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Observations  
of members of the Governing Council  
on the preliminary draft Convention  
on the Hotelkeeper's Contract

(Secretariat Memorandum)

Rome, May 1976

## INTRODUCTION

On the occasion of its 54<sup>th</sup> session, held in Rome from 23 to 25 April 1975, the Governing Council proceeded to an examination of the preliminary draft Convention on the Hotelkeeper's Contract, which had been prepared by a Working Committee under the chairmanship of Professor R. Loewe, and the accompanying Explanatory Report prepared by the Secretariat. In the absence of Professor Loewe, the draft was presented to the Council by Ambassador Kearney, who was a member of the Working Committee.

As a number of members of the Council made critical observations on the draft, it was decided not to follow the recommendation of the Working Committee that a Committee of Governmental Experts be convened with a view to the preparation of a draft Convention which might be submitted to a Diplomatic Conference for adoption. Instead, the Council accepted a proposal by the President that the Secretariat should circulate to its members the preliminary draft Convention, which they had had little time to study, together with the observations made during the session. The members would then communicate to the Secretariat their observations and proposals for the revision of the text and a new paper would be prepared by the Secretariat and submitted in good time for the 1976 session of the Council, on which occasion a detailed examination of the draft might be undertaken designed to lead to the adoption of firm conclusions.

In accordance with this decision, the Secretariat transmitted the preliminary draft Convention, together with the minutes of the 54<sup>th</sup> session of the Council, to its members on 20 October 1975 with a request for comments on the draft by 15 March 1976. The present document contains the observations so far received from Professors Loewe and Wortley as well as a recapitulation of the remarks made by members of the Council at its 54<sup>th</sup> session.

Article 1

Mr. PETREN (Minutes of the 54<sup>th</sup> session, p. 15)

"..... the draft seemed to be concerned only with contracts between hotelkeepers and individual guests and did not cover relations with guests accommodated in a hotel as a group under a travel contract. He could envisage problems arising if, for example, some members of the group behaved in a manner causing the hotelkeeper to eject them from the hotel. What effect, if any, could this have on the other members of the group? Again, he wondered whether it would be the member of the group or the travel organiser who would be the appropriate person to bring an action against the hotelkeeper if a guest were, for example, injured as a result of the defective state of the premises? Finally, he expressed some hesitation arising from the loosely worded definition of a hotelkeeper's contract in Article 1 to which Ambassador Kearney had referred in his commentary on the draft. He was, in particular, concerned to know whether relations between youth hostels and young people taking advantage of the facilities offered by them would be covered by the draft. If they were, then he considered that the application to them of some of the provisions of the draft would not be appropriate."

Mr. von OVERBECK (Minutes of the 54<sup>th</sup> session, p. 17)

"..... stated that he shared Judge Petren's concern over the vagueness of the definition contained in Article 1 and noted that a similar problem to that created by youth hostels existed with respect to the letting out of rooms in students' halls of residence for participants at conferences and congresses. He wondered whether it might not be possible to find out the definition of hotels in the various States, based for example on the classification of different establishments, and perhaps to leave it to States to provide their own definition for the purpose of the future instrument."

Mr. KEARNEY (Minutes of the 54<sup>th</sup> session, pp. 18 and 19)

"Taking first the general issue of group travel raised by Judge Petren, he considered that this was basically a problem of broader scope than the hotelkeeper's contract as such in that a third party, the travel organiser, was interposed between the two parties to the hotelkeeper's contract. The Working Committee had given careful consideration to the question of whether the present draft should cover contracts con-

cluded with hotelkeepers by travel organisers but had decided at the present stage only to deal with the bilateral relations between the hotelkeeper and the guest, while not excluding the possibility of extending or modifying the rules drawn up to govern these relations to take account of the problems raised by travel contracts later. He considered that the example given by Judge Petrán of some members of a large group being ejected by the hotelkeeper raised immediately the difficulties inherent in the tripartite relationship created by group travel which the Committee had not considered it expedient to deal with at the present time."

"He..... personally agreed with Judge Petrán's remarks concerning the need to regulate the relations between hotelkeepers and guests accommodated by virtue of a travel contract concluded with a travel organiser."

In his view, however, the draft was too much concerned with the contractual relationship between hotelkeepers and guests and it would be preferable to concentrate on some aspects of their status relations.

Mr. WORTLEY (Letter of 25 November 1975)

"..... in my view, this document<sup>(1)</sup> fails to deal with a most important aspect of the problem, i.e. what is the position of innkeepers vis-à-vis travel agents, through whom most "package tours" are arranged..... There is a passage in the recently published report of the Law Commission on "Exemption Clauses"<sup>(2)</sup> ..... which is particularly relevant..... The problem is, is the agent an agent for the customer, for the innkeeper or sometimes for one and sometimes the other?"

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(1) Study XII - Doc. 12.

(2) The Law Commission and the Scottish Law Commission (LAW COM No. 69) (SCOT. LAW COM. No. 39) - Exemption Clauses, Second Report, pp. 49 and 50

"Travel agents

125. The exemption clauses used by travel agents are another source of complaint. There are two aspects of the operation of these exemptions that we have considered: one is the purported exemption from liability for negligence, to which our discussion

Mr. LOEWE (Letter of 6 November 1975)

"The Working Committee was very careful in drawing up the definition of the hotelkeeper's contract which limits the scope of the future Convention. Among the other problems, it of course also envisaged definitions containing a list of the situations to be included in the field of application and perhaps a list of those to be excluded. This proved to be impossible on account of the numerous forms of contracts providing accommodation which moreover vary from country to country. Apart from the situations envisaged by Mr. Petré (youth hostels) and by Mr. von Overbeck (rooms in students' halls of residence let out to participants at conferences and congresses) one could call to mind a great many others. The members of the Working Committee saw nothing against all the situations covered by the definition as drawn up being governed to the rules of the Convention as the definition can just as easily apply to de luxe hotels as to the youth hostels mentