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Summary record of the 155th meeting

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83. Mr. HUDSON said that in his view each of the articles should be followed by a brief commentary, as had been done in the case of the draft articles on the régime of the continental shelf.

84. Mr. LAUTERPACHT said that in his opinion the Commission would not be doing justice either to the importance of the subject or to the labour it had devoted to it if it confined itself to short commentaries such as had been appended to the draft articles on the régime of the continental shelf. The commentaries should be of the nature laid down in article 20 of the Commission's Statute. He felt that it was extremely important that a further twelve months should be devoted to producing a commentary which would be of high scientific value, great persuasive force and the maximum usefulness as a source of information, somewhat along the lines of the commentaries appended to the Harvard Research drafts, but even fuller, in view of the greater resources which were supposed to be at the Commission's disposal.

85. The decision on the commentary on arbitration procedure would be of crucial importance, as it would determine the character of all the Commission's work on questions of a similar nature, and he hoped that it would not be taken hastily.

86. Mr. LIANG (Secretary to the Commission) said that he would again emphasize that mere legal texts, without a full commentary, lacked persuasive value. The Commission's work on the régime of the continental shelf had been one of development, not of codification; for that reason it had not been possible to make the commentary very extensive. In the field of arbitration procedure, on the other hand, there was a whole body of international precedent and doctrine, and there was no reason why the commentary should not be much fuller. A full commentary could not, however, be written in two or three weeks. But it might be considered desirable, as the Assistant Secretary-General had suggested earlier, to accompany the draft convention which had been tentatively adopted with a simple, precise commentary, pending the fuller commentary which would be prepared during the forthcoming year.

87. Mr. HUDSON said that in order to retain the interest of governments in the Commission's work, the articles adopted should be submitted to them with a brief commentary during the current year. Their comments could then be taken into account in preparing the final, full commentary in 1953.

88. Mr. FRANÇOIS said that Mr. Lauterpacht's proposal would only be practicable if the Commission sat permanently and was assisted by a large Secretariat. The plain fact was that the Commission had not the material resources of the Harvard Research, and had no choice but to limit the commentary on arbitral procedure to approximately the same proportions as the commentary on the régime of the continental shelf.

89. Mr. KOZHEVNIKOV said that it might be wise to defer the decision on so important a matter in order

to give members of the Commission an opportunity of pondering carefully Mr. Lauterpacht's remarks. In his view, if the Commission was to fulfil its role as an expert and authoritative body, it must supplement the draft convention with a full commentary which would enable governments to see what position the Commission had adopted, and to judge what position they themselves should adopt with regard to its proposals.

90. Mr. LAUTERPACHT thought that Mr. François was being unnecessarily pessimistic, and that it would be quite possible for the special rapporteur, with the help of the Division for the Development and Codification of International Law, to produce a volume of commentary, dealing with each article in the convention, within the space of twelve months.

91. With regard to what should be done at present, he would remind the Commission that it was first impressions which mattered. If governments received a draft with a short commentary, which could not be self-explanatory, on such a controversial question as arbitration procedure, their interest would be lukewarm and their comments necessarily perfunctory and sterile.

92. Mr. HSU heartily agreed with Mr. Lauterpacht that a full commentary was required. Such had obviously been the General Assembly's intention, and the Commission might forfeit that body's support if the commentary it produced on so important a question was inadequate. On the other hand, he agreed that the Commission should show something for its labours without waiting for a full commentary to be prepared. What could be done in the way of a commentary in the remaining few weeks at the Commission's disposal must be left to the discretion of the special rapporteur.

93. Mr. SCELLE agreed that a full commentary was necessary; but it could not be prepared by the end of the present session. In his view, the Commission should confine itself, in its report on the present session, to submitting the articles it had tentatively adopted.

94. Mr. AMADO was in complete agreement with Mr. Lauterpacht that the draft convention should be accompanied by a volume of commentary.

95. Mr. KOZHEVNIKOV proposed that further discussion be deferred until the next meeting.

It was so agreed.

The meeting rose at 1.15 p.m.

155th MEETING

Wednesday, 2 July 1952, at 9.45 a.m.

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Chairman : Mr. Ricardo J. ALFARO.

