TWO HUNDREDTH MEETING

Held at Lake Success, New York, on Tuesday, 22 November 1949, at 10.45 a.m.

Chairman: Mr. LACHS (Poland).

Consideration, at the request of the Third Committee, of certain articles of the draft convention for the suppression of the traffic in persons and of the exploitation of the prostitution of others (A/C.6/329 and A/C.6/329/Add.1) (*continued*)

DRAFT ARTICLE 9 (*concluded*)

1. The CHAIRMAN invited the Committee to continue the consideration of article 9 of the draft convention as proposed in the report of Sub-Committee 7 of the Sixth Committee (A/C.6/L.88).

2. Mr. LOUTFI (Egypt), with reference to the discussion of the article at the preceding meeting, at which he and the representative of Yugoslavia had suggested a modification of its text, proposed the following amendment: to insert, in the first paragraph after the words "prosecuted and punished", the phrase "by the courts of their own State", and to delete the remainder of the article. The reasons for the deletion were as follows. As had already been pointed out by the Brazilian representative (199th meeting) in connexion with the phrase "in the same manner as if the offence had been committed in that State", the penal law in the country where the offence had been committed might differ from that of the country where the offender would be tried. With regard to the rest of the first paragraph which referred to the nationality acquired by the offender after the commission of the offence, he recalled the previous statement he had made that national legislations differed on that matter, and that certain States refused to prosecute persons who had become their nationals, since the commission of an offence in another country.

3. For those reasons as well as those stated by the representatives of Yugoslavia and Brazil he wished to move his amendment to article 9.

4. Mr. BARTOS (Yugoslavia) supported the Egyptian amendment. He explained, in that connexion, that the text was based on the legal fiction that the offence had been committed in the offender's national State. A study of comparative law would show, however, that three different systems were applied in countries not recognizing the extradition of their own nationals. Firstly, the system based on the legal fiction that the crime had been committed on the territory of the national State; secondly, the system of *lex loci delicti commissi* which took into consideration the legislation of the country where the offence had been committed; and thirdly, the *cumulatio legis* — the act must be an offence both under the law of the country where the crime had been committed and under the law of the country where the offender was to be tried, the less severe law being applied to the offender. That system involved no legal fiction since the crime was considered as having been committed where it had been actually committed.

5. Application of the convention to all three legal systems would be difficult, and would only be possible if the provisions of draft article 9 were made more elastic. He therefore favoured the Egyptian amendment which safeguarded the purpose of the convention and overcame the technical difficulties presented by the diversity of systems.

6. Mr. ZIAUDDIN (Pakistan) regretted that he had to oppose the Egyptian amendment.

7. Under the Sub-Committee's stricter text, it would be impossible for an offender who had escaped to another country to avoid punishment by acquiring the nationality of that country. The procedure of extradition was already difficult in itself; that difficulty was further increased when the fugitive offender acquired the nationality of the State to which he had fled. The severe provisions of the Sub-Committee's text might, however, act as a deterrent, whereas the proposed amendment to delete the nationality clause might invite prospective offenders to commit crimes, as an offender who had acquired the nationality of the State to which he had fled would be safe. He therefore felt that the Sub-Committee's text should be maintained, and opposed the Egyptian amendment.

8. Mr. ROMÁN (Dominican Republic) stated that his delegation wished to make reservations concerning draft article 9 as the phrase "even in a case where the offender has acquired his nationality after the commission of the offence" at the end of the first paragraph might raise a problem of a constitutional nature.

9. If extradition were demanded immediately after the offence had been committed, the problem would not arise since either the offender would not have had the time to become naturalized in the State to which he had fled, or else naturalization would be denied him once it was known that he had committed an offence in another country which was demanding his extradition. The non-retroactivity of penal law was laid down in the Constitution of his country; a naturalized Dominican who had committed an offence before his naturalization and on another territory could therefore not be tried in Dominican courts.

10. The first part of draft article 9 also raised difficult problems of a legislative nature which could be settled, however, by the appropriate modification of the national legislations of States ratifying the convention, so as to give effect to the provisions of the convention. Offences of the nature listed in the convention were severely punished under the law of the Dominican Republic, and therefore his Government in the main supported the provisions of the convention.

