as a universal system.

20. It must be pointed out that Mr. Yepes' statement contained expressions which might place other members of the Commission who came from Latin America in an unfavourable light. He thought that, by way of compromise, Mr. Yepes might be requested to agree with the General Rapporteur and the Secretariat on an abridged version of his statement which would still state his substantive reasons for voting against paragraph 9 of the report.

21. The CHAIRMAN thought that Mr. Alfaro had very well expressed the Commission's feelings on the matter. He hoped that Mr. Yepes would accept the proposed solution.

22. Mr. YEPES said that he had no desire to disturb the Commission's deliberations. Although he considered that he had been treated rather unfairly, he would not complain. He accepted Mr. Alfaro's suggestion, since he did not wish to displease his friends from Latin America.

23. The CHAIRMAN expressed the Commission's thanks to Mr. Yepes for his conciliatory attitude.

24. Mr. CORDOVA said that he was quite willing to join with the Chairman and Mr. Yepes in exploring the possibility of summarizing the text submitted by the latter.

25. Mr. YEPES said that he left it entirely to Mr. Córdova to summarize the text while at the same time preserving its substance.

26. Mr. EL KHOURY thought that the Commission had at no time decided that any member was at liberty to submit whatever statement he cared and to have it inserted in the report on his own responsibility. There was but one precedent — a precedent which, he feared, would become a rule if the Commission continued to follow it. Had he been present in 1949 he would have voted against the insertion of Mr. Koretsky's note.

27. It was not customary to include in the report of an organ of the General Assembly the views expressed on that organ by one of its members. In his view, the International Law Commission, as an organ of the General Assembly, should conform to that rule.

28. While he saw no objection to a friendly agreement between Mr. Yepes and Mr. Córdova, he trusted that it would not be regarded as establishing a compulsory rule for the future.

29. The CHAIRMAN insisted that there could be no question of members of the Commission having any such right. A request was submitted to the Commission and the latter decided whether to grant it or not.

30. Mr. YEPES agreed with Mr. el Khoury's proposal where the report was a true reflection of the Commission's proceedings, in which case it would not be necessary to request the insertion of notes. The same did not apply to a report which stated the case of the majority and did

not mention the opposing arguments. For example, his own argument that the system adopted by the Commission implied the right of veto was not even mentioned in the report.

31. Mr. FRANÇOIS completely disagreed with Mr. Yepes' conception of a report. No member was entitled to demand that all his arguments should be reproduced in the report; otherwise the report could not be submitted in readable form. All the arguments were to be found in the summary record. He was completely opposed to Mr. Yepes' proposal, and he regretted that the Commission by including in the report a summary of Mr. Yepes' observations was continuing on the unfortunate course chosen in 1949.

32. He hoped the Commission would decide that, from that day on, it would no longer accept detailed explanations, but merely a statement to the effect that, for the reasons given in the summary records, one member was opposed to the adoption of a particular passage in the report. He would vote against the insertion of the text submitted by Mr. Yepes.

33. Mr. AMADO said that he also would oppose the inclusion of the summary of Mr. Yepes' text.

34. Mr. SPIROPOULOS considered that, irrespective of its decision concerning the text whose inclusion in the report was requested by Mr. Yepes, the Commission must adopt a general decision applicable to all members. Precedents existed and the Commission must state whether they were bad precedents or not. The Commission should not have to decide on each separate occasion whether one of its members had the right or not.

35. Mr. François' view was also admissible. All the explanations given by a member of the Commission were contained in the summary records, so that the note need only state that the member had voted for or against the report and that the reasons for his vote were to be found on a certain page of a certain summary record.

36. Mr. SCELLE fully supported the proposals submitted by Mr. François and Mr. Spiropoulos.

37. The CHAIRMAN pointed out that four members of the Commission had spoken in favour of the adoption of the rule proposed by Mr. François.

38. Mr. HUDSON favoured the adoption of Mr. Alfaro's solution in the case of Mr. Yepes, but was opposed to deciding the question for all time. He, personally, would vote against that part of the report and would state in two lines why he had done so.

39. Mr. CORDOVA asked what was to prevent the Commission adopting Mr. Alfaro's proposal and then deciding the question for the future.

40. Mr. HUDSON thought that no decision should be taken on the question, in view of the friendly atmosphere in which the Commission worked. Mr. Yepes certainly understood that he must abridge his statement.

41. Mr. FRANÇOIS, supported by Mr. SCELLE, considered that a strict rule was necessary. Mr. Hudson said two lines, but another member would say that he required four. The report of the Commission covering its 1950 session contained notes running to ten and

fifteen lines. A rule was required and the only acceptable rule was the one which he had proposed.

42. Mr. EL KHOURY also considered that the solution should not be dependent upon the number of lines in the text the insertion of which was requested.

43. Mr. KERNO (Assistant Secretary-General) said that he was trying to take a completely objective view of the problem. So far as concerned the precedent established by Mr. Koretsky's note, he thought that the Commission had not recognized the right of any member to insert a note in the report; on the contrary, it had stated that a note could only be inserted in the report with its permission. In other words, it had implied that the Commission was entitled to refuse permission. A vote had been taken, the result of which had been 7 votes for granting permission and 3 against.

44. The Commission might perhaps adopt the solution suggested by Mr. François and decide that, if a member voted against a passage of the report, a note, and always the same note, would be added, as follows:

“Mr. X voted against this passage in the report for the reasons given in the summary record of the . . . th meeting, page . . .”

The reasons could be explained at length in the summary record. If one member of the Commission was allowed to have his arguments included in the report, the rest had the same right; otherwise, there would be a lack of balance.

45. Mr. SCELLE noted that the proposal submitted by Mr. Kerno was merely an amplification of that submitted by Mr. François.

46. The CHAIRMAN recalled that Mr. François had proposed the adoption by the Commission of a rule that a member could express his dissent and refer the reader to the summary record of the proceedings for an account of his reasons.

47. Mr. YEPES emphasized that Mr. François' proposal concerned a rule for the future.

48. Mr. ALFARO thought that it could not be otherwise. The Commission had so far followed precedent. At its last session Mr. Hudson, Mr. Scelle and he himself had stated their reasons for opposing paragraph 96 of the report concerning the formulation of the Nürnberg Principles. Given that precedent, Mr. Yepes could not be denied the right to insert a brief statement prepared in consultation with the other members of the Commission.

49. The principle applied in 1949 had been that an explanation could only be included in the report with the Commission's consent. What was now required was the formulation of a more precise rule stating just what latitude was allowed. If the proposal which he had made with regard to Mr. Yepes' statement were accepted, he would support the proposal submitted by Mr. François.

50. Mr. CORDOVA pointed out that the rule would only apply beginning with the following session.

51. Mr. SPIROPOULOS said that if the Commission decided that the rule was not to take effect immediately, he would oppose Mr. François' proposal. In his view, the privilege was being abused.

52. Mr. FRANÇOIS did not consider that there was any established right to have reservations inserted in the report concerning the present session. If the general rule which he proposed was accepted no member would have any ground for complaint.

53. Mr. CORDOVA thought that it would be unfair to lay down a rule for Mr. Yepes only. In the previous year there had been three dissentients, namely, Mr. Alfaro, Mr. Hudson and Mr. Scelle, whose arguments appeared in the report. Footnote 3 to part III of the report stated that Mr. Scelle had said that “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 . . .”<sup>4</sup>

54. Mr. Yepes and Mr. Hudson should therefore be permitted to follow the same procedure if they wished to establish a rule for the future. But the Commission agreed that the experiment of earlier years had proved dangerous and it was about to decide that the addition of such notes to the report would not be permitted in future.

55. Mr. SCELLE thought that the rule proposed by Mr. François was undoubtedly the best for the future. From a strictly legal point of view Mr. François was justified in stating that there was no reason for not applying it to the present case. However, he thought that in all fairness Mr. Yepes was entitled that year, on the basis of several precedents, to request the insertion of his remarks in a very brief form. Mr. Alfaro, Mr. Córdova and the Chairman would summarize Mr. Yepes' explanation in four or five lines so as to reduce it to the same length as earlier notes, with the exception of Mr. Koretsky's.

56. Mr. FRANÇOIS supported Mr. Scelle's proposal.

*It was decided, by 7 votes to 5, to adopt for future sessions the proposal by Mr. François.*

57. The CHAIRMAN said that the note submitted by Mr. Yepes would be discussed by Mr. Alfaro, Mr. Córdova, Mr. Kerno and himself.<sup>5</sup>

*Paragraph 20 (paragraph 34 of the “ Report ”)*

*New sub-paragraph (3)*

58. Mr. KERNO (Assistant Secretary-General) drew attention to the decision by the Commission at its previous meeting to add to its conclusions a new sub-paragraph (3), as follows:<sup>6</sup>

“(3). If a multilateral convention is not open to signature but is open only to accession, a State which tenders an accession with a reservation may become a party to the convention only in the absence of objection by any State which, at the time the tender is made, has acceded to the convention.”

He pointed out that Mr. Hudson had proposed that such a case be mentioned in the report itself.

<sup>4</sup> See “ Report of the International Law Commission covering its second session ”, part III, in vol. II of the *Yearbook of the International Law Commission 1950*.

<sup>5</sup> See summary record of the 129th meeting, para. 9.

<sup>6</sup> Summary record of the 127th meeting, paras. 81-91.

59. Like Mr. Hudson and certain other members of the Commission, he had given much thought to the question and, also like them, had begun to wonder whether the best solution would not be to insert in the report the following text, prepared by Mr. Hudson:

“In some instances conventions are open to accession and are not open to signature, for example the Convention on the Privileges and Immunities of the United Nations of 1946. Such conventions, which are exceptional, present special problems with respect to reservations. However, as their number is somewhat limited, the Commission does not consider it necessary to formulate a practice to be applied to them.”

60. He proposed the deletion of the sub-paragraph (3) adopted on the preceding day, since paragraph 16 of document A/CN.4/L.22 (paragraph 28 of the “Report”) contained the following statement:

“The Commission believes that multilateral conventions are so diversified in character and object that, when the negotiating States have omitted to deal in the text of their convention with the admissibility or effect of reservations, no single rule uniformly applied can be wholly satisfactory. Any rule may in some cases lead to arbitrary results, and the Commission feels that its problem is not to recommend a rule which will be perfectly satisfactory, but that which seems to it to be the least unsatisfactory and to be suitable for application in the majority of cases.”

60a. In other words, the Commission did not aim at absolute perfection, so that the conclusions contained in paragraph 20 (paragraph 34 of the “Report”) could be limited to the cases originally envisaged and the somewhat exceptional case of multilateral conventions which were open only to accession could be disregarded.

61. At the previous meeting Mr. Scelle had, with some force, pointed out that the system applied in such a case was not identical with that applied in other cases. If a State were very assiduous and the first to accede, it could impose its will on other States since, whereas it itself did not have to deal with objections from any quarter, by its own reservations it could alter the meaning of the convention.

61a. Furthermore, that was not the only case. There was the case of mixed conventions, which were simultaneously open, on the one hand to signature and ratification, and on the other to accession. Neither sub-paragraph (2) nor sub-paragraph (3) could be applied to them, which meant that the system adopted by the Commission was applicable, not to all cases, but only to the vast majority of cases. For that reason, he wondered whether it would not be wiser to use the formula prepared by Mr. Hudson, which he had read out and which, if adopted by the Commission, would have the effect of eliminating the additional sub-paragraph (3) from the conclusions.

62. Mr. SCELLE fully agreed with Mr. Kerno's proposal. He was well aware of the tremendous work which had had to be done to reach a result which could not be perfect. Perfection could only be attained, indeed, by the elimination of reservations, which could, however, not be expected in the present state of international law.

He thought that, if the potentially dangerous sub-paragraph (3) were deleted, the general solution adopted was satisfactory.

63. The CHAIRMAN was convinced that the text of sub-paragraph (3) should be deleted. It was too dangerous as Mr. Scelle had said.

64. Mr. HUDSON agreed with Mr. Scelle, but on different grounds, that the text should be deleted, provided the other text was inserted in the report. The Commission should indicate that it had studied the question. He proposed that his text be included as a separate sub-paragraph before the conclusions.<sup>7</sup>

*It was so agreed.*

### CHAPTER III. QUESTION OF DEFINING AGGRESSION (A/CN.4/L.25) (resumed from the 127th meeting)

*Paragraph 6 (paragraph 42 of the “Report”) (resumed)<sup>8</sup>*

65. Mr. YEPES asked if he was right in thinking that the Commission had decided at the previous meeting to reproduce textually all the draft definitions submitted to the Commission.

66. Mr. ALFARO and Mr. CORDOVA said that the effect of the decision adopted was to substitute paragraphs 6, 7, 8 and 9 of an earlier report (A/CN.4/L.20) for paragraph 6 of the present draft report (A/CN.4/L.25). In view of that decision, the first of Mr. Yepes' proposals, which was contained in document A/CN.4/L.7, would not appear in the general report.

67. Mr. YEPES said that he would like his two proposals (A/CN.4/L.7 and A/CN.4/L.12) to appear in the general report.

68. Both the CHAIRMAN and Mr. HUDSON pointed out that Mr. Yepes had withdrawn the first of his proposed definitions.

69. Mr. CORDOVA recalled that Mr. Yepes had expressly requested the insertion in the general report of the enumerative draft definition, of which he was the author (A/CN.4/L.7). The Commission had taken no decision on his request, but the Chairman had given his assurance that it would be met.<sup>9</sup> However, it might be assumed that Mr. Yepes' second proposal had replaced the first, which explained why he, as general Rapporteur, had not deemed it necessary to reproduce it. He thought that the only proposal by Mr. Yepes that should appear in the report was the second.

70. Replying to Mr. YEPES' observation that his first proposal had not even been inserted in the summary record, he said that it was not customary to reproduce in the summary records proposals which had been previously communicated in the form of official documents.

*It was decided by 4 votes to 2, not to include Mr. Yepes' first proposal in the general report.*

71. Mr. AMADO announced that he had abstained from voting because he considered that the subject of discussion was not one on which a vote was required.

<sup>7</sup> That text was incorporated in the “Report” as para. 31.

<sup>8</sup> Summary record of the 127th meeting, para. 60.

<sup>9</sup> Summary record of the 94th meeting, para. 5.

72. Mr. ALFARO noted that the vote just taken confirmed the decision previously adopted to substitute paragraphs 6, 7, 8 and 9 of the first report (A/CN.4/L.20) for paragraph 6.

*Paragraph 7 (paragraph 38 of the "Report")*

73. The CHAIRMAN, having read out paragraph 7, said that he failed to understand the meaning of the third sentence, which ran:

"As the draft code then under consideration by the Commission did not include the term aggression, they doubted that the Commission was called upon to draft a definition of aggression."

Since it did not, in his view, state why certain members of the Commission doubted that it was called upon to draft a definition of aggression it should be deleted.

*It was so agreed.*

74. Mr. HUDSON did not agree that "the majority of the Commission, however, held the view that the Commission had been requested by the General Assembly to make an attempt to submit a report on the result of its efforts". The General Assembly resolution did not include such a request. All that should be said was that "the majority of the Commission perhaps held the view that the Commission had been requested by the General Assembly to make an attempt to define aggression".

75. Mr. YEPES, in support of Mr. Hudson's proposal, read out the following paragraph from General Assembly resolution 378 B (V):

"Decides to refer the proposal of the Union of Soviet Socialist Republics and all the records of the First Committee dealing with this question to the International Law Commission, so that the latter may take them into consideration and formulate its conclusions as soon as possible."

76. Mr. EL KHOURY thought that the Commission had been expected to formulate its conclusions and the code simultaneously, not to submit a separate report. It was a long time since he had first drawn attention to that point.<sup>10</sup>

77. The CHAIRMAN recalled that at the previous meeting,<sup>11</sup> as a result of an observation by Mr. Hsu,<sup>12</sup> the Commission had decided to add a similar sentence at the end of paragraph 4 (paragraph 39 of the "Report"), as follows:

"The majority of the members of the Commission expressed a contrary opinion, and it was decided that the Commission should try to find a definition of aggression."

78. Mr. HUDSON pointed out that paragraph 7 was an interpretation of the General Assembly resolution and that paragraph 4 was a summary of the report by Mr. Spiropoulos.

79. The CHAIRMAN replied that paragraph 7 should contain some reference to the point, but not in the same terms.

80. Mr. SPIROPOULOS thought that a paragraph 4 (a) should be added, since the new sentence was not in harmony with the paragraph as a whole.

81. Mr. SANDSTRÖM thought that it was a mistake to add the sentence to paragraph 4 and proposed its deletion.

82. The CHAIRMAN pointed out that the difficulty could perhaps be solved by inserting paragraph 7 immediately after paragraph 4.

83. Mr. ALFARO objected that paragraphs 4, 5 and 6<sup>13</sup> contained a detailed statement on the question before the Commission. If paragraph 7 were placed before paragraph 5, the link between paragraphs 4 and 5 would be broken. He proposed that the sentence be left where it was in paragraph 7 and that another statement in different terms be included in paragraph 4, for example, that although the Rapporteur had stated that there was no reason for defining aggression, the Commission had thought otherwise.

84. The CHAIRMAN said that the majority of the Commission had, in fact, thought otherwise and that it had been decided to try to find a definition.

85. Mr. SPIROPOULOS proposed a statement to the effect that the majority had disagreed with the views of Mr. Spiropoulos and had decided to proceed with the task.

86. Mr. HSU, agreeing with Mr. Spiropoulos' suggestion, said that some reference should be included at that point. The passage in paragraph 7 referred to a different situation. The General Assembly had requested a definition of aggression and the Commission had decided to attempt to find one. Paragraph 4 stated that Mr. Spiropoulos had expressed the view that a definition was not possible. A third sentence would suffice to state that the majority of the Commission had felt unable to accept that view.

87. Mr. KERNO (Assistant Secretary-General) said that, as he understood the situation, the special Rapporteur had considered that a definition of aggression was quite impossible, whereas the majority of the Commission, refusing to accept his findings, had taken the view that aggression could be defined and that the Commission should loyally attempt to draft a definition.

88. Mr. CORDOVA accordingly proposed the addition to paragraph 7 of the following text:

"Furthermore, the majority of the Commission had held the view, contrary to that held by the special Rapporteur and expressed in paragraph 4, that an abstract definition was possible".

89. Mr. SANDSTRÖM having requested some information as to the decision adopted by the Commission on the subject, the CHAIRMAN read out a passage from the summary record<sup>14</sup> clearly indicating that the Commission had decided at an early stage of its work to try to provide an abstract definition.

<sup>10</sup> Summary record of the 93rd meeting, para. 50 *et seq.*

<sup>11</sup> Summary record of the 127th meeting, paras. 41-42.

<sup>12</sup> *Ibid.*, paras. 32-34.

<sup>13</sup> For the text of paras. 5 and 6, see summary record of the 127th meeting, footnotes 5 and 7.

<sup>14</sup> See summary record of the 93rd meeting, paras. 103-106.

90. Mr. HSU observed that the passage from the summary record quoted by the Chairman was related rather to paragraph 7 of the draft report. His own request for an addition to paragraph 4 was due to the fact that the report by Mr. Spiropoulos concluded that it was impossible to define aggression. The majority of the Commission had dissented from that conclusion. A trace of that attitude was to be found in the summary records and also in a memorandum (A/CN.4/L.19) in which Mr. Scelle opposed the special Rapporteur's view.

91. The draft report gave Mr. Spiropoulos' argument in full, but made no mention of the view of the majority. The omission should be repaired in order to restore the balance between the conflicting view points, or else the explanations devoted to the report by Mr. Spiropoulos should be deleted.

92. The Commission must be careful not to discourage those who would be resuming the search for a definition of aggression in the future.

93. The CHAIRMAN, supported by Mr. HUDSON, thought that the question had little practical importance; he asked the Commission to come to a decision as soon as possible.

94. Mr. ALFARO, supporting Mr. Hudson's view that the last sentence of paragraph 7 might be deleted, said that, in order to state the facts correctly, that sentence should be replaced by the following text:

"The majority of the Commission, however, held the view that a definition was possible and that the Commission had been requested by the General Assembly to make an attempt to define aggression."

95. If that formula were used, the addition to paragraph 4, which the Commission had previously decided, could be eliminated.

96. Mr. HSU agreed.

97. Mr. HUDSON proposed that paragraph 7 be inserted before paragraph 4.

98. Mr. ALFARO and Mr. HSU agreed.

*Mr. Hudson's proposal was adopted.*

99. Replying to a remark by Mr. LIANG (Secretary to the Commission) Mr. HUDSON said that it was logical to devote a paragraph at the beginning of the report to an analysis of the instructions received by the Commission from the General Assembly.

*It was so agreed.*

100. Mr. SPIROPOULOS said that he proposed to submit to the general Rapporteur an addition to paragraph 4 in the light of the discussions which had taken place.

*It was so agreed.*

101. On the proposal of Mr. HUDSON, the CHAIRMAN requested the members to state, without comments, what amendments they intended to propose to the draft report. If that rule were followed the Commission could finish its work within the prescribed time-limit.

*Paragraph 8 (paragraph 45 of the "Report")*

102. Mr. SANDSTRÖM pointed out that, since the text of paragraph 7 was to be placed before paragraph 4,

the word "next" at the beginning of paragraph 8 should be deleted.

103. Mr. HUDSON proposed that the drafting changes necessitated by the decisions of the Commission be left to the Secretariat.

*It was so agreed.*

*Paragraph 8 was adopted as amended.*

*Paragraph 9 (paragraph 46 of the "Report")*

104. Mr. HUDSON, proposed that the word "Under-taking" be substituted for the opening words "Having decided to attempt".

*It was so agreed.*

*Paragraph 9 was adopted, as amended.*

*Paragraph 10<sup>15</sup>*

105. Mr. HUDSON proposed the deletion of paragraph 10.

*It was decided by 6 votes to 5 to delete paragraph 10*

*Paragraph 11 (paragraph 47 of the "Report")*

106. Mr. HUDSON proposed the deletion of the words "as to", in the phrase "as to whether indirect aggression" and the substitution of the word "connexion" for the word "respect", in the last sentence.

*It was so agreed.*

*Paragraph 11 was adopted as amended.*

*Paragraph 12 (paragraph 48 of the "Report")*

107. On the proposal of Mr. HUDSON, *it was decided to delete the phrase "for instance, by Hitlerite Germany" after the words "for aggressive purposes."*<sup>16</sup>

*Paragraph 12 was adopted as amended.*<sup>17</sup>

*Paragraph 13 (paragraph 49 of the "Report")<sup>18</sup>*

*Paragraph 13 was adopted without comment.*

*Paragraph 14 (paragraph 50 of the "Report")*

108. Mr. HSU proposed the deletion of the words "that, in their opinion, it did not comprehend all conceivable acts of aggression and . . ." and consequentially of the words "on the other hand" after the words "that it might".