Present :

Members : Mr. Gilberto AMADO, Mr. Roberto CORDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi Hsu, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. J. ZOUREK.

Secretariat : Mr. Ivan S. KERNO (Assistant Secretary General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Arbitral procedure (item 2 of the agenda) (A/CN.4/18, A/CN.4/46, A/CN.4/57, A/CN.4/L.33 and Add. 1 to 9) (continued)

ACTION TO BE TAKEN IN RESPECT OF THE DRAFT
ARTICLES (continued)

1. The CHAIRMAN invited the Commission to continue the discussion, begun at the preceding meeting, of the question of what action was to be taken in respect of the draft articles on arbitration procedure when they were eventually adopted by the Commission after the second reading during the current session. The great majority of the Commission had appeared to be in agreement that it was indispensable that those articles should eventually be accompanied by a commentary as prescribed in article 20 of the Commission's Statute, but it was evident that the preparation of such a work would be a time-consuming task. The Commission had therefore to decide what it wished to include in its report to the forthcoming session of the General Assembly. It was for the Commission to consider whether the draft articles lay in the domain of the progressive development or in that of the codification of international law, and to decide accordingly whether to apply article 16 or article 20 of the Commission's Statute.

2. In that connexion, Mr. Hudson had submitted a proposal to the effect that the draft articles on arbitral procedure be included, with a commentary on each article, in the Commission's report of that year as a tentative provisional draft.

3. Mr. KERNO (Assistant Secretary-General) expressed full agreement with what Mr. Lauterpacht had said at the preceding meeting concerning the importance of the decision that was to be taken in connexion with the commentary on the draft articles on arbitration procedure, inasmuch as that decision would establish a precedent for all the Commission's work on codification.

4. As reference had been made to article 20 of the Commission's Statute, he would like to point out that

the relation between that article and articles 21 and 22 was far from clear. Article 20 provided that the Commission should submit its drafts to the General Assembly together with a full commentary, the nature of which was specified. Article 21 provided that when the Commission considered a draft to be satisfactory it should request the Secretary-General to issue it as a Commission document and request governments to submit comments thereon within a reasonable time. Article 22 then went on to state that, taking such comments into consideration, the Commission should prepare a final draft and explanatory report for submission to the General Assembly. Having regard to the order of the articles, that might be held to mean that the Commission should submit its drafts to the General Assembly both before and after submitting them to governments for comment. In his view, however, that was not the case; the Commission had to submit its draft to the General Assembly once only, and the procedure laid down in article 21 preceded that laid down in article 20. But the point was not clear, and he had felt it his duty to draw the Commission's attention to the position.

5. Mr. LIANG (Secretary to the Commission) said that even if the Assistant Secretary-General's view that the Commission had to submit its drafts to the General Assembly once only was adopted, that would not mean that it could not include in its annual reports to the General Assembly progress reports with regard to its work on such drafts. Mr. Hudson's proposal, made at the previous meeting, was therefore perfectly in accordance with the Statute, as he (the Secretary) understood it, but he would suggest that it would be preferable to keep the word "commentary" for the full commentary provided for in article 20, and replace it in Mr. Hudson's proposal by the word "explanations".

6. Mr. HUDSON accepted the Secretary's suggestion.

7. Mr. LAUTERPACHT, after recalling the views he had expressed at the preceding meeting, agreed that it would be useful for the draft articles eventually adopted at the present session to be submitted to governments forthwith, provided, however, that they were accompanied by relatively full explanations — one or two pages for each article — in order to facilitate the consideration of the draft article by governments and to elicit fuller comments from them. The special rapporteur could obviously not be expected, without help, to produce such full explanations in the few weeks still available to him. On the other hand, he thought it perfectly feasible to ask the Standing Drafting Committee, or any individual members of the Commission who had shown particular interest in certain articles, to help the special rapporteur in his task. He (Mr. Lauterpacht) himself would be glad to prepare the explanation for the articles dealing with remedies. The special rapporteur would then circulate the draft explanations to members of the Commission for any further comment, and draw up, for inclusion in the Commission's report, his final explanations on each of the articles adopted. The explanations would, however, be regarded as the explanations of the special rap-

porteur, and there would accordingly be no need for the Commission to approve them.

