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REPORT OF THE INTERNATIONAL LAW COMMISSION TO THE GENERAL ASSEMBLY

DOCUMENT A/1316

Report of the International Law Commission covering its second session, 5 June - 29 July 1950

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[July 1950]

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Part I. GENERAL

Chapter I. Introduction

ORGANIZATION OF THE SECOND SESSION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947 and in accordance with the Statute of the Commission annexed thereto, held its second session at Geneva, Switzerland, from 5 June to 29 July 1950.

2. The Commission consists of the following members:

<i>Name</i>	<i>Nationality</i>
Mr. Ricardo J. Alfaro	Panama
Mr. Gilberto Amado	Brazil
Mr. James Leslie Brierly	United Kingdom
Mr. Roberto Córdova	Mexico
Mr. J. P. A. François	Netherlands
Mr. Shuhsi Hsu	China

<i>Name</i>	<i>Nationality</i>
Mr. Manley O. Hudson	United States of America
Faris Bey el-Khoury	Syria
Mr. Vladimir M. Koretsky	Union of Soviet Socialist Republics
Sir Benegal Narsing Rau	India
Mr. A. E. F. Sandström	Sweden
Mr. Georges Scelle	France
Mr. Jean Spiropoulos	Greece
Mr. J. M. Yepes	Columbia
Mr. Jaroslav Zourek	Czechoslovakia

3. With the exception of Sir Benegal Narsing Rau and Mr. Jaroslav Zourek who were unable to attend, all the members of the Commission were present at the second session. Mr. Vladimir M. Koretsky withdrew at the opening meeting, as related in paragraphs 4-7 below.

4. At the opening meeting on 5 June 1950, under the chairmanship of Mr. Manley O. Hudson, Mr. Koretsky objected to the presence in the Commission of

Mr. Shuhsi Hsu. He stated: "All the members of the Commission had been nominated by their Governments and should represent a particular legal system, so that all the main legal systems in the world would be represented in the Commission. Mr. Shuhsi Hsu had been elected following nomination by the former Kuomintang Government which he thus represented, and hence he had clearly ceased to represent the Chinese legal system". Mr. Koretzky therefore called upon the Commission "to stop Mr. Shuhsi Hsu from taking part in its work and, in accordance with article 11 of its Statute, to elect a representative of the legal system of the Chinese People's Republic". He further declared that if his proposal were not accepted, he would take no further part in the work of the Commission; moreover, any decisions taken by the Commission with the participation of Mr. Hsu "could not be regarded as valid".

5. The Chairman ruled the proposal of Mr. Koretzky out of order. He declared: "The members of the Commission were elected in 1948 to serve for three years. They do not represent States or Governments; instead, they serve in a personal capacity as persons of 'recognized competence in international law' (article 2 of the Statute). Being a creation of the General Assembly, the Commission is not competent to challenge the latter's application of article 8 of the Statute [relating to the election of the members]. Nor can it declare a 'casual vacancy' under article 11 in these circumstances. Mr. Koretzky's proposal is therefore out of order."

6. Several members spoke in support of the ruling of the Chair. They emphasized that members of the Commission were elected by the General Assembly on a personal basis and did not represent Governments. Only the General Assembly could lay down the conditions for the election of members of the Commission. The Commission had no competence to do so.

7. Mr. Koretzky appealed against the ruling of the Chair. By a vote of 10 to 1, the Commission decided to uphold the ruling. Mr. Koretzky thereupon withdrew from the meeting.

At a subsequent meeting, Mr. J. P. A. François, who was absent at the opening meeting, declared that, had he been present, he would have supported the ruling of the Chair.

8. The Commission elected, for a term of one year, the following officers:

<i>Chairman:</i>	Mr. Georges Scelle;
<i>First Vice-Chairman:</i>	Mr. A. E. F. Sandström;
<i>Second Vice-Chairman:</i>	Faris Bey el-Khoury;
<i>Rapporteur:</i>	Mr. Ricardo J. Alfaro.

9. Mr. Ivan S. Kerno, Assistant Secretary-General for Legal Affairs, represented the Secretary-General. Mr. Yuen-li Liang, Director of the Division for the Development and Codification of International Law, acted as Secretary of the Commission.

10. The Secretariat, besides servicing the Commission, placed before the latter a number of memoranda

and other documents¹ relating to the several subjects under consideration.

AGENDA

11. The Commission considered a provisional agenda for the second session prepared by the Secretariat (A/CN.4/21), consisting of the following items:

(1) (a) General Assembly resolution 373 (IV) of 6 December 1949: approval of Part I of the report of the International Law Commission covering its first session.

(b) General Assembly resolution 375 (IV) of 6 December 1949: draft Declaration on Rights and Duties of States.

(2) General Assembly resolution 374 (IV) of 6 December 1949: recommendation to the International Law Commission to include the regime of territorial waters in its list of topics to be given priority.

(3) (a) Formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal: report by Mr. Spiropoulos.

(b) Preparation of a draft code of offences against the peace and security of mankind: preliminary report by Mr. Spiropoulos (General Assembly resolution 177 (II) of 21 November 1947).

(4) Desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide and other crimes over which jurisdiction will be conferred upon that organ by international conventions: working papers by Messrs. Alfaro and Sandström (General Assembly resolution 260 B (III) of 9 December 1948).

(5) Law of treaties: preliminary report by Mr. Brierly.

(6) Arbitral procedure: preliminary report by Mr. Scelle.

(7) Regime of the high seas: preliminary report by Mr. François.

¹These include the following:

(i) Article 24 of the Statute of the International Law Commission: Memorandum on the Working Paper of Mr. Hudson (A/CN.4/27).

(ii) Regime of the High Seas: Questions under Study by other Organs of the United Nations or by Specialized Agencies (A/CN.4/30).

(iii) Bibliography on the Regime of the High Seas (A/CN.4/26).

(iv) Bibliography on International Criminal Law and International Criminal Courts (A/CN.4/28).

(v) Bibliography on Arbitral Procedure (A/CN.4/29).

(vi) Bibliography on the Law of Treaties (A/CN.4/31).

The following memoranda were also submitted to the special rapporteurs for their reference and were subsequently made available to the members of the Commission:

(i) Memorandum on the Soviet Doctrine and Practice with respect to Arbitral Procedure.

(ii) Memorandum on the Soviet Doctrine and Practice with respect to the Regime of the High Seas.

(iii) Memorandum on the Soviet Doctrine and Practice with respect to the Law of Treaties.

(iv) Memorandum on Arbitral Procedure.

(v) Memorandum on the Regime of the High Seas.

(vi) Memorandum on the Draft Code of Offences against the Peace and Security of Mankind.

(8) Ways and means for making the evidence of customary international law more readily available: working paper by Mr. Hudson (Article 24 of the Statute of the International Law Commission).

(9) The right of asylum: working paper by Mr. Yepes.

(10) Co-operation with other bodies:

(a) Consultation with organs of the United Nations and with international and national organizations, official and non-official.

(b) List of national and international organizations prepared by the Secretary-General for the purpose of distributing documents (Articles 25 and 26 of the Statute of the International Law Commission).²

(11) Date and place of the third session.

12. At its first session, the Commission invited Mr. M. Yepes to prepare, for its consideration, a working paper on the topic of the right of asylum. At the beginning of the second session, Mr. Yepes stated that, in view of the fact that a case involving the right of asylum was pending before the International Court of Justice, he would for the time being, postpone the submission of this working paper which had already been prepared. The Commission accordingly decided not to include the topic of the right of asylum in the agenda of its second session. As regards the item "Co-operation with other bodies", the Commission did not find it necessary to consider the item separately at the present session, since no independent question arose in that connexion.

ITEMS ON WHICH THE COMMISSION HAS COMPLETED ITS STUDY

13. In the course of its second session the Commission held forty-three meetings. It completed its study on the following items:

(1) Ways and means for making the evidence of customary international law more readily available;

(2) Formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal;

(3) Desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions.

14. The reports on these three items are contained respectively in parts II, III and IV of the present document. These are submitted to the General Assembly for its consideration.

ITEMS ON WHICH THE COMMISSION WILL CONTINUE ITS STUDY

15. The Commission undertook a preliminary discussion on the reports presented by the special rapporteurs on the following items:

(1) Preparation of a draft code of offences against the peace and security of mankind;

(2) Law of treaties;

(3) Regime of the high seas;

(4) Arbitral procedure.

16. The progress in the work done by the Commission on the foregoing four items is related in parts V and VI of the present document for the information of the General Assembly. The Commission will in due course submit its reports on these subjects for the consideration of the General Assembly, in accordance with the provisions of the Statute of the Commission.

Chapter II. Miscellaneous Decisions

GENERAL ASSEMBLY RESOLUTIONS ON THE REPORT OF THE COMMISSION COVERING ITS FIRST SESSION

17. The General Assembly at its fourth session, adopted resolutions 373 (IV) and 375 (IV), both on the report of the International Law Commission covering its first session. The Commission took note of these resolutions.

RECOMMENDATION OF THE GENERAL ASSEMBLY RELATIVE TO THE TOPIC OF THE REGIME OF TERRITORIAL WATERS

18. The Commission further gave consideration to General Assembly resolution 374 (IV) in which the General Assembly recommended to the International Law Commission that it include the topic of the regime of territorial waters in its list of priority topics selected for codification. In response to this request, the Commission decided to include in its list of priorities the topic of territorial waters.

REQUEST OF THE ECONOMIC AND SOCIAL COUNCIL RELATIVE TO A DRAFT CONVENTION ON THE NATIONALITY OF MARRIED WOMEN

19. By a letter of 18 July 1950 (A/CN.4/33), the Secretary-General transmitted to the Commission the following resolution adopted on 17 July 1950 by the Economic and Social Council:

"The Economic and Social Council,

"Noting the recommendation of the Commission on the Status of Women (fourth session) in regard to the nationality of married women (document E/1712, paragraph 37),

"Noting further that the International Law Commission, at its first session, included among the topics selected for study and codification 'nationality, including statelessness',

"Proposes to the International Law Commission that it undertake as soon as possible the drafting of a convention to embody the principles recommended by the Commission on the Status of Women;

"Requests the International Law Commission to determine at its present session whether it deems it appropriate to proceed with this proposal and, if so, to inform the Economic and Social Council as to the appropriate time when the International

² Revised provisional list prepared by the Secretary-General (A/CN.4/24).