109. Mr. KERNO (Assistant Secretary-General) pointed out that the phrase did in fact refer to an opinion held by

<sup>15</sup> Paragraph 10 read as follows:

"10. In the course of the discussions on the draft definition quoted above, one of the members expressed the view that it might not be possible to formulate a general definition, designed to envisage all possible cases of aggression. He therefore suggested that the Commission should confine itself to stating that the use of force under certain conditions 'is an act of aggression.' This proposal was, however, not accepted by the Commission."

<sup>16</sup> See summary record of the 129th meeting, paras. 30-31.

<sup>17</sup> The last sentence of para. 12 read as follows: "The Commission decided to include the threat of force in the definition." (See also summary record of the 129th meeting, para. 32 for the reference to Mr. Alfaro.)

<sup>18</sup> Paragraph 13 opened with the phrase: "Besides resolving these main points of substance, the Commission . . ."

certain members, and that it was not inserted in the report without reason. However, it might be advisable to delete the phrase "on the other hand".

*It was decided by two consecutive votes and by a large majority to delete only the phrase "on the other hand".*

110. Mr. HSU further proposed the deletion of the last sentence in paragraph 14.

*Mr. Hsu's proposal was rejected by 6 votes to 3.*

*Paragraph 14 was adopted as amended.*

*Paragraph 15 (paragraph 51 of the "Report")*

111. Mr. AMADO, asked that it be stated in the report that the taking of a roll-call vote by the Commission was exceptional.

112. Mr. HUDSON thought that the report should contain a brief reference to the decision adopted by the Commission, without mentioning that there had been a roll-call vote or how the various members had voted.

*The proposal to delete the words "by roll-call" was rejected by 6 votes to 4.*

113. Mr. SPIROPOULOS, following on the proposal by Mr. Amado, proposed the addition of the following words: "the vote being taken by roll-call at the request of one member".

*It was so agreed.*

114. Replying to an observation by Mr. EL KHOURY, Mr. HUDSON proposed the insertion of the phrase "a vote of" after the words "rejected by".

*It was so agreed.*

*It was decided by 6 votes to 4 to retain the statement as to how the members had voted.*

*Paragraph 15 was adopted as amended.*

*Paragraph 16 (paragraph 52 of the "Report")*

115. Mr. HUDSON pointed out that it was not clear whether the proposal rejected by the Commission was a proposal not to abandon its efforts to define aggression or a proposal to make further attempts. He proposed the deletion of the first of those expressions.

116. Mr. ALFARO pressed for the retention of the text as it stood, which exactly expressed his idea. He had requested the Commission to examine all the texts which had been submitted to it.

117. Mr. HUDSON withdrew his proposal.

*Paragraph 17 (paragraph 53 of the "Report") 19*

118. Mr. HUDSON proposed the deletion of the phrase "as a result of these discussions", before the words "the Commission decided to include...".

119. Mr. ALFARO, supported by Mr. HUDSON, requested the insertion of the amended text of Mr. Scelle's proposal in the body of paragraph 17.

*It was so agreed.*

120. Mr. HUDSON said that, although the text finally adopted by the Commission had been drafted by him, he did not wish his name to be mentioned in the report.

121. Mr. EL KHOURY said that, although the first to propose the inclusion of the definition of aggression in the draft code of offences against the peace and security of mankind, he would not insist that the report refer to his contribution to the work of the Commission.

122. After some discussion during which Mr. ALFARO, supported by Mr. SCELLE, urged that Mr. Hudson's name should be mentioned in that part of the report, while Mr. HUDSON said that he did not wish his name linked with the decision finally adopted on the matter by the Commission, Mr. SPIROPOULOS requested a vote on the question whether the names of Mr. Hudson and Mr. el Khoury should be specially mentioned in the report.

*The proposal to make specific mention of names was rejected by 6 votes to 2.*

123. As a result of an observation by Mr. ALFARO, Mr. HUDSON suggested an amendment to the end of the first sub-paragraph in paragraph 17, in the form of the insertion after the words "security of mankind and", of the words "proposals by other members were introduced to a similar effect."

*Mr. Hudson's amendment was adopted by 9 votes to none.*

124. As a result of an observation by the CHAIRMAN, it was decided to delete the words "To that effect" and to insert the word "therefore" before "inserted" at the beginning of the second sub-paragraph.

125. Mr. HUDSON observed that the last sub-paragraph of paragraph 17, which was a commentary on the draft code, was out of place. He proposed its deletion.

126. Mr. SCELLE, supported by Mr. CORDOVA, supported Mr. Hudson's proposal, provided a similar commentary was inserted in the draft code of offences against the peace and security of mankind.<sup>20</sup>

*It was decided with that proviso to delete the last sub-paragraph of paragraph 17.*

result of these discussions, the Commission decided to include among the offences defined in the draft code any act of aggression and any threat of aggression.

"To that effect the following paragraphs were inserted in Article 2 of the draft code:"

"... [Text of Article 2 of the draft code]

"..."

"According to these paragraphs any act of aggression or threat of aggression is an offence under the draft code. The employment of armed force in the circumstances defined in paragraph 1 is expressly characterized as an act of aggression but the possibility is left open that aggression can also be committed by other acts, including some of those defined in other paragraphs of Article 2."

<sup>20</sup> See chapter IV of the "Report", sub-paragraph 3 of the commentary on article 2, paragraph 1.

<sup>19</sup> Paragraph 17 read as follows:

"17. The matter was later reconsidered at the request of Mr. G. Scelle who in a memorandum (A/CN.4/L.19, with Corr.1) submitted a general definition of aggression and proposed that aggression should be explicitly declared to be an offence against the peace and security of mankind. Mr. Scelle's proposal was discussed in connexion with the preparation of the draft code of offences against the peace and security of mankind and, as a

*Observations on chapter III of the report as a whole*

127. Mr. HUDSON announced his intention of expressing his personal attitude in a footnote which, with the consent of the Commission, would be included in the report in the following form:

“Mr. Hudson voted against this chapter of the report on the ground that, in resolution 378 B (V), the General Assembly did not request the Commission to formulate a definition of aggression”.

*The above footnote was approved.*

128. Mr. SANDSTRÖM observed that Mr. Hudson might tender his reservation on paragraph 7.

129. Mr. SPIROPOULOS doubted whether members of the Commission were entitled to vote on a part of the report in which no concrete proposal was formulated.

130. In addition, he reserved the right to communicate at a later stage the text of a note with a request for its insertion in Chapter III.<sup>21</sup>

131. Mr. AMADO requested the insertion in the summary record of the following statement:

“Mr. AMADO explained that he did not think a definition of aggression possible, but thought that it should be attempted. It was in that spirit that he had submitted his memorandum (A/CN.4/L.6) and that he had spoken during the discussion of the report.”

132. Mr. HSU requested the insertion of the following reservation in the summary record:

“Mr. HSU voted against the draft definition which he considered inadequate since, in his view, it had no practical value. He had also objected to the form of the draft definition, which he considered confused and verbose.”

133. Mr. EL KHOURY pointed out that he would not vote for Chapter III of the report.

The meeting rose at 1.10 p.m.

## 129th MEETING

Friday, 20 July 1951, at 9.45 a.m.

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*Chairman:* Mr. James L. BRIERLY

*Rapporteur:* Mr. Roberto CORDOVA

*Present:*

*Members:* Mr. Ricardo J. ALFARO, Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCALLE, 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.

### Examination of the draft report of the Commission covering its third session (*continued*)

#### CHAPTER I: INTRODUCTION (A/CN.4/L.24)<sup>1</sup>

*Paragraphs 1–6 inclusive (paragraphs 1–6 of the “Report”)*

*Paragraphs 1–6 were adopted without comment.*

*Paragraph 7 (paragraph 7 of the “Report”)*

1. After an exchange of views with Mr. CORDOVA, Mr. SCALLE and Mr. LIANG, Mr. HUDSON proposed that the second sentence of the paragraph, “This is one of the topics of international law selected by the Commission for codification” be deleted, and that the last sentence of the paragraph read as follows: “This report is held over for consideration by the Commission at its next session”, instead of “Owing to the lack of time, however, the Commission had not been able to discuss this report which was therefore held over for consideration by the Commission at its next session.”

*It was so decided.*

*Paragraph 7 was adopted as thus amended.*

*Paragraph 8 (paragraph 8 of the “Report”)*

2. After a discussion as to the heading of paragraph 8, it was decided to leave it as it stood.

*Paragraph 8 was adopted.*

*Paragraph 9 and 10 (paragraphs 9 and 10 of the “Report”)*

*Paragraphs 9 and 10 were adopted without comment.*

*Paragraph 11 (paragraph 11 of the “Report”)*

3. Mr. HUDSON proposed that paragraph 11 be deleted.

*It was decided by a vote to allow the paragraph to stand.*

4. On a proposal by Mr. HUDSON, it was decided to delete the word “also” as superfluous, in the phrase “the Commission also gave consideration”.

*Paragraph 11 was adopted as thus amended.*

#### CHAPTER III: QUESTION OF DEFINING AGGRESSION (A/CN.4/L.25) (*resumed from the 128th meeting*)

5. In accordance with a decision taken at the previous meeting, Mr. SPIROPOULOS read out the following

<sup>1</sup> Mimeographed document only, the text of which corresponds, with drafting changes, to chapter I of the Report of the Commission. (See vol. II of the present publication.) The drafting changes are indicated in the present summary record.

<sup>21</sup> See summary record of the 129th meeting, para. 5.

statement which he wished to have inserted in Chapter III of the Commission's report in the form of a footnote.<sup>2</sup>

"While paying tribute to the Commission's efforts, Mr. Spiropoulos felt that it had mistaken its instructions from the General Assembly. Instead of examining systematically, as the special Committee of the Temporary Mixed Commission and the Permanent Advisory Commission of the League of Nations had done, whether a definition was possible, the Commission had tried to produce a definition of aggression. This was so general that it could have no practical value, and therefore the General Assembly could not be deemed to have asked for such a definition.

"Moreover, the Commission's report did not contain any conclusion, either positive or negative, on the subject in question, but merely gave an account of the discussion which had taken place in the Commission, thus leaving it to the General Assembly to decide whether a definition of aggression was possible or not".

6. Mr. HUDSON thought Mr. Spiropoulos' criticism of the Commission was improper. Members of the Commission should confine themselves to stating their own personal views.

7. Mr. ALFARO also felt that footnotes to a report while they might express opinions, should not express criticism.

8. While Mr. SPIROPOULOS did not see any essential difference between his note and that which Mr. Hudson had asked to have inserted,<sup>3</sup> he agreed to withdraw it and to replace it by a text which he would communicate to the Commission in due course, and which would be practically identical with Mr. Hudson's.<sup>4</sup>

#### CHAPTER II: RESERVATIONS TO MULTILATERAL CONVENTIONS (resumed from the 128th meeting)

9. Mr. YEPES said he had given a good deal of thought to the discussion at the previous day's meeting,<sup>5</sup> and had come to the conclusion that the Commission was absolutely right. It was not practicable for a statement as detailed as the one he had submitted to be inserted in the report to the General Assembly. That was why he had supported Mr. François' proposal that in future the only insertions to be made in summary records should be explanations of votes in the Commission. He only regretted that he had been rather heated in defence of his attitude, and he would like to apologize. He did so as an earnest of his complete good faith and the sincerity of his convictions.

9a. He had studied all that had been written on the problem of reservations, and had carefully scrutinized all the documentation submitted to the Commission. Having thus steeped himself in that matter, he had drawn the conclusions set forth in his statement. He only hoped that the future would prove that it was he who had been

<sup>2</sup> Summary record of the 128th meeting, para. 130.

<sup>3</sup> Summary record of the 128th meeting, para. 127.

<sup>4</sup> Mr. Spiropoulos subsequently informed the Secretariat that he no longer wished to have a footnote included in the report.

<sup>5</sup> See summary record of the 128th meeting, paras. 1-56. See also summary record of the 133rd meeting, para. 22.

wrong in his assessment and that the majority of the Commission had been right. That would be the best possible outcome for the prestige and authority of the Commission, which were his sole concern.

9b. With regard to the statement he had made the previous day, he left it entirely to his good friends the Chairman and the general rapporteur, to summarize it as they thought fit. He had perfect confidence in their honesty of purpose and sense of fair play, and he was quite sure that whatever they did would be well done and would be acceptable to the Commission. He would now dismiss it from his mind and leave it entirely to them. With the Commission's consent, he would have no further say in what happened to his statement, which was in excellent hands with Mr. Briery and Mr. Córdova.

10. The CHAIRMAN, on behalf of the members of the Commission, thanked Mr. Yepes for the conciliatory spirit he had just shown and the confidence in the Commission which his words implied.

#### CHAPTER IV: DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND (A/CN.4/L. 26)<sup>6</sup>

11. On the proposal of the CHAIRMAN, it was decided to deal only with the passages in the document which were additional to document A/CN.4/L.15 examined by the Commission at its 106th and 111th meetings.

##### *Paragraph 5, sub-paragraphs (c) and (d) (paragraph 58 sub-paragraphs (c) and (d) of the "Report")*

12. Regarding sub-paragraph (c), Mr. CORDOVA explained that in order to justify the decision taken by the Commission to deal with the criminal responsibility of individuals only, he had felt it advisable to refer to the comment on that point made in the judgment of the Nürnberg Tribunal.

13. Referring to sub-paragraph (d), Mr. HUDSON suggested that, in the second line, the expression "to deal with the various methods" should read "to propose methods".

*It was so decided.*

*Paragraph 5, sub-paragraphs (c) and (d) were adopted.*

*Comment on article 2, paragraph 1 of the Draft Code.*

14. Mr. CORDOVA asked the Commission if there were any observations on the first five sub-paragraphs, which were new.

##### *First and second sub-paragraphs*

*The first and second sub-paragraphs were adopted without comment.*

##### *Third sub-paragraph*

15. Mr. HUDSON said that at the previous meeting<sup>7</sup> the Commission had decided to transfer to chapter IV

<sup>6</sup> Mimeographed document only, the text of which corresponds, with drafting changes, to chapter IV of the *Report of the International Law Commission covering the work of its third session*. (See vol. II of the present publication.) The drafting changes are indicated in the present summary record.

<sup>7</sup> Summary record of the 128th meeting, paras. 126-127.

the comment which formed the final sub-paragraph of paragraph 17 of the draft chapter III (Question of Defining Aggression). In accordance with that decision he proposed that the end of the third sub-paragraph be replaced by the words "that aggression can be committed by other acts, including some of those referred to in other paragraphs of this article".

16. Mr. ALFARO thought the expression "but the possibility is left open" in the fifth line of the third sub-paragraph was not satisfactory.

After a discussion in which Mr. CORDOVA, Mr. SCALLE and Mr. HUDSON took part, Mr. ALFARO proposed that the second sentence end with the word "aggression" in the fourth line, and that the next sentence begin with the words "It is, however, possible..." instead of reading as follows: "but the possibility is left open that aggression can be committed also in other forms...".

*It was so decided.*

#### *Fourth sub-paragraph*

17. Mr. YEPES, supported by Mr. ALFARO, asked to have the Inter-American Treaty of Reciprocal Assistance signed in Rio de Janeiro on 2 September 1947, added to the list of international instruments mentioned, as being equally important.

18. Mr. SPIROPOULOS thought it would be better to delete the fourth sub-paragraph entirely. When it was engaged in formulating the Nürnberg Principles, the Commission had felt it desirable to quote the texts to show that the Principles had been taken from positive law. It was no longer necessary to justify in the same manner the prohibition in the draft Code of the use of force.

19. Mr. CORDOVA said that article 2, paragraph 1 was based on the Charter of the United Nations, which was not very explicit on the point, and on the Draft Declaration on the Rights and Duties of States, prepared by the Commission. To give still more substantial backing to the Commission's argument, he had thought fit to indicate in the draft report that on a number of occasions already, man had proclaimed that aggression was a crime under international law.

20. Mr. HUDSON proposed that the words "is... prohibited" be replaced by "has been... prohibited", so as to make it clear that some of the international instruments mentioned were no longer in force. He was in favour of Mr. Yepes' proposal that the Rio de Janeiro Treaty of 1947 be included in the list.

21. Mr. SCALLE supported Mr. Hudson's proposal, though, unlike Mr. Spiropoulos, he felt that the list given in the sub-paragraph should be kept as illustrating the fact that international legislators had been constantly concerned with prohibiting the use of force.

22. Mr. CORDOVA, replying to Mr. Yepes, said that the Rio de Janeiro Treaty of 1947 did contain a sort of definition of cases of aggression, but merely systematized self-defence.

23. Mr. ALFARO said that the treaty in question expressly prohibited the use of force.

*It was decided to mention the Rio de Janeiro Treaty in the list.*

24. Mr. KERNO (Assistant Secretary-General) pointed out that the Covenant of the League of Nations did not prohibit the use of force in all circumstances. In the interests of accuracy he suggested that the beginning of the fourth paragraph be worded as follows: "Provisions against the use of force are to be found in...".

25. Mr. HUDSON preferred the following formula: "Limitations on the use of force have been contained in many international instruments of recent years".

26. Mr. SANDSTRÖM was in favour of changing the order of the various sub-paragraphs. The fourth and fifth sub-paragraphs, relating to the use of force, should come before those dealing with aggression, which was a very much broader concept.

27. Mr. HUDSON proposed for similar reasons that the order of the fourth and fifth sub-paragraphs be inverted, so as to give greater emphasis to the sub-paragraph dealing with the Charter and the draft Declaration on the Rights and Duties of States.

28. Mr. SANDSTRÖM agreed, but Mr. CORDOVA was in favour of keeping the chronological order, which had the further advantage of putting the most important passages at the end.

*It was decided, by 7 votes to 3, to keep the order of the sub-paragraphs as it stood.*

29. After a discussion in which Mr. AMADO, Mr. ALFARO and the CHAIRMAN took part, *it was decided* that the fourth sub-paragraph begin with the words "Provisions against the use of force have been included in many international instruments of recent years" instead of "The use of force is prohibited by many international instruments".

#### *Fifth sub-paragraph*

30. Following an observation by Mr. HUDSON, Mr. ALFARO proposed that the word "moreover" in the first line (The use of force is, moreover, prohibited...) be replaced by "above all".

*After some discussion it was decided to delete the word "moreover."*

*The fifth sub-paragraph was adopted as thus amended.*

#### *Comment on article 2, paragraph 2*

##### *First sub-paragraph*

31. Mr. HUDSON, supported by Mr. YEPES, pointed to a certain lack of cohesion between the text of the first sub-paragraph and that of chapter III, paragraph 12, (Question of Defining Aggression) of the draft report (A/CN.4/L.25), adopted by the Commission at the previous day's meeting.<sup>8</sup> He proposed, therefore, that the expression "actual aggression" in the second line be replaced by "acts of aggression".

32. Mr. CORDOVA said the Commission had decided to make the threat of aggression a special crime on the grounds that self-defence was a concept opposed to acts of

<sup>8</sup> Summary record of the 128th meeting, para. 107.

aggression exclusively. If self-defence in the face of mere threat of aggression were to be allowed, it would no longer be possible to distinguish between aggression and self-defence.

*Mr. Hudson's amendment and the first sub-paragraph as thus amended were adopted: it was also decided to make it clear in paragraph 12 of document A/CN.4/L.25, that the definition in question was Mr. Alfaro's draft.*

#### *Second and third sub-paragraphs*

*The second and third sub-paragraphs were adopted without comment.*

#### *Article 2, paragraph 3*

33. Mr. CORDOVA, supported by Mr. YEPES, thought that in order to bring the text of paragraph 3 into line with the new text of paragraph 5, the preparation of any act of aggression should be made a crime against the peace and security of mankind. He proposed therefore that the beginning of the paragraph be amended to read: "The preparation by . . . of any kind of act of aggression."

34. Mr. HUDSON, supported by Mr. AMADO, pointed out that generally speaking States made their preparations for self-defence, and then at the last moment, used their means of self-defence for aggressive purposes. While he appreciated Mr. Córdova's point, he was in favour of leaving article 2, paragraph 3, as it stood.

35. Mr. SANDSTRÖM, supported by the CHAIRMAN, also thought it would be better to keep the text. The most subtle forms of aggression, namely incursion and fomenting civil strife, were concepts more difficult to define at the preparation stage.

*The amendment submitted by Mr. Córdova and Mr. Yepes was rejected by 6 votes to 4.*

#### *Comment on article 2, paragraph 3*

##### *First sub-paragraph*

36. Mr. CORDOVA explained that he had added the last sentence of the first sub-paragraph of the comment in order to elucidate the previous sentence, which read "As used in this paragraph the term 'preparation' includes 'planning'." He had felt that that sentence could not stand alone and required further clarification.

37. Mr. HUDSON pointed out that the Commission had been of the opinion that the fact of drawing up plans was punishable.

38. The CHAIRMAN explained that the punishable element there was the plot.

39. Mr. CORDOVA said that, according to the summary records of the discussions,<sup>9</sup> the Commission's idea was that for the planning of aggression to be punishable, it must take the form of acts; if such acts could be regarded as the preparation of war, they were punishable.

*The first sub-paragraph of the comment on article 2, paragraph 3, was adopted.*

#### *Article 4*

40. Mr. CORDOVA thought the article was important

<sup>9</sup> Summary record of the 107th meeting, paras. 11-75.

in view of the criticisms expressed in the General Assembly. The only change made was in the second sub-paragraph of the comment.<sup>10</sup>

*Article 4 was adopted.*

#### *Comment on article 5*

41. Mr. CORDOVA said that the only change made was the addition of the second sentence of the comment. A principle used as a basis for the penalties to be prescribed should be inserted in the Code. The tribunal responsible for determining the penalty would base its decision on the authority of the Code.

42. Mr. AMADO said that he had voted against the article for reasons which would be found in the summary record of the discussions.<sup>11</sup>

43. The CHAIRMAN said that the same applied to him; the comment explained precisely how the majority had felt about the matter.

*The comment on article 5 was adopted.*

#### CHAPTER V: REVIEW BY THE COMMISSION OF ITS STATUTE (A/CN.4/L.23)<sup>12</sup>

44. The CHAIRMAN said he saw no reason why chapter V need be examined word by word. The Commission had before it an amendment submitted by Mr. Scelle, which read as follows:

"It should be noted that the principle of work on a full-time basis would not necessarily mean that the members of the Commission would have to have their fixed residence at the place where their meetings were held. The essential point would be the continuity of the work assigned to them. Various arrangements would be feasible. The Commission might, for instance, split up into several sections, each making a special study of one or more particular topics. Each section would be grouped about its special rapporteur, and the Commission would thus work in a series of teams, by correspondence, according to the method already tried and found practicable by the Institute of International Law and the International Law Association. The various sections would keep constantly in touch with the Legal Department of the Secretariat, to enable them to obtain at short notice any documentation or practical information required. The Development and Codification Division of the Secretariat would no doubt have to take on extra staff for the purpose.

"There is no question, however, that a system of this kind would be much less costly than one of permanent residence on the lines, say, of the International Court of Justice. It would not exclude the possibility of holding two or more special sessions or

<sup>10</sup> For the original text of the second sub-paragraph of the comment, see summary record of the 110th meeting, footnote 9 and para. 148.

<sup>11</sup> See summary record of the 111th meeting, paras. 86-170.

<sup>12</sup> Mimeographed document only, the text of which corresponds to chapter V of the *Report of the International Law Commission covering the work of its third session*. (See vol. II of the present publication.)

annual plenary sessions, especially if the Commission's official headquarters were established at Geneva."

45. Mr. SCELLE said that his amendment was based on the fact that, as all the members of the Commission had found, it was practically out of the question for them to take up their fixed residence at Geneva, and particularly, to think in terms of more than two months of sessions in the year. In his opinion, work on a full-time basis did not mean that the members of the Commission must be continuously in session and resident at the place where the meetings were held. It meant that they would devote the whole of their time to the work of the Commission. The idea of full-time in the scheme referred to the full-time nature of the work.

46. Full-time work could be achieved in several ways: the Commission might split up into a number of committees on special topics, a definite piece of work being allotted to rapporteurs who would carry it out, but keep in contact throughout with the other members of the committees. That was the method followed by the Institute of International Law and the International Law Association. Their rapporteurs remained constantly in touch with the members of their particular sub-committee, and arrived at the meetings of those bodies armed with reports which they knew were bound to be acceptable to them. That method would save a great deal of time, since a rapporteur coming to a session of the Commission with a report which was his own personal work was liable to find himself at loggerheads with his colleagues, each one of whom had his own views; and time was thus lost in producing a text acceptable to the majority of members. If, on the other hand, the Rapporteur was already in agreement with four or five of his colleagues who were prepared to support a common point of view, much time could be saved. Still more time could be saved if the Rapporteur remained constantly in touch with the Secretariat.

47. The Secretariat was invariably extremely helpful to the members of the Commission. On that point he disagreed with Mr. Koretsky, who at the first session had been prejudiced in his criticism of the help given by the Secretariat. The Rapporteur ought to keep constantly in touch with the Secretariat to obtain such day-to-day information as he required. It would enable him to produce far more significant results.

48. If the principle of a full-time Commission were applied, each member would undertake in principle to work exclusively for the International Law Commission. Obviously there would have to be a gentleman's agreement, since there was no way of keeping a check. It would nevertheless be a great step forward.

49. As to the principle of permanence as discussed at the beginning of the session,<sup>13</sup> he had gone over the matter with Mr. Kerno and several of the members of the Commission, including the Rapporteur and Mr. Spiropoulos, and he felt that the idea of continuous residence for seven or eight months in the year, with a status similar to that of the Hague judges, should be abandoned. It was entirely out of the question. From

an examination of the earlier instances of codification work by the League of Nations and the permanent commission at Rio de Janeiro, it was clear that the principle of full-time work had not been conceived in that manner. The Rio commission had held sessions. Experience showed that it was an illusion to think of working in a vacuum, and on the basis of a session continuing for more than two months. In any case the cost would be prohibitive. Salaries at least as high as those of the judges of the Hague Court would be necessary, and the Fifth Committee of the General Assembly would never agree to that. On the other hand, a compromise arrangement by which the members of the Commission would live in their own homes would involve much lower salaries.

50. Mr. Hudson had pointed out to him that his suggestion might be expressed more briefly. The text he had submitted was somewhat lengthy in the interests of clarity, and not with the idea of its being incorporated in the report in its entirety. He was quite prepared to have it abridged, and he had no strong feelings about the wording he had used being kept as it stood.

51. Mr. HUDSON thought it would be a good thing to cut Mr. Scelle's text down by omitting the reference to collaboration by correspondence according to the method already used by the Institute of International Law and the International Law Association, and by deleting the second paragraph.

52. Mr. AMADO asked Mr. Hudson why he was suggesting that the passage relating to work by correspondence should be cut out.

53. Mr. HUDSON thought the method used by the Institute of International Law was not practicable for the International Law Commission.

54. Mr. FRANÇOIS thought Mr. Scelle's amendment was a fundamental one, since it would completely change the nature of the recommendation which the Commission had decided to submit to the General Assembly. He wondered whether it was desirable to make such a change, even in the form of an observation by the way.

55. It seemed likely that the Commission's proposal would meet with very strong opposition on the part of the Assembly and perhaps of the Secretary-General; but the sight of Mr. Scelle's proposal would make the opposition still more obstinate. It would be suggested that the members of the Commission wanted high salaries for staying at home and doing nothing.

56. He was not so sanguine as Mr. Scelle about the work of sub-committees. It frequently happened that all the work by a sub-committee was re-hashed in plenary. Moreover, when sub-committees were set up, it was impossible to ensure that the various legal systems would be represented. Again, from the practical point of view, the sub-committees would have to meet, and that would mean travelling expenses. While he was on that subject, since there might be three or four sessions of the plenary Commission, that would make the travelling expenses mount still higher.

<sup>13</sup> Summary records of the 83rd, 96th and 97th meetings.

57. He did not follow Mr. Scelle's argument that salaries would not be so high. If the best men were to be enlisted, they would have to be paid very high salaries, which would be just the same whether the experts lived at home or took up residence in Geneva, New York or Washington.

58. In his opinion there was very little to be said in favour of Mr. Scelle's proposal. It reduced the chance of having the recommendation for a full-time Commission accepted by the Assembly; it meant very little saving; and it would make for less efficient work.

59. It was not essential that every member of the Commission should remain twelve months of the year at the Commission's headquarters. The judges at the Hague court did not do so either. That was a matter of arrangement within the terms of the Statute; it was not a question that need be discussed at the moment. He would rather that Mr. Scelle's proposal were not included in the report.

60. Mr. SCELLE said his idea was that the emoluments of the members of the Commission would be very much lower than under the earlier suggestion for a full-time Commission. He had no wish to start an argument. But he did wish to ask Mr. François whether he thought it conceivable to find fifteen members chosen from among the most eminent jurists, who would be prepared to meet in any centre, anywhere in the world, for more than a month or two every year.

61. Mr. FRANÇOIS replied that so far it had not been so very difficult to find candidates for the position of judge at the International Court of Justice — far from it. The difficulty in finding properly qualified experts for the International Law Commission would not be any greater, provided the standing of the Commission was roughly the same as that of the Court.

62. Mr. KERNO (Assistant Secretary-General) said that when the question had been discussed,<sup>14</sup> he had explained the reasons which had led the General Assembly to vote against the principle of members of the Commission working on a full-time basis. The Assembly had felt that under such a system it would be impossible to obtain the services of the most competent persons, and secondly, that in the course of a few years, the members of the Commission would become bureaucrats.

63. Mr. Scelle's amendment had made it clear that some of the members of the Commission shared that same anxiety, at any rate to some extent. The version suggested by Mr. Hudson might well justify the impression mentioned by Mr. François — that members of the Commission wanted fat salaries without leaving their homes. Mr. Scelle's amendment on the other hand suggested a considerably lower salary scale. He would all the same be glad to see the mention of Geneva removed from Mr. Scelle's text. It had in fact been the Commission's view that at the present moment it was not politic to raise that particular issue.

64. Mr. YEPES was not opposed to the notion underlying Mr. Scelle's proposal. The system recommended

was calculated to improve the Commission's work. Nevertheless, he felt that it was neither wise nor desirable to insert in the Commission's report a recommendation that the Commission should work on a full-time basis though the members would not be required to take up their fixed residence at the place where the meetings were held. Such a suggestion would make a bad impression on the General Assembly and would result in the Commission's recommendation being unanimously voted down. Hence, while he was in favour of the underlying idea, he would oppose the insertion of the text in the Commission's report.

65. Mr. CORDOVA said that clearly the members of the Commission were roughly in agreement that the proposal for members of the Commission to work on a full-time basis, and with a salary scale at least equivalent to that of the judges at the International Court of Justice, would not easily pass the General Assembly. The impression would be conveyed that the members of the Commission were anxious to show how important they were.

66. He felt that there was nothing to lose by submitting a proposal which made it clear that the Commission was earnestly concerned with achieving the utmost efficiency in its work. It would thus prove that, even if the General Assembly did not give approval to its main proposal, it had in hand measures to improve its working methods and to reduce expense.

67. Under the present system, a few days before the beginning of each session the members of the Commission received a report they had never set eyes on before. Under the new system it would be possible to achieve greater collaboration and to obtain more assistance from the Secretariat. Up to the present, not all the members of the Commission had requested the Secretariat to work on their behalf in between sessions; if they did so, there was no doubt that the Secretariat would comply. Sub-committees would make it possible to work on given topics by correspondence.

68. Mr. HUDSON said he could not see himself examining any problem with his colleagues without meeting them. Meetings were essential. In the work of the Harvard Research on International Law, the reports had been studied in meetings, and that was where progress had been made. He was against the idea of working by correspondence as the Institute of International Law did.

69. Mr. SCELLE thought it would be useful for the sub-committees to meet from time to time, but it was not essential that they should do so several times a year. Mr. Hudson had had a great deal of experience in the Harvard Research on International Law, which had accomplished a great deal even though the research workers did not work on a full-time basis or in one particular centre.

70. Mr. EL KHOURY said that the Commission had decided to consult the General Assembly so as to find out whether it accepted the principle that members of the Commission should work on a full-time basis. When the new Statute was ready, it would be time enough

<sup>14</sup> Summary record of the 97th meeting, paras. 26-30.

to discuss the question raised by Mr. Scelle, and not till then. Personally he was against the full-time principle. At present the Commission met daily to study reports prepared beforehand. If the Commission sat daily the whole year round, who was to prepare the reports?

71. He proposed that the Commission take no decision on Mr. Scelle's text.

72. Mr. HUDSON shared Mr. el Khoury's view. The text proposed by Mr. Scelle would surely be incompatible with paragraph 11, (paragraph 70 of the "Report") the first sentence of which read: "The recommendation of a full-time Commission is placed before the General Assembly, at this time, in general terms only". It would be premature to decide how the new Commission was to work. Nevertheless he would be inclined to add a new paragraph in between paragraphs 10 and 11, to the effect that a full-time Commission might organize its work in many various ways, but that no attempt was being made at present to outline the possible ways in which it might be done.

73. If the first sentence of Mr. Scelle's amendment were inserted in the report, it would have to be reconciled with the statement in paragraph 8 (paragraph 67 of the "Report") that "no member of the Commission may exercise any political or administrative function, or engage in any other occupation of a professional nature". If a member of the Commission lived at home and gave up all other occupation, he would have to be paid accordingly. The first sentence of Mr. Scelle's proposal did not tally with the passage which stated that his system would be much less costly than one of permanent residence on the lines, say, of the International Court of Justice.

74. He agreed with Mr. François that to insert Mr. Scelle's text would upset the fundamental structure of the draft report.

75. Mr. SCELLE said he had submitted his proposal in the conviction that if the Commission was to deal seriously with the codification of international law, it could never hope to achieve that end by working for two-and-a-half months per year. If the full-time principle were adopted, it would mean having either young people — perhaps very able men, anxious to make a career — or retired jurists quite happy to find a comfortable niche for their retirement. In his opinion, the Commission should not consist of either. It should seek some method of enlisting men of the very first rank, men actually engaged in the profession, and capable of carrying out what was required of the International Law Commission, namely, the codification of international law in its entirety. That was no mean task, and at the same time it was one which had to be carried out quickly, otherwise the codified law would already be out of date by the time the texts were published. The essential feature of law was that it was born of social necessity, which was itself in a constant state of flux. If years had to be spent in codifying the régime of the high seas, for example, the work of the Commission would be quite useless; and the same could be said of other topics. He mentioned the high seas because the Commission had come up against the question of the continental shelf, which had crystallized

over a period of several years and might well collapse in the same way.

76. A two months' session every year was no way of ensuring that the Commission fulfilled its function. It was of course extremely difficult to hit upon an acceptable system — that he agreed. The object of the proposal he had submitted was to demonstrate that the statement that the Commission was anxious for its members to devote their full time to the work did not amount to a great deal. The important thing was not the full-time principle, but the matter in which the work of the Commission was organized.

77. Mr. HUDSON pointed out that, if the principle of a full-time Commission were challenged, the entire chapter would have to be re-written, paragraph 10 in particular, and an alternative method of reorganization suggested.

78. Mr. AMADO said that, when the Commission discussed the question of its Statute, he had had occasion to mention an important point.<sup>15</sup> He had reminded the Commission that when the General Assembly set up the Commission in 1947, it was interested in the question of codification. Hopes had then been high that the co-operation between the great powers might continue. At the present time, the Commission should find out whether the Assembly was still disposed to give the work of codification the necessary scope. If it decided that now was the moment to push on the work to completion, the decision could be implemented in the appropriate way. His own view was that it was out of the question to bring the task of codification to a successful conclusion without increasing the facilities at the Commission's disposal. That was why he had voted in favour of the principle that the work of the Commission should be on a full-time basis. His idea had been to postpone the examination of the practical issue, and to ask the General Assembly for authorization to go ahead. He was not in favour of accepting Mr. Scelle's proposal, which was concerned only with the actual completion of the task in hand, and which seemed to him premature.

79. The CHAIRMAN said that the Commission was faced with several possibilities. It could either accept the proposal, or reject it, or adjourn discussion of it until the General Assembly had given its decision on the general principle. If the Assembly accepted the principle, Mr. Scelle's proposal could be used as a basis for discussion.

80. Mr. HUDSON suggested that the proposal to insert the text in the report be turned down. On the other hand, if it could be resubmitted in a year's time, it might be considered.

81. Mr. SCELLE said he would abide by any decision the Commission might take.

*It was decided by 8 votes to 2, with 2 abstentions, not to insert Mr. Scelle's amendment in the report.*

82. Mr. ALFARO explained that his reason for voting against the insertion of the amendment in the report was not that he was opposed to Mr. Scelle's idea, but

<sup>15</sup> Summary record of the 112th meeting, paras. 29-30.

that he felt the amendment would be an obstacle to the adoption by the General Assembly of the Commission's recommendation.

83. Mr. EL KHOURY said that the reason why he had voted against the amendment was that it seemed premature to discuss it at the present session. If the General Assembly accepted the principle that the members of the Commission should work on a full-time basis, he would be in favour of the system suggested by Mr. Scelle.

84. Mr. SPIROPOULOS thought that if the Assembly agreed to the principle of a full-time Commission, the rapporteur ought to prepare the Statute of the new Commission for discussion at the next session.

85. The CHAIRMAN said he was prepared to appoint a rapporteur if necessary.

86. Mr. HUDSON thought that, even if the General Assembly did not approve the principle, the Commission should nevertheless examine its Statute carefully, and it might be useful to have a rapporteur who would study the Statute with the help of the Secretariat and present a report. The Commission might nominate a rapporteur. He personally considered the Statute very unsatisfactory. Its interpretation in concrete instances was bound to give rise to lengthy discussion, and an attempt should be made to improve it.

87. Mr. SPIROPOULOS held the opposite view. If the Assembly did not agree to the proposed fundamental change, the amendments to be made to the Statute would be so insignificant that they would hardly justify a rapporteur being nominated. The Commission had discussed the question. It was not the provisions of the Statute that prevented the work from proceeding, but lack of time. He was not in favour of appointing a rapporteur.

*It was decided by 5 votes to 2, to nominate a rapporteur.*

Mr. HUDSON suggested that the Chairman put forward a nomination.

The CHAIRMAN pointed out that the rapporteur would not know what he was called upon to do until the General Assembly had taken a decision.

The meeting rose at 12.50 p.m.

## 130th MEETING

*Monday, 23 July 1951, at 3 p.m.*

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*Chairman:* Mr. James L. BRIERLY

*Rapporteur:* Mr. Roberto CORDOVA

*Present:*

*Members:* Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, 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.

### Communication from Mr. Jaroslav Zourek

1. The CHAIRMAN announced that Mr. Zourek had written expressing his regret at his inability to take part in the work of the Commission's third session as a result of "unexpected calls on his time and urgent work".
2. In reply to a remark by Mr. HUDSON, the CHAIRMAN observed that the Commission's members were not under any obligation to take part in its work.
3. Mr. EL KHOURY thought that the letter suggested that Mr. Zourek would take part in the work of the next session.
4. Mr. CORDOVA pointed out that, if the Commission's Statute did not oblige members to attend the sessions, advantage might be taken of the forthcoming revision to lay down rules for such a contingency.

### Examination of the draft report of the Commission covering its third session (*continued*)

#### CHAPTER VII. RÉGIME OF THE HIGH SEAS (A/CN.4/L.27) (*continued*)

5. Mr. HUDSON congratulated Mr. François on the valuable draft report he had submitted to the Commission; he wished to make two observations of a general nature.
6. In the first place the English text, although carefully translated, did not always present ideas in their simplest form. The General Rapporteur should be given the opportunity of touching it up from the point of view of style.
7. In the second place it was difficult for the reader to distinguish clearly between the part of the report which was to be included in the Commission's report to the General Assembly, and the draft articles for submission to governments for comment. The paragraphs following the various articles did not always consist of comment pure and simple, but contained matter which should be included in the general report. It would be better to include some of the paragraphs which came after the articles, in the report to the General Assembly. The articles themselves, together with those texts that constituted comments in the strict sense of the word and were intended for governments, should be included in an annex to the general report. As regards the consecutive numbering of commentary paragraphs, such a course might lead to confusion and complicate discussions in the General Assembly. It would be preferable to number the commentary paragraphs to each article separately.

8. Mr. FRANÇOIS agreed that consecutive numbering would not be satisfactory, but suggested that, when the report came to be printed, the articles themselves and the comments thereon could be distinguished by the use of different type. The comments to each article might also be preceded by a sub-heading which would make the text still easier to understand.

9. In reply to a remark by Mr. CORDOVA, Mr. HUDSON said that it would be better to number the commentary paragraphs, even though such numbering were not used in other parts of the general report.

10. With reference to a remark by Mr. SANDSTRÖM and following a discussion in which the CHAIRMAN, Mr. CORDOVA and Mr. HUDSON took part, *it was decided* to number separately the comments relating to each article.

11. Mr. LIANG (Secretary to the Commission) wondered whether the whole of that part of the report which dealt with the régime of the high seas should be included in the general report to the General Assembly. In the course of its work, the Commission had decided that the régime of the high seas was a matter which came within the sphere of its work on the progressive development of international law and that the rules of article 16 (g) of its statute were applicable to the question, that was to say, that satisfactory drafts should receive the necessary publicity and be communicated to governments for their comments. Only after the receipt of comments from governments, and re-examination of the project in the light thereof, should a final text be submitted to the General Assembly.<sup>1</sup>

12. It would appear reasonable not to prejudice that last stage in the proceedings by including, in the general report, the draft report on the continental shelf which, though considered "satisfactory" under the terms of the Commission's Statute, had not yet been given its final form. It would appear to follow that the Commission should, on the one hand, inform the General Assembly in the general report of the progress made in its study of the question of the régime of the high seas, and on the other, annex thereto a printed document comprising the articles to be submitted for comment to governments and to public and private organizations concerned with international law.

13. In his opinion the form given to document A/CN.4/L.27 by the General Rapporteur did not enable the reader to distinguish clearly between what was intended for the information of the Assembly, and what was to be communicated to governments for comment. The studies of the resources of the sea, of sedentary fisheries, and of contiguous zones were not as far advanced as that of the continental shelf, and it would be better not to mix up those various questions. As it stood, the draft report did not distinguish between questions, the study of which was considered to be finished, and those which were less advanced.

14. Mr. FRANÇOIS considered that it would be difficult to deal with the continental shelf separately

from related questions which had been grouped together in the draft report (A/CN.4/L.27). Those questions formed a whole, and were to be distinguished from those dealt with in the second part of the draft report (A/CN.4/L.27/Add.1), firstly by their nature, and secondly by the fact that the latter questions, that of the nationality of ships in particular, had only been examined by the Commission in first reading. On the other hand, the studies of the resources of the sea, of sedentary fisheries and of contiguous zones were sufficiently advanced to enable governments to be consulted. Hence, only two categories were required, the continental shelf and related subjects, on the one hand, and other questions on the other.

15. Mr. KERNO (Assistant Secretary-General) was of opinion that the draft report under examination should be considered as a text for submission to governments for comment, rather than as a part of the general report. The Commission had, right from the beginning, been in favour of asking governments to comment on the continental shelf in conjunction with related problems, as it was difficult to deal separately with questions that had many points of contact.

16. There was no reason, however, why reference should not be made to those questions in the chapter of the general report which dealt with the régime of the high seas. It might be said, in that chapter, that the Commission had examined the problem of the continental shelf and related questions in second reading and had decided to ask governments for their comments on the points at issue. The document under consideration, as amended during the discussion, would be included in the form of an annex. In that way the General Assembly would know that it was not asked to concern itself with those matters, which were brought to its notice for information only.

17. Mr. FRANÇOIS was in entire agreement with that procedure.

*It was so decided.*

18. In answer to a remark by Mr. LIANG (Secretary to the Commission) the CHAIRMAN said that organizations concerned with international law would be consulted at the same time as governments.

#### *Paragraphs 1 to 5*

19. The CHAIRMAN pointed out that the first five paragraphs of the draft report would be included in the general report and should be amended so as to conform to the decision taken in that connection.<sup>2</sup>

### *Continental shelf*

#### *Article 1*

#### *Comments on Article 1*

20. Mr. HUDSON was of the opinion that generally speaking the comments should relate to the accompanying article, and not to what the Commission had done, as it was not a question of a report to the General Assembly.

<sup>1</sup> See *Statute of the International Law Commission* United Nations publication, Sales No. : 1949.V.5, article 16 (i) and (j).

<sup>2</sup> See summary record of the 133rd meeting, paras. 15-16.

21. Mr. EL KHOURY considered that Mr. Hudson's remark would have been entirely justified if the Commission's work had reached its final stage. The text would, however, be reviewed after the receipt of comments from governments and the Commission could then formulate its comments in accordance with Mr. Hudson's suggestion. At the actual stage of the Commission's work the comments submitted in the draft were entirely satisfactory.

22. Mr. CORDOVA considered that governments should be told that the Commission had taken such and such a decision and took the responsibility for a given notion or interpretation.

23. Mr. AMADO pointed out that paragraph 6 and the following paragraphs all referred to measures taken by the Commission. Should it be decided to recast them, it would mean a lot of work and would take a long time.

25. While he accepted the change in numbering, which would make the draft easier to read, he did not think it advisable to recast the comments completely. He himself was ready to accept them, as they stood, subject to changes of detail. Furthermore, the procedure suggested by Mr. Hudson would involve substantial cuts, which could not fail to give rise to very long discussion.

25. Mr. HSU also foresaw that the method advocated by Mr. Hudson for the drafting of comments might well involve revision of all the articles. He felt that the work might be deferred until the following session and that, as regards the current year, they should rest content with the wording of the draft, possibly with some changes in form.

*Paragraph 6 (annex to the "Report", part I, art. 1, com., para. 1)*

26. Mr. HUDSON read out the following text which he proposed should be substituted for the first two lines of paragraph 6:

"This article explains the sense in which the term 'continental shelf' is used for present purposes. It departs from the geological concept of that term."

He wished to avoid the use of the term "legal definition" as it did not appear in article 1.

27. Mr. YEPES wished further emphasis to be laid on the difference between the geological concept of the term and the definition adopted by the Commission. He would accept Mr. Hudson's amendment if it had that result.

28. The CHAIRMAN considered that Mr. Hudson's text met Mr. Yebes' requirements.

*Mr. Hudson's amendment was adopted.*

29. Mr. HUDSON proposed the deletion of the second sentence of paragraph 6.

30. Mr. FRANÇOIS was of opinion that the sentence should be retained. If all geologists were in agreement, there would be no reason for the Commission to discard their definition. To his mind, the divergence of opinion between geologists was the main reason for discarding the geological concept of the continental shelf.

31. Mr. YEPES said that he had supported the amendment of the first two lines of paragraph 6, but considered the last sentence to be essential.

32. In reply to a question by Mr. Hudson, Mr. FRANÇOIS said that some geologists considered "shallow waters" to form part of the continental shelf, but that others did not agree.

33. Mr. AMADO was inclined to agree with Mr. Hudson. Had the Commission the right to speak of differences between geologists in a document to which it was intended to give wide publicity? Had it studied their conclusions sufficiently? Why give reasons? The draft report was too full of detail and would be better if it were less prolix. Why explain to all and sundry why the Commission had discarded a concept?

34. Mr. CORDOVA pointed out that the Commission did not give a definition of the continental shelf. It only indicated the sense in which it was used in the draft articles which had been drawn up. The Commission had discarded the geological concept of a maximum depth of 200 metres, owing to the impossibility of stating precisely up to what depth of superjacent water the exploitation of the sub-soil was possible, in other words, it had not wished to limit the continental shelf to any given depth, but preferred to allow for the exploitation of the sea bed at all accessible depths.

35. Mr. YEPES maintained that the Commission was entitled to refer to the differences of opinion among geologists in justification of its departure from the geological concept of the continental shelf. Geologists were not, in fact, in agreement as to the extent of the shelf. For some it extended up to a depth of 100 metres, for others up to 200 or 600 or even 1,000 metres. Some considered that the continental shelf was a continuation of the land, while others considered it to be an independent alluvial formation. The divergencies were, therefore, such as to fully justify the retention of the second sentence in paragraph 6.

36. Mr. FRANÇOIS pointed out that the divergent views obtaining in scientific circles were described on page 54 and onwards (mimeographed English text; paras. 169-201 printed French text) of the Secretariat Memorandum on the Régime of the High Seas (A/CN.4/32).

37. Mr. HUDSON claimed, on the authority of the above memorandum that the opinions expressed by geographers and oceanographers were equally divergent. He therefore proposed replacing the beginning of the second sentence of paragraph 6 by the following:

"The varied usage of the term by physical scientists...".

38. Mr. YEPES preferred the expression:

"The differences of opinion between experts on the subject...".

39. The CHAIRMAN proposed that it be left to the General Rapporteur to find a wider term than the word "geologists".

*It was so decided.*

*Paragraph 7 (annex to the "Report," part I, art. 1, com., para. 2)*

40. Mr. HUDSON remarked that the paragraph gave the real reason why the geological concept of the term "continental shelf" had been discarded.

*Paragraph 7 was adopted.*

*Paragraph 8 (annex to the "Report", part I, art. 1, com., para. 3)*

41. Mr. HUDSON proposed the deletion of the introductory clause "While rejecting the geological concept as a basis for regulation". He also suggested that in line 2, the word "considered" be substituted for the word "wondered", that in line 4 the word "some" be inserted before the words "scientific works", and the word "simply" after the word "works".

42. He would also have liked to see the last sentence of the paragraph deleted, but in the face of objection by Mr. SANDSTRÖM and Mr. FRANÇOIS he proposed that it be re-worded as follows:

"The Commission decided to retain the term 'continental shelf' because it has already come into general current use and also because the term 'submarine area' alone would give no indication of the nature of the submarine areas in question."

43. After a discussion, in which Mr. FRANÇOIS, Mr. HSU, Mr. EL KHOURY, the CHAIRMAN and Mr. SANDSTRÖM took part, *it was so decided.*

*Paragraph 9 (annex to the "Report", part I, art. 1, com., para. 4)*

44. Mr. HUDSON proposed the substitution of the following text for paragraph 9:

"The term 'continental shelf' as here used is not limited to continents. It may apply also to islands to which such submarine areas are contiguous."

Without altering the sense of the paragraph, the underlying idea would be expressed more clearly.

45. Mr. FRANÇOIS approved that wording.

46. In answer to an observation by Mr. Scelle who, as he was opposed to the notion of the continental shelf, did not approve the extension given it in the paragraph in question, Mr. HUDSON and the CHAIRMAN pointed out that there was no reason why a continental shelf should not be recognized in the case of Jamaica, for instance, or even the British Isles.

*Mr. Hudson's amendment was adopted.*

*Paragraph 10 (annex to the "Report", part I, art. 1, com., para. 5)*

47. Mr. HUDSON proposed that the paragraph be amended to read:

"With regard to the delimitation of the continental shelf, the Commission would place emphasis on the limits set by the following words in article 1: 'Where the depth of the superjacent waters admits of the exploitation of the natural resources of the sea bed and sub-soil'. It follows that the areas within which

exploitation is not technically possible are excluded from the continental shelf here referred to".

48. After a discussion in which Mr. YEPES, Mr. FRANÇOIS and the CHAIRMAN took part, *it was so decided.*

*Paragraph 11 (annex to the "Report", part I, art. 1, com., para. 6)*

49. Mr. HUDSON proposed that the first sentence of the paragraph be redrafted to read:

"The Commission considered the possibility of adopting a fixed limit for the continental shelf in terms of the depth of the superjacent waters".

50. The CHAIRMAN considered that wording to be clearer.

51. Mr. HUDSON proposed the deletion, at the beginning of the third sentence of the following words:

"Another reason for adopting this limit might be found in the fact that . . .".

52. Mr. CORDOVA considered that the following paragraph was so closely linked to the one under consideration that it would be advisable to combine them.

Mr. FRANÇOIS accepted the amendments proposed by Mr. Hudson.

*Paragraph 11 was adopted as amended.*

*Paragraph 12 (annex to the "Report", part I, art. 1, com., para. 6)*

53. Mr. HUDSON proposed that the beginning of the second sentence should read:

"It was felt such limit would have the disadvantage . . .".

He also proposed the insertion of a full stop after the words "article 1" in the fourth sentence and the deletion of the rest of the sentence.

54. Mr. YEPES proposed the deletion of the words "for information" in the last sentence.

55. In reply to a question by Mr. Cordova, Mr. FRANÇOIS said that the Commission did not in any way restrict the exploitation of the sub-soil by means of tunnels.

56. Mr. HUDSON suggested the following simplified wording for the last sentence:

"The Commission points out that it is not intended to restrict in any way exploitation . . .".

*The above amendments were adopted and paragraph 12 was adopted as amended.*

*It was decided to combine paragraphs 11 and 12.*

*Paragraphs 13 and 14 (annex to the "Report", part I, art. 1, com., paras. 7 and 8)*

57. Mr. HUDSON advocated the deletion of paragraph 13, which might be appropriate in a report on the Commission's discussions, but was out of place in a commentary to an article.

58. Mr. YEPES agreed with Mr. Hudson. Nothing essential would be lost by the omission of the paragraph.

He recalled that, in a spirit of conciliation he had withdrawn the text he had submitted.<sup>3</sup>

59. Mr. FRANÇOIS was of opinion that the report would be incomplete without the paragraph in question. It referred to a proposal by the French branch of the International Law Association, which the Commission had considered, and clearly showed that the Commission had not omitted to take note of the proposal, but had rejected it for very definite reasons.

60. Mr. HUDSON observed that Mr. François had given a valid reason for the retention of the paragraph, which he had overlooked. It was a question of an idea expressed outside the Commission to which the latter wished to reply. If, therefore, Mr. François wished to retain the paragraph, he had no objection.

61. The CHAIRMAN considered that Mr. François was right; something should be said on the subject.

62. Mr. KERNO (Assistant Secretary-General) observed that paragraph 13 spoke of a minimum, and paragraph 14 of a maximum. In his opinion, if one were mentioned, the other should be also.

*The proposal for the deletion of paragraph 13 was rejected.*

63. Mr. HUDSON considered that the paragraph was not satisfactory. It spoke of rights, whereas article 2, which dealt with such rights had not yet been reached. If the Commission adopted the paragraph, it should be redrafted. He proposed the wording "The Commission did not see any reason for fixing, in terms of distance from the coast, a minimum limit of the continental shelf".

64. Mr. SCALLE was not very much impressed by Mr. Hudson's remarks. If a continental shelf were established, it would be in order that neighbouring States could exercise certain rights over it. Mr. Hudson's argument seemed to him too logical.

65. Mr. SANDSTRÖM proposed that the paragraph be combined with paragraph 11.

66. Mr. FRANÇOIS did not consider that matters would be made any clearer thereby. Three different things were involved: a fixed limit, a maximum distance and a minimum distance. It would be better to devote a paragraph to each of those notions.

67. Mr. HUDSON proposed the following text in place of paragraphs 13 and 14:

"The Commission considered the possibility of fixing both minimum and maximum limits of the continental shelf in terms of distances from the coast. It could find no practical need for either of such limits and it preferred to stop with the limit set out in article 1, which is cast in terms of the possibility of exploiting natural resources."

68. Mr. YEPES approved Mr. Hudson's text.

69. Mr. KERNO (Assistant Secretary-General) considered that, as a substitute for paragraphs 13 and 14, Mr. Hudson's formula could not be bettered, but was nevertheless of the opinion that it would serve a useful purpose to mention the very extensive claims put forward

by certain States, and to say that, for practical reasons, they had no reference to the continental shelf; also that fishing in such areas, for instance, was dealt with elsewhere, since it did not enter into the problem.

70. Mr. YEPES did not consider that any useful purpose would be served by retaining paragraph 14, which constituted an unmerited criticism of the policy of certain States such as Chile, Peru, Costa Rica and Salvador. He would vote against the paragraph.

71. Mr. FRANÇOIS was of the opinion that it was not a question of criticizing certain States. Actually, the second sentence of paragraph 14 read: "the claims of control and jurisdiction up to a distance of 200 sea miles from the coast formulated by certain States can, at the present time, only relate to fishing, since the stage of technical development reached does not yet permit the sub-soil of the sea to be exploited at a distance of 200 miles from the coast".

72. Mr. KERNO (Assistant Secretary-General) was also of opinion that, far from criticizing such claims, the paragraph only said that they did not concern the continental shelf.

73. Mr. HUDSON accepted Mr. Kerno's suggestion. He wished to make the following addition to the text he had proposed:

"Note was taken of the fact that some claims have been advanced with the maximum limit of 200 miles; but such a limit can have a practical purpose only in connection with fishing for, as a general rule, the depth of the water at that distance from the coast does not admit of the exploitation of the natural resources of the sub-soil."

74. Mr. FRANÇOIS wished to retain the last sentence of paragraph 14.

*It was so decided.*

*The two texts proposed by Mr. Hudson were adopted.*

*Paragraph 15 (annex to the "Report", part I, art. 1, com., para. 9)*

75. Mr. HUDSON suggested that the paragraph be reworded to read:

"The continental shelf envisaged in this article is limited to submarine areas outside territorial waters. Submarine areas beneath territorial waters are, like the waters above them, subject to the sovereignty of the coastal State, and there is no need to deal with them here".

*Mr. FRANÇOIS accepted the amendment, and paragraph 15, as amended, was adopted.*

*Paragraph 16 (annex to the "Report", part I, art. 1, com., para. 10)*

76. Mr. HUDSON proposed the deletion of the paragraph, as it was only a repetition of what was said in article 3.

77. Mr. FRANÇOIS admitted as much but had included it because he wished the comment on article 1 to be as complete as possible.

<sup>3</sup> See summary record of the 123rd meeting, para. 5.

78. Mr. EL KHOURY was of opinion that the paragraph had the advantage of showing that the definition of the continental shelf had no other implication.

*It was decided to retain the paragraph.*

### Article 2

Paragraph 17 (annex to the "Report", part I, art. 2, com., para. 1)

79. Mr. HUDSON was pleased to note that the article defined the position clearly but, in his opinion, it lacked an introduction to the comment which would do what Mr. François had tried to do in the comment on article 1. Article 2 emphasised that control and jurisdiction were only recognized for the purposes of the exploration and exploitation of the continental shelf. That had already been said in the comment on article 1, but it was not clearly stated in the comment on article 2. That omission had struck him and he wished paragraph 17 to be preceded by a paragraph in which that was brought out. The primary purpose, which was to stress the restricted ends for which control and jurisdiction could be exercised, had not been achieved.

80. He therefore proposed the following text as an introduction to the comment:

"In this article the Commission adopts the idea that the coastal State may exercise control and jurisdiction over the continental shelf, but requires such jurisdiction and control to be solely for the purpose stated. There can be no question of jurisdiction and control independently of the exploration and exploitation of the natural resources of the sea-bed and sub-soil."

*Mr. Hudson's text was approved.*

81. Mr. HSU pointed out that the beginning of paragraph 17 read: "The Commission rejected the view that the principle of the freedom of the seas conflicts with any exploration of the sea-bed and sub-soil...", but the Commission had never discussed the question. It was therefore somewhat arbitrary to say that it had rejected that opinion; neither had the Commission ever discussed the question mentioned in the second sentence. He was of the opinion that if the Commission had not discussed a question, it should be so stated.

82. He thought the paragraph should be redrafted and be wished to propose the following text to replace the first two sentences of paragraph 17:

"The Commission is aware that exploration and exploitation of the sea-bed and sub-soil, which involves the exercise of control and jurisdiction by the coastal State, would affect, though to a very limited extent, the principle of the freedom of the seas, particularly as it relates to navigation. It favours such exploration and exploitation only because they mean progress and may enhance the well-being of mankind. Nevertheless, it is evident..."

83. Mr. YEPES considered that the text proposed by Mr. HSU would obviate an undesirable interpretation. He did not, however, see why the principle of the freedom

of the high seas had been qualified as sound. The way in which Mr. Hsu presented the question was satisfactory to him.

The meeting rose at 6 p.m.

## 131st MEETING

Tuesday, 24 July 1951, at 9.45 a.m.

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*Chairman:* Mr. James L. BRIERLY  
*Rapporteur:* Mr. Roberto CORDOVA

*Present:*

*Members:* Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jesús Maria 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.

### Examination of the draft report of the Commission covering its third session (*continued*)

#### CHAPTER VII. RÉGIME OF THE HIGH SEAS (A/CN.4/L.27) (*continued*)

##### *Continental shelf*

##### *Article 2 (continued)*

Paragraph 17 (annex to the "Report", Part I, art. 2, com., para. 1) (*continued*)

1. The CHAIRMAN recalled that towards the end of the previous meeting, Mr. Hsu had submitted to the Commission a text to replace the greater part of paragraph 17<sup>1</sup>. He personally agreed with Mr. Hsu that the exploration and exploitation of the sea-bed and subsoil did not leave the freedom of the high seas wholly intact.

2. Mr. HUDSON was in favour of deleting paragraph 17 and including the ideas it expressed in the comment on article 6.

<sup>1</sup> Summary record of the 130th meeting, para. 82.

3. Mr. FRANÇOIS did not approve of the passage in Mr. Hsu's text claiming that exploration and exploitation of the sea-bed and subsoil would affect the principle of the freedom of the high seas. In point of fact, it was the freedom of the high seas which would be affected and not the principle of that freedom. The rules of navigation were similar in that respect. In his opinion, the principle of the freedom of the high seas was in no way affected by the exploitation of their subsoil, even though such exploitation might cause a certain amount of obstruction to navigation.

4. He did not approve of Mr. Hudson's proposal to delete the paragraph or, at least, insert it elsewhere. He drew the attention of members of the Commission to the fact that the point was one on which the report would be most vigorously attacked. The main objection of the opponents of the system adopted by the Commission was that it interfered with the principle of the freedom of the high seas; that was, for example, the opinion of Professor A. de La Pradelle. It was advisable for that line of argument to be refuted from the outset in the main article of the rules elaborated by the Commission. There was thus good reason for including a statement of those ideas in the comment on article 2.

5. Mr. YEPES shared the view of Mr. François. Article 2 was the main article in the draft. It summed up the opinion of the Commission on a new legal question.

6. The CHAIRMAN noted that the Commission had two proposals before it: one, from Mr. Hsu, was to amend paragraph 17; the other, from Mr. Hudson, was to insert the paragraph elsewhere. He himself had no set opinion with regard to the second proposal.

7. In reply to a question from the CHAIRMAN, Mr. HSU agreed to delete from his text the words "the principle of".

8. Mr. SANDSTRÖM thought it necessary for the Commission, at some point in the report, to state its reasons for recognizing the right of coastal States to explore and exploit the resources of the continental shelf; it should also reply to possible objections. In the comment on article 1, the Commission had given the reasons for recognizing that right. Under article 2, the reasons against recognition should be outlined so that they could be refuted.

9. Mr. SCELLE enquired whether Mr. François was anxious to retain the words "in any respect" in the clause "that would in any respect diminish the freedom of navigation". Although he personally shared the view of Professor de La Pradelle on the question, he considered the words, even viewed from the standpoint of the rapporteur, to be too categorical. The assertion would be correct had the Commission confined itself to recognizing the right to exploit the continental shelf from the shore only. Since, however, it went so far as to envisage exploitation from the high seas, it was no longer possible to claim that freedom of navigation on the high seas was not "in any respect" diminished by exploration of the sea-bed and subsoil.

10. Replying to Mr. FRANÇOIS, who pointed out that it was only the freedom of the high seas which was

diminished, the principle of that freedom remaining intact, Mr. SCELLE remarked that a principle devoid of practical application was as good as non-existent.

11. The phrase "as much... as anyone" was also distasteful to him. It struck a somewhat aggressive note. In any case, while the text of paragraph 17 was quite in accord with the general feeling of the Commission and should accordingly be retained, it was clear that the wording was too categorical.

12. The CHAIRMAN pointed out to Mr. Scelle that the amendment proposed by Mr. Hsu would meet his objections.

13. Mr. AMADO approved, in substance, the ideas enunciated in paragraph 17 but was critical of certain phrases such as "the sound principle", "but refuses to interpret", and "the well-being of mankind". The latter expression, so lyrical in tone, was out of place in a serious text. The exploitation in question was mainly carried out for pecuniary gain. The Commission should return to a sober style befitting the subject.

14. Mr. KERNO (Assistant Secretary-General), actuated by the same desire for stylistic restraint, suggested replacing the words "because they mean progress and may enhance the well-being of mankind", in Mr. Hsu's amendment, by the words "because they meet the needs of the international community".

15. Mr. HSU agreed to the suggestion, but pointed out that the phrase which it was desired to change was taken from the rapporteur's text.

16. The CHAIRMAN noted that the majority of the members of the Commission preferred to leave the ideas enunciated in paragraph 17 where they were.

17. He asked the Commission to come to a decision on the substance of Mr. Hsu's amendment, namely, whether the Commission should acknowledge that exploitation of the continental shelf did to some extent affect the freedom of the seas.

18. Mr. FRANÇOIS did not contest such an assertion but must emphasize once again that the principle of the freedom of the high seas remained intact. The principle was not of so rigid a kind that it would automatically be limited by anything which might limit the freedom of the high seas.

*Mr. Hsu's proposal was approved in substance.*

*The wording suggested by Mr. Kerno for the second sentence of Mr. Hsu's proposal was adopted.*

19. Mr. AMADO proposed that the word "would" in the first sentence of the text submitted by Mr. Hsu be replaced by the word "may".

*It was so decided.*

20. Mr. HUDSON proposed that the words "the principle of the freedom of the seas, particularly as it relates to navigation" be replaced by the words "the freedom of navigation".

21. Mr. YEPES preferred Mr. Hsu's text as it stood.

22. Mr. KERNO (Assistant Secretary-General), developing a remark by Mr. CORDOVA, thought that other maritime activities, such as fishing, must be taken into

consideration. The suggested deletion would therefore have its disadvantages.

*Mr. Hudson's proposal was rejected and Mr. Hsu's text was adopted as amended.*

*Paragraph 18 (annex to the "Report", Part I, art. 2, com., para. 4)*

23. Mr. HUDSON read out the following text which he proposed should be substituted for paragraph 18:

"It serves no purpose to refer to the sea-bed and subsoil of the submarine areas in question as *res nullius*, capable of being acquired by the first occupier. That conception would lead to chaos and would disregard the fact that in most cases the effective exploitation of the natural resources will depend on the existence of installations on the territory of the coastal State to which the submarine areas are contiguous."

24. Mr. FRANÇOIS pointed out that the text left out the consideration that the *res nullius* theory "would make any systematic exploitation of the natural resources of the sea-bed impossible".

25. Mr. HUDSON remarked that, in the Gulf of Mexico for example, Mexico might undertake the exploitation of the continental shelf just as well as the United States of America, if the area of the high seas in which it carried out such exploitation were contiguous to its territory.

26. Mr. FRANÇOIS recalled that the Commission had noted that if the first occupant State could exploit certain resources of the sea, other States subsequently participating in such exploitation at the same points, systematic exploitation of the continental shelf would be impossible. If exploitation was to be efficiently carried out, each area must be placed under single control, that of a single company, for instance. If the continental shelf were considered as *res nullius*, everyone could claim the right to exploit it.

27. Mr. CORDOVA remarked that any decision by the Commission to extend the concept of *res nullius* to the continental shelf might have most undesirable consequences for the coastal States.

28. Mr. SCALLE drew attention to certain contradictions in the system outlined by the Commission. At one point, it stated that exploitation of the subsoil did not depend on the possibility of access from the mainland and, at another, it linked exploitation of the continental shelf with exploitation of the mainland. If the Commission declared it possible to gain access to the continental shelf from the high seas, it would be logical to authorize its exploitation by one and all.