8. With regard to the action to be taken at the fifth session in 1953, he proposed that the Commission should at that time consider the comments submitted by governments, and, at the close of the session, submit the draft articles to the General Assembly accompanied by a full commentary complying with the requirements laid down in article 20 of the Commission's Statute.

9. Mr. FRANÇOIS said that in his view the draft articles were much more a progressive development than a codification of international law; the provisions of article 16 of the Commission's Statute should therefore be followed. Governments did not need any detailed explanations of the draft articles at the present time, nor would they have time to study them; it was significant that only a few governments had so far replied to the Commission's request for comments on the draft articles relating to the régime of the continental shelf. For that reason it was also unrealistic to suppose that full comments on the draft articles on arbitration procedure would be received in time to be taken into account at the Commission's fifth session.

10. It would be a fundamental, and, he believed, unfortunate departure from the practice not only of the Commission but of other international bodies if the Commission was not itself to assume responsibility for all the matter included in its reports. On the other hand, approval of detailed explanations might well prove a lengthy process; that was not an argument, however, for making such explanations the responsibility of the special rapporteur, but rather a further argument in favour of making them brief.

11. Mr. KOZHEVNIKOV said that it was essential to lay before governments texts which were self-explanatory. On the other hand, he saw no reason why the Commission should consider itself bound at all costs to submit to the next session of the General Assembly some account of its work on arbitration procedure. In his view, it was only necessary to lay before that body the final fruits of its labours.

12. He proposed, therefore, that the special rapporteur should prepare a detailed commentary for consideration by the Commission at its fifth session, that the Commission should then submit the draft articles and the commentary to governments for comment, and that it should take their comments into account before submitting its final draft to the General Assembly.

13. Mr. SCALLE said that the Commission should clearly include in its report to the General Assembly the text of the draft articles it eventually adopted, stating at the same time that those articles were being submitted to governments for comment. It would be quite impossible for him, even with the help of other members of the Commission, to prepare before the close of the present session a commentary on the lines indicated in article 20 of the Commission's Statute. All that would be possible would be to append to each article a brief explanation of what it meant.

14. After further lengthy discussion, Mr. LAUTERPACHT, supported by Mr. KOZHEVNIKOV, proposed that further discussion be deferred and that the vote on the three proposals which had been submitted, namely, that of Mr. Hudson, that of Mr. Lauterpacht and that of Mr. Kozhevnikov, be taken at the following meeting.

It was so agreed.

Nationality, including statelessness (item 6 of the agenda) (A/CN.4/50)

GENERAL

15. The CHAIRMAN invited the Commission to take up the report on nationality, including statelessness (A/CN.4/50) prepared by Mr. Hudson, special rapporteur for that subject.

16. Mr. HUDSON said that those members of the Commission who attended the third session would remember that he had accepted the task of preparing a report on nationality, including statelessness, only with great reluctance.¹ He hoped that the report that he was now submitting to the Commission would at least furnish it with a basis for discussion. In its preparation he had had the valuable assistance of Mr. Paul Weiss, Legal Adviser to the High Commissioner for Refugees. Mr. Weiss, who had also worked for the International Refugee Organization, was closely concerned with questions of statelessness.

17. The substance of his report was contained in the three annexes to it. Annex I gave a general historical and analytical review of the major problems connected with nationality. Annex II dealt with the nationality of married persons and contained a draft convention on that question. Annex III constituted a working paper on statelessness, and contained nineteen points which he put forward for discussion by the Commission.

18. He proposed that Annex II be dealt with first, since it constituted a method of approach to a specific task entrusted to the Commission by the Economic and Social Council in the latter's resolutions 304 (XI) and 385 F (XIII). That task was to draft a convention on the nationality of married women embodying the following principles recommended by the Commission on the Status of Women:

"(i) There shall be no distinction based on sex as regards nationality, in legislation or in practice;

"(ii) Neither marriage nor its dissolution shall affect the nationality of either spouse. Nothing in such a convention shall preclude the parties to it from making provision for the voluntary naturalization of aliens married to their nationals."