11. If extradition were demanded immediately after the crime had been committed, the offender would have neither the opportunity nor the necessary time to change his nationality. He therefore supported the Egyptian amendment for the deletion of the second part of the first paragraph of draft article 9. That text raised an extremely difficult problem and might prevent States from ratifying the convention, yet the cases for which it provided would occur very rarely in practice.

12. Mr. KORETSKY (Union of Soviet Socialist Republics), with reference to the statements made by the representatives of Egypt and the Dominican Republic concerning the problem of change of nationality, recalled the experience that had followed the First World War when members of criminal organizations had married girls and sold them into white slavery in certain other countries, changing their own nationality to evade the law of their own countries. At the present stage it had become increasingly easy for a greater number of individuals to change their nationality; the Egyptian amendment to delete the nationality clause from the first paragraph weakened the provisions of the article and would therefore enable such criminals as were well organized and amply supplied with money to escape punishment.

13. Mr. Koretsky further thought that the meaning of the phrase "between the Parties to this Convention" inserted by the Sub-Committee in the second paragraph of the article was not clear, and he wondered whether those words limiting the application of the convention should be retained.

14. Mr. RENOUF (Australia), in reply to the USSR representative, explained that the Sub-Committee had found the original drafting of the last paragraph unsatisfactory as being too general. As the Netherlands representative had pointed out, it would be easy to find at least one alien who could not be extradited, because no extradition treaty existed which would be applicable to him in a similar case. The Sub-Committee's intention had therefore been to limit the exception made in the second paragraph to the case of an alien's extradition which between the Parties to the convention would not be granted. Those cases would be rare, since under article 8 the offences referred to in articles 1 and 2 between the Parties to the convention would be regarded as extraditable.

15. Mr. KORETSKY (Union of Soviet Socialist Republics) thought that the phrase "between the Parties to this Convention" restricted draft article 9 unnecessarily; he would therefore vote against it.

16. Mr. DUYNSTEE (Netherlands) explained, in reply to the USSR representative's statement concerning the phrase "between the Parties to this Convention" that in two cases it was impossible to extradite an alien: firstly, when no extradition treaty had been concluded with the national State of the offender; and secondly, for reasons connected with the crime. The phrase "in a similar case" seemed to refer only to the character of the crime, for instance the lack of seriousness. However, under the article as drafted in the text submitted by the Third Committee, it would always be possible to find at least one alien who would not be extradited because there would be no extradition treaty with the State concerned. The Sub-Committee had therefore inserted the phrase in the second paragraph of draft article 9 in order to limit the cases in which the exception could be claimed.

17. Mr. ORIBE (Uruguay) recalled his statement made at the preceding meeting that draft article 9 should be modified to provide for derogation from the principle of non-extradition of nationals for crimes listed in articles 1 and 2 of the convention. The odious nature of the offences in question required derogation from that principle which constituted a serious obstacle to the repression of the crime. He therefore thought that draft article 9 should be replaced by a text stating that extradition for the commission of offences listed in articles 1 and 2 of the convention should be granted even in the case where the offender had acquired the nationality of the State requested to extradite him.

18. Mr. FITZMAURICE (United Kingdom) suggested for clarification that if the Egyptian-Yugoslav amendment were adopted, the word "in" should be inserted after the word "prosecuted" in the first paragraph of draft article 9.

That drafting change was accepted.

19. The CHAIRMAN called for a vote on the Egyptian-Yugoslav amendments to article 9, as drafted by the Sub-Committee. He first put to the vote the proposed insertion of the words "by the courts of their own State" after the words "prosecuted in and punished" in the first paragraph of draft article 9.

The amendment was adopted by 27 votes to 4, with 9 abstentions.

20. The CHAIRMAN, in accordance with a request made by Mr. FITZMAURICE (United Kingdom), first put to the vote the deletion of the remainder of the first paragraph as proposed by Egypt.

The remainder of the first paragraph was deleted by 17 votes to 12, with 11 abstentions.

21. The CHAIRMAN put to the vote the Egyptian amendment for the deletion of the second paragraph.

The second paragraph was retained by 16 votes to 16, with 7 abstentions.