29. Although it was his intention to abstain from voting on the whole section dealing with the continental shelf, he nevertheless felt he must draw attention to that contradiction.

30. Mr. CORDOVA pointed out that, according to the Commission's comment, access to the continental shelf contiguous to the coast of Mexico would be possible from Texas. If one went to the root of the matter, the

Commission was acknowledging the right of the coastal State to priority of control and jurisdiction over the continental shelf not on the ground of possibility of access thereto but because it thought, though it did not say so, that the continental shelf was an extension of the territory of the State.

*The text proposed by Mr. Hudson was adopted.*

*Paragraph 19 (annex to the "Report", part I, art. 2, com., para. 2)*

31. The CHAIRMAN, in reading out the text, suggested that it would be preferable to say in the third line "has its advocates".

32. Mr. HUDSON proposed the following text:

"In some circles it is thought that the exploitation of the natural resources of submarine areas should be entrusted, not to coastal States, but to agencies of the international community generally. In present circumstances, such internationalization would meet with insurmountable practical difficulties, however, and would not ensure the effective exploitation of the natural resources, which is necessary to meet the needs of mankind. Continental shelves exist in many parts of the world; exploitation will have to be undertaken in very diverse conditions, and it seems impracticable at present to rely upon international agencies to conduct the exploitation."

33. Mr. KERNO (Assistant Secretary-General) noted that the majority of the members of the Commission had in fact considered internationalization of the continental shelf to be unwarranted at that stage. He wondered, however, whether internationalization should not be mentioned as an ideal solution which it was not possible to apply for the moment. In that way, the Commission would avoid prejudging the future.

34. Mr. HUDSON said that he did not regard internationalization as an ideal. It was with a view to giving partial satisfaction to the point of view just put forward by Mr. Kerno that he had included the words "in present circumstances" in his text.

35. Mr. CORDOVA enquired whether the Commission admitted the right of the coastal State to consider the continental shelf as part of its territory. If it did not admit that, why should it not accept the possibility of internationalization, which both the draft and Mr. Hudson's amendment dismissed without explanation?

36. The underlying reason which led the Commission to dismiss the idea of internationalisation was that, at bottom, it thought the coastal State enjoyed sovereignty over the continental shelf.

37. Mr. HSU thought that if Mr. Hudson's proposal was going to be accepted, it should be modified. Except for a reference to the "very diverse conditions" in which exploitation of the continental shelf would have to be undertaken in many parts of the world, it did not give the Commission's reasons for turning down the idea of internationalization. Were those reasons valid, they would apply equally to all such problems and would justify a general rejection of all internationalization.

38. Mr. FRANÇOIS accepted the text submitted by Mr. Hudson. Mr. Cordova's thesis was a dangerous one. If it admitted, even provisionally, appropriation by the coastal State, the Commission would render any subsequent internationalization impossible.

39. Mr. AMADO considered that it would be dangerous to rule out all possibility of subsequent international co-operation, such as the formation of an international economic consortium, for the purpose of exploiting the resources of the marine subsoil.

40. Mr. SCELLE wondered if it would be possible to modify the system once adopted. A claim by each State to possession of the bed of the high seas contiguous to its coasts was tantamount to an indefinite extension of the system of territorial waters.

41. Mr. CORDOVA thought that the Commission should not be afraid to say that the exploitation of the continental shelf did not lend itself to internationalization because the shelf should be regarded as an extension of the territory of the coastal State.

42. Mr. HUDSON felt that such an addition would conflict with article 2.

43. The CHAIRMAN thought that, in order not to compromise the future, the Commission would be well advised to make no pronouncement on the merits of a possible internationalization of the continental shelf.

44. Mr. HSU suggested deleting the last sentence in Mr. Hudson's text. International agencies were set up in order to meet the various needs that arose, but the text rejected the idea of their playing any part.

45. The reasons adduced against international agencies were precisely those quoted elsewhere in their support. He felt the sentence was contradictory.

*It was decided by 6 votes to 2, to retain the sentence.*

46. Mr. YEPES explained that he had voted for Mr. Hudson's text because it mentioned the existence of continental shelves in many parts of the world.

*The whole of the text submitted by Mr. Hudson was adopted by 7 votes.*

47. Mr. CORDOVA pointed out that the vote for Mr. Hudson's text involved the rejection of the text he (Mr. Cordova) had submitted in writing and which was worded as follows:

"The Commission is aware that the latter solution has had its advocates. It considers, however, that such internationalization should not be carried out because it believes that the continental shelf, as a submarine extension of the territory of the coastal State, should be subject to the jurisdiction and control of that State."

*Paragraph 20 (annex to the "Report", part I, art. 2, com., para. 6)*

48. Mr. HUDSON read out the text he proposed substituting for paragraph 20. It was as follows:

"It seems to be unnecessary to attempt to base the right of a coastal State to exercise control and jurisdiction for the limited purposes stated in article 2 on customary law. Though numerous proclamations have

been issued over the past decade, it can hardly be said that such unilateral action has established a new customary law. It is sufficient to say that the proclamations are based upon concepts of international law which serve the present-day needs of the international community."

49. Mr. YEPES thought that the idea that international customary law might be established by unilateral proclamation should not be ruled out entirely. If the Commission accepted Mr. Hudson's text, it would be identifying itself with a particular conception of the process of formation of customary law.

50. The CHAIRMAN pointed out that the Commission was not taking any decision as to substance. It was merely stating that, in a specific case, the proclamations in question did not have the effect of establishing a customary law.

51. Mr. YEPES reminded the Commission that no one made the formation of customary law subject to certain conditions as to time. He would accept the proposed text provided it specified that, as an exception to the general rule with regard to the formation of customary law, the case in point was not an example of a new customary law.

52. Mr. HSU considered it incorrect to talk of "concepts of international law".

53. Mr. SCELLE was unable to grasp the pretended distinction between the formation of a customary rule and the establishment of a rule of law based on the needs of the community. As far as he was concerned, every rule of law was based on social need, on the public weal. It seemed to him that, in the case in point, they were dealing with a rule of customary law in process of formation.

54. After a discussion in which Mr. HSU, the CHAIRMAN, Mr. KERNO (Assistant Secretary-General) and Mr. SCELLE took part, Mr. HUDSON proposed replacing the words "concepts of international law", in his text, by the words "general principles of law", the term employed in article 38 of the Statute of the International Court of Justice.

*It was so decided.*

*Mr. Hudson's text was adopted as thus amended.*

*Paragraph 21 (annex to the "Report", part I, art. 2, com., para. 7)*

55. Mr. HUDSON thought the last sentence unnecessary and suggested that the following text be substituted for the paragraph as a whole:

"Article 2 avoids any reference to "sovereignty" of the coastal State over the submarine areas of the continental shelf. As control and jurisdiction by the coastal State would be exclusively for exploration and exploitation purposes, they cannot be placed on the same footing as the general powers exercised by a State over its territory and its territorial waters."

56. Mr. KERNO (Assistant Secretary-General) thought the distinction drawn in the text submitted by Mr. Hudson more apposite. What the Commission had in mind was

not sovereignty but certain rights exercised for clearly defined ends.

57. Mr. CORDOVA preferred the text of the draft report. Once it was stated that exploration and exploitation must be carried out from the mainland, the Commission implicitly recognized the fact that the coastal State enjoyed such rights by reason of its sovereignty. The continental shelf was part of the State territory. Once again, the Commission was frightened of saying that the sovereignty of States extended to the bed and sub-soil of the contiguous high seas. If the basis for exploitation was not ownership, what else could it be?

58. Mr. YEPES said that he too preferred the text of the draft, in which the reasons for which the Commission avoided using the term sovereignty were more clearly stated.

*Mr. Hudson's text for paragraph 21 was adopted by 5 votes to 4.*

*Paragraph 22 (annex to the "Report", part I, art. 2, com., para. 5)*

59. Mr. HUDSON proposed that the paragraph be worded as follows:

"The exercise of the right of control and jurisdiction is independent of the concept of occupation. Effective occupation of the submarine areas in question would be practically impossible; nor can recourse be had to a purely declaratory occupation. The right of the coastal State under Article 2 does not depend on any formal assertion of that right by the State."

60. On the proposal of Mr. SCALLE and following a discussion between Mr. FRANÇOIS and Mr. YEPES, it was decided provisionally to replace in the French text the word "*notionnelle*" by the word "*théorique*".

61. Mr. FRANÇOIS supported the text submitted by Mr. Hudson.

*Mr. Hudson's text for paragraph 22 was adopted. Additional paragraph proposed by Mr. Yepes*

62. Mr. YEPES proposed an additional paragraph on the following lines:

"The idea of the Commission in adopting this article is that the rights of control and jurisdiction over the continental shelf, as defined in this draft, which coastal States are acknowledged to possess, belong to all States regardless of the existence or non-existence of a continental shelf in the geological sense."

63. Mr. HUDSON pointed out that Mr. Yepes was coming back to the same proposal he had already submitted. The recasting of article 1 should have given him satisfaction and the same objections applied to his proposal as before.

*Mr. Yepes' proposal was rejected by 6 votes to 1.*

#### *Articles 3 and 4*

64. Mr. HSU wondered whether articles 3 and 4, which were practically the same, could not be combined into a single article.

65. The CHAIRMAN considered that would hardly be feasible.

*Paragraphs 23 and 24 (annex to the "Report", part I, arts. 3 and 4, com.)*

66. Mr. HUDSON proposed the following text:

"23. The object of articles 3 and 4 is to make it perfectly clear that the control and jurisdiction which may be exercised over the continental shelf for the limited purposes stated in article 2 may not be extended to the superjacent waters and the air-space above them. While some States have connected the control of fisheries and the conservation of the resources of the waters with their claims to the continental shelf, it is thought that these matters should be dealt with independently." (See A/CN.4/L.27, para. 34.)

67. He pointed out that paragraphs 23 and 24 were thereby merged into a single paragraph. He thought he had expressed more forcibly what Mr. François had in mind.

68. Mr. FRANÇOIS had no objection to the new wording.

*Mr. Hudson's text for paragraphs 23 and 24 combined was adopted.*

#### *Article 5*

*Paragraph 25 (annex to the "Report", Part I, art. 5, com., para. 1)*

69. Mr. HUDSON was in favour of deleting the first sentence in the paragraph. They were not really concerned with an application of articles 2 and 3. He proposed that the paragraph be reworded as follows:

"It must be recognized that, in exercising control and jurisdiction under article 2, a coastal State may adopt measures reasonably connected with the exploration and exploitation of the sub-soil, but it may not exclude the laying of submarine cables by non-nationals."

70. Mr. FRANÇOIS accepted that text.

*Mr. Hudson's text for paragraph 25 was adopted.*

*Paragraph 26 (annex to the "Report", Part I, art. 5, com., para. 2)*

71. Mr. HUDSON proposed amending the first sentence of the paragraph to read "whether this provision should be extended . . ." instead of "whether it should extend this provision . . ."

*Paragraph 26 was adopted as thus amended.*

#### *Article 6*

*Paragraph 27 (annex to the "Report", Part I, art. 6, com., para. 1)*

72. Mr. LIANG (Secretary to the Commission) pointed out that the third sentence, "In most cases, however, such exploitation could not meet requirements.", was a little obscure and, furthermore, seemed unnecessary.

73. Mr. HUDSON was in favour of omitting the sentence, which merely repeated what had been said in the previous one.

74. Mr. FRANÇOIS thought the sentence served a useful purpose.

*It was decided to amend the sentence to read as follows:*

“In most cases, however, such exploitation would not be practicable.”

75. Mr. CORDOVA and the CHAIRMAN thought that if the words “in such cases” were to be used in the last sentence, then mention should also be made of fishing. It was not only the interests of navigation which were involved.

76. Mr. HUDSON did not wish any reference to be made to fishing, because the Commission was dealing with the waters in narrow channels. He suggested the following wording:

“For example, in narrow channels, essential to navigation, the claims of navigation should have priority over those of exploitation, unless the conflicting claims can be reconciled.”

77. Mr. FRANÇOIS having accepted that text, *it was adopted.*

*Paragraph 28 (annex to the “Report”, Part I, art. 6, com., para. 2)*

78. *Paragraph 28 was adopted*, after substitution of the word “should” for the word “must” in the first and third sentences.

*Paragraph 29 (annex to the “Report”, Part I, art. 6, com., para. 3)*

79. Mr. HUDSON suggested the wording “The responsibility for giving notification and warning . . . is not restricted to installations set up on regular sea lanes. It is a general duty . . .”

*Mr. Hudson’s text was adopted.*

*Paragraph 30 (annex to the “Report”, Part I, art. 6, com., para. 4)*

80. Mr. HUDSON thought that the first sentence should be deleted and the second and third sentences recast as follows:

“While an installation could not be regarded as an island or elevation of the sea-bed with territorial waters of its own, the coastal State might establish narrow safety zones encircling it.”

81. He would also like to see the last sentence deleted. The point to be brought out was that while such installations must not be considered as islands with territorial waters of their own, the State could establish a safety zone.

82. Mr. KERNO (Assistant Secretary-General) thought that the last sentence might nevertheless be of use in order to make it clear that, in referring to a narrow zone, the Commission was thinking in terms of metres and not kilometres. It was, after all, dealing with installations on the high seas, where a distance of several kilometres might well be regarded as quite small.

83. Mr. FRANÇOIS was in entire agreement with that view.

84. The CHAIRMAN likewise considered that the expression “narrow zone” was vague. The Commission should make clear what it meant by the term.

*It was decided to delete the first sentence of the paragraph, to adopt the wording proposed by Mr. Hudson in place of the second and third sentences, and to retain the last sentence.*

#### Article 7

85. Mr. HUDSON thought the second sentence was unnecessary.

86. The CHAIRMAN, supported by Mr. CORDOVA, was in favour of keeping it.

*It was decided to retain the sentence.*

87. Mr. HSU asked whether article 7, which placed States under an obligation, was not to be redrafted.

88. The CHAIRMAN replied that the majority of the Commission had expressed itself in favour of imposing an obligation whenever it was necessary for an existing dispute to be settled.

*Paragraph 31 (annex to the “Report”, Part I, art. 7, com., para. 1)*

89. Mr. HUDSON suggested the following wording:

“No general rule can be proposed for the drawing of such a boundary, just as a delimitation of territorial waters between adjacent States is not governed by any general rule.”

90. The CHAIRMAN, supported by Mr. FRANÇOIS, said that he did not think it was possible to say: “just as”, since something different was involved. If it were possible to establish a general rule for the delimitation of territorial waters, a great obstacle to the establishment of a delimitation of the continental shelf would be removed. One of the reasons for which the Commission was concerning itself with the continental shelf was that it wished to propose rules in a field in which the practice of States was not yet settled.

91. Mr. HUDSON did not share that view. He recalled that several States, among them the United States and Mexico, and France and Spain, had fixed a boundary between their territorial waters.

92. The CHAIRMAN noted that there was no general rule for the delimitation of territorial waters and that, even if there were, it would not necessarily apply outside those waters. The object was to establish a general rule for the delimitation of the continental shelves but it was difficult to do so in the absence of a general rule for territorial waters.

93. Mr. HSU said he would like the second sentence in the paragraph to be phrased as follows:

“The statement of a general rule for this purpose will be subject to insurmountable difficulties as long as there are no generally recognized rules for the delimitation of territorial waters between adjacent States. Even if such rules existed, they would not necessarily meet the situation when the continental shelf extended far into the sea.”

94. Mr. HUDSON proposed the following text.

“Where the same continental shelf is contiguous to the territories of two or more adjacent States, boundaries may be necessary in the area of the continental shelf. Such boundaries should be fixed by agreement among the States concerned. It is not feasible to lay down any general rule which States should follow; and it is not unlikely that difficulties may arise. For example, no boundary may have been fixed between the respective territorial waters of the interested States, and no general rule exists for such boundaries. It is proposed, therefore, that if agreement cannot be reached and a prompt solution is needed, the interested States should be under an obligation to submit to arbitration *ex aequo et bono*.”

The last sentence in paragraph 31 of Mr. François' draft could then follow on.

95. Mr. FRANÇOIS accepted that drafting.

96. Mr. YEPES wondered whether the text ruled out other means of peaceful settlement.

97. The CHAIRMAN explained that the States concerned could always resort to other means. The text applied only in the absence of agreement.

*Mr. Hudson's text was adopted.*

Paragraph 32 (annex to the “Report”, Part I, art. 7, com., para. 2)

98. The CHAIRMAN and Mr. SCALLE both wondered whether the paragraph was necessary.

99. Mr. HUDSON said that the demarcation line between continental shelves might generally coincide with a certain median line. At times, however, the latter might be difficult to establish, as had been pointed out by Mr. R. Young in the case of the Persian Gulf.<sup>2</sup>

100. He thought it might perhaps be better to say in the second sentence:

“However, in such cases the configuration of the coast might give rise to difficulties in drawing any median line, and such difficulties should be referred to arbitration.”

101. Mr. CORDOVA would prefer no mention to be made of the median line.

102. Mr. FRANÇOIS thought that it was none the less desirable to lay down as a general rule that the boundary would be the median line.

103. Mr. SCALLE objected that the Commission had previously said it was impossible to lay down any general rule.

104. Mr. HUDSON explained that, on that occasion, it had been neighbouring States which were involved. In the case before them, however, the States concerned were those separated by an arm of the sea, such as Iran and Saudi Arabia.

105. Mr. CORDOVA pointed out that two States situated on different sides of an arm of the sea might have continental shelves of very different extent.

106. Mr. FRANÇOIS said that the hypothetical case envisaged by Mr. Córdova did not correspond to that covered by article 7. The article envisaged the existence of a single continental shelf such as that between France and the United Kingdom. Article 7 was appropriate both for States on opposite sides of a stretch of sea and for neighbouring States. Paragraph 31 applied to the latter and paragraph 32 to the former. Territorial waters raised no problem except between neighbouring States. In the case of States on opposite sides of a stretch of sea, there were no difficulties.

107. Mr. CORDOVA was in favour of leaving the whole question to arbitration and not introducing the idea of the median line.

108. Mr. EL KHOURY, supported by Mr. CORDOVA, pointed out that, since the geographical distribution of the continental shelf was uneven, any division by means of a median line was an arbitrary one.

109. Mr. HUDSON did not wish paragraph 32 to be separated from paragraph 31. He referred to the opinion of Mr. S. F. Boggs, that the principle of the median line should be applied in such a case.<sup>3</sup> He recalled the difficulties which arose in the Persian Gulf. It was necessary to decide from what territory the median line was to be measured. When there were islands, account must be taken of their ownership, but it was also possible to trace a median line which left islands out of account.<sup>4</sup> He would vote in favour of retaining the principle of the median line.

110. Having heard that Mr. Kerno (Assistant Secretary-General) had to leave Geneva to lecture to the Academy of International Law at the Hague, he would like to pay tribute to the very valuable assistance given by Mr. Kerno during the whole of that session.

111. The CHAIRMAN and the other members of the Commission associated themselves with Mr. Hudson's tribute.

The meeting rose at 1.0 p.m.

## 132nd MEETING

Wednesday, 25 July 1951, at 9.45 a.m.

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<sup>2</sup> “Legal status of submarine areas beneath high seas”, *American Journal of International Law*, vol. 45 (1951) p. 236.

<sup>3</sup> “Delimitation of seaward areas”, *ibid.*, pp. 256–258.

<sup>4</sup> *Ibid.*, p. 261.

*Chairman:* Mr. James L. BRIERLY  
*Rapporteur:* Mr. Roberto CORDOVA

*Present:*

*Members:* Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jesús Maria YEPES.

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

**Examination of the draft report of the Commission covering its third session (continued)**

CHAPTER VII. REGIME OF THE HIGH SEAS (A/CN.4/L.27)  
 (continued)

*Continental shelf*

*Article 7 (continued)*

*Paragraph 32 (annex to the "Report", Part I, art. 7, com., para. 2) (continued)*

1. The CHAIRMAN recalled that, when the previous meeting had risen, the Commission had been considering the question of the median line between the continental shelves of two States on opposite shores. He thought that the Commission might adopt the following text:

"Where the territories of two States are separated by an arm of the sea, the boundary of their continental shelves would generally coincide with some median line between the two coasts. However, in such cases the configuration of the coast might give rise to difficulties in drawing any median line, and such difficulties should be referred to arbitration."

*The above text was adopted.*

*Paragraph 33*

*Paragraph 33 was deleted.*

*Resources of the sea*

*Article 1*

2. The CHAIRMAN observed that some specific number of miles should be mentioned in article 1.

3. After some discussion, in which Mr. HUDSON, Mr. FRANÇOIS and Mr. YEPES took part — the first-named favouring a short distance and the last-named the distance of 200 miles already stipulated in proclamations by certain Latin American States — Mr. EL KHOURY suggested a distance of 100 miles.

*It was decided to substitute "100" for "X" (miles) in the fourth sentence of article 1.*

*Article 2*

4. Mr. LIANG (Secretary to the Commission) drew attention to what he considered a contradiction between the beginning of the text of article 2 and article 1, doubtless due to the fact that the texts had been adopted independently. The statement at the beginning of

article 2 that the "FAO should confer competence on a permanent body . . ." was not mentioned in the comment in paragraph 34. If it was a recommendation to FAO, it should perhaps be worded differently. Furthermore, the desirability of imposing a task on FAO without previous consultation was questionable. He would prefer the following wording:

"A permanent body should be established to conduct continuous investigations on an international basis . . ."

The comment could state that the Commission regarded FAO as the organization most competent to establish such a body.

5. Mr. HUDSON supported by the CHAIRMAN and Mr. HSU fully agreed with Mr. Liang. Article 2, as it stood, was not an article concerning the resources of the sea, but a hope expressed by the Commission that someone would do something; it should preferably be included in the comment. He did not think that FAO should be told what to do.

6. Mr. FRANÇOIS pointed out that at the 119th meeting he had not voted for the present article 2, but for another and more far-reaching text. Those members who had voted for article 2 had considered that it formed an integral whole with article 1. If the principle of compulsory arbitration were dropped from the article, its supporters were faced with quite a different situation. It had even been the Commission's intention to set up a body whose decisions would be binding.

7. Mr. HUDSON thought that the aim was, not to set a standard, but to express a vague aspiration. The Commission could not define the powers of a body which it was not creating. He would repeat that the whole of article 2 should be transferred to the comment.

8. Mr. FRANÇOIS said that Mr. Hudson's proposal would represent a substantive amendment to the draft.

9. Mr. HUDSON suggested the deletion of the words "and for the prevention of water pollution".

10. Mr. FRANÇOIS said that the question of water pollution was important, not only for the protection of fish, but also for that of sea-birds, for the prevention of fire in harbours etc.