19. He recalled that the Commission on the Status of Women had decided not to recommend that the draft convention should include a provision relating to distinction as between the father and mother in the transmission of nationality *jure sanguinis*.

¹ Mr. M. O. Hudson was appointed special rapporteur at the 133rd meeting.

20. He considered that it would be unnecessary for the Commission to express any views on the principles upon which the draft convention was to be based, or to analyse the consequences of their application. It could confine itself solely to the task of drafting the necessary text.

21. In preparing the draft he had concluded that it should be broadened to include married persons of both sexes in order to conform with the first of the two principles mentioned.

22. Mr. YEPES thanked Mr. Hudson for his valuable contribution to the study of the topic of nationality, including statelessness, but expressed disagreement with the special rapporteur's proposal as to how the Commission should deal with his report. Annex I should be regarded as an introduction to the other two annexes, as it contained certain general principles which must be examined first. For example, he could not agree with the view expressed in section II,4 of that annex that in principle the power of States to cancel or withhold nationality was not limited by international law. Clearly, fundamental issues of principle which must of necessity affect the draft convention contained in annex II should be fully discussed first.

23. He was in almost complete agreement with the draft convention prepared by Mr. Hudson, and wished to take the opportunity of pointing out that the principles laid down in it had already been accepted some twenty years ago by those Latin-American States which had signed the Convention on the Nationality of Married Women adopted at Montevideo in 1933.

24. Mr. HUDSON appealed to the Commission not to embark upon a substantive discussion of his report until it had decided the question of procedure, namely, whether it should first take up annex II and discharge the task entrusted to it by the Economic and Social Council.

25. Mr. LAUTERPACHT found himself in considerable difficulty concerning Mr. Hudson's report, and in particular concerning the suggestion that the draft convention on the nationality of married persons should be discussed at the present session.

26. The draft convention was not accompanied by any supporting documentation, although the Secretary-General's consolidated report on the problem of statelessness (E/2230-A/CN.4/56), which the Secretariat had made available to the Commission, contained an analysis of replies from certain governments. He believed that an important question of principle was involved, namely, whether the Commission should consider the text of a draft convention which was not accompanied by a report by the special rapporteur. It was true that those who were diligent enough to assemble information from other sources could benefit from the purely factual report of the Secretary-General on the nationality of married women. Nevertheless, that could not fill the vital gap left by the failure of the special rapporteur to present his considered views on a most complicated subject. The question of the

nationality of women had many legal, sociological and other ramifications, but the Commission was now being asked, at the insistence of the Commission on the Status of Women, to adopt a draft convention on the subject embodying certain principles laid down by that Commission.

27. Mr. HUDSON intervened to point out that the International Law Commission had merely been asked to draft a text.

28. Mr. LAUTERPACHT said that it would be a deplorable development if the Commission were to prepare for submission to the General Assembly texts, the underlying principles of which it had not itself approved. Any convention which it drafted must have its approval, both as to principle and as to phraseology.

29. It was true that at its second session the Commission had decided to deal with the matter in connexion with its consideration of nationality, including statelessness, but that decision was subject to the usual procedure, namely, that the Commission must give due consideration, not only to the legal merits of the subject, but also to its sociological and political implications. He could not agree that it was the function of the Commission to act as a drafting committee and, as such, to cast in the form of a draft convention principles laid down by another body.

30. Were it not for the great respect he felt for Mr. Hudson, he would suggest that the Commission should not take up the matter at the present session at all, but should only do so when it had all the necessary accompanying information and a statement of the special rapporteur's personal views.

31. Should the Commission decide to consider the draft convention he would loyally participate in the discussions, despite his gravest doubts as to the possibility of the Commission's doing useful work without adequate preparation.

32. Mr. FRANÇOIS said that he could understand Mr. Lauterpacht's reactions to what at first sight seemed a somewhat doubtful thesis, namely, that the Commission could adopt a draft convention without pronouncing itself either on the principles the convention embodied or on the consequences of their application. Nevertheless, he felt that the method proposed by Mr. Hudson was the only possible one, particularly as it was not for the Commission to touch upon questions relating to private international law, and as the adoption of such a draft convention by States would possibly have the most serious repercussions upon both public and private international law. For example, many countries would be reluctant to abandon the principle that nationality was transmitted by the father. A report prepared for the Institute of International Law at its last session by Messrs. Batiffol and Valladao indicated that in order to realize the principle of equality between spouses as to the effects of the marriage in international private law, it would be necessary to make applicable the law of the country

of residence, and not the law of the husband's country.² Such a change had not been applied even by the States which had adopted the Montevideo Convention, and would undoubtedly be resisted by many States. That was only one example of the kind of obstacles which might be met.