Law Commission might proceed to initiate action on this problem; and

"Invites the Secretary-General to transmit this resolution to the International Law Commission together with the recommendation of the Commission on the Status of Women."

20. After consideration, the Commission adopted the following decision:

"The International Law Commission

"Deems it appropriate to entertain the proposal of the Economic and Social Council in connexion with its contemplated work on the subject of 'nationality, including statelessness',

"Proposes to initiate that work as soon as possible."

It was understood that the Commission might initiate work on the subject at its session in 1951, if it were found possible to do so.

EMOLUMENTS FOR MEMBERS OF THE COMMISSION

21. In its report on the first session, the Commission suggested that the General Assembly might wish to reconsider the terms of article 13 of the Statute concerning the allowance paid to the members of the Commission, in order to make service in the Commission less onerous financially. The Commission remains convinced that such a reconsideration is necessary for the sake of the future efficiency of its work.

DATE AND PLACE OF THE THIRD SESSION

22. The Commission decided, after consultation with the Secretary-General, that it would hold its third session in Geneva, Switzerland. This session, which will last not longer than twelve weeks, will begin in May 1951, the exact date being left to the discretion of the Secretary-General in consultation with the Chairman of the Commission.

ACKNOWLEDGMENT OF THE WORK OF THE SECRETARIAT

23. The Commission wishes to acknowledge the important collaboration of the Secretary-General and the Legal Department of the Secretariat in its work, and expresses its appreciation for the numerous memoranda and documents placed at the disposal of the Commission and for the valuable assistance afforded to it.

Part II. WAYS AND MEANS FOR MAKING THE EVIDENCE OF CUSTOMARY INTERNATIONAL LAW MORE READILY AVAILABLE

I. INTRODUCTION

24. Article 24 of the Statute of the International Law Commission provides:

The Commission shall consider ways and means for making the evidence of customary international law more readily available, such as the

La Commission examine les moyens susceptibles de rendre plus accessible la documentation relative au droit international coutumier, par exemple

collection and publication of documents concerning State practice and of the decisions of national and international courts on questions of international law, and shall make a report to the General Assembly on this matter.

la compilation et la publication de documents établissant la pratique des Etats et des décisions de juridiction nationales et internationales sur des questions de droit international, et elle fait rapport à l'Assemblée générale sur ce sujet.

25. The history of the drafting of this text was set forth in the memorandum placed before the Commission at its first session by the Secretary-General of the United Nations (A/CN.4/6, pages 3-5). The Commission also had before it at its first session a working paper prepared by the Secretariat, based on the memorandum (A/CN.4/W.9). The question of the implementation of article 24 was considered by the Commission at its 31st and 32nd meetings. At the conclusion of the discussion, the Commission invited Mr. Manley O. Hudson to prepare a working paper on the subject, to be submitted to the Commission at its second session.

26. This working paper (A/CN.4/16 and A/CN.4/16/Add.1) was studied by the Commission during its second session at its 40th meeting. The results of this study are shown in the following paragraphs which are based on the contents of the working paper as harmonized with views expressed by the majority of the Commission.

27. The task assigned to the Commission was to consider and to report to the General Assembly on ways and means (*moyens*) for making the evidence (*documentation*) of customary international law more readily available (*plus accessible*). Two sources of customary international law are referred to in article 24: State practice, and decisions of national and international courts on questions of international law. The Commission was directed to consider (*par exemple*) such ways and means as the collection and publication of documents concerning these sources. The text of article 24 does not preclude consideration of other ways and means, nor does it exclude other sources.

2. SCOPE OF CUSTOMARY INTERNATIONAL LAW

28. Article 24 of the Statute of the Commission refers only to "customary international law" (*droit international coutumier*). Its emphasis is in line with the traditional distinction between customary international law and conventional international law. That distinction was followed in 1920 in the drafting of article 38 of the Statute of the Permanent Court of International Justice, the integrity of which is preserved in Article 38 of the Statute of the International Court of Justice, as revised in 1945. The Court is directed to "apply" four categories of sources of law, i.e., to resort to them in finding the law applicable to the case before it. Though the fourth category is denominated "subsidiary", Article 38 does not otherwise establish a general hierarchy among the following:

(a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

(b) International custom, as evidence of a general practice accepted as law;

(c) The general principles of law recognized by civilized nations;

(d) ... judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

29. Perhaps the differentiation between conventional international law and customary international law ought not to be too rigidly insisted upon, however. A principle or rule of customary international law may be embodied in a bipartite or multipartite agreement so as to have, within the stated limits, conventional force for the States parties to the agreement so long as the agreement is in force; yet it would continue to be binding as a principle or rule of customary international law for other States. Indeed, not infrequently conventional formulation by certain States of a practice also followed by other States is relied upon in efforts to establish the existence of a rule of customary international law. Even multipartite conventions signed but not brought into force are frequently regarded as having value as evidence of customary international law. For present purposes, therefore, the Commission deems it proper to take some account of the availability of the materials of conventional international law in connexion with its consideration of ways and means for making the evidence of customary international law more readily available.

30. Article 24 of the Statute of the Commission seems to depart from the classification in Article 38 of the Statute of the Court, by including judicial decisions on questions of international law among the evidences of customary international law. The departure may be defended logically, however, for such decisions, particularly those by international courts, may formulate and apply principles and rules of customary international law. Moreover, the practice of a State may be indicated by the decisions of its national courts.

31. Evidence of the practice of States is to be sought in a variety of materials. The reference in article 24 of the Statute of the Commission to "documents concerning State practice" (*documents établissant la pratique des Etats*) supplies no criteria for judging the nature of such "documents". Nor is it practicable to list all the numerous types of materials which reveal State practice on each of the many problems arising in international relations.

32. Without any intended exclusion, certain rubrics may be listed for convenience. The following paragraphs will serve both as a list of such rubrics, and as a survey of the more important official and non-official collections with reference to each of them. Some of the materials referred to will evidence the formulation of customary or conventional international law, while others will evidence merely the practice of States. Commentaries to be found in treatises and monographs will not be included among the materials listed under the various rubrics.

3. EVIDENCE OF CUSTOMARY INTERNATIONAL LAW

A. Texts of international instruments

33. Two important collections of the texts of treaties and conventions concluded by various States have long served a useful purpose:

(a) *British and Foreign State Papers*, published in 140 volumes from 1841 to 1948;

(b) de Martens, *Nouveau Recueil général de Traités*, published since 1843 in succession to the earlier *recueils* published from 1791: 1st series, twenty volumes; 2nd series, thirty-five volumes; 3rd series, forty volumes, down to 1943.

Mention may also be made of the thirty volumes of Hertslet's *Commercial Treaties*.

34. For present purposes, it is hardly necessary to refer to collections of the texts of earlier instruments, such as the seventeen volumes of Rymer's *Foedera*, and the thirteen volumes of Dumont's *Corps Universel Diplomatique du Droit des Gens*, both published in the eighteenth century.

35. The inauguration of a collection of texts of treaties and conventions to be published under official international auspices was considered at a diplomatic conference held in Berne in 1894, but no agreement was reached. Soon thereafter, however, publications of texts of international instruments in their respective fields were inaugurated by the international unions for the protection of industrial and literary property. In 1911, the International Bureau of the Permanent Court of Arbitration inaugurated the publication of the texts of arbitration treaties communicated to it under articles 22 and 43 respectively of the Hague Conventions on Pacific Settlement of International Disputes of 1899 and 1907.

36. In 1920, the publication of the texts of treaties registered under article 18 of the Covenant was begun by the League of Nations. When it was discontinued in 1946, the *League of Nations Treaty Series* consisted of 205 volumes, supplemented by nine volumes of indices. A consolidated index of the whole *Series* would serve a useful purpose.

37. Since 1946, the texts of treaties and agreements registered with, or filed and recorded by, the Secretariat of the United Nations are being published in the *United Nations Treaty Series*, of which thirty-three volumes have appeared up to this time. Index volumes are contemplated for the future.

38. It may be assumed that the texts of most of the treaties concluded since 1920 have been published, or are to be published in either the *League of Nations Treaty Series* or the *United Nations Treaty Series*. For the texts of treaties concluded before 1920, the *British and Foreign State Papers* and de Martens' *Nouveau Recueil général de Traités* are supplemented by various national collections.

39. Many States publish in serial or in collected form the texts of treaties and conventions to which they are parties; in some States, such texts are scattered in publications of various kinds. Collections of the

treaties of particular countries are often published privately, also.

The *Manual of Collections of Treaties and of Collections Relating to Treaties*, compiled by Denys P. Myers, and published in 1922, contains 3,468 entries.

40. Several useful *répertoires* of treaties have been published, notably:

(a) Tétot, *Répertoire des Traités de Paix*, etc., 1493-1866, in two parts; published 1866-1870.

(b) Ribier, *Répertoire de Traités de Paix*, etc., 1867-1895, two volumes; published 1895-1899.

(c) Institut intermédiaire international, *Répertoire général des Traités*, 1895-1920; published in 1926.

A Chronology (*Répertoire*) of International Treaties and Legislative Measures was published by the League of Nations Library from 1930 to 1940.

41. Mention may also be made of several collections of treaties, either regional or otherwise special. Extremely useful is the *Collection of Treaties, Engagements and Sanads relating to India and Neighbouring Countries*, edited by C. U. Aitchison, published in five editions since 1862; the fifth edition, published by the Government of India, consists of fourteen volumes. Valuable, also, is Calvo's *Recueil des Traités* of the States of Latin America, 1493-1823, in six volumes, published 1862-1868. A collection of the texts of multipartite international instruments concluded between 1919 and 1945, edited by Hudson, was published in Washington by the Carnegie Endowment for International Peace in nine volumes, under the title *International Legislation*. In 1948, the United Nations published a valuable survey of treaties on pacific settlement.

B. Decisions of international courts

42. The awards of tribunals of the Permanent Court of Arbitration were published by the International Bureau as they were handed down, but no official collection of them was issued. An unofficial collection of the texts of the awards, with English translations, was compiled by James Brown Scott and published in his *Hague Court Reports* (1916) and *Hague Court Reports*, second series (1932). A volume of *Analyses des Sentences* was published by the International Bureau in 1934. A digest of the awards down to 1928 was published in *Fontes Juris Gentium*, Series A, Sectio I, Tomus 2.

43. Most of the decisions of the Central American Court of Justice were published in the seven volumes of the *Anales de la Corte*, issued from 1911 to 1917. The editing of these volumes left much to be desired, and it seems probable that they are not now generally available. There is need for a new and complete collection of the jurisprudence of this Court.