11. Mr. HSU, holding that the question was one of drafting, submitted the following amended text:

"A permanent body should be set up by such competent international organization as the FAO to conduct continuous investigations of the world's fisheries and the methods employed in exploiting them, for the information of the public. It shall also draw up regulations for conserving marine resources and the prevention of water pollution for use by the States referred to in article 1. Pending adoption of regulations by their own accord, the said States shall provisionally enforce the regulations drawn up by the permanent body."

12. The CHAIRMAN thought that article 2 might begin with the words: "Competence should be conferred on a permanent body to conduct . . .", while Mr. CORDOVA proposed: "A permanent international body should be established . . .".

13. Mr. HUDSON requested Mr. Hsu to clarify the meaning of the last sentence in his proposal.
14. Mr. HSU explained that the proposed body would have the right to prepare regulations which would be applied pending inter-State agreement.
15. Mr. CORDOVA asked whether regulations prepared by an international body could be changed as a result of an agreement between States whose nationals engaged in fishing. He thought it would be preferable to state that regulations were a matter for the States concerned, but that if the latter could not reach agreement the permanent body would take action.
16. Mr. HUDSON considered that the text submitted by Mr. Hsu contradicted Mr. François' draft.
17. Mr. EL KHOURY pointed out that the Commission had adopted article 2 and he saw no reason for its reversing its decision.
18. Mr. FRANÇOIS said that he would also prefer, on the same grounds, that no substantial amendments should be made to the text. He requested Mr. Hsu not to press his proposal.
19. Mr. HSU withdrew his proposal.
20. The CHAIRMAN asked what decision the Commission intended to take with regard to the second sentence in article 2.
21. Mr. CORDOVA thought that, if the second sentence were retained, the proposed permanent body would be competent to deal with the cases referred to in article 1. But since the Commission apparently did not intend to retain the sentence, the gist of it should at least be given in the comment.
22. Mr. FRANÇOIS thought that the sentence should be retained.
23. Mr. LIANG (Secretary to the Commission) asked whether the sentence implied that arbitration should be resorted to in the event of a dispute between two States. He suggested that the sentence begin with the phrase "In case of disagreement such body should occupy itself . . .".
24. The CHAIRMAN, supported by Mr. SCALLE and Mr. LIANG (Secretary to the Commission) thought that the sentence referred, not to arbitration, but to the right to lay down regulations.
25. Mr. CORDOVA disagreed, since where States whose nationals fished in certain areas could not agree as to the measures to be adopted, there were no regulations for the conservation of marine fauna and the proposed body could take compulsory measures in the case of fisheries.
26. Mr. SANDSTRÖM understood that in the event of dispute between States the proposed body would be competent to regulate. In a nutshell, its competence would cease when States reached agreement.
27. Mr. CORDOVA thought that the sentence should begin: "Such body should not regulate the case referred to in article 1 except in case of disaccord . . .".
28. The CHAIRMAN explained that the regulations established by such a body applied only to the cases referred to in article 1, and then only if the States failed to reach agreement.
29. Mr. SANDSTRÖM thought that it was preferable to make no reference to arbitration at that point, but to confirm the right of the body to establish quite independent regulations.
30. The CHAIRMAN read out the following text:  
 "Such regulations, however, should not apply in the cases referred to in article 1 unless the States whose nationals are engaged in fishing in any particular area are unable to agree among themselves."
31. Mr. LIANG (Secretary to the Commission) pointed out that the cases mentioned in article 1 were stated in general terms. He did not think that there were any measures mentioned in article 1 which were not conservatory measures. Since article 2 concerned the same measures, it must refer to article 1.
32. Mr. HUDSON proposed the following text:  
 "Competence should be conferred on a permanent international body to conduct continuous investigations of the world's fisheries and the methods employed in exploiting them, and to make regulations for conservatory measures to be applied by the States whose nationals are engaged in fishing in any area of the high seas, and for the prevention of water pollution, unless such States reach agreement otherwise.  
 However he thought it preferable that water pollution should be the subject of a separate article. Mr. François' intentions were doubtless excellent, but orderly work was essential.
33. The CHAIRMAN suggested the following text:  
 "Competence should be conferred on a permanent international body to conduct continuous investigations of the world's fisheries and the methods employed in exploiting them. Such body should also be empowered to make regulations for conservatory measures to be applied by the States whose nationals are engaged in fishing in any particular area, where the States concerned are unable to agree among themselves."
34. Mr. FRANÇOIS regretted the elimination of the question of water pollution from the article since it was one which the States claiming control of the waters overlying the continental shelf had had in mind. He saw no reason for eliminating it.
35. Mr. HUDSON explained that the Economic and Social Council had recently transmitted a questionnaire on water pollution to governments. He was doubtful as to the advisability of stating that the proposed body should deal with that question separately. He asked whether the Secretariat had any information concerning the action taken by the Economic and Social Council.
36. Mr. LIANG (Secretary to the Commission) thought that no statement was possible so long as the replies to the questionnaire had not been examined. The problem could be solved by stating in the commentary that the Economic and Social Council was dealing with the question of water pollution.
37. Mr. AMADO asked whether it was really impossible to include a short article on the question.

38. Mr. HUDSON said that, although he would agree to such an article, it would be difficult to word. The conference held at Washington in 1926, like the efforts of the League of Nations, had proved fruitless. Moreover, it was doubtful whether the same body should deal with both fisheries and water pollution. In his view, that was impossible.

39. Mr. FRANÇOIS agreed, but added that the working of the subsoil could pollute waters.

40. Mr. HUDSON knew of no case in point, either in the Gulf of Maracaibo or in the Gulf of Mexico. It could only happen if, for example, there was a leak in an oil well at sea.

41. Mr. FRANÇOIS thought that it would nevertheless be wise to consider such a possibility.

42. Mr. LIANG (Secretary to the Commission) suggested that it might be considered when the Commission reviewed the draft in the following year. The Economic and Social Council might have reached a conclusion by that time.

43. Mr. FRANÇOIS agreed and said that he would merely mention the question in the comment.

44. The CHAIRMAN, referring to the difficulty of indicating the competent body to deal with the question, said that a body solely concerned with fisheries might clearly not be the appropriate body. He proposed that it be stated in the commentary that the Commission had taken note that the Economic and Social Council had taken up that question, which affected fisheries.

*It was so agreed.*

*Article 2, as amended by the Chairman's proposal (see paragraph 33 above), was adopted.*

*Paragraph 34 (annex to the "Report", Part II, art. 2, com., para. 1)*

45. Mr. FRANÇOIS drew attention to an inaccuracy in the second half of the penultimate sentence of paragraph 34 and proposed the deletion of the words: "it is one of the fourteen items . . . selected for codification".

*It was so agreed.*

46. Mr. HUDSON proposed the deletion of paragraph 34 and the substitution of the following text:

"The conservation of the resources of the sea has been connected with the claims to the continental shelf advanced by some States in recent years, but the two subjects seem to be quite distinct, and for this reason they have been separately dealt with."

47. The CHAIRMAN noted that the redraft proposed by Mr. Hudson was much shorter and did not alter the meaning of the paragraph concerned.

48. Mr. FRANÇOIS had no objection to the proposed amendment.

49. Mr. SANDSTRÖM observed that the text proposed by Mr. Hudson omitted the idea contained in the following sentence from the text prepared by Mr. François: "The Commission fully recognizes that the conservation of the resources of the sea is a matter of capital importance which requires an early solution; . . ."

50. Mr. HUDSON thought that there was no point in judging the importance of the question.

*Mr. Hudson's proposal was adopted.*

*Paragraphs 35 and 36 (annex to the "Report", Part II, art. 2, com., para. 2)*

51. Mr. HUDSON proposed the following text to combine paragraphs 35 and 36:

"The protection of marine fauna against extermination is needed in the interest of conserving the world's supply of food. The States whose nationals are engaged in fishing in a particular area have a special responsibility, therefore, and they should reach agreement on the regulations to be applied in that area. Where only nationals of a single State are thus engaged in an area, the responsibility rests on that State. Yet the exercise of power to ordain conservatory measures should not exclude participation in fishing in any area by new-comers. Where a fishing area is close to a coast, so that any regulation might affect the fishing in the territorial waters of a coastal State, that State should be entitled, even though its nationals are not engaged in fishing in the area, to participate in making the regulations to be applied."

52. Mr. AMADO asked why territorial waters were mentioned.

53. Mr. HUDSON explained that it was because the regulation of fishing in the areas in question might affect fishing in territorial waters.

54. Though he wished to point out that the text to which Mr. Hudson proposed the above amendment had been adopted by a sub-committee of which Mr. Hudson had been a member, Mr. FRANÇOIS, supported by Mr. EL KHOURY and Mr. YEPES, said that he was satisfied with Mr. Hudson's new text.

*It was decided to substitute for paragraphs 35 and 36 of the draft the new text proposed by Mr. Hudson.<sup>1</sup>*

*Paragraph 37 (annex to the "Report", Part II, art. 2, com., para. 3)*

55. Mr. HUDSON thought that the introductory phrase "The Commission is quite aware that . . ." and also the last sentence should be deleted. The paragraph was consistent with the amended text of article 2, and he saw no objection to the reference to the question of water pollution which it contained.

*It was decided to delete the introductory phrase "The Commission is quite aware that . . .".*

56. After some discussion, in which Mr. HUDSON, Mr. CORDOVA and the CHAIRMAN took part, it was decided to include in the draft a short paragraph on the prevention of water pollution.<sup>1a</sup>

57. Mr. LIANG (Secretary to the Commission) pointed out that the Commission should consider whether the international body mentioned in paragraph 37 was, in fact, the body which would be competent to deal with

<sup>1</sup> See summary record of the 134th meeting, para. 57.

<sup>1a</sup> See summary record of the 133rd meeting, paras. 13-14.

the question. It was stated in the memorandum presented by the Secretariat on questions concerning the regime of the high seas which were under study by other organs of the United Nations or by specialized agencies, of 23 June 1950 (A/CN.4/30), that the Transport and Communications Commission of the Economic and Social Council had noted that "the Inter-Governmental Maritime Consultative Organization (IMCO) . . . would be the competent agency to handle this subject" and had proposed the adoption by the Economic and Social Council of a resolution instructing the Secretary-General to transmit a questionnaire to the States Members of the United Nations. No information was so far available as to the action taken that year by the Economic and Social Council on the question of water pollution. In addition, the attention of the Commission should be drawn to the functions of the Food and Agriculture Organization of the United Nations in that field, as laid down in its Constitution. Under article I, paragraph 2 (c) of the latter that organization was responsible for "the conservation of natural resources and the adoption of improved methods of agricultural production", while article 1, paragraph 1, stated that "the term 'agriculture' and its derivatives include fisheries, marine products . . .".

58. Mr. AMADO thought that the Commission might recommend that FAO should continue its study of the question.

59. The CHAIRMAN and Mr. HUDSON proposed the following text:

"This matter would seem to lie within the general competence of FAO."

60. Mr. FRANÇOIS accepted the above text.

*The above text was adopted in substitution for the last sentence of paragraph 37.*

*Paragraph 37 was adopted as amended.*

*Paragraph 38 (annex to the "Report", Part II, art. 2, com., para. 5)*

61. Mr. HUDSON considered that the feelings of the Commission should not be reported to the General Assembly. In his view, paragraph 38 was incompatible with article 2. It might very well be included in the general report, but was out of place in the comment on that article.

62. Mr. FRANÇOIS observed that, whereas the general report was not transmitted to governments, the present draft must be submitted to them. The comment recorded the view that the coastal State should be granted the right to frame regulations, which was much further than the draft article went. He was strongly in favour of leaving that text in the comment.

63. Mr. HUDSON thought that, if the text was retained, the comment would cease to be a comment. If he were a delegate to the General Assembly reading such a text, he would assume that the Commission did not believe what it stated in article 1.

64. The CHAIRMAN, however, thought that the General Assembly would note that the Commission had

studied that possibility without actually sponsoring it — the very words used at the end of the paragraph.

65. Mr. CORDOVA pointed out that the text gave a true account of the proceedings.

66. Mr. FRANÇOIS was under the impression that the Commission had decided to insert the text in the report. Six members of the Commission had agreed, as a compromise, to accept the text of the article, provided that the other proposal was included in the report.

*It was decided, by 6 votes to 2, to retain paragraph 38.*

67. Mr. EL KHOURY said that he would prefer the introductory phrase to read: "Some members of the Commission were in favour of granting . . ."

68. Mr. LIANG (Secretary to the Commission) was very doubtful whether the result of the vote should be given in the paragraph, as it was in the last sentence.

69. Mr. HUDSON thought that the last sentence only referred to the breadth of the contiguous zone, but Mr. FRANÇOIS explained that it referred to the whole paragraph.

70. Mr. LIANG (Secretary to the Commission) was of opinion that the paragraph should first state the problem and then mention that the Commission had discussed it, adding some reference or other to the fact that only some members had favoured the proposal. The paragraph might begin with the sentence:

"The Commission discussed the question concerning the right to frame . . . pending the establishment of the body referred to in article 2."

71. Mr. HUDSON thought that the statement might read:

"It was proposed that pending the establishment of the body referred to in the previous paragraph a coastal State should have power to enact regulations to be applied in a zone contiguous to its own territorial waters."

72. The CHAIRMAN proposed the substitution of the following text for the first sentence in paragraph 38:

"The Commission discussed a proposal that a coastal State should be empowered to lay down conservatory regulations to be applied in a zone contiguous to its territorial waters, pending the establishment of the body referred to in the previous paragraph."

*The Chairman's text was adopted.*

73. The CHAIRMAN said that the Commission had to decide whether to state in the comment that there had been a tied vote or merely to mention that the proposal concerned had not been adopted.

74. Mr. FRANÇOIS thought that the last sentence of the paragraph should be retained.

*It was decided by 6 votes to retain the last sentence of paragraph 38.*

*Paragraph 38 was adopted as amended.*

#### *Sedentary fisheries*

75. Mr. HUDSON thought it might be useful to insert the general heading "Related Questions" before the individual headings which followed the study of the

continental shelf. It might also be desirable to adopt one system of numbering for all the articles.

*It was so decided.*

*Paragraph 39 (annex to the "Report", Part II, art. 3, com., para. 1)*

76. After reading out the text of paragraph 39, the CHAIRMAN pointed out that in line 5, the words "of either" should be transposed and in line 6, the word "of" should be inserted after the word "or".

77. Mr. HUDSON proposed the substitution of the following text for paragraph 39:

"This article deals with fisheries regarded as sedentary due to the species of fish caught and the nature of the equipment used. It is concerned only with such fisheries located upon the high seas.

"The regulation of sedentary fisheries presents a problem which is quite distinct from that of the exploitation of the natural resources of the continental shelf, and for this reason it has been dealt with separately."

78. Mr. FRANÇOIS pointed out that the text proposed by Mr. Hudson combined the ideas contained in paragraphs 39 and 40. After some discussion, in which Mr. YEPES and Mr. AMADO took part, Mr. HUDSON agreed with Mr. FRANÇOIS that "mineral resources" would be more accurate than "natural resources".

After some further discussion *it was decided to retain the text of paragraph 39 as contained in the draft.*

*Paragraph 40 (annex to the "Report", Part II, art. 3, com., para. 2)*

79. Mr. HUDSON thought that paragraph 40 should be deleted, but agreed, in reply to an observation by Mr. FRANÇOIS, that it might be retained if amended as follows:

"The question of sedentary fisheries can give rise to legal difficulties only when such fisheries are situated beyond the outside limit of territorial waters."

*Paragraph 40 was adopted as amended.*

*Paragraph 41 (annex to the "Report", Part II, art. 3, com., para. 3)*

80. Mr. HUDSON proposed the substitution of the following text for paragraph 41:

"Banks where there are sedentary fisheries, situated in areas contiguous to but seaward of territorial waters, have been regarded by some coastal States as under their occupation and as forming part of their territory. Yet this has rarely given rise to complications."

81. Mr. CORDOVA observed that sedentary fisheries did not form part of the territory of the coastal State.

82. Mr. HUDSON emphasized the moderate tone of the words which he had used. His text concerned, not sedentary fisheries, but the banks on which they were established and stated that only "some" coastal States regarded them as forming part of their territory.

83. Mr. FRANÇOIS, observing that Mr. Hudson had deliberately refrained from using the word "property"

in his proposal, said that the Government of the United Kingdom had used that term in defining the rights which it claimed over the banks in question. In support of this statement he read out the following passage from the reply by the Government of the United Kingdom to a questionnaire of the Preparatory Committee of the Conference for the Codification of International Law of 1930:

"There are certain banks outside the three-mile limit off the coasts of various British dependencies on which sedentary fisheries of oysters, pearl oysters, chanks or bêtes-de-mer on the sea bottom are practised, and which have by long usage come to be regarded as the subject of occupation and property."<sup>2</sup>

84. Mr. HUDSON observed that such a property claim was a survival of the theories of Vattel.

85. Mr. AMADO said that he favoured the text as contained in the draft, which he considered unobjectionable.

86. After some discussion in which, among others, the CHAIRMAN and Mr. CORDOVA took part, the text proposed by Mr. Hudson was adopted.

*Paragraph 42 (annex to the "Report", Part II, art. 3, com., para. 3)*

87. In reading out the text of paragraph 42 the CHAIRMAN observed that the word "private", in the first sentence should be deleted.

88. Mr. HUDSON proposed the deletion of the last sentence, which he regarded as valueless. So far as concerned oyster fisheries, special rights might be justified in the case of edible oysters, but not in that of pearl oysters.

89. The CHAIRMAN said that, in his view, such special rights should not be based on a special situation. He favoured the "occupation" theory.

90. After some discussion *it was decided* to insert a full stop after the word "restricted" in the third sentence and to delete the remainder of the sentence. The following amendments of form were *approved*: the substitution of the words "reference to" for the words "definition of", in the first sentence; of the word "special" for the word "peculiar", and of the word "areas" for the word "territories", in the second sentence; and the deletion of the word "special", in the third sentence.

*Paragraph 42 was adopted as amended.*

*Paragraph 43 (annex to the "Report", Part II, art. 3, com., para. 4)*

91. Mr. HUDSON proposed the deletion of the first sentence of paragraph 43.

*It was decided by 6 votes to retain the first sentence of paragraph 43.*

92. Mr. HUDSON proposed the deletion of the word "all" before "purposes", in line 3, and of the phrase

<sup>2</sup> Publications of the League of Nations. Bases of Discussion drawn up for the Conference for the Codification of International Law, of 1930. Vol. II, p. 162.

“ at the point ”, in line 4, which had no equivalent in the French text.

*It was so agreed.*

*Paragraph 43 was adopted as amended.*

*Paragraph 44*

93. Mr. HUDSON, supported by Mr. FRANÇOIS, proposed the deletion of paragraph 44.

*It was decided to delete paragraph 44.*

94. The CHAIRMAN said that he wished to point out, on completion of the reading of the section of the report devoted to sedentary fisheries, that he was far from accepting the premises on which the relevant rules formulated by the Commission were based. In his view, sedentary fisheries became a subject of occupation and ceased to form, legally speaking, a part of the high seas.

*Contiguous zones*

*Paragraph 45 (annex to the “ Report ”, Part II, art. 4, com., para. 1)*

95. On an observation by Mr. FRANÇOIS, the CHAIRMAN proposed the insertion of the phrase “ for certain purposes ” after the word “ jurisdiction ”.

96. On an observation from Mr. LIANG (Secretary to the Commission) the CHAIRMAN proposed the substitution for the final clause of the wording “ without extending the seaward limits of those waters ”.

97. Mr. HUDSON proposed the substitution for the phrase “ a belt of sea situated beyond territorial waters ” of the phrase “ a belt of the high seas contiguous to their territorial waters ”.

*The above amendments were adopted.*

98. Mr. HUDSON also proposed that the opening of the paragraph be reworded to read: “ At the present time, international law . . . ”.

99. The CHAIRMAN said that he preferred the original wording. The Commission should not affirm too dogmatically a principle which was not accepted by certain governments — for instance, the Government of the United Kingdom.

100. After some discussion, in which Mr. EL KHOURY, Mr. AMADO and Mr. LIANG (Secretary to the Commission) took part, *the rewording proposed by Mr. Hudson was accepted*, subject to the deletion of the words “ At the present time ”.

*Paragraph 45 was adopted as amended.*

*Paragraph 46 (annex to the “ Report ”, Part II, art. 4, com., para. 2)*

101. On the proposal of Mr. AMADO, *it was decided* to delete the words “ A great ” at the beginning of the paragraph.

102. Replying to an observation by Mr. HUDSON, Mr. FRANÇOIS explained that it was indeed the principle that had been adopted by many States, since there were States that had accepted control for fiscal and customs purposes by other States.

103. Mr. HUDSON proposed the deletion of the second

sentence of paragraph 46, beginning with the words “ In the Commission’s view . . . ”.

After some discussion, *it was decided to retain the second sentence of paragraph 46.*

104. On the proposal of Mr. FRANÇOIS, *it was decided* to substitute the words “ may be ” for the words “ might still be some ” in the second sentence.

105. On an observation by Mr. FRANÇOIS, *it was decided* to substitute the phrase “ is in favour of fixing ” for the phrase “ feels that it would be reasonable to fix ” in the third sentence.

106. On an observation by Mr. FRANÇOIS, the CHAIRMAN, supported by Mr. AMADO, proposed that the phrase “ will prove insufficient ” in the fourth sentence, be replaced by the phrase “ is insufficient ”.

107. Mr. SCELLE observed that the words “ slight extension ”, in the fifth sentence were open to a dangerous interpretation. They would enable the contiguous zone to be extended for considerable distances, for example, 80 or 90 miles.

108. The CHAIRMAN agreed with Mr. Scelle and proposed the deletion of the whole of the sentence, beginning “ If so, the Commission would have no objection . . . ”.

*The Chairman’s two amendments were adopted.*

109. Mr. EL KHOURY having proposed that the distances be stated in kilometres, Mr. HUDSON pointed out that nautical practice was to measure distances in miles.

*Paragraph 46 was adopted as amended.*

*Paragraph 47 (annex to the “ Report ”, Part II, art. 4, com., para. 3)*

110. Mr. HUDSON proposed that the sense of paragraph 47 should be conveyed affirmatively by substituting for the clause beginning “ . . . the Commission sees no reason . . . ” the words “ . . . the Commission believes that, in view of the connexion between customs and sanitary regulations, the contiguous zone of 12 miles should be recognized for the purposes of sanitary control as well ”.

111. After some further discussion in which Mr. FRANÇOIS and Mr. LIANG (Secretary to the Commission) took part, *the text proposed by Mr. Hudson was adopted.*

*Paragraph 48 (annex to the “ Report ”, Part II, art. 4, com., para. 4)*

112. A discussion took place as to whether the Commission should state in its report that it felt that there was no occasion to set up contiguous zones for security purposes.