33. Mr. YEPES had contended that the principles enunciated in the draft prepared by Mr. Hudson had been accepted by the Latin-American countries some twenty years earlier, but it was quite clear that those principles were far from being applied in practice. It would take the Commission at least two or three sessions to examine the extent to which the principles in the draft convention could be applied. Consequently, the only possible solution seemed to him to follow Mr. Hudson's suggestion and to prepare a draft for the Economic and Social Council, making it absolutely clear that it was a draft upon the principles of which the Commission had not expressed any opinion.

34. Mr. HUDSON said that he had merely put forward a draft. He held no brief for it, or for attempting to follow the 1933 Montevideo Convention on the Nationality of Women, which had only been ratified by ten States, or the 1933 Montevideo Convention on Nationality, which was in force between only five States, three of which had entered reservations. He did not think that there was anything in the Statute of the Commission to preclude it from preparing a draft for the Economic and Social Council without assuming responsibility for its content.

35. Mr. HSU reminded the Commission that the request made by the Economic and Social Council in its resolution 304 (XI) had given rise to a considerable amount of criticism at the Commission's second session, notably from those members who considered that the Commission was not a body which should concern itself with the mere drafting of conventions to embody principles laid down by another organ.³ The Commission's task was to develop and codify international law. Some members, and he was among them, had at the time expressed the view that the Commission should not undertake the task.

36. With all due respect, he felt that Mr. Hudson had ignored the spirit in which the Commission had decided to accede to the Council's request, which was to consider the problem of the nationality of married women as part of the topic of nationality, including statelessness. At that time the Commission had not decided merely to prepare a draft without going into the substance of the question. Had that been proposed, the motion would probably have been rejected.

37. Mr. LIANG (Secretary to the Commission) said that the crucial point at issue was whether the Commission should transform itself into a mere drafting

bureau. He quoted the remarks of various members made at the seventy-first meeting of the Commission during its second session to show the doubts then entertained on that point.

38. Mr. SANDSTRÖM said that several members, of whom he had been one, had at the second session expressed the view that investigation of the problem of the nationality of married women could only be undertaken as part of the whole subject of nationality, including statelessness.

39. If the Commission were to treat the Economic and Social Council's request as a mere matter of drafting, it would have to accompany the text with very strong and clear reservations explaining that it had not examined the question of how such a convention would affect the problem of nationality as a whole. Such reservations would clearly so attenuate the value of the draft as to render it almost meaningless, and he therefore had the gravest doubts whether any useful purpose would be served by proceeding in the manner proposed by Mr. Hudson.

40. Mr. KOZHEVNIKOV said that, as one of the new members of the Commission, he was not fully acquainted with the historical background of the problem, but Mr. Hudson's proposal clearly raised very important issues relating to the position and competence of the Commission. He personally thought that the General Assembly was the only body competent to entrust the Commission with a specific task.

41. The Commission's Statute left no doubt as to its great responsibilities. It was called upon to deal with grave and important problems, and he was very doubtful whether it could transform itself into a mere technical drafting committee. At all events, the question of competence must be settled first.

42. Should the Commission decide to act in accordance with Mr. Hudson's proposal it would then have to consider how it was to deal with the draft convention. It might find that it could not confine itself to mere drafting, but would have to pronounce on certain questions of principle.

43. Mr. SCELLE expressed his firm conviction that the Commission could not act as a drafting body on behalf of any other organ. He was fortified in that belief by the reasons adduced by Mr. François, with whose conclusion, however, he could not agree. It was unthinkable that the Commission should be given the task of casting the concepts of others in concrete form. He, for his part, was unable to endorse some of the articles which Mr. Hudson had prepared, the effect of which, in his view, would be to destroy the family, which was not putting it too strongly. If the Commission considered the draft convention before it, it must pronounce upon its substance.