44. The judgments, advisory opinions and orders of the Permanent Court of International Justice, in French and English, were published in serial form in Series A, Series B and Series A/B of its publications; documents and records of proceedings concerning them were published in Series C; and digests were published in Series E. The English texts of the judgments and

opinions were reproduced in the four volumes of Hudson's *World Court Reports*. A German translation of the judgments and opinions down to 1935 was published in the twelve volumes of *Entscheidungen des Ständigen Internationalen Gerichtshofs*. A Spanish translation of the earlier judgments and opinions was published in the two volumes of *Collección de Decisiones del Tribunal Permanente de Justicia Internacional*. A digest of the Court's jurisprudence from 1922 to 1934 was published in *Fontes Juris Gentium*, Series A, Sectio I, Tomus 1 and Tomus 3.

45. The judgments, orders and opinions of the International Court of Justice are published in the annual volumes of *I. C. J. Reports*. Documents and records of the proceedings in each case are published by the Court in *Pleadings, Oral Arguments and Documents*; these volumes are not serially numbered. Decisions taken by the Court in application of its Statute and Rules are recorded in the Yearbook published by the Registry.

46. Few of the judgments and awards of the many temporary and *ad hoc* tribunals which have functioned over the past 150 years have been published in systematic form. A useful list of them is to be found in Stuyt's *Survey of International Arbitrations, 1791-1938*. No complete collection of the texts of such judgments and awards has been made.

47. In 1902, La Fontaine published in his *Pasicrisie Internationale* a documentary history of international arbitrations from 1794 to 1900, dealing with 177 cases.

48. Two notable efforts have been inaugurated to compile general collections of international jurisprudence, but both of them were discontinued before completion of the original design. De La Pradelle and Politis edited two volumes of the *Recueil des Arbitrages internationaux*, published in 1905 and 1923, reprinted in 1932; these volumes report and comment on fifty-two cases arising between 1798 and 1872. John Bassett Moore's work on *International Adjudications, Ancient and Modern*, was planned as a comprehensive collection of many volumes; beginning in 1929, six volumes of the *Modern Series* were published, dealing with relatively few cases but in great detail; the one volume of the *Ancient Series*, published in 1936, dealt with a single arbitration.

49. Two collections may be noted of awards in arbitrations to which particular States were parties. Moore's *History and Digest of the International Arbitrations to which the United States has been a Party* was published in six volumes in 1898. Van Boetzelaar's volume, *Les Arbitrages néerlandais de 1581 à 1794*, published in 1930, is supplemented by van Hamel's volume, *Les Arbitrages néerlandais de 1813 à nos jours*, published in 1939.

50. The recent inauguration by the United Nations of a series of *Reports of International Arbitral Awards* (*Recueil des Sentences Arbitrales*) is to be signalized. Three volumes, of continuous pagination, appeared in 1948 and 1949, reporting fifty-nine awards handed down during the period from 1920 to 1941; edited by the staff of the

Registry of the International Court of Justice, these volumes were issued as publications of the United Nations. An additional series is now contemplated by the Secretariat of the United Nations.

51. Most of the current international decisions are reported in various periodicals; summaries and digests of them appear in the valuable *Annual Digest and Reports of Public International Law Cases*, published under varying titles since 1932 and now edited by Lauterpacht; the eleven volumes of the *Annual Digest* cover the period from 1919 to 1945. Schwarzenberger's *International Law*, volume I (2nd ed.), is a useful digest of international judicial decisions.

C. Decisions of national courts

52. Article 24 of the Commission's Statute refers to "the collection and publication . . . of the decisions of national and international courts on questions of international law". The text seems to set off national court decisions from State practice.

53. In general, national courts apply the national law. Their decisions "on questions of international law" are frequently based on international law only in so far as provisions of the latter have been incorporated into the national law. That incorporation is necessarily limited, for many of the provisions of international law serve little purpose in national law; at most, it is only the national view of international law which is incorporated into national law so as to be applicable by national courts. Suits are sometimes brought in the courts of one State by the Government of another State, but as questions of international law, or questions of international concern, more often arise in national courts when no State is represented before the court, decisions may be taken on them without the court's having opportunity to hear the views of any Government. Even where the theory prevails that international law is a part of the national law, a national court may base its decision on principles of international law only in the absence of a controlling national statute or regulation or precedent; for example, in some States which purport to incorporate their treaties into the national law, a statute enacted after the conclusion of a treaty will prevail over the provisions of the treaty itself.

54. It may be concluded that the decisions of the national courts of a State are of value as evidence of that State's practice, even if they do not otherwise serve as evidence of customary international law. The Commission is of the opinion that it is unnecessary to assess the relative value of national court decisions as compared with other types of evidence of customary international law.

55. It would be a herculean task to assemble the decisions, on questions of international law, of the national courts of all States. Assuming that most of such decisions are published in each country, the selection, collection and editing of the texts would involve a great deal of time and a considerable expense.

56. In some of the international law periodicals, reports or digests of national judicial decisions are regularly published. Particular mention should be made

in this connexion of the *Journal de Droit International Privé*, founded in 1874 and continued since 1915 as the *Journal de Droit International*, with a total of some seventy-two volumes. Since 1907, the *American Journal of International Law* has regularly published texts of national court decisions.

57. Most valuable in this connexion are the eleven volumes of the *Annual Digest of Public International Law Cases* inaugurated in 1932, covering both national and international jurisprudence for the years since 1919. Significantly, the term *Reports* has been added to the title of the more recent volumes.

58. A significant collection of decisions of national courts concerning private international law is *Giurisprudenza Comparata di Diritto Internazionale Privato*, published in eight volumes by the Istituto di Studi Legislativi at Rome (1937-1942). In 1925, the International Labour Office inaugurated as an annual publication an *International Survey of Legal Decisions on Labour Law*, of which at least thirteen volumes have been published.

59. Various collections of decisions of prize courts of some countries have been published.

D. National legislation

60. The term legislation is here employed in a comprehensive sense; it embraces the constitutions of States, the enactments of their legislative organs, and the regulations and declarations promulgated by executive and administrative bodies. No form of regulatory disposition effected by a public authority is excluded.

61. In most States, legislative texts are regularly published in systematic form. The publications in some countries are voluminous and expensive. Obviously, they serve as an important storehouse of evidence of State practice. Yet it seems probable that in many countries the published legislation of other States is not readily available.

62. Several attempts have been made to publish the texts of the constitutions of the various States of the world, but any such collection soon becomes out of date. The most extensive collection is Dareste's *Les Constitutions modernes*, inaugurated in 1883; six volumes of a fourth edition were published in 1928. In 1935 and 1936, a four-volume collection of constitutions of various States was published in Moscow under the auspices of the Government of the Soviet Union. An ambitious collection of *The Constitutions of All Countries* was projected by the Foreign Office of the United Kingdom in 1938, but only one volume containing British Empire constitutions was published. Reference may also be made to the collection of constitutions recently published by Peaslee in three volumes. A tenth edition of a collection of European constitutions edited by Mirkine-Guetzévitch was published in 1938.

63. Several collections of Latin-American constitutions have been made, notably by Altamira (1930), Mirkine-Guetzévitch (1932), Lozano y Mazon (1942), and Pasquel (1943). Fitzgibbon's *Constitutions of the Americas* (1948) contains English texts and translations. Giannini's collection of *Le Costituzioni degli Stati dell' Europa Orientale*

appeared in two volumes in 1930. The collection of *Constitutions, Electoral Laws, Treaties of the States in the Near and Middle East* (1947), by Davis, has also served a useful purpose.

64. The *Yearbook on Human Rights* for 1946, published by the United Nations, collects provisions in the constitutions of Members of the United Nations relating to human rights.

65. No attempt has been made to assemble a global collection of the legislation of all States bearing on matters of international concern. An ambitious project was launched by the Istituto di Studi Legislativi of Rome about 1936; its *Legislazione Internazionale* was designed to present texts of or information concerning the laws, decrees, and projects of laws of most of the countries of Europe; the seven volumes published covered the years from 1932 to 1938. Under the same auspices, a *Repertorio della Legislazione Mondiale* was launched in 1933, but only a few volumes were published.

66. Four volumes of an *International Digest of Laws and Ordinances* were published by the International Legislative Information Centre of Geneva in 1938, but the series was not continued.

67. The *Boletín Analítico de los Principales Documentos Parlamentarios Extranjeros*, published in Madrid from 1910 to 1927, was succeeded in 1930 by the *Boletín de Legislación y Documentos Parlamentarios Extranjeros*, of which twelve volumes were published between 1930 and 1935. The French *Société de Législation Comparée* published an *Annuaire de Législation étrangère* from 1872 to 1939.

68. Some attempts have been made to collect and publish the laws of various countries relating to particular topics of international interest. Notable is the *Sammlung Ausserdeutscher Strafgesetzbücher*, of which fifty-four numbers were published between 1881 and 1942. In the early part of the twentieth century, a great collection of the commercial laws of many States was published in four editions in different languages, the English edition consisting of thirty-two volumes. Mention may also be made of the collections of *Nationality Laws, Diplomatic and Consular Laws and Regulations, Neutrality Laws Regulations*, and *Piracy Laws*, published by the Harvard Research in International Law. The United Nations Commission on Narcotic Drugs has inaugurated the publication of an *Annual Summary of Laws and Regulations relating to the Control of Narcotic Drugs*. The Legal Committee of the International Civil Aviation Organization is now planning a publication of national laws and regulations on aviation.

69. At the present time, there would seem to be need for a collection of national laws on many topics, such as nationality, territorial sea, and exploitation of the natural resources of submarine areas of the high seas. The *Legislative Series* published by the International Labour Office supplies prototype for such publications.

70. Various reviews of the current legislation of particular countries are regularly published. The British Society of Comparative Legislation has long published in its *Journal of Comparative Legislation and International*

Law valuable reviews of the legislation of various parts of the British Empire. From 1930 to 1940, the League of Nations Library published a *Chronology (Répertoire) of International Treaties and Legislative Measures*; a continuance of that *Chronology* by the United Nations Secretariat might be envisaged.

E. Diplomatic correspondence

71. The diplomatic correspondence between Governments must supply abundant evidence of customary international law. For various reasons, however, much of the correspondence is not published. Within the limits set by propriety, some Governments publish selected texts of diplomatic exchanges, but frequently only after a lapse of years. Archives of foreign offices are in some cases opened to access by qualified scholars engaged in research, but usually only up to a particular time.

72. It is unnecessary to attempt to list the publications of their diplomatic correspondence issued by various Governments. Of the bibliographical aids in this connexion, mention may be made of *Guide Internationale des Archives—Europe*, published by the Institute of Intellectual Cooperation in 1934. The memorandum placed before the Commission by the Secretary-General lists (A/C.N.4/6, pages 10-12) the periodical publications issued by the States of Latin America, and refers (pages 13-20) to the principal publications of France, Germany, the Soviet Union, the United Kingdom and the United States of America. Meyer's *Official Publications of European Governments* (1929) lists the current publications of eight other Governments. The Union of Soviet Socialist Republics has recently published a collection of diplomatic correspondence on the eve of the war of 1939. A vast library would be required to house all such publications, and for the most part they are of interest chiefly to historians. If reproduction were contemplated, it seems questionable whether new processes, such as microfilming, would offer much relief.

73. In some countries, digests of their diplomatic correspondence have been compiled, which have a certain usefulness generally. An outstanding example of such a digest is the digest of the diplomatic correspondence of European States, published in *Fontes Juris Gentium*, Series B, Sectio I, Tomus 1 (in two parts) and Tomus 2 (in three parts), covering the period from 1856 to 1878.

74. A series of digests relating especially to United States of America materials included diplomatic correspondence—the three volumes of Wharton's *Digest* (1886), the eight volumes of Moore's *Digest* (1906), and the eight volumes of Hackworth's *Digest* (1940). Suggestions have emanated from various quarters that other such digests are needed.

75. Some reserve may be required in the use of such digests; a well-known compiler, John Bassett Moore, was careful to point out in a preface that:

"Mere extracts from State papers or judicial decisions cannot be safely relied on as guides to the law. They may indeed be positively misleading. Especially is this true of State papers, in which arguments are often contentiously put forth which by no means

represent the eventual view of the government in whose behalf they were employed”.

F. *Opinions of national legal advisers*

76. The opinions on questions of international law given by legal advisers to Governments are published in few countries. Reserve may be needed in assessing the value of such opinions as evidence of customary international law, for the efforts of legal advisers are necessarily directed to the implementation of policy. Nor would a reproduction of such opinions be of much value unless it were accompanied by an adequate analysis of the history leading up to the occasions with reference to which they were given.

77. The two volumes of *Great Britain and the Law of Nations*, published by H. A. Smith in 1932 and 1935, exemplify the use of such opinions as illustrations of the development of customary international law. Admirable use of British opinions was made also in McNair's *Law of Treaties* (1938). The regularly published *Opinions of the Attorney-General of the United States* may also be mentioned in this connexion; a digest of such opinions, published in three volumes, covers the period 1789-1921. The single volume of *Jurisprudencia de la Cancillería Chilena*, by Cruchaga Ossa, covers the period down to 1865.

G. *Practice of international organizations*

78. Records of the cumulating practice of international organizations may be regarded as evidence of customary international law with reference to States' relations to the organizations. The *Répertoire of Questions of General International Law before the League of Nations, 1920-1940*, published by the Geneva Research Centre in 1942, contained chiefly statements in the *Official Journal* of the League of Nations concerning questions of international law. It is understood that a *répertoire* of its practice is planned by the Secretariat of the United Nations.

4. AVAILABILITY OF EVIDENCE OF CUSTOMARY INTERNATIONAL LAW

79. In the foregoing survey of various types of evidence of customary international law, little attention has been given to the availability of published materials. It may be desirable to attempt some analysis of the concept of availability, before suggesting specific “ways and means for making the evidence of customary international law more readily available”.

80. Availability may be considered in three aspects. First, availability for meeting the needs of particular groups of persons. Second, the extent to which materials already published are available throughout the world. Third, the extent to which materials not yet published may be made available throughout the world. Article 24 of the Commission's Statute seems to envisage the third aspect in its reference to “collection and publication of documents” (*la compilation et la publication de documents*); it does not expressly envisage the first and second aspects.

81. In the first aspect of availability, account should be taken of the needs of private individuals engaged in the exploration of problems of international law, as well as of the needs of governmental and international officials. The needs of the three groups are not necessarily the same. An individual may be able to undertake wider investigations than those which government officials ordinarily have time to pursue. Access to extensive libraries is desirable for all three groups, but officials must often rely on works of ready reference.

82. For the most part, the published materials mentioned in the foregoing survey are to be found only in great libraries of international law. Unfortunately, such libraries are few and far between. The Library of the Peace Palace at The Hague, which serves the needs of the International Court of Justice, has few counterparts in the capitals of States. Indeed, it seems possible that in some capitals no working library of international law exists. This situation has a bearing on the general outlook for international law. The establishment of libraries containing the principal collections of published materials which serve as evidence of customary international law would require much labour and expense, as well as time. The problem of creating new libraries seems to lie beyond the scope of the inquiry undertaken by the Commission, but attention might be given to it by other organs of the United Nations.

83. As to the second aspect of availability, it is extremely difficult to estimate the present availability of many of the principal collections of evidence of customary international law, which have been published. In many instances, stocks probably do not exist to be drawn upon for meeting present or future demands. For example, it would probably be difficult to obtain a complete set of de Martens' *Nouveau Recueil général de Traités*.

84. The Commission invited the Secretariat of the United Nations to undertake an inquiry as to the present availability of the *League of Nations Treaty Series*, the publications of the Permanent Court of International Justice, and the awards of tribunals of the Permanent Court of Arbitration. The inquiry revealed that the European Office of the United Nations has on hand for distribution stocks of the *League of Nations Treaty Series*, and that the Registry of the International Court of Justice is similarly possessed of stocks of the publications of the Permanent Court; it was revealed also, that the Secretary-General of the Permanent Court of Arbitration holds, for distribution on demand, stocks (in some cases few copies) of the awards of tribunals of that Court.

85. The Commission also inquired of the Secretariat concerning the current distribution of the *United Nations Treaty Series* and the publications of the International Court of Justice, emphasizing the need for constant attention to such distribution. It appears that a generally satisfactory system for distribution is maintained and that, with the exception of volumes 18-23 of the *Treaty Series*, adequate stocks are being kept on hand.

86. As to the third aspect of availability, the Commission could draw up a list of certain types of evidence

of customary international law which are not adequately covered by existing publications. The foregoing survey mentions some of the *lacunae*, but it is a difficult task to say what procedure should be followed in attempting to fill them. The Commission itself is not in a position to launch any new series of publications; it can, however, suggest that the Secretariat of the United Nations should undertake certain types of publications.

87. It seems doubtful that much can be done to stimulate the publication by Governments of materials on international law. The suggestion has been advanced from time to time that more Governments should issue digests of their international practice, along the lines of some of the well-known digests issued in the past under government sponsorship. It would serve little purpose for the Commission to renew the suggestion, for artificial stimulus of such arduous enterprises does not promise much in the way of results.

88. The Commission has considered means by which the publications currently issued by Governments could be made more widely available. It seems possible that a plan could be worked out for a general exchange between Governments of such of their publications as relate to customary international law. Some eighteen States are now parties to the 1886 Brussels Convention for the International Exchange of Official Documents, and some thirteen American States are parties to the 1936 Inter-American Convention on the subject; some fifty bipartite treaties on the subject have been concluded, also. The possibility of a new convention in a broader framework than that now contemplated was recently considered by the United Nations Educational, Scientific and Cultural Organization.

89. Results of the fruitful activities of non-official scientific bodies have appeared in the numerous reviews, and recent years have seen the launching of yearbooks or journals of international law in a number of countries. Despite these manifestations of zeal, it seems doubtful that many national or international institutes exist which may be relied upon for the sustained effort involved in the publication of useful compendiums of the evidence of customary international law. Few of them can undertake and continue a long-range programme of solid work; their personnel changes rapidly, their interest is easily deflected, and their funds are seldom adequate.

5. SPECIFIC WAYS AND MEANS SUGGESTED BY THE COMMISSION

90. The Commission recommends that the widest possible distribution be made of publications relating to international law issued by organs of the United Nations, particularly the *Reports* and other publications of the International Court of Justice, the *United Nations Treaty Series*, and the *Reports of International Arbitral Awards*. To this end, the price at which such publications are sold should be kept as low as is consistent with budgetary limitations, and considerations of economy should not preclude the maintenance of the stocks necessary for meeting future demands. The Commission attaches special importance to the continuance of the present language system of the *United Nations Treaty Series*, i.e., reproduction of the original text with

translations—as essential to the general usefulness of the Series. It expresses the *voeu*, also, that the texts of international instruments registered with, or filed and recorded by, the Secretariat should be published with the greatest possible promptness.

91. The Commission recommends that, in so far as it has not already done so, the General Assembly of the United Nations should authorize the Secretariat to prepare and issue, with as wide a distribution as possible, the following publications:

(a) A Juridical Yearbook, setting forth, *inter alia*, significant legislative developments in various countries; current arbitral awards by *ad hoc* international tribunals; significant decisions of national courts relating to problems of international law and particularly those concerning multipartite international conventions. The need for such a publication is especially urgent because of the great difficulty long encountered by interested persons in their efforts to keep abreast of current developments. The Commission now has before it a topic—the continental shelf under the high seas—which affords an example of both the need and the difficulty.

(b) A Legislative Series containing the texts of current national legislation on matters of international interest, and particularly legislation implementing multipartite, international instruments. In connexion with this series, the Secretariat should assemble and publish from time to time collections of the texts of national legislation on special topics of general interest; for example, on such topics as nationality, territorial sea, and submarine areas of the high seas.

(c) A collection of the constitutions of all States, with supplementary volumes to be issued from time to time for keeping it up to date. Precise knowledge of constitutional provisions of other countries is essential to those who in any country are engaged in negotiating treaties.

(d) A list of the publications issued by the Governments of all States containing the texts of treaties concluded by them, supplemented by a list of the principal collections of treaty texts published under private auspices.

(e) A consolidated index of the *League of Nations Treaty Series*. This publication is essential to the wider use of the Series.

(f) Occasional index volumes of the *United Nations Treaty Series*.

(g) A *répertoire* of the practice of the organization of the United Nations with regard to questions of international law.

(h) Additional series of the *Reports of International Arbitral Awards*, of which a first series has already been published in three volumes.

92. The Commission recommends that the Registry of the International Court of Justice should publish occasional digests of the Court's *Reports*.