22. The CHAIRMAN then put to the vote the Sub-Committee's proposal for the insertion of the words "between the Parties to this Convention" in the second paragraph of draft article 9.

The phrase was approved by 10 votes to 9, with 20 abstentions.

23. The CHAIRMAN put to the vote draft article 9 as a whole, as amended, reading as follows:

"In States where the extradition of nationals is not permitted by law, nationals who have returned to their own State after the commission abroad of any of the offences referred to in Articles 1 and 2 of this Convention shall be prosecuted in and punished by the courts of their own States.

"This provision shall not apply if, in a similar case between the Parties to this Convention, the extradition of an alien cannot be granted."

Article 9, as amended was approved by 35 votes with 4 abstentions.

DRAFT ARTICLE 12

24. The CHAIRMAN pointed out that the Sub-Committee had recommended that no changes should be made in the text proposed by the Third Committee and thought therefore that the article could be dealt with expeditiously.

25. Mr. PÉREZ PEROZO (Venezuela) doubted the usefulness of draft article 12, in view of the purpose of the draft Convention. Its only justification would be the concern of some delegations that their Governments' signatures to the convention might be interpreted to mean acceptance of the principle of universal repression. In his opinion, however, those fears were groundless. He would like to know, in that connexion, whether it had been found necessary in the past to insert a similar article in other conventions in the field of criminal law. There was no doubt in his mind that, if draft article 12 were deleted, there would be no attempt to read an acceptance of the principle into the provisions of the convention.

26. Mr. RENOUF (Australia), speaking on behalf of Sub-Committee 7, explained that it had not discussed draft article 12 in detail and had made no changes in the Third Committee's text.

27. Speaking as the representative of AUSTRALIA, he had no objections to the deletion of draft article 12. On the contrary, its retention in the present convention might necessitate its being included in all future conventions, as its omission might then be interpreted that the conventions did in fact determine the attitude of the Parties towards the general question of the limits of criminal jurisdiction under international law.

28. Whatever action the Committee decided to take, a summary of its opinions in the matter could be included in the report.

29. Mr. ZIAUDDIN (Pakistan) agreed with the representative of Australia. As the inclusion of draft article 12 might make it difficult for some States to adhere to the draft convention, he believed it should be deleted.

30. Mr. KERNO (Assistant Secretary-General in charge of the Legal Department) pointed out that a similar provision had been included in the Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs and the International Convention for the Suppression of Counterfeiting Currency of 1929. While he was not convinced that the article was necessary on legal grounds, it might be useful for psychological reasons. That, however, was for the Committee to decide.

31. Mr. BARTOS (Yugoslavia) wished to be clear on the meaning of draft article 12. If it signified that States signatory to the convention were recognizing it only as a source of special law, and that it was not to be interpreted as a precedent on the problem of the territoriality of criminal jurisdiction or of a wider jurisdiction, it was acceptable. He wondered, however, whether the Committee was not attempting to avoid solving the complex problem of the role of the international community in penal law. The three schools of thought on that question could be resolved into those supporting the principle of strict territoriality, those favouring universal criminal jurisdiction and those supporting the principle of co-operation in the prosecution of crimes committed under international law. If draft article 12 was included as a reservation of the rights of States, the Yugoslav delegation would support it; but if it was intended to indicate that States were under no obligation to co-operate in the prosecution of crimes under international law, it would oppose it.

32. Apparently the Sub-Committee had adopted a clear position, as the article had not been debated in detail. He wondered, however, whether the Sub-Committee's attitude was in favour of or against international co-operation in matters of penal law, or whether it meant that in its view the convention did not apply to any other cases than those covered by it. If the question was not settled, States would be free to adopt any position they wished. If it was interpreted to mean that the international community was as yet unable to fix the duties of States in the repression of crimes committed under international law, however, that was against the principles of the Charter and therefore unacceptable.

