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**Summary record of the 128th meeting**

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## 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>1</sup> See summary record of the 125th meeting, footnote 6.

<sup>2</sup> See summary record of the 36th meeting, paras. 14–20; see also summary record of the 37th meeting, paras. 42–59.

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. KERN (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 "Undertaking" 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.