93. The Commission recommends that the General Assembly call to the attention of Governments the desirability of their publishing digests of their diplomatic correspondence and other materials relating to international law.

94. The Commission recommends that the General Assembly give consideration to the desirability of an international convention concerning the general exchange of official publications relating to international law and international relations.

Part III. FORMULATION OF THE NÜRNBERG PRINCIPLES³

95. Under General Assembly resolution 177 (II), paragraph (a), the International Law Commission was directed to "formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal".

96. In pursuance of this resolution of the General Assembly, the Commission undertook a preliminary consideration of the subject at its first session. In the course of this consideration the question arose as to whether or not the Commission should ascertain to what extent the principles contained in the Charter and judgment constituted principles of international law. The conclusion was that since the Nürnberg principles had been affirmed by the General Assembly, the task entrusted to the Commission by paragraph (a) of resolution 177 (II) was not to express any appreciation of these principles as principles of international law but merely to formulate them. This conclusion was set forth in paragraph 26 of the report of the Commission on its first session, which report was approved by the General Assembly in 1949. Mr. Jean Spiropoulos was appointed special rapporteur to continue

the work of the Commission on the subject and to present a report at its second session.

97. At the session under review, Mr. Spiropoulos presented his report (A/CN.4/22) which the Commission considered at its 44th to 49th and 54th meetings. On the basis of this report, the Commission adopted a formulation of the principles of international law which were recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal. The formulation by the Commission, together with comments thereon, is set out below.

PRINCIPLES OF INTERNATIONAL LAW RECOGNIZED IN THE CHARTER OF THE NÜRNBERG TRIBUNAL AND IN THE JUDGMENT OF THE TRIBUNAL

PRINCIPLE I

Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

98. This principle is based on the first paragraph of article 6 of the Charter of the Nürnberg Tribunal which established the competence of the Tribunal to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the crimes defined in sub-paragraphs (a), (b) and (c) of article 6. The text of the Charter declared punishable only persons "acting in the interests of the European Axis countries" but, as a matter of course, Principle I is now formulated in general terms.

99. The general rule underlying Principle I is that international law may impose duties on individuals directly without any interposition of internal law. The findings of the Tribunal were very definite on the question whether rules of international law may apply to individuals. "That international law imposes duties and liabilities upon individuals as well as upon States", said the judgment of the Tribunal, "has long been recognized".⁴ It added: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provision of international law be enforced."⁵

PRINCIPLE II

The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

100. This principle is a corollary to Principle I. Once it is admitted that individuals are responsible for crimes under international law, it is obvious that they are not relieved from their international responsibility by the fact that their acts are not held to be crimes under the law of any particular country.

³ Mr. Ricardo J. Alfaro declared that he voted in favour of part III of the report with a reservation as to paragraph 96, because he believed that the reference therein contained regarding the task of formulating the Nürnberg principles should have been inserted in the report together with a quotation of the passage in the judgment of the Nürnberg Tribunal in which the Tribunal asserted that the Charter "is the expression of international law existing at the time of its creation, and to that extent is itself a contribution to international law".

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

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

⁴ *Trial of the Major War Criminals before the International Military Tribunal*, vol. I, Nürnberg 1947, page 223.

⁵ *Ibid.*

101. The Charter of the Nürnberg Tribunal referred, in express terms, to this relation between international and national responsibility only with respect to crimes against humanity. Sub-paragraph (c) of article 6 of the Charter defined as crimes against humanity certain acts "whether or not [committed] in violation of the domestic law of the country where perpetrated". The Commission has formulated Principle II in general terms.

102. The principle that a person who has committed an international crime is responsible therefor and liable to punishment under international law, independently of the provisions of internal law, implies what is commonly called the "supremacy" of international law over national law. The Tribunal considered that international law can bind individuals even if national law does not direct them to observe the rules of international law, as shown by the following statement of the judgment: "... the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State".⁶

PRINCIPLE III

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.

103. This principle is based on article 7 of the Charter of the Nürnberg Tribunal. According to the Charter and the judgment, the fact that an individual acted as Head of State or responsible government official did not relieve him from international responsibility. "The principle of international law which, under certain circumstances, protects the representatives of a State", said the Tribunal, "cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment"⁷ The same idea was also expressed in the following passage of the findings: "He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law."⁸

104. The last phrase of article 7 of the Charter, "or mitigating punishment", has not been retained in the formulation of Principle III. The Commission considers that the question of mitigating punishment is a matter for the competent Court to decide.

PRINCIPLE IV

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.

105. This text is based on the principle contained in article 8 of the Charter of the Nürnberg Tribunal as interpreted in the judgment. The idea expressed in Principle IV is that superior orders are not a defence provided a moral choice was possible to the accused. In conformity with this conception, the Tribunal rejected the argument of the defence that there could not be any responsibility since most of the defendants acted under the orders of Hitler. The Tribunal declared: "The provisions of this article [article 8] are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible."⁹

106. The last phrase of article 8 of the Charter "but may be considered in mitigation of punishment, if the Tribunal determines that justice so requires", has not been retained for the reason stated under Principle III, in paragraph 104 above.

PRINCIPLE V

Any person charged with a crime under international law has the right to a fair trial on the facts and law.

107. The principle that a defendant charged with a crime under international law must have the right to a fair trial was expressly recognized and carefully developed by the Charter of the Nürnberg Tribunal. The Charter contained a chapter entitled: "Fair Trial for Defendants", which for the purpose of ensuring such fair trial provided the following procedure:

"a. The indictment shall include full particulars specifying in detail the charges against the defendants. A copy of the indictment and of all the documents lodged with the indictment, translated into a language which he understands, shall be furnished to the defendant at a reasonable time before the trial.

"b. During any preliminary examination or trial of a defendant he shall have the right to give any explanation relevant to the charges made against him.

"c. A preliminary examination of a defendant and his trial shall be conducted in, or translated into, a language which the defendant understands.

"d. A defendant shall have the right to conduct his own defence before the Tribunal or to have the assistance of counsel.

"e. A defendant shall have the right through himself or through his counsel to present evidence at the trial in support of his defence, and to cross-examine any witness called by the prosecution."

⁶ *Trial of the Major War Criminals before the International Military Tribunal*, vol. I, Nürnberg 1947, page 223.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*, page 224.

108. The right to a fair trial was also referred to in the judgment itself. The Tribunal said in this respect: "With regard to the constitution of the Court all that the defendants are entitled to ask is to receive a fair trial on the facts and law."¹⁰

109. In the view of the Commission, the expression "fair trial" should be understood in the light of the above-quoted provisions of the Charter of the Nürnberg Tribunal.

PRINCIPLE VI

The crimes hereinafter set out are punishable as crimes under international law:

a. Crimes against peace:

- (i) *Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;*
- (ii) *Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).*

110. Both categories of crimes are characterized by the fact that they are connected with "war of aggression or war in violation of international treaties, agreements or assurances".

111. The Tribunal made a general statement to the effect that its Charter was "the expression of international law existing at the time of its creation".¹¹ It, in particular, refuted the argument of the defence that aggressive war was not an international crime. For this refutation the Tribunal relied primarily on the General Treaty for the Renunciation of War of 27 August 1928 (Kellogg-Briand Pact) which in 1939 was in force between sixty-three States. "The nations who signed the Pact or adhered to it unconditionally", said the Tribunal, "condemned recourse to war for the future as an instrument of policy, and expressly renounced it. After the signing of the Pact, any nation resorting to war as an instrument of national policy breaks the Pact. In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who planned and waged such a war, with its inevitable and terrible consequences, are committing a crime in so doing. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the Pact".¹²

112. In support of its interpretation of the Kellogg-Briand Pact, the Tribunal cited some other international instruments which condemned war of aggression as an international crime. The draft of a Treaty of Mutual Assistance sponsored by the League of Nations in 1923 declared, in its article 1, "that aggressive war is

an international crime". The Preamble to the League of Nations Protocol for the Pacific Settlement of International disputes (Geneva Protocol), of 1924, "recognizing the solidarity of the members of the International Community", stated that "a war of aggression constitutes a violation of this solidarity, and is an international crime", and that the contracting parties were "desirous of facilitating the complete application of the system provided in the Covenant of the League of Nations for the pacific settlement of disputes between the States and of ensuring the repression of international crimes". The declaration concerning wars of aggression adopted on 24 September 1927 by the Assembly of the League of Nations declared, in its preamble, that war was an "international crime". The resolution unanimously adopted on 18 February 1928 by twenty-one American Republics at the Sixth (Havana) International Conference of American States, provided that "war of aggression constitutes an international crime against the human species".¹³

113. The Charter of the Nürnberg Tribunal did not contain any definition of "war of aggression", nor was there any such definition in the judgment of the Tribunal. It was by reviewing the historical events before and during the war that it found that certain of the defendants planned and waged aggressive wars against twelve nations and were therefore guilty of a series of crimes.

114. According to the Tribunal, this made it unnecessary to discuss the subject in further detail, or to consider at any length the extent to which these aggressive wars were also "wars in violation of international treaties, agreements, or assurances".¹⁴

115. The term "assurances" is understood by the Commission as including any pledge or guarantee of peace given by a State, even unilaterally.

116. The terms "planning" and "preparation" of a war of aggression were considered by the Tribunal as comprising all the stages in the bringing about of a war of aggression from the planning to the actual initiation of the war. In view of that, the Tribunal did not make any clear distinction between planning and preparation. As stated in the judgment, "planning and preparation are essential to the making of war".¹⁵

117. The meaning of the expression "waging of a war of aggression" was discussed in the Commission during the consideration of the definition of "crimes against peace". Some members of the Commission feared that everyone in uniform who fought in a war of aggression might be charged with the "waging" of such a war. The Commission understands the expression to refer only to high-ranking military personnel and high State officials, and believes that this was also the view of the Tribunal.

118. A legal notion of the Charter to which the defence objected was the one concerning "conspiracy".

¹⁰ *Trial of the Major War Criminals before the International Military Tribunal*, vol. I, Nürnberg 1947.

¹¹ *Ibid.*

¹² *Ibid.*, page 220.

¹³ *Ibid.*, pages 221-222.

¹⁴ *Ibid.*, page 216.

¹⁵ *Ibid.*, page 224.