33. Mr. FITZMAURICE (United Kingdom) thought that draft article 12 was intimately linked with draft article 10, which had been the subject of a separate report by Sub-Committee 7 (A/C.6/L.88/Add.1). Draft article 10, the Committee would recall, concerned the problem of jurisdiction over aliens in regard to the offences committed abroad. Sub-Committee 7 had recommended the deletion of draft article 10. If that recommendation were adopted, draft article 12 would undoubtedly lose much of its importance. Conversely, if draft article 10 were retained, draft article 12 would continue to be of great significance. The Committee should take note of the reasons for which Sub-Committee 7 had recommended the deletion of draft article 10, which was an important factor in considering draft article 12. The report of the Sub-Committee (A/C.6/L.88/Add.1) expressly stated that:

"Firstly, with regard to criminal offences a large majority of States recognizes only the principle of territorial jurisdiction or of jurisdiction based on the nationality of the offender. If the convention were to recognize the principle of jurisdiction over aliens for offences committed abroad, this might have for its consequence that only a limited number of States would become Parties to the Convention".

34. It was in the best interests of all to secure the greatest possible number of States to sign the convention; unnecessary obstacles, which did

not vitally affect the provisions of the convention, should in his opinion be eliminated.

35. A number of differing views and practices obtained in the field of criminal jurisdiction under international law. Draft article 12 attempted to preserve those points of view. The United Kingdom delegation considered that if draft article 12 made it easier for many States to sign the convention, it should be retained.

36. Mr. KERNO (Assistant Secretary-General in charge of the Legal Department) remarked that in earlier conventions a provision similar to draft article 12 had been included when customary international law had not been as advanced as the convention itself. It was intended to enable States to sign the convention with the assurance that its provisions for a wider jurisdiction applied only to the specific field covered by it, but not to the whole field of criminal law.

37. The article might not be essential in the convention under consideration. It was important if considered together with draft article 10, which as now drafted went beyond customary international law. As the United Kingdom representative had remarked, however, if draft article 10 were deleted, article 12 would become correspondingly less necessary. Some representatives might also see a close connexion between draft article 9 and draft article 12. In any case, he did not feel that it was essential to retain draft article 12.

38. Mr. FERRER VIEYRA (Argentina) favoured the retention of draft article 12, which bore a close relation to draft articles 9 and 10 among others.

39. In reply to the representative of Yugoslavia, he observed that no doubt was cast upon the principles of international criminal jurisdiction because the convention referred merely to the limits of that jurisdiction.

40. Mr. ORIBE (Uruguay) agreed with the representative of Venezuela that draft article 12 should be deleted. After the remarks of the Assistant Secretary-General, it was clear that draft article 12 was not only unnecessary but contrary to reality. States were gradually modifying their attitude towards the limits of international criminal jurisdiction through their accession to conventions on various matters of international law, thus he did not feel it necessary any longer to retain provisions such as draft article 12 in the convention.

41. Mr. KORETSKY (Union of Soviet Socialist Republics) felt that the technical problem of co-ordinating draft articles 10 and 12 was not the most important point. The most serious problem concerned international criminal jurisdiction and universal repression, which went far beyond customary international law and infringed the domestic jurisdiction of States.

42. It should be agreed that the prosecution of delinquents remained within the domestic jurisdiction of States except when the State voluntarily undertook obligations such as those contained in the draft convention. The only purpose of draft article 12 was to make it clear that the convention affected certain cases, and that the jurisdiction of States was defined for those special cases and was not to be interpreted as applying generally. In every case involving the prosecution of a criminal for crimes falling within the purview of the convention, the question whether international co-operation existed would have to be considered. In no event could the jurisdiction be extended to cover other cases.

43. Moreover, if the Committee decided to delete draft article 12, that might be interpreted as setting a precedent. The courts would be able to say that its provisions could be extended to other fields, whereas in the USSR representative's opinion the prosecution of criminals remained solely within the domestic jurisdiction of the State. Its deletion would be dangerous since it would make it difficult for some States to adhere to the convention, as they would fear that they would have to apply its provisions on jurisdiction beyond the field of the convention whereas they accepted international co-operation in the field of criminal law only if agreed upon in Conventions.

44. As the formula appeared in earlier Conventions, to delete draft article 12 would cause confusion. It would strike a direct blow at the competence and sovereignty of States. The retention of the article, on the other hand, would facilitate the application of the principles of the convention. He felt that the Uruguayan proposal to delete the article could be called a revolutionary step in criminal law

45. Mr. ORIBE (Uruguay) could not understand why his proposal should be considered revolutionary and by implication the USSR position conservative. The Uruguayan delegation believed that the inclusion of draft article 12 in the draft convention would be of no use and would indicate unreasonable fear on the part of delegations. Moreover, the articles recognizing a wider jurisdiction would remain a precedent, even if draft article 12 denied it.