113. Mr. FRANÇOIS pointed out that the Conference for the Codification of International Law, held at The Hague in 1930, had considered security purposes in connexion with contiguous zones. If the Commission deleted all reference to the question of security, its report would be incomplete.

114. Mr. HUDSON proposed that paragraph 48 begin with the following sentence :

“The proposed contiguous zones are strictly limited. They are not intended for purposes of security or of exclusive fishing rights.”

115. Mr. AMADO, supported by Mr. CORDOVA, considered that security purposes should not be mentioned and requested a vote on the matter.

*It was decided by 6 votes to 4 to retain the reference to security purposes.*

*The amendment proposed by Mr. Hudson was adopted.*

116. Mr. HUDSON proposed the deletion of the word “Even”, in the third sentence, and the substitution of the words “offered no prospect” for the words “did not suggest the prospect”, in the third sentence.

117. The CHAIRMAN proposed the deletion of the word “appreciably” at the end of the paragraph.

118. Mr. FRANÇOIS accepted the above amendments.

*Paragraph 48 was adopted as amended.*

#### *Paragraph 49*

119. On the proposal of Mr. HUDSON, *it was decided to delete paragraph 49.*

#### *Paragraph 50*

120. On the proposal of Mr. FRANÇOIS, supported by Mr. AMADO, *it was decided to delete paragraph 50.*

*Paragraph 51 (annex to the “Report”, Part II, art. 4, com., para. 5)*

121. Mr. HUDSON proposed that the first sentence of paragraph 51 be reworded as follows:

“The recognition of special rights to the coastal State in a zone contiguous to its territorial waters for customs, fiscal and sanitary purposes, will not affect the legal status of the air-space above such a zone.”

*It was so agreed.*

122. The CHAIRMAN proposed the deletion from the second sentence of the words “Possibly” and “at present”.

*It was so agreed.*

123. On an observation by Mr. HUDSON, Mr. LIANG (Secretary to the Commission) proposed the substitution for the words “rules on maritime law”, in the last sentence, of the words “the régime of the high seas.”

*It was so agreed.*

124. The CHAIRMAN said that, on the completion of the first reading of Chapter VII of the general report of the Commission, he had to express the Commission's warm thanks to Mr. François for his valuable assistance in preparing the special reports and the draft general report on the régime of the high seas. He paid tribute to the conciliatory spirit displayed by Mr. François during the reading of the draft, the final version of which he had had to produce in particularly difficult working conditions, and assured him of the Commission's whole-hearted gratitude.

125. Mr. SCELLE said that he wished to point out that he would not vote on the report concerning the régime of the high seas owing to the articles which it

contained concerning the continental shelf. The ground for his abstention, which must not be interpreted as a criticism of that chapter of the report, was that he was opposed to the continental shelf doctrine, which was contrary to the freedom of the seas.

The meeting rose at 1.20 p.m.

## 133rd MEETING

*Thursday, 26 July 1951, at 9.45 a.m.*

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*Chairman:* Mr. James L. BRIERLY

*Rapporteur:* Mr. Roberto CORDOVA

#### *Present:*

*Members:* Mr. Gilberto AMADO, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. Jesús Maria YEPES.

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

### Appointment of special rapporteurs

1. The CHAIRMAN reminded the Commission that it had still to appoint special rapporteurs “for the questions of nationality, including statelessness”, and of the revision of the Commission's statute.

(a) *Appointment of a special rapporteur for the study of nationality, including statelessness*

2. Mr. SANDSTRÖM proposed Mr. Hudson as rapporteur for the question of nationality.

3. Mr. HUDSON observed that the projected study was mainly concerned with the elimination of the problem of statelessness. Although the Commission had decided to undertake a study of nationality as a whole, it was with questions connected with the elimination of statelessness that they were concerned at the moment.

4. The CHAIRMAN remarked that it would be difficult to separate the two parts of that study. He proposed that the projected study be called: "Nationality, with particular reference to the elimination of statelessness". He was, moreover, of the opinion that the rapporteur should be allowed considerable latitude.

*The Commission unanimously invited Mr. Hudson to undertake the duties of special rapporteur for that question.*

5. Mr. HUDSON accepted the appointment.

6. Mr. LIANG (Secretary to the Commission) read out a communication, dated 5 April 1951, from the High Commissioner for Refugees to the Secretary-General of the United Nations, offering the United Nations his assistance for the purposes of the study of the question of statelessness.

7. Mr. HUDSON said he would get in touch with the High Commissioner for Refugees in regard to the matter.

8. Mr. LIANG (Secretary to the Commission) considered that, in accordance with a decision taken at its last session,<sup>1</sup> the Commission should also take up the question of the nationality of married women.

9. The CHAIRMAN pointed out that the position of married women would naturally be covered in the report on nationality.

(b) *Appointment of a special rapporteur for the study of the revision of the Commission's statute*

10. The CHAIRMAN, supported by Mr. SANDSTRÖM, proposed Mr. Córdova as special rapporteur for the question of revision. Before starting his work, the rapporteur appointed would have to await the decision of the General Assembly on that part of the Commission's general report having reference to the statute.

11. Mr. CORDOVA agreed to act as rapporteur; and asked the other members of the Commission to afford him their assistance.

12. Mr. HUDSON urged that he submit the Commission's existing statute to really critical examination.

*The Commission unanimously decided to appoint Mr. Córdova as special rapporteur for the study of the revision of its statute.*

#### **Examination of the draft report of the Commission covering its third session (continued)**

#### **CHAPTER VII: REGIME OF THE HIGH SEAS (A/CN.4/L.27 AND A/CN.4/L.27.ADD.1) (continued)**

*Resources of the sea (resumed from the 132nd meeting)*

*Prevention of the pollution of waters (annex to the "Report", Part II, art. 2, com., para. 4)*

13. The CHAIRMAN recalled that, at its last meeting, the Commission had decided to insert after paragraph 37 a text on the protection of waters against pollution.<sup>2</sup> Mr. François had submitted the following text:

<sup>1</sup> See *Report of the International Law Commission covering its second session, Official records of the General Assembly, fifth session, Supplement No. 12 (A/1316)*, paras. 19–20.

<sup>2</sup> Summary record of the 132nd meeting, paras. 33–34.

"The problem of the pollution of sea water is another question of great importance, not only with regard to the conservation of the resources of the sea, but also with regard to birds, fires in harbours etc. The Commission noted that the Economic and Social Council has concerned itself with the problem."<sup>3</sup>

14. Mr. HUDSON proposed that the above text be replaced by the following, which expressed the same concepts in another form;

"The pollution of waters of the high seas presents special problems, not only with regard to the conservation of the resources of the sea but also with regard to the protection of other interests. The Commission noted that the Economic and Social Council has taken an initiative in this matter."<sup>4</sup>

After some discussion, *the text submitted by Mr. Hudson was adopted.*

#### *Paragraphs for inclusion at the beginning of chapter VII*

15. The CHAIRMAN submitted the following drafts for the consideration of the Commission:

"1. At its first session, held in 1949, the International Law Commission included in the provisional list of topics selected for codification, the régime of the high seas; after giving priority to this topic, among others, it elected Mr. J. P. A. François special rapporteur for the régime of the high seas.

2. Mr. François' first report on this subject (A/CN.4/17) was examined at the second session of the Commission in 1950. The Commission had before it also the replies from some governments to a questionnaire circulated by it (A/CN.4/19, part I, C). The special rapporteur was requested to formulate concrete proposals on various subjects coming under the régime of the high seas.

3. At the third session Mr. François submitted a second report on these subjects (A/CN.4/42). It was examined by the Commission at its 113th to 125th meetings and at its 130th to 133rd meetings.

4. The Commission first examined the chapters of the report dealing with the continental shelf and various related subjects, namely, conservation of the resources of the sea, sedentary fisheries and contiguous zones. It reached certain conclusions and it decided to give to its drafts the publicity referred to in Article 16, paragraph (g) of its Statute, and in particular to communicate these drafts to governments so that they could submit their comments as envisaged in paragraph (h) of the same article. The texts of the draft articles and commentaries thereon are reproduced in the Annex to this report."

*Paragraphs 1 and 2 (paragraphs 76–77 of the "Report")*

*Paragraphs 1 and 2 were approved without comment.*

<sup>3</sup> Resolution 298 C (XI) of 12 July 1950.

<sup>4</sup> *Ibid.*

*Paragraph 3 (paragraph 77 of the "Report")*

16. Following a remark by Mr. LIANG (Secretary of the Commission) the CHAIRMAN proposed that paragraph 2 and paragraph 3 be combined.

*It was so decided.*

*Paragraph 4 (paragraph 78 of the "Report")*

*Paragraph 4 was approved without comment.*

*Paragraph 52 (A/CN.4/L.27/Add. 1)<sup>5</sup>*

17. Mr. HUDSON observed that the paragraphs comprising document A/CN.4/L.27/Add. 1 should follow immediately after those which the Commission had just approved. Document A/CN.4/L.27, less its first five paragraphs, should be included as an annex to the general report.

18. He suggested that the above-mentioned annex be entitled "The Continental Shelf and Related Questions". The draft articles on related questions, such as the conservation of the resources of the sea, sedentary fisheries and contiguous zones, should be numbered consecutively.

19. After a short discussion, Mr. CORDOVA, as general rapporteur, expressed his agreement with the above-mentioned proposals.

20. On a proposal by Mr. HUDSON, supported by Mr. FRANÇOIS, *it was decided to delete paragraph 52.<sup>6</sup>*

*Paragraph 53 (paragraph 79 of the "Report") (Nationality of ships)*

21. Mr. HUDSON proposed that the heading of the paragraph (Nationality of ships) be deleted and included in the text itself, which would then read: "On the question of the nationality of ships, the Commission approved . . ."; the same thing should be done as regards the following paragraphs.

*It was so decided.*

22. Mr. HUDSON proposed that the second sentence of the paragraph be deleted.

23. After hearing Mr. FRANÇOIS, *it was decided to retain the sentence.*

*Paragraph 53 was adopted as amended.*

*Paragraph 54 (paragraph 80 of the "Report") (Penal jurisdiction in matters of collision)*

*The paragraph was adopted without comment.*

<sup>5</sup> Mimeographed document only, the text of which corresponds with drafting changes to paragraphs 79-84 of the *Report of the International Law Commission covering the work of its third session*. (See vol. II of the present publication.) The drafting changes are indicated in the present summary record.

<sup>6</sup> Paragraph 52 read as follows:

"52. The Commission examined the various other topics coming within the régime of the high seas, which it had decided at its second session to set aside for codification, and asked the special rapporteur to continue his work on them, on the basis of such directives as he was able to deduce from the discussions and tentative decisions taken by the Commission."

*Paragraph 55 (paragraph 81 of the "Report") (Safety of life at sea)*

24. Mr. HUDSON remarked that the word "principle" was wrongly used. He proposed that the phrase be redrafted to read: "The inclusion, in the codification of the régime of the high seas, or rules . . ."

*It was so decided.*

*Paragraph 55 was adopted as amended.*

*Paragraph 56 (paragraph 82 of the "Report") (Right of approach, piracy and the slave trade)*

25. Mr. HUDSON proposed two alterations in drafting; the addition at the end of the first sentence, after the words "foreign merchant vessels", of the words "on the high seas", and of the word "general", at the beginning of the third sentence, before the word "treaties".

*It was so decided.*

26. Referring to a remark by the CHAIRMAN in regard to the last sentence of the paragraph, Mr. FRANÇOIS said that he had found it difficult to interpret the Commission's instructions in respect of the study of the question of piracy.

27. Reversing a previous decision,<sup>7</sup> *it was decided* that the special rapporteur should not deal with the question of piracy, and, that the last sentence of the paragraph be deleted.

*Paragraph 56 was adopted as amended.*

*Paragraph 57 (paragraph 83 of the "Report") (Submarine telegraph cables)*

28. Mr. HUDSON proposed that the second part of the paragraph be amended to read: "asked the special rapporteur to deal with the subject in a general way, without going into details".

*It was so decided.*

*Paragraph 57 was adopted as amended.*

*Paragraph 58 (paragraph 84 of the "Report") (Right of pursuit)*

29. Mr. HUDSON proposed that the paragraph begin with the words: "On the subject of hot pursuit, the Commission . . .".

*It was so decided.*

CHAPTER VI: LAW OF TREATIES (A/CN.4/L.29)<sup>8</sup>*Paragraph 1 (paragraph 72 of the "Report")*

30. On Mr. HUDSON's proposal, *it was decided* to substitute the word "subject" for the word "topic" throughout the draft. *It was also decided* to amend the second sentence of the paragraph to read: "It elected Mr. J. L. Brierly special rapporteur on this subject . . ."

<sup>7</sup> Summary record of the 124th meeting, paras. 89-94.

<sup>8</sup> Mimeographed document only, the text of which corresponds, with drafting changes, to chapter VI of the *Report of the International Law Commission covering the work of its third session*. (See vol. II of the present publication.) The drafting changes are indicated in the present summary record.

instead of "It elected one of its members, Mr. J. L. Brierly . . .".

*Paragraph 4 was adopted as amended.*

*Paragraphs 2 and 3 (paragraphs 73–74 of the "Report")*

*Paragraphs 2 and 3 were adopted without comment.*

*Paragraph 4 (paragraph 75 of the "Report")*

31. At Mr. HUDSON's suggestion, *it was decided* to delete the words "in detail" in line 2.

*Paragraph 4 was adopted as amended.*

#### CHAPTER VIII: OTHER DECISIONS OF THE COMMISSION (A/CN.4/L.30)<sup>9</sup>

*Paragraph 1 (paragraph 85 of the "Report")*

32. In reading out the paragraph, the CHAIRMAN remarked that Mr. Manley O. Hudson's name should be inserted in the blank space. He proposed the insertion of a full stop after the date "1950" in line 10, and the deletion of the rest of the sentence.

*It was so decided.*

33. Mr. HUDSON proposed that the last sentence be amended to read: "This matter lies within the framework of the subject of 'nationality, including statelessness' instead of "The Commission decided to study also this question in the framework of the topic of 'nationality including statelessness'".

*It was so decided.*

*Paragraph 1 was adopted as amended.*

*Paragraph 2 (paragraph 86 of the "Report")*

34. The CHAIRMAN remarked that the words "to which it had" should be inserted before "at its second session" in the first sentence.

*Paragraph 2 was adopted.*

*Paragraphs 3, 4 and 5 (paragraphs 87 and 89–90 of the "Report")*

*Paragraphs 3, 4 and 5 were adopted without amendment.*

*Paragraph 6 (paragraph 91 of the "Report")*

35. On an observation by Mr. HUDSON, Mr. LIANG (Secretary to the Commission) explained that the probable duration of the fourth session had to be mentioned in the message to the Secretary-General, so as to permit the preparation of budget estimates and a timetable of meetings.

36. Mr. HUDSON proposed the substitution of the wording "which will last some ten weeks" for "which will last not longer than ten weeks". He also proposed that the end of the paragraph be amended to read: "the exact date being left to the discretion of the Chairman of the Commission in consultation with the Secretary-General" instead of "to the discretion of the Secretary-

General in consultation with the Chairman of the Commission".

*It was so decided.*

*Paragraph 6 was adopted as amended.*

*New paragraph (paragraph 88 of the "Report")*

37. Mr. HUDSON said that, in spite of a previous decision to the contrary,<sup>10</sup> the Commission should take note of the General Assembly's resolution prolonging the term of office of the existing members. A new paragraph worded as follows could be included in the report for that purpose:

"The Commission took note of General Assembly resolution 486 (V) of 12 December 1950 extending the term of office of its present members until 1953."

*The new paragraph was adopted.*

Following a remark by the CHAIRMAN, *it was decided* to insert the new paragraph just before paragraph 4 above.

#### Second reading of the Report of the Commission covering its third session: Chapters I, II, III and IV (A/CN.4/L.31)<sup>11</sup>

38. Speaking as general rapporteur, Mr. CORDOVA requested that his name, which appeared on the cover of the document, should not be included in the printed text.

39. Mr. LIANG (Secretary to the Commission) said that the request would be noted; the name of the rapporteur had not, in any case, appeared on the cover of the printed text of previous reports.

#### CHAPTER I: INTRODUCTION (concluded)

*Paragraphs 1–11*

*Paragraphs 1–11 were adopted without comment.*

#### CHAPTER II: RESERVATIONS TO MULTILATERAL CONVENTIONS (concluded)

*Paragraphs 12–16*

*Paragraphs 12–16 were adopted without comment.*

*Paragraph 17*

40. Mr. FRANÇOIS pointed out that the sentence: "The Court recognized this fact in its advisory opinion, in the following words:" was somewhat ambiguous. The words "this fact" seemed to refer to the invitation to the Commission, to which reference was made in the preceding sentence.

41. In the light of the above, Mr. HUDSON proposed that the two clauses of the first sentence be reversed, and that the above-mentioned sentence be then amended to read: "The Court underlined the nature of its task in the following words".

*It was so decided.*

<sup>10</sup> Summary record of the 124th meeting, para. 68.

<sup>11</sup> Mimeographed document only, the text of which corresponds, with drafting changes, to chapters I–IV of the *Report of the International Law Commission covering the work of its third session*. (See vol. II of the present publication.) The drafting changes are indicated in the present summary record. The paragraph numbers correspond to those of the "Report".

<sup>9</sup> Mimeographed document only, the text of which corresponds, with drafting changes, to chapter VIII of the *Report of the International Law Commission covering the work of its third session*. (See vol. II of the present publication.) The drafting changes are indicated in the present summary record.

42. Mr. HUDSON proposed that, by way of analogy, the last sub-paragraph of the paragraph be amended to read: "In the second place, while the Commission has been asked to study the question both from the point of view of codification and from that of the progressive development of international law, the Court gave its advisory opinion on the basis of its interpretation of the existing law", instead of "The Commission, on the other hand, has been asked . . . development of international law".

43. He also proposed the substitution of the word "practice" for the word "rules" in the same sub-paragraph.

*It was so decided.*

*Paragraph 17 was adopted as amended.*

#### Paragraphs 18 and 19

*Paragraphs 18 and 19 were adopted without comment.*

#### Paragraph 20

44. In the light of an observation by Mr. FRANÇOIS, Mr. HUDSON proposed the substitution of the wording "by making such exceptional provisions for them, as will admit" for "by placing them in such exceptional circumstances as will admit of their".

*It was so decided.*

*Paragraph 20 was adopted as amended.*

#### Paragraph 21

45. Mr. HUDSON, with the support of the CHAIRMAN, proposed that the first part of the first sentence be redrafted to read: "The Organization of American States follows a different system, as described in the Written Statement dated 14 December 1950 of the Pan-American Union," instead of "The Pan-American Union, which is the general secretariat of the Organization of American States follows . . .". He also proposed the deletion, at the beginning of the second sentence, of the words "according to" and the addition, after the word "Peru" of the words "provided that".

*It was so decided.*

*Paragraph 21 was adopted.*

#### Paragraph 22

46. Mr. YEPES thanked the Chairman and the general rapporteur for the manner in which his ideas had been interpreted in the footnote at the bottom of the page.

*Paragraph 22 was adopted without comment.*

#### Paragraph 23

*Paragraph 23 was adopted without comment.*

#### Paragraph 24

47. On the CHAIRMAN's proposal, it was decided to substitute the words "resorted to" for the word "attempted" in the fifth sentence.

*Paragraph 24 was adopted as amended.*

#### Paragraphs 25 to 30

*Paragraphs 25 to 30 were adopted without comment.*

#### Paragraphs 31 to 33

*Paragraphs 31 to 33 were adopted without comment.*

#### Paragraph 34

##### Sub-paragraph (4)

48. The CHAIRMAN considered that the wording of the sub-paragraph was not satisfactory. Reference was made to two cases, but the terms used were not the same. In his opinion it would be better to use the phrase "only in the absence of objection" in both cases, instead of the phrase "if no objection is made" in the second case.

*It was so decided.*

##### Sub-paragraph (5)

49. Mr. HUDSON thought that the passage commencing with the words "provided, however, . . ." should be indented, so as to form part of sub-paragraph (5b).

*It was so decided.*

*Paragraph 34 was adopted as amended.*

#### CHAPTER III: QUESTION OF DEFINING AGGRESSION (concluded)

50. Mr. HUDSON asked that the footnote at the bottom of the page (footnote 18 in the Report) be redrafted to read:

"Mr. Manley O. Hudson voted against this chapter of the report on the ground that, in resolution 378 (V) B, the General Assembly did not request the Commission to formulate a definition of aggression."<sup>12</sup>

*It was so decided.*

#### Paragraphs 35 to 38

*Paragraphs 35 to 38 were adopted without comment.*

#### Paragraph 39

51. Mr. HUDSON regretted that Mr. SPIROPOULOS' views had not been better expressed.

52. The CHAIRMAN and Mr. SCALLE observed that that was what Mr. Spiropoulos had said.

53. Mr. CORDOVA added that Mr. Spiropoulos had drafted the paragraph himself.

*Paragraph 39 was adopted.*

#### Paragraphs 40 to 48

*Paragraphs 40 to 48 were adopted without comment.*

#### Paragraph 49

54. Mr. LIANG (Secretary to the Commission) supported by the CHAIRMAN, thought it would be preferable to delete the phrase "Besides resolving these main points of substance" and start the paragraph with "The Commission also adopted . . .", as the Commission had not yet reached a definite conclusion on those points.

*It was so decided.*

*Paragraph 49 was adopted as amended.*

<sup>12</sup> Instead of "Mr. Manley O. Hudson voted against this chapter of the report as a whole on the ground that resolution 378 (V) B, adopted by the General Assembly on 17 November 1950, did not request the Commission to present to the General Assembly a definition of aggression".

*Paragraphs 50 to 53*

*Paragraphs 50 to 53 were adopted without comment.*

CHAPTER IV: DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND (*concluded*)*Paragraph 54*

*Paragraph 54 was adopted without comment.*

*Paragraph 55*

55. Mr. LIANG (Secretary to the Commission) thought it would be better to substitute "recognised" for "defined" in the last sentence.

*It was so decided.*

*Paragraph 55 was adopted as amended.*

*Paragraph 56*

*Paragraph 56 was adopted without comment.*

*Paragraph 57*

56. Mr. HUDSON was of the opinion that the words "on the basis of the draft prepared by Mr. Spiropoulos and" served no useful purpose, the point having already been made; they should be deleted and the third sentence should therefore start with "Taking into account".

*It was so decided.*

*Paragraph 57 was adopted as amended.*

*Paragraph 58*

57. Mr. HUDSON was of opinion that it would be better to say "In submitting . . . the Commission wishes to present the following observations as to some general questions which arose in the course of the preparation of the draft code", instead of "The Commission, in submitting this draft code wishes . . ."