The Tribunal recognized that "conspiracy is not defined in the Charter".¹⁶ However, it stated the meaning of the term, though only in a restricted way. "But in the opinion of the Tribunal", it was said in the judgment, "the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action. The planning, to be criminal, must not rest merely on the declarations of a party programme such as are found in the twenty-five points of the Nazi Party, announced in 1920, or the political affirmations expressed in *Mein Kampf* in later years. The Tribunal must examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan".¹⁷

b. *War crimes:*

Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

119. The Tribunal emphasized that before the last war the crimes defined by article 6 (b) of its Charter were already recognized as crimes under international law. The Tribunal stated that such crimes were covered by specific provisions of the Regulations annexed to The Hague Convention of 1907 respecting the Laws and Customs of War on Land and of the Geneva Convention of 1929 on the Treatment of Prisoners of War. After enumerating the said provisions, the Tribunal stated: "That violation of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument."^{18, 19}

c. *Crimes against humanity:*

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime.

120. Article 6 (c) of the Charter of the Nürnberg Tribunal distinguished two categories of punishable acts, to wit: first, murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population, before or during the war, and second, persecution on political, racial or religious grounds. Acts within these categories, according to

the Charter, constituted international crimes only when committed "in execution of or in connexion with any crimes within the jurisdiction of the Tribunal". The crimes referred to as falling within the jurisdiction of the Tribunal were crimes against peace and war crimes.

121. Though it found that "political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty", that "the policy of persecution, repression and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out", and that "the persecution of Jews during the same period is established beyond all doubt", the Tribunal considered that it had not been satisfactorily proved that before the outbreak of war these acts had been committed in execution of, or in connexion with, any crime within the jurisdiction of the Tribunal. For this reason the Tribunal declared itself unable to "make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter".²⁰

122. The Tribunal did not, however, thereby exclude the possibility that crimes against humanity might be committed also before a war.

123. In its definition of crimes against humanity the Commission has omitted the phrase "before or during the war" contained in article 6 (c) of the Charter of the Nürnberg Tribunal because this phrase referred to a particular war, the war of 1939. The omission of the phrase does not mean that the Commission considers that crimes against humanity can be committed only during a war. On the contrary, the Commission is of the opinion that such crimes may take place also before a war in connexion with crimes against peace.

124. In accordance with article 6 (c) of the Charter, the above formulation characterizes as crimes against humanity murder, extermination, enslavement, etc., committed against "any" civilian population. This means that these acts may be crimes against humanity even if they are committed by the perpetrator against his own population.

PRINCIPLE VII

Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

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

¹⁶ *Ibid.*, page 225.

¹⁷ *Trial of the Major War Criminals before the International Military Tribunal*, vol. I, Nürnberg 1947, page 225.

¹⁸ *Ibid.*, page 253.

¹⁹ During its discussion on the crime of killing hostages, the Commission took note of the fact that the Geneva Conventions of 12 August 1949, and more specifically article 34 of the Convention relative to the protection of civilian persons in time of war, prohibit the taking of hostages.

²⁰ *Trial of the Major War Criminals before the International Military Tribunal*, vol. I, Nürnberg 1947.

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"²¹ 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.²²

Part IV. THE QUESTION OF INTERNATIONAL CRIMINAL JURISDICTION

128. The General Assembly, by resolution 260 B (III), invited the International Law Commission "to study the desirability and possibility of establishing an international judicial organ for the trial of persons, charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions", and requested it, in carrying out that task, "to pay attention to the possibility of establishing a Criminal Chamber of the International Court of Justice".

129. At its first session, the Commission appointed as special rapporteurs to deal with this question Messrs. Ricardo J. Alfaro and A. E. F. Sandström who were requested to submit to the Commission, at its second session, one or more working papers on the subject.

130. At the second session, each of the special rapporteurs presented a report. These reports were discussed by the Commission during its 41st to 44th meetings.

131. In presenting his report (A/CN.4/20), Mr. Sandström first raised the question whether the judicial organ mentioned in the resolution was to be created as an organ of the United Nations and stated that, in that case, an amendment of the Charter of the United Nations would be necessary.

132. Several members of the Commission held the view that an international criminal court could be created by means of a convention open to signature by States, Members and non-members of the United Nations; that such a court was not necessarily envisaged as an organ of the United Nations; that Article 7 of the Charter contained a mere enumeration of the prin-

cipal organs of the United Nations; that the said article did not preclude the possibility of creating new subsidiary organs; and that, therefore, the creation of an international judicial organ as contemplated by the resolution would not require an amendment of the Charter. It was pointed out, furthermore, that the essential question before the Commission was whether it was desirable and possible to create an international criminal jurisdiction, and that the problem with which the General Assembly was concerned would be the same, whether a judicial organ were set up within the framework of the United Nations or outside the organization.

133. On the question of desirability and possibility of establishing an international criminal court, Mr. Sandström stated that he could only consider the problem in a concrete manner; and that it was impossible under such conditions to consider separately desirability and possibility.

134. Mr. Sandström expressed the view that an international judicial organ such as envisaged in the resolution of the General Assembly would be desirable only if effective. Whether established within or without the framework of the United Nations, such an international judicial organ would have the defects which he had pointed out in his report and would be ineffective, especially in respect of grave international crimes. He therefore concluded that its establishment was not desirable.

135. The Commission next considered the report presented by Mr. Alfaro (A/CN.4/15, A/CN.4/15/Corr.1). With regard to the question of desirability, Mr. Alfaro stated that if "desirable" meant useful and necessary, the creation of an international criminal jurisdiction vested with power to try and punish persons who disturbed international public order was desirable as an effective contribution to the peace and security of the world. In the community of States, as in national communities, there were aggressors and disturbers of the peace, and mankind had a right to protect itself against international crimes by means of an adequate system of international repression. The rule of law in the community of States could only be ensured by the establishment of such a system. Public opinion had been in favour of an international criminal jurisdiction since the end of the First World War, when the Treaty of Versailles provided for the arraignment of William of Hohenzollern for "a supreme offence against international morality and the sanctity of treaties". Such public opinion had found expression also in the official and unofficial action, plans and views emanating from Governments, international bodies, law associations, statesmen and jurists, as stated in Part II of Mr. Alfaro's report. Mr. Alfaro also expressed his conviction that the creation of an international organ of criminal justice would have a deterring effect on potential aggressors and that even if its establishment were not feasible, it would always be desirable.

136. As to the possibility of establishing the judicial organ envisaged, Mr. Alfaro stated that he could not see any legal reason which made it impossible for States to set up by convention a judicial organ for the

²¹ *Ibid.*, page 226.

²² *Ibid.*, pages 281, 287, 295, 298, 306, 314, 319, 320, 321, 330.

trial of persons responsible for crimes under international law. That the creation of such an organ was juridically and politically possible seemed to be demonstrated by several facts, namely, that the Treaty of Versailles made provision to that effect; that by the Geneva Convention of 1937, thirteen nations agreed to create an international judicial organ for the trial of persons responsible for terrorism; that the two International Military Tribunals of Nürnberg and Tokyo had been created and had actually functioned; and that seven different draft statutes for international criminal organs had been formulated by, presented to, or adopted by, official and non-official entities (A/CN.4/7/Rev.1, pages 47-147).

137. Some members of the Commission referred to the many difficulties which the establishment and functioning of an international criminal jurisdiction would encounter, as for instance, that nations would refuse to give up their territorial jurisdiction or to submit to the compulsory jurisdiction of the international organ; that a tribunal would be unable to bring the accused before it and to enforce its judgments; and that the Tribunals of Nürnberg and Tokyo could function effectively only because the States which established these Tribunals were occupying the territory in which the trials took place and had the accused in their power; that punishment of aggressors would depend on their being on the losing side, and that no illusory ideas should be encouraged as to the possibility of setting up the organ in question.

138. Other members of the Commission held the view that while difficulties undeniably existed, they did not constitute an impossibility. If States were free to refuse to submit to an obligatory international criminal jurisdiction, they had also the power to agree thereto. Though the community of States lacked a police force at the present time, it might have one in the future.

139. It was pointed out by some members that the Commission was only concerned with the legal and technical aspects of the question and that it was for the General Assembly to weigh the purely political considerations that might militate in favour of or against the creation of an international criminal court. The view was stated that, even if it were found that the establishment of the international judicial organ envisaged was not practicable or expedient at this time, this did not mean that it was not possible.

140. After consideration of the matter by the Commission, the Chairman put the two points discussed to the vote, with the following results:

By 8 votes to one, with 2 abstentions, the Commission decided that the establishment of an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions is desirable.

By 7 votes to 3, with one abstention, the Commission decided that the establishment of the above-mentioned international judicial organ is possible.

141. The Commission took up next the question of

the possibility of establishing a criminal chamber of the International Court of Justice.

142. In their reports, Mr. Sandström and Mr. Alfaro were agreed that the establishment of a criminal chamber of the International Court of Justice, vested with power to try persons accused of certain crimes, would necessitate an amendment of the Statute of the Court which, in Article 34, provided that only States may be parties in cases before the Court.

143. Mr. Alfaro stated in his report that, subject to this condition, the creation of a criminal chamber was possible. At the opening of the discussion of this part of his report, he stated that this did not imply that he favoured the creation of a criminal chamber of the International Court of Justice.

144. Mr. Sandström expressed his agreement with the objections raised by some members of the Commission against the creation of a criminal chamber of the International Court of Justice.

145. After an exchange of views on different aspects of this question, the Commission decided to state that it has paid attention to the possibility of establishing a criminal chamber of the International Court of Justice and that, though it is possible to do so by amendment of the Court's Statute, the Commission does not recommend it.

Part V. PREPARATION OF A DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

146. 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.

147. At its first session the Commission appointed 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.

148. At the session under review, Mr. Spiropoulos presented his report (A/CN.4/25) to the Commission, which took it as a basis of discussion. The subject was considered by the Commission at its 54th to 62nd and 72nd meetings. The Commission also took into consideration the replies received from Governments (A/CN.4/19, part II, A/CN.4/19/Add.1 and A/CN.4/19/Add.2) to its questionnaire.

149. The Commission first considered the meaning of the term "offences against the peace and security of mankind", contained in resolution 177 (II). The view of the Commission was that the meaning of this

term should be limited to offences which contain a political element and which endanger or disturb the maintenance of international peace and security, and that the draft code, therefore, should not deal with questions concerning conflicts of legislation and jurisdiction in international criminal matters. Nor should such matters as piracy, traffic in dangerous drugs, traffic in women and children, slavery, counterfeiting currency, damage to submarine cables, etc., be considered as falling within the scope of the draft code.