46. Mr. Oribe saw no danger that courts by analogy would apply the provisions of article 12 to cases not covered by the convention. Generally, under the penal code of countries following the Roman system of law, penal law could not be applied by analogy.

47. He repeated that, as by accepted principles of international law, the application of draft article 12 was limited to the convention in question, its inclusion was superfluous.

48. Mr. KORETSKY (Union of Soviet Socialist Republics) replied that if he could be called conservative, it was only in the sense that he wished to protect and conserve the sovereignty of peoples and States, whereas the Uruguayan representative apparently wished to do away with it.

49. In his view, the deletion of a provision which appeared in many conventions might be regarded as a deliberate omission and give the impression that the General Assembly wished to take the opposite position. The point had not yet been reached when the exceptions were more numerous than the rule and international co-operation was still possible only by means of specific agreements. The USSR was prepared to co-operate in the particular case under consideration, but not to accept international co-operation in the prosecution of crime as a general rule.

50. The CHAIRMAN explained that he would put to the vote the Uruguayan proposal for the deletion of draft article 12, rather than the article itself, because no alteration to the Third Committee's text had been suggested by the Sub-Com-

mittee. Consequently, unless the proposal for deletion were put to the vote, no action would be required on the Third Committee's text of draft article 12.

The Uruguayan proposal for the deletion of draft article 12 was rejected by 26 votes to 3, with 10 abstentions.

Draft article 12 was consequently retained.

DRAFT ARTICLE 25

51. The CHAIRMAN directed the Committee's attention to the Sub-Committee's text for draft article 25, which combined the Third Committee's texts of draft articles 25 and 26 with a few minor changes of a technical nature.

52. Mr. KERNO (Assistant Secretary-General in charge of the Legal Department) drew attention to the fact that the recommended text of draft article 25 — like that of draft article 24 — used the phrase "signed without reservation as to acceptance or accepted" instead of the terminology previously used by the United Nations, "signature, ratification or accession".

53. He pointed out that the changes introduced by the Sub-Committee were changes of form only, intended to make the language clearer and more precise in the legal sense. Thus, it had been decided not to make use of the word "Party" because, strictly speaking, a State became a Party to a convention only upon the latter's taking effect in respect of that State and not at the moment of acceptance. Another clarification had been made with respect to the date of signature or acceptance.

54. Mrs. BASTID (France) introduced an amendment to draft article 25 on behalf of the French delegation. She regretted that the text had not yet been circulated to the Committee.[1]

55. The amendment did not alter the substance of the article but introduced another terminology — and, indeed, another system — for the conditions under which the convention would enter into force. She remarked in passing that if the French amendment were adopted, the same terminology would have to be introduced in draft article 24, which had not been examined by the Sub-Committee. The Sixth Committee was, however, unquestionably competent to deal with draft article 24, as the Third Committee had requested it to consider generally all legal problems arising in connexion with the draft convention.

56. The French delegation preferred the use of the terms "signature, ratification and accession" because it would be in conformity with United Nations practice in the two most recent Conventions approved by the General Assembly — the Convention on Genocide and the Convention on the International Transmission of News and the Right of Correction — as well as with classical terminology. The classical system had been to permit States to sign a convention without thereby engaging themselves; it was only after the process of ratification, which in most democratic countries required parliamentary action, that the signatures became binding. States not signatories of the convention prior to its entry into force used the method of accession, which also permitted such action as was necessary by their parliaments.

57. At one point, in order to facilitate the procedure for some States, the United Nations had abandoned that system in favour of the system mentioned in draft article 25, which permitted immediate engagement upon acceptance, and acceptance with reservation in cases of States which required constitutional processes for ratification. The same procedure was followed with respect to States which adhered to the convention after its entry into force.