*Sub-paragraph (d)*

58. Mr. HUDSON considered that the opening words "In the preparation of the draft code" should be omitted.

*It was so decided.*

*Paragraph 58 was adopted as amended.*

*Paragraph 59*

*Paragraph 59 was adopted without comment.*

*Text of the draft code**Article 1*

*Article 1 was adopted without comment.*

*Article 2*

*The first ten paragraphs of article 2 were adopted without comment.*

*Paragraph (11)*

59. Mr. HUDSON felt that it would be advisable to alter the order of the commentaries. Sub-paragraphs 3 and 4 should come immediately after sub-paragraph 1.

60. He asked whether the third sub-paragraph was accurate.

61. The CHAIRMAN considered that it represented what the Commission had decided.

62. Mr. HUDSON had been under the impression that the Commission had decided to make it possible for the rank and file to be relieved of that responsibility. But the commentary said "every violation . . .". Account should be taken of the fact that the rank and file sometimes committed petty infringements of the laws and customs of war.

63. Mr. CORDOVA was of opinion that it was a matter for the judges to decide, as the rank and file were obviously capable of committing war crimes. Conspiracy was another matter.

64. He referred to paragraph 11 and the last sub-paragraph of the commentary. He asked how private individuals could violate the laws and customs of war.

65. The CHAIRMAN said that the Commission could not go back on its decision.

66. Mr. SCALLE added that the Commission had discussed the matter in all its aspects. In his opinion the text should stand, all the more as the hypothetical case in question was not impossible.

67. Mr. HUDSON considered that the reference should be given of the document in which the United Nations Educational, Scientific and Cultural Organization made the request mentioned in the second sub-paragraph.

68. Mr. LIANG (Secretary to the Commission) thought the wording of the third sentence of sub-paragraph 2 of the commentary was not satisfactory, since the phrase "In fact, it is a consequence of article 56 . . ." did not actually refer to the preceding sentence.

69. On Mr. HUDSON's proposal *it was decided* that the sentence be redrafted to read "Indeed, to some extent, it is forbidden by article 56 . . ."

*It was decided to insert the second sub-paragraph of the commentary after the fourth.*

70. Mr. LIANG (Secretary to the Commission) thought that it would be advisable to substitute the words "none of them" for the words "one of them" in the fourth sub-paragraph of the commentary.

*It was so decided.*

*Paragraph 11 was adopted as amended.*

*Paragraph 12*

*Paragraph 12 was adopted without comment.*

*Article 3*

*Article 3 and its comments were adopted without comment.*

*Article 4*

*Article 4 and its comments were adopted without comment.*

*Article 5**Comment*

71. Mr. FRANÇOIS thought it would be better to substitute "desirable" for "necessary" in the second sentence.

72. The CHAIRMAN pointed out that no penalty was mentioned and that there could not, therefore, be any question of a law. He added that he had opposed that article, but had deferred to the decision of the majority.

He, also, would prefer "desirable" to "necessary".

*Article 5 was adopted and its comment was adopted as amended.*

The meeting rose at 12 noon.

## 134th MEETING

Friday, 27 July 1951, at 11.0 a.m.

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*Chairman:* Mr. James L. BRIERLY

*Rapporteur:* Mr. Roberto CORDOVA

#### *Present:*

*Members:* Mr. J. P. A. FRANÇOIS, Mr. Manley O. HUDSON, Mr. Faris EL KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Jesús Maria YEPES.

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

#### Corrections to summary records

1. The CHAIRMAN explained that a certain period was generally allowed for sending in corrections to the provisional summary records of meetings, but a difficulty arose regarding the records of the final meetings of the session, since members would be leaving Geneva. If the normal procedure were followed it would not be possible to distribute the final records for at least two months, and that would hinder preparations for the work of the General Assembly.

2. He proposed therefore that no corrections should be made to the summary records of the final meetings of the session. That procedure could not give rise to any difficulties; members of the Commission were aware that the first draft of the records was generally very accurate and reliable and, moreover, the discussions at the final meetings did not deal with matters of substance but with mere questions of drafting.

3. Mr. YEPES said that, for his part, he was prepared to place full trust in the Secretariat.

4. In reply to a question by Mr. CORDOVA, the CHAIRMAN explained that the records in question would be those of the final week of the session. He pointed out that members of the Commission in fact made very few corrections.

*The Chairman's proposal was adopted.*

#### Second reading of the Report of the Commission covering its third session (*continued*): Chapters V, VI, VII and VIII and Annex (A/CN.4/L.31 Add.1)<sup>1</sup>

##### CHAPTER V: REVIEW BY THE COMMISSION OF ITS STATUTE (*concluded*)

5. Mr. HUDSON was not sure that the chapter was appropriately placed, since it dealt with a special task entrusted to the Commission by the General Assembly.

6. The CHAIRMAN pointed out that chapters II, III and IV also dealt with special tasks, which had all been entrusted to the Commission by the General Assembly.

7. Mr. LIANG (Secretary to the Commission) said that he would have preferred the chapter to occupy a different position in the report, not because it dealt with a special task, but because it would be more logical to place it after chapter VII, which concerned the régime of the high seas. If that were done, the review of the Statute would follow all the chapters dealing with questions of substance studied by the Commission. Chapter V dealt with a question of organization, and should be placed near chapter VIII which recorded the other decisions of the Commission. However, the change was of no great importance and he saw no reason why the Review of the Statute should not remain as chapter V.

8. Mr. HUDSON observed that, in the existing order of chapters, reservations to multilateral conventions, which were dealt with in chapter II, were too far away from the law of treaties, which was examined in chapter VI. He thought that the review of the Statute should appear as chapter II and the reservations as chapter V.

9. After an exchange of views *it was decided* to leave the chapters in their existing order.

##### *Paragraphs 60 to 71*

*Paragraphs 60 to 71 were adopted without comment.*

##### CHAPTER VI: LAW OF TREATIES (*concluded*)

##### *Paragraphs 72 to 75*

*Paragraphs 72 to 75 were adopted subject to the deletion of the words "in detail" in paragraph 75.*

##### CHAPTER VII: REGIME OF THE HIGH SEAS (*concluded*)

##### *Paragraphs 76 and 77*

*Paragraphs 76 and 77 were adopted without comment;*

<sup>1</sup> Mimeographed document only, the text of which corresponds, with drafting changes to chapters V-VIII and annex of the *Report of the International Law Commission covering the work of its third session*. (See vol. II of the present collection.) The drafting changes are indicated in the present summary record. The paragraph numbers correspond to those of the "Report".

*Paragraph 78*

10. Mr. HUDSON proposed the deletion of the words "It reached certain conclusions and . . ." at the beginning of the second sentence.

*It was so decided.*

*Paragraph 78 was adopted as amended.*

*Paragraphs 79 to 81*

*Paragraphs 79 to 81 were adopted without comment.*

*Paragraph 82*

11. Mr. HUDSON proposed that in the second sentence the words "In his conclusion" be deleted.

*It was so decided.*

*Paragraph 82 was adopted as amended.*

*Paragraphs 83 and 84*

*Paragraphs 83 and 84 were adopted without comment.*

CHAPTER VIII: OTHER DECISIONS OF THE COMMISSION  
(concluded)

*Paragraphs 85 to 87*

*Paragraphs 85 to 87 were adopted without comment.*

*Paragraphs 88 to 89*

12. Mr. HUDSON proposed that, in the headings the words "General Assembly resolution on . . ." and the words "General Assembly resolution on the . . ." be deleted.

*It was so decided.*

*Paragraphs 88 and 89 were adopted as amended.*

*Paragraphs 90 and 91*

*Paragraphs 90 and 91 were adopted without comment, subject to a few drafting amendments.*

ANNEX: THE CONTINENTAL SHELF AND RELATED SUBJECTS  
(CONSERVATION OF THE RESOURCES OF THE SEA, SEDIMENTARY FISHERIES, CONTIGUOUS ZONES) (concluded)

13. Mr. HUDSON, supported by the CHAIRMAN, proposed that the title of the Annex begin with the words "Draft articles on . . ." and that the words appearing in brackets be deleted.

*It was so decided.*

14. The CHAIRMAN pointed out that Mr. Scelle's note (footnote 22 of the "Report") should be included in the Report and not in the annex to be sent to governments.

*It was so decided.*

*Part I. Continental shelf**Article 1*

15. Mr. FRANÇOIS observed that article 1 referred to "marginal seas." The Commission always spoke of territorial waters and he saw no reason why a different term should be used in that instance and it might cause confusion. He proposed the substitution of the term "territorial waters."

16. Mr. HUDSON said that he preferred the term "marginal seas". Nevertheless, he was aware that it was not popular in Europe and he accepted Mr. François' argument.

*Mr. François' proposal was adopted.*

*Article 1 was adopted as amended.*

*Comment**Paragraphs 1 and 2*

*Paragraphs 1 and 2 were adopted without comment.*

*Paragraph 3*

17. Mr. HUDSON proposed that, in the first sentence the word "use" be substituted for the word "keep"; that in the second sentence the words "because it is" be substituted for the words "as being by now"; and that in the same sentence the word "also" in the phrase "and also because the term" be deleted.

*It was so decided.*

*Paragraph 3 was adopted as amended.*

*Paragraph 4*

*Paragraph 4 was adopted without comment.*

*Paragraph 5*

18. Mr. FRANÇOIS considered that, in the last sentence of the paragraph, the words "by reason of the depth of the waters" should be added after the words "technically possible".

*It was so decided.*

*Paragraph 5 was adopted as amended.*

*Paragraph 6*

19. On the proposal of Mr. HUDSON, it was decided to delete the word "possibly", in the fifth sentence of the paragraph, after the words "technical developments".

*Paragraph 6 was adopted as amended.*

*Paragraph 7*

20. On the proposal of Mr. HUDSON, it was decided to delete the words "which is based on the possibility of exploiting natural resources", at the end of the paragraph.

*Paragraph 7 was adopted as amended.*

*Paragraph 8*

21. Mr. HUDSON proposed the deletion of the words "a limit at such a distance could only serve a practical purpose in connection with fishing, since" before the words "as a general rule". He did not wish it to be recognized that the 200-mile limit was justified for fishing purposes.

22. Mr. FRANÇOIS accepted that amendment.

*The amendment was adopted.*

23. Mr. FRANÇOIS proposed the deletion of the word "even" before the words "the conservation" in the second sentence and of the words "Resources of the sea", appearing in brackets at the end of the paragraph,

since the reference also applied to other sections of Part II.

*It was so decided.*

24. Mr. LIANG (Secretary to the Commission) considered that in order to avoid all ambiguity, it would be advisable, in the second sentence, to say "should be dealt with separately", instead of "should be regulated separately".

*It was so decided.*

25. Mr. HUDSON proposed that in the same sentence the words "in the interests of which such limits are fixed" after the words "resources of the sea" should be deleted.

26. Mr. FRANÇOIS saw no objection to that deletion.

*It was so decided.*

*Paragraph 8 was adopted as amended.*

*Paragraph 9*

27. Mr. HUDSON proposed the deletion of the words "and there is no need to deal with them here", appearing at the end of the paragraph.

*It was so decided.*

*Paragraph 9 was adopted as amended.*

*Paragraph 10*

*Paragraph 10 was adopted with various drafting amendments.<sup>2</sup>*

*Article 2*

*Article 2 was adopted.*

*Comment*

*Paragraph 1*

28. Mr. YEPES proposed that the second sentence of the paragraph be deleted.

*The proposal was rejected.*

29. Mr. HUDSON proposed that the second sentence be amended to read "The article excludes control and jurisdiction independently . . ." instead of "There can be no question of jurisdiction and control independently . . .".

*It was so decided.*

*Paragraph 1 was adopted as amended.*

*Paragraph 2 (paragraph 3 in the "Report")*

30. Mr. HUDSON proposed the deletion of the paragraph, since it duplicated the terms of article 6.

31. Mr. YEPES pointed out that Mr. HUDSON had already made that proposal during the discussion on the subject, and that it had not been adopted.<sup>3</sup>

32. The CHAIRMAN observed that the Commission could nevertheless delete the paragraph if it so desired.

33. Mr. FRANÇOIS explained that the paragraph had been included in his report in order to counter the view

<sup>2</sup> The phrase, "The wording of the article brings out the fact that", was replaced by, "The text of the article emphasizes that".

<sup>3</sup> Summary record of the 131st meeting, paragraph 2 *et seq.*, paragraph 16 in particular.

of Professor A. de La Pradelle, who was entirely opposed to the doctrine of the continental shelf on the ground that it restricted the freedom of the seas. The Commission had already watered down his original text and that paragraph was all that remained on the subject. He had included it in the comment on Article 2, since otherwise the principle of freedom of the seas would only be maintained in subsequent articles of secondary importance.

34. Mr. HUDSON withdrew his proposal.

35. He proposed that the words "though" and "very" in the phrase "though to a very limited extent" in the first sentence be deleted and that the beginning of the second sentence be amended to read: "exploration and exploitation are permitted . . ." instead of "It favours such exploration and exploitation only because . . .".

*It was so decided.*

*Paragraph 2 was adopted as amended.*

*Paragraph 3 (paragraph 4 in the "Report")*

36. Mr. HUDSON observed that the wording of the paragraph was rather abrupt. He proposed that the first sentence be amended to read: "It would seem to serve no purpose", instead of "It serves no purpose" and the second sentence to read: "That conception might lead to chaos" instead of "That conception would lead . . .".

*It was so decided.*

*Paragraph 3 was adopted as amended.*

*Paragraph 4 (paragraph 2 in the "Report")*

37. Mr. HUDSON proposed the transfer of the word "however", in the second sentence to after the word "circumstance".

38. He also proposed that paragraph 4 be placed after paragraph 1, the various paragraphs being renumbered accordingly.

*It was so decided.*

*Paragraph 4 was adopted as amended.*

*Paragraph 5 (paragraph 6 in the "Report")*

39. Following a comment by Mr. François, Mr. CORDOVA proposed that the beginning of the paragraph be amended to read: "The Commission has not attempted to base on customary law the right . . ." instead of "It seems to be unnecessary to attempt . . .".

*It was so decided.*

40. Mr. YEPES proposed that the word "already" be inserted before the words "established a new customary law".

*It was so decided.*

41. The CHAIRMAN expressed some doubt as to the accuracy of the idea expressed in the last sentence. He thought it should be deleted.

42. Mr. LIANG (Secretary to the Commission) thought that the last sentence, although worded as an axiom, was more open to question than the preceding one.

43. Mr. HUDSON observed that the authors of proclamations relied on more or less acceptable general

principles, but the CHAIRMAN pointed out that certain proclamations made extravagant claims.

44. Mr. FRANÇOIS proposed that the sentence in question be amended to read: "... the principle of the continental shelf is based upon general principles ..." instead of "It is sufficient to say that the proclamations are based ...".

*It was so decided.*

*Paragraph 5 was adopted as amended.*

*Paragraph 6 (paragraph 7 in the "Report")*

*Paragraph 6 was adopted without comment.*

*Paragraph 7 (paragraph 5 in the "Report")*

45. *It was decided* to make the following amendments to the text of paragraph 7: In the second sentence, to replace the words "nor can recourse be had" by the words "nor should recourse be had"; and in the last sentence, to replace the words "does not depend on" by the words "is also independent of".

46. Following a long discussion on the words "declaratory occupation", *it was noted* that the English term "constructive occupation" would be the best. Nevertheless, in order to adopt a text that could be more easily translated into the various languages, *it was decided*, on the proposal of Mr. YEPES, to replace the words "purely declaratory occupation" by the words "fictional occupation".

47. On the proposal of Mr. HUDSON; *it was decided* to make paragraph 7 the fifth paragraph of the comment.

*Paragraph 7 was adopted as amended.*

#### *Articles 3 and 4 and comments*

*Articles 3 and 4 and the comments thereon were adopted without comment.*

#### *Article 5 and comment*

48. On the proposal of Mr. HUDSON, *it was decided* that the words "does not affect" be replaced by the words "may not exclude".

*Article 5 was adopted as amended.*

49. There were no remarks on the accompanying comment.

#### *Article 6*

50. Following an observation by Mr. SANDSTRÖM and on the proposal of Mr. HUDSON, *it was decided* that in paragraph 1 the words "Interested parties, which may be affected by the construction of installations, must be duly notified thereof and due means of warning..." be replaced by the words "Due notice must be given of any installations constructed and due means of warning..."

51. On the proposal of Mr. HUDSON, *it was decided* that in paragraph 2 the words "No such installations shall have the status of an island..." be replaced by the words "Such installations shall not have the status of islands..."

*Article 6 was adopted as amended.*

#### *Comment*

##### *Paragraph 1*

52. On the proposal of Mr. YEPES *it was decided* that in the first sentence the word "inevitable" be replaced by the word "evident"; on the proposal of Mr. HUDSON *it was decided* that in the same sentence the word "will" be replaced by the word "may" and that at the end of the paragraph the words "unless the conflicting claims can be reconciled" be deleted.

*Paragraph 1 was adopted as amended.*

*Paragraphs 2, 3 and 4.*

*Paragraphs 2, 3 and 4 were adopted with a minor amendment.<sup>4</sup>*

##### *Article 7 and comment*

53. Mr. HUDSON proposed that the first sentence of paragraph 1 of the comment be amended to read "... the drawing of boundaries may be necessary..." instead of "boundaries may be necessary..."

*It was so decided.*

54. On the proposal of Mr. FRANÇOIS, *the Commission decided* that in the last sentence the word "possible" be inserted before the word "recourse" and that the words "where necessary" at the end of the sentence be deleted.

*Article 7 and the comment thereon were adopted as amended.*

#### *Part II. Related subjects*

##### *Article 1*

55. On the proposal of Mr. HUDSON *it was decided* to reverse the order of the second and third sentences.

56. *It was also decided* to delete the word "relevant" before "system of regulation" in the penultimate sentence.

*Article 1 was adopted as amended.*

##### *Article 2*

*Article 2 was adopted without comment.*

##### *Comments on articles 1 and 2*

###### *Paragraph 1*

*Paragraph 1 was adopted without comment.*

###### *Paragraph 2*

57. Mr. FRANÇOIS observed that his report (A/CN.4/L.27) included, in the sentence corresponding to the last sentence of paragraph 2, the words "or rather any inadequacy in the measures taken", following the words "the measures taken". That phrase no longer appeared in the amendment adopted by the Commission.<sup>5</sup> It was important to stress that if a State whose nationals engaged in fishing in areas of the high seas contiguous to the territorial waters of another State failed to establish regulations, or established inadequate ones, the latter

<sup>4</sup> The words "the present article" being replaced by "this article" in para. 3.

<sup>5</sup> Summary record of the 132nd meeting, paras. 51-54.

would have the right to claim participation in any regulation. He proposed that in the last sentence of paragraph 2 the words "any regulations" be replaced by the words "regulations or the failure to adopt regulations".

*It was so decided.*

*Paragraph 2 was adopted as amended.*

*Paragraphs 3, 4 and 5*

58. The CHAIRMAN observed that, in paragraph 3, the title of the United Nations Food and Agriculture Organization should be given in full.

*It was so decided.*

59. Mr. LIANG (Secretary to the Commission) said that the footnote to paragraph 4 (resolution 298 C (XI), of 12 July 1950) should be incorporated in the text.

*It was so decided.*

60. Mr. HUDSON proposed the deletion of the word "actually" before "without sponsoring it" at the end of paragraph 5.

*It was so decided.*

*Paragraphs 3, 4 and 5 were adopted as amended.*

*Article 3*

61. Mr. HUDSON proposed that the last part of the first sentence be amended to read "... provided that non-nationals are permitted to participate in the fishing activities on an equal footing with nationals", instead of "provided that nationals of other States are permitted to participate in the fishing activities on an equal footing with its own nationals".

*It was so decided.*

*Article 3 was adopted as amended.*

*Comment*

*Paragraph 1*

62. Following a comment by Mr. LIANG (Secretary to the Commission) *it was decided* to delete the word "sharp" before the word "division" in the last sentence.

*Paragraph 1 was adopted as amended.*

*Paragraph 2*

*Paragraph 2 was adopted without comment.*

*Paragraphs 3 and 4*

63. Following a comment by Mr. HUDSON, *it was decided* that the words "an area" in paragraph 3 be replaced by the word "areas".

*Paragraph 3 was adopted as amended.*

*It was decided that the last sentence of paragraph 4 be deleted.*<sup>6</sup>

<sup>6</sup> The last sentence read as follows: "It also feels that the authority exercised by the coastal State over such waters should not be restricted."

*It was decided that paragraphs 3 and 4 be combined.*

*Paragraph 5*

64. On the proposal of Mr. HUDSON *it was decided* that the words "purposes of", in the second sentence, be deleted.

*Paragraph 5 was adopted as amended.*

*The comment on article 3 was adopted as amended.*

*Article 4*

*Article 4 was adopted*

*Comments*

*Paragraphs 1 to 3 were adopted without comment.*

*Paragraph 4*

65. On the proposal of Mr. FRANÇOIS, *it was decided* that the first two sentences be combined and amended to read as follows: "The proposed contiguous zones are not intended for purposes of security or of exclusive fishing rights" instead of "The proposed contiguous zones are strictly limited. They are not intended ...".

*The comment on article 4 was adopted as amended.*

#### Closure of the third session

66. Mr. HUDSON congratulated Mr. Córdova on the skill and rapidity with which he had drawn material from the discussions for incorporation in the general report, and thanked him for the care with which he had conducted all the research involved in drafting the report.

67. Mr. CORDOVA, General Rapporteur, supported by Mr. el Khoury, warmly thanked the Chairman, on behalf of all the members of the Commission, for his able direction of the work of the third session.

68. The CHAIRMAN said that he had felt very doubtful about taking the Chair, in view of the heavy duties entailed. He thanked all the members of the Commission for their valuable collaboration, which had facilitated the study of the various items on the agenda for the third session to the greatest possible degree.

68a. He also thanked the Secretariat staff, officials of the Legal Department, the précis-writers and the interpreters. Some of them had had to put in long hours every day and sometimes work late servicing the meetings. It was their collaboration which had enabled the Commission successfully to complete a session which had, on the whole, been most fruitful.

69. Mr. LIANG (Secretary to the Commission) speaking on behalf of Mr. Kerno (Assistant Secretary-General) thanked the Chairman for his kind words to the Secretariat.

The meeting rose at 12.35 p.m.

# INDEX

## ABBREVIATIONS

- Art., Article.  
Conf., Conference.  
Conv., Convention.  
Draft code of offences, Draft code of offences against the peace and security of mankind.  
GA, General Assembly.  
ICJ, International Court of Justice.  
ILC, International Law Commission.  
Int., International.  
Nürn. prin., Nürnberg principles, formulation of.  
Res., Resolution.  
Ways and means, Ways and means of making the evidence of customary international law more readily available.

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