150. The Commission thereafter discussed the meaning if the phrase "indicating clearly the place to be accorded to" the Nürnberg principles. The sense of the Commission was that this phrase should not be interpreted as meaning that the Nürnberg principles would have to be inserted in their entirety in the draft code. The Commission felt that the phrase did not preclude it from suggesting modification or development of these principles for the purpose of their incorporation in the draft code.

151. The question as to the subjects of criminal responsibility under the draft code was then examined by the Commission. The Commission decided that it would only deal with the criminal responsibility of individuals.

152. Several meetings were devoted to a discussion of the particular offences to be included in the draft code. Tentative decisions were taken by the Commission on this matter and referred to the Drafting Sub-Committee mentioned in paragraph 157 below.

153. The Chairman brought to the attention of the Commission a communication from the United Nations Educational, Scientific and Cultural Organization in which it was recommended that, with a view to the protection of historical monuments and documents and works of art in case of armed conflict, the destruction of such cultural objects should be defined as a crime punishable under international law. The Commission took note of the recommendation, and agreed that such destruction comes within the general concept of war crimes. The matter will be given detailed consideration when the definitive drafting of the code is undertaken.

154. The Commission considered at some length the responsibility of a person acting as Head of State or as responsible government official. The tentative decision taken on this matter follows the relevant principle of the Nürnberg Charter and judgment as formulated by the Commission.²³

155. In respect of the responsibility of a person acting under superior orders, the Commission also decided tentatively to follow the relevant principle of the Nürnberg Charter and judgment, as formulated by the Commission.²⁴

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, of the necessary legislation for the trial and punishment of persons charged with offences under the code.

157. In the light of the deliberations in the Commission, a Drafting Sub-Committee, composed of Messrs. Alfaro, Hudson and Spiropoulos, prepared a provisional draft of a code (A/CN.4/R.6). This draft was referred by the Commission to the special rapporteur, Mr. Spiropoulos, who was requested to continue work on the subject and to submit a further report to the Commission at its third session.

Part VI. PROGRESS OF WORK ON TOPICS SELECTED FOR CODIFICATION

158. The International Law Commission at its first session, having in pursuance of article 18 of its Statute, surveyed the whole field of international law with a view to selecting topics for codification, decided to give priority to three topics from fourteen provisionally selected for codification. These three topics were:

- (1) Law of treaties;
- (2) Arbitral procedure;
- (3) Regime of the high seas.

159. The Commission, at its second session, considered reports on these three subjects and reached certain decisions which were not intended to have a definitive and binding character, but to serve for the guidance of the special rapporteurs in their future work. The special rapporteurs were requested to continue work on the topics in the light of the discussions which had taken place in the Commission and to submit further reports at the next session.

Chapter I. Law of Treaties

160. At its first session the International Law Commission elected as special rapporteur for the law of treaties, Mr. James L. Brierly, who prepared a report (A/CN.4/23) on the topic for the second session of the Commission. The Commission devoted its 49th to 53rd meetings to a preliminary discussion of this report with a view to assisting the special rapporteur in the continuance of his work between the second and third sessions of the Commission. The Commission also had available replies of Governments to a questionnaire addressed to them under article 19, paragraph 2, of its Statute (A/CN.4/19, part I, A).

161. The Commission devoted some time to a consideration of the scope of the subject to be covered in its study. Though it took a provisional decision that exchanges of notes should be covered, it did not undertake to say what position should be given to them by the special rapporteur. A majority of the Commission favoured the explanation of the term "treaty" as a "formal instrument" rather than as an "agreement recorded in writing". Mention was frequently made by members of the Commission of the desirability of emphasizing the binding character of the obligations under international law established by a treaty.

²³ See Principle III in part III of the present report.

²⁴ See Principle IV in part III of the present report.

162. A majority of the Commission were also in favour of including in its study agreements to which international organizations are parties. There was general agreement that, while the treaty-making power of certain organizations is clear, the determination of the other organizations which possess capacity for making treaties would need further consideration.

163. On the question of the effect of constitutional provisions as to the exercise of capacity to make treaties, there was a divergence of views and no decision was reached.

164. Finally, the Commission discussed the part of the special rapporteur's report dealing with reservations. There was a large measure of agreement on the general principles on this topic formulated in the report, and particularly on the point that a reservation requires the consent at least of all parties to become effective. But the application of these principles in detail to the great variety of situations which may arise in the making of multilateral treaties was felt to require further consideration.

Chapter II. Arbitral Procedure

165. At its first session, the International Law Commission elected Mr. Georges Scelle special rapporteur to study the topic of arbitral procedure. At its second session, Mr. Scelle submitted his report (A/CN.4/18) in which he proposed a preliminary draft of a code of arbitral procedure. The Commission also had before it the replies of Governments (A/CN.4/19, part I, B) to a questionnaire circulated by it.

166. The Commission devoted its 70th to 73rd meetings to a discussion of the subject.

167. The report of the special rapporteur, which served as the basis of discussion in the Commission, was confined to arbitration between States, or inter-governmental arbitration.

168. The special rapporteur emphasized the following thesis: An arbitration procedure had already been drawn up by The Hague Conferences of 1899 and 1907 and by the League of Nations (General Act of 26 September 1928, revised by the General Assembly of the United Nations in 1949). The elements of codification therefore existed but needed to be consolidated and developed. At the present time, States were bound by numerous undertakings to have recourse to arbitration, but it sometimes happened that they sought to evade their obligations, *inter alia*, by making the constitution of an arbitral tribunal or the conclusion of a *compromis* impossible, or by hampering the functioning of the tribunal. A code of arbitral procedure should close those loopholes. It should be borne in mind that international arbitration was distinct from international jurisdiction proper in that it left it to the parties to define the issue and to choose the arbitrators. The arbitrators, however, made their award on the basis of law (article 37 of The Hague Convention of 1907) and had to be furnished with all the powers necessary to perform their task. As the law stood at present, this was possible only if Governments acted

in good faith and showed a conciliatory spirit. Normally, the Governments would draw up a *compromis* and, using varying procedures, appoint arbitrators. Provision should be made for intervention, in the absence of agreement between the parties, by an international authority whose decisions would be binding. In some cases that authority might be the arbitral tribunal itself and, in other cases, the International Court of Justice. The special rapporteur accordingly proposed that the arbitral tribunal should be constituted, if necessary, prior to the conclusion of the *compromis*, to enable it, if required, to draw up the *compromis* itself and adopt the procedure required to enable the award to be reached.

169. The Commission gave special attention to the first three paragraphs of the "proposed preliminary draft text", contained in the report of Mr. Scelle.

170. Paragraph I of this draft text read as follows:

"The compromissory clause or undertaking to have recourse to arbitration may apply to questions which may arise eventually or to questions already existing. Whatever the instrument or agreement on which it is based, the clause is strictly obligatory and must be implemented in good faith.

"In the event of dispute as to whether this obligation exists, the matter shall be referred to the International Court of Justice by a direct application submitted by the more diligent party, and the International Court of Justice shall pronounce final and binding judgment on the arbitrability of the dispute in a chamber of summary procedure and in application, in particular, of Articles 29 and 41 of its Statute (except where the parties to the dispute have expressly agreed on a different procedure for deciding the pre-judicial²⁵ question)."

171. In the view of Mr. Scelle, in the event of a dispute as to whether an issue existed or as to whether it fell within the terms of the obligation to arbitrate, the issue should be referred to a judicial authority for final decision. That authority would be the International Court of Justice pronouncing judgment in a chamber of summary procedure.

172. The special rapporteur proposed, in the second place, that the International Court of Justice should be empowered to order provisional measures in accordance with Article 41 of its Statute. On the other hand, some members of the Commission pointed out that, if called upon to pass judgment, the Court would apply its Statute as a whole, including Article 41, without any need to refer to that article. The Commission recognized that the provisional measures referred to in Article 41 would cease to apply when the Court pronounced its judgment, whereas these measures ought to apply until the arbitral award had been given.

173. The Commission accepted the following text:

"If the parties disagree as to the existence of a dispute or as to whether an existing dispute is within

²⁵ The French term *préjudicielle* in the original text of the report of the special rapporteur might be better translated into English by the term "preliminary".

the scope of the obligation to have recourse to arbitration, these questions ought, in the absence of agreement between the parties upon another procedure for dealing with it, to be brought before the Chamber for Summary Procedure of the International Court of Justice by any party by a written application, and the judgment rendered by the Chamber for Summary Procedure shall be final and without appeal."

174. Paragraph II of the draft text submitted by Mr. Scelle read as follows:

"If the dispute is of the kind referred to in the undertaking to resort to arbitration and cannot be settled within a reasonable time by diplomatic negotiation or other amicable means, the parties shall appoint an arbitrator or constitute an arbitral tribunal by mutual agreement in a special conventional instrument. The most diligent party shall take the initiative in this appointment.

"The appointment shall be made in accordance with the procedure agreed upon for this purpose in the instrument containing the undertaking to resort to arbitration. If nothing has been stipulated in this connexion in the said instrument, or if the parties are unable to agree, the most diligent party may have recourse to the procedure provided in articles 22 and 23 of the General Act of Arbitration, as revised by the General Assembly of the United Nations.

"If one of the parties, by systematically abstaining, obstructs the operation of the procedure laid down in the said articles, the missing arbitrators shall be appointed by the President of the International Court of Justice in accordance with article 23, paragraph 3, of the said General Act. The tribunal so constituted shall hear the case and its judgment shall be binding.

"When the arbitrator or members of the arbitral tribunal are appointed by mutual agreement, the parties may act in whatever manner they deem most appropriate and refer the matter to a single arbitrator, to an existing judicial body or to a tribunal constituted as they think fit.

"Nevertheless, generally speaking and having due regard to the circumstances of the case, it is recommended in the light of experience (a) that the persons chosen as arbitrators should possess the qualifications set forth in Article 2 of the Statute of the International Court of Justice; (b) that the sole arbitrator or the majority of the arbitrators should be chosen from among the nationals of States having no direct (or indirect?) interest in the case, that the tribunal should have an odd number of judges, preferably five, and that it should be presided over by one of the neutral judges."