44. Mr. CORDOVA said that he had already expressed his views on the matter at the second session. The Commission would never be able to fulfil its task if it were to turn itself into a pure drafting committee. It would be remembered, for example, that in preparing

² See *Annuaire de l'Institut de droit international*, vol. 44 (1952), t. II, pp. 1—9.

³ See *Yearbook of the International Law Commission, 1950*, summary record of the 71st meeting, pp. 247—255.

the draft code of offences against the peace and security of mankind, the Commission had not felt itself bound by the principles recognized by the Nürnberg Tribunal. The Commission's task was to codify international law as it understood it, and not in accordance with the concepts put forward by other organs. If it decided to prepare a draft convention, the Commission should examine the substance of the subject.

45. Mr. el-KHOURI said that to the best of his recollection the Commission had decided to take up the question of nationality of married women as part of the whole problem of nationality, including statelessness. It could not therefore confine itself to the mere drafting of a text for whose content it would be taking no responsibility.

46. Mr. HUDSON said that if the Commission refused to draft a convention it would be guilty of misleading the Economic and Social Council as to its intentions.

47. Mr. YEPES said that if the Commission followed the procedure proposed by Mr. Hudson it would do so in violation of article 1 of its Statute.

48. Mr. ZOUREK considered that the Commission had decided to accede to the Council's request in accordance with article 17, paragraph 2, of its Statute.

49. Mr. HUDSON suggested that the Chair take the sense of the Commission by putting to the vote the following proposal:

"The Commission decides, complying with the proposal of the Economic and Social Council, to draft a convention embodying the principles recommended by the Commission on the Status of Women.

"In doing so, it does not express any approval of those principles."

Mr. Hudson's proposal was rejected by 8 votes to 3, with 1 abstention.

50. Mr. LAUTERPACHT said that out of respect for the Commission's previous decision and the work done by Mr. Hudson, the Commission should hold a short general discussion on the problem of nationality of married women to enable it to decide whether it could draft a convention at a subsequent session.

The meeting rose at 1.15 p.m.

156th MEETING

Thursday, 3 July 1952, at 9.45 a.m.

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Chairman : Mr. Ricardo J. ALFARO.

Present :

Members : Mr. Gilberto AMADO, Mr. Roberto CORDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Faris Bey el-KHOURI, Mr. F. I. KOZHEVNIKOV, Mr. H. LAUTERPACHT, Mr. A. E. F. SANDSTRÖM, Mr. Georges SCELLE, Mr. J. M. YEPES, Mr. J. ZOUREK.

Secretariat : Mr. Ivan S. KERNO (Assistant Secretary General in charge of the Legal Department), Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Arbitral procedure (item 2 of the agenda) (A/CN.4/18, A/CN.4/46, A/CN.4/57, A/CN.4/L.33 and Add. 1 to 9) (resumed from the 155th meeting)

ACTION TO BE TAKEN IN RESPECT OF THE DRAFT ARTICLES (resumed)

1. The CHAIRMAN invited the Commission to continue its discussion of the action which was to be taken with regard to the draft articles which had been tentatively adopted. He recalled that three proposals had been made. Mr. Hudson had proposed

"That the draft on arbitral procedure be included, with explanations to follow on each article, in the report of the Commission this year as a tentative provisional draft."

2. Mr. Lauterpacht had proposed

"1. That after the end of this session the draft articles shall be submitted to governments with explanations.

"The Special Rapporteur, with the assistance of the Standing Drafting Committee and any other member of the Commission, shall prepare a draft of explanations to every article adopted by the Commission and circulate that draft among members of the Commission for comment. After receiving that comment the Special Rapporteur shall finally prepare his explanations to be appended to the draft articles;

"2. That after the end of the 1953 session the draft articles shall be submitted to the General Assembly accompanied by a full commentary in accordance with article 20 of the Statute of the Commission."

3. Finally Mr. Kozhevnikov had submitted a proposal worded as follows:

"To prepare a detailed commentary before transmitting it to governments. To submit the commentary to the Commission for consideration at its fifth session. After such consideration, to transmit all the material to governments for their observations. To