58. Mrs. Bastid pointed out that the draft convention under consideration dated back to the period when that system had been in use and consequently reproduced that terminology. It did not appear logical, however, to go back to a system already abandoned, and the French amendment consequently proposed following the method used in the latest Conventions of the United Nations. There was another reason why the convention under consideration should contain a mention of ratification. The constitutional processes by which ratification was effected were usually performed by a country's parliament; as the convention might make it necessary for a number of States to pass new legislation, it was highly desirable that the parliaments, which would have to pass that legislation, should first approve the convention.

59. Mr. MAÚRTUA (Peru) supported the French amendment. The constitution of his country would make it impossible for him to accept article 25 as re-drafted by the Sub-Committee. The National Congress of Peru had to approve all treaties, particularly if they required changes in the national legislation. While, ideally, the draft convention should be given immediate application, he feared that it would not be effective if it were merely signed by States. Such a signature would be no guarantee that the requisite changes would be made in domestic legislation unless the convention had been ratified by national parliaments.

60. The CHAIRMAN suggested that until the French amendment to draft article 25 had been circulated, the Committee might postpone discussion of that article and pass on to the consideration of the text of draft article 28 proposed by the Sub-Committee.

It was so agreed.

DRAFT ARTICLE 28

61. Mr. DUYNSTEE (Netherlands) pointed out that draft articles 25 and 28 were closely connected. The five-year period, after which denunciation of the convention was permitted, was to run from the convention's entry into force. The denunciation would take effect one year later. Consequently, the first two signatory States would be bound by the convention for at least six years, whereas, under the text proposed by the Sub-Committee for those articles in conjunction with one another, States adhering to the convention after its entry into force would be bound for a shorter period. Inasmuch as that arrangement appeared to put a premium on not accepting the convention too soon, he suggested that the words "shall take effect" in the second paragraph of draft article 25, should be replaced by the words "shall come into force". The consequence of that amendment would be that the provision contained in the first paragraph of draft article 28 would apply to both categories of States, and that each State would be bound by the convention for at least six years, irrespective of when it had accepted it.

[1] Subsequently distributed as document A/C.6/R.94.

62. Mr. KERNO (Assistant Secretary-General in charge of the Legal Department), said that the question raised by the Netherlands representative was one of policy, which it was for the Committee to decide. Articles 25 and 28 had been purposely so drafted as to enable the convention to remain in effect for at least six years from the moment of its entry into force.

63. Mr. KORETSKY (Union of Soviet Socialist Republics) saw no need for the Netherlands amendment. He wished to call attention, however, to the fact that the second sentence of the second paragraph of draft article 28 of the Third Committee's text had been deleted. Since that Committee had deleted draft article 27, he thought that the second part of that sentence was unnecessary, but that the first part, reading: "Such denunciation shall be operative only in respect of the State on whose behalf it was made", should be retained, as its deletion might give the impression that denunciation of the convention by one Party would make the convention as a whole inoperative.

64. Mr. KERNO (Assistant Secretary-General in charge of the Legal Department) replied that after deletion of the second part of that sentence the Sub-Committee had considered the first part alone to be unnecessary on the grounds that its provision went without saying. He saw no particular objection, however, to the re-introduction of that phrase.

65. Mr. FERRER VIEYRA (Argentina) thought the re-introduction might have serious legal consequences. It was a generally recognized principle that any denunciation of a convention was operative only in respect of the Party which had denounced it and did not affect the convention itself. Restatement of that principle was not only unnecessary but dangerous, as it might be misconstrued to mean that any convention which did not contain such a provision could be rendered inoperative if it were denounced by any one Party. The phrase should therefore be omitted.

66. Mr. FITZMAURICE (United Kingdom) thought that the points of both the USSR and the Argentine representatives could be met by a few simple drafting changes. Thus, the words in the first paragraph, "it may be denounced", might be replaced by "any Party to the Convention may denounce it" and the words "for the Party making it" might be inserted in the second paragraph after the words "shall take effect". It would then be completely clear that the convention would remain in effect in spite of denunciation by any one Party.

67. While he appreciated the point made by the Netherlands representative, he was opposed to the Netherlands amendment. A fixed initial period of operation was a feature common to a number of treaties, whereas the procedure suggested by the Netherlands had not, to his knowledge, ever been used previously. It was useful to have an initial period during which all States adhering to the convention would be bound by it, and to provide for denunciation after that period.

The meeting rose at 1 p.m.