175. The discussion on the above-quoted paragraph was brief and showed no wide divergencies of opinion. With regard to the first sub-paragraph, a member of the Commission observed that the expression "a reasonable time" was too vague. With regard to the second sub-paragraph, a member of the Commission said that the reference to articles 22 and 23 of the General Act of 1928 did not provide an adequate solution. With

regard to the third sub-paragraph, the special rapporteur agreed that the last sentence stipulating that "the Tribunal so constituted shall hear the case and its judgment shall be binding" was superfluous. With regard to the fourth and fifth sub-paragraphs, some members of the Commission thought that it was unnecessary to elaborate the qualifications required of the arbitrators and that arbitration by Heads of State should not be excluded. On this last point, some other members of the Commission were of a different opinion, observing that the intervention by Heads of State was likely to introduce political elements in the arbitration. As to the number of arbitrators, some members of the Commission observed that it would not be necessary to provide for an arbitral tribunal composed of five members except in cases of important international disputes. It was also suggested that the adjective "direct" before the word "interest" in the fifth sub-paragraph should be deleted.

176. Paragraph III of the draft text proposed by Mr. Scelle read as follows:

"Once the arbitral tribunal has been set up by agreement between the parties or by the subsidiary procedures indicated above, it shall not be open to any of the outstanding Governments to alter its composition.

"If a vacancy occurs, the arbitrator shall be replaced by the method laid down for appointments.

"If it is necessary to replace a single arbitrator, the appointment of the new arbitrator shall, in the absence of agreement between the parties, be entrusted to the third Power which would have been competent to appoint the first arbitrator, or to the President of the International Court of Justice.

"An arbitrator may not participate in the judgment of a case with which he has previously had to deal in any capacity. Any doubt in this connexion shall be decided by the tribunal.

"A party may not propose the disqualification²⁶ of one of the arbitrators except on account of a fact arising subsequent to the constitution of the tribunal unless it can reasonably be supposed to have been unaware of the fact or has been the victim of fraud. The matter shall be decided by the tribunal. In the case of a single arbitrator, the decision shall rest with the International Court of Justice through summary procedure.

"A 'national' arbitrator may not withdraw or be withdrawn by the Government which has appointed him. Should this occur, the tribunal is authorized to continue the proceedings and to render an award which shall be binding. If the withdrawal prevents the continuation of the proceedings, the tribunal may request that the absent arbitrator be replaced and, if the procedure employed for his appointment fails, may request the President of the International Court of Justice to replace him."

²⁶ The French term *récusation* used in the original text of the report of the special rapporteur might be better translated into English by the term "challenge".

177. The fourth sub-paragraph of the above-quoted paragraph, in accordance with which "an arbitrator may not participate in the judgment of a case with which he has previously had to deal in any capacity", gave rise to some discussion. Some members of the Commission regarded the formula as too broad, asking whether an arbitrator appointed by one party should be disqualified because he had dealt with related cases or had, as a teacher or author, expressed opinions concerning the case at issue. They pointed out that the character of the arbitrators appointed by the parties was to a certain extent special and that, in accordance with established practice, Governments should be given wide latitude in the choice of such arbitrators and be allowed, if need be, to appoint legal experts in their service. It was proposed that the words "with which he has previously had to deal" should be replaced by the words "in which he had previously participated".

178. The Commission unanimously accepted the following general formula:

"No party may appoint as national arbitrator a person who has previously been actively connected with the particular case submitted to arbitration".

179. The fifth sub-paragraph of paragraph III concerning challenge (*récusation*) also gave rise to some discussion. Doubts were expressed as to the advisability of including a provision concerning the challenge of arbitrators. If provision had been made for the challenge of judges in the case of a judicial tribunal it was because the constitution of such a tribunal, unlike an arbitral tribunal, was permanent and the judges were not appointed by the parties. The special rapporteur said that challenge was permissible only where a new fact, such as the insanity or venality of an arbitrator, had come to light after the appointment of the arbitral tribunal. Divergent views were expressed as to whether the arbitral tribunal or the International Court of Justice should decide on the challenge. Finally, it was suggested that the question should be reconsidered in the light of the views expressed by members of the Commission.

180. The sixth sub-paragraph of paragraph III concerning the resignation of the national arbitrator or his withdrawal by the Government which appointed him gave rise to a lengthy discussion. In the special rapporteur's view, when arbitrators had been appointed they exercised their functions on behalf of both parties. They were independent of the Government which appointed them and that Government could not therefore withdraw them or instruct them to withdraw. The resignation of an arbitrator should be subject to acceptance by the arbitral tribunal. Some members of the Commission thought this view went too far. Arbitration differed from judicial settlement of disputes in that its procedure was more flexible; consequently, various questions must be left to the agreement between the parties. It would discourage arbitration if unduly strict rules were imposed on Governments. Other members of the Commission replied that it was essential that the new code of arbitral procedure should prevent the parties from evading the obligations to which they had subscribed and from paralysing arbitration.

181. The Commission agreed to request the special rapporteur to submit, at its next session, a revised draft taking into account the views expressed during the discussions.

Chapter III. Regime of the High Seas

182. The International Law Commission, at its first session, elected Mr. J. P. A. François special rapporteur to study the topic of the regime of the high seas. At its second session, Mr. François submitted his report (A/CN.4/17) on the topic. The Commission had before it also the replies of Governments (A/CN.4/19, part I, C) to a questionnaire circulated by it.

183. The Commission considered this topic at its 63rd to 69th meetings, using as a basis of discussion the report of the special rapporteur. In this report, Mr. François set out the various subjects which might be studied with a view to the codification or the progressive development of maritime law. 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.

184. The Commission thought that it could, for the time being, leave aside all those subjects which were being studied by other United Nations organs or by the specialized agencies.²⁷ The Commission also left out subjects which, because of their technical nature, were not suitable for study by it. Lastly, it set aside a number of subjects the limited importance of which did not appear to justify their consideration by the Commission in the present phase of its work. The subjects retained by the Commission are set forth in the following paragraphs.

NATIONALITY OF SHIPS

185. The Commission considered that an attempt should be made to determine the general principles governing this matter in the various countries. It invited the special rapporteur to submit a further report on this subject at its next session.

186. With regard to the question of ships without a nationality and of ships possessing two or more nationalities, the Commission adopted the principle that every ship should have a flag and one flag only.

COLLISION

187. The Commission decided to disregard, for the present, problems of private international law involved in the question of collision. The Commission considered it important, however, to determine which court was competent in criminal cases arising out of collision and that, after the case of the *Lotus* and its repercussions throughout the world, it could not remain silent on the subject. The special rapporteur was requested to make a study of the subject and to propose a solution to the Commission at its next session.

²⁷ On this matter, see memorandum by the Secretariat (A/CN.4/30).

SAFETY OF LIFE AT SEA

188. The Commission ascribed great importance to the international regulations for preventing collisions at sea, which constituted Annex B of the Final Act of the London Conference of 1948. The special rapporteur was requested to study the question and to endeavour to deduce from these regulations principles which the Commission might discuss at its next session.

189. The Commission took the view that principles could be formulated, taking into account article 11 of the Brussels Convention of 23 September 1910 for the unification of certain rules relating to assistance and salvage at sea, which provided that after a collision the captain of each of the ships was bound to lend assistance to the other ship in so far as he could do so without serious danger to his ship, his passengers and his crew, and taking into account also article 8 of the Convention of 23 September 1910 for the unification of certain rules relating to collision, which provided that the captain of a ship was bound to render assistance to every person found in the sea in danger of his life, in so far as he could do so without serious danger to his ship, his passengers and his crew.

THE RIGHT OF APPROACH

190. Detailed consideration of this question was deferred until the next session.

SLAVE TRADE

191. 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.

SUBMARINE TELEGRAPH CABLES

192. The Commission agreed on the principle that all States were entitled to lay submarine telegraph and telephone cables on the high seas and considered that the same principle should also apply to pipelines. The Commission requested the special rapporteur to include proposals to that effect in his report for the next session, and at the same time to examine the question of protective measures.

RESOURCES OF THE SEA

193. 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. It was agreed that consultations might have to be held with other organizations, especially technical organizations, which dealt with the question of the protection of the resources of the sea.

RIGHT OF PURSUIT

194. The Commission will resume consideration of the right of pursuit at its next session, on the basis of proposals to be drafted by the special rapporteur,

with due regard to the results of the Codification Conference held at The Hague in 1930.

CONTIGUOUS ZONES

195. The Commission took the view that a littoral State might exercise such control, as was required for the application of its fiscal, customs and health laws, over a zone of the high seas extending for such a limited distance beyond its territorial waters as was necessary for such application.

196. The Commission requested the special rapporteur to assemble the fullest possible documentary material on claims made by States and on the measures adopted by them with regard to their contiguous zones, such material to include information as to the various limits laid down by States.

SEDENTARY FISHERIES

197. After an exchange of views, the Commission requested the special rapporteur to study existing regulations governing sedentary fisheries and to report on his findings at the next session.

THE CONTINENTAL SHELF

198. The Commission recognized the great importance, from the economic and social, as well as from the juridical points of view, of the exploitation of the sea-bed and subsoil of the continental shelf. Methods existed whereby submarine resources might be exploited for the benefit of mankind. Legal concepts should not impede this development. 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. The Commission took the view that a littoral State could exercise control and jurisdiction over the sea-bed and subsoil of the submarine areas situated outside its territorial waters with a view to exploring and exploiting the natural resources there. The area over which such a right of control and jurisdiction might be exercised should be limited; but, where the depth of the waters permitted exploitation, it should not necessarily depend on the existence of a continental shelf. The commission considered that it would be unjust to countries having no continental shelf if the granting of the right in question were made dependent on the existence of such a shelf.

199. The Commission agreed that, where two or more neighbouring States were interested in the submarine area of the continental shelf outside their territorial waters, boundaries should be delimited. It should not be possible for States to penetrate into the region attributable to another State for purposes of control and jurisdiction.

200. In the opinion of the Commission, the sea-bed and subsoil of the submarine areas above referred to were not to be considered as either *res nullius* or *res communis*. The sea-bed and subsoil were subject to

the exercise, by the littoral States, of control and jurisdiction for the purposes of their exploration and exploitation. The exercise of such control and jurisdiction was independent of the concept of occupation. There could be no question of such right of control and jurisdiction over the waters covering those parts of the sea-bed. Those waters remained under the regime of the high seas. The exercise in them of navigation and fishing rights might be impaired only in so far as was strictly necessary for the exploitation of the sea-bed and subsoil. For works and installations established

in the waters of the high seas for working the sea-bed and subsoil, special security zones might be set up, but they could not be classed as territorial waters. The Commission considered that protection of the resources of the sea should be independent of the concept of the continental shelf.

201. The Commission requested the special rapporteur to submit, at its next session, a further report and to include therein concrete proposals based on the conclusions above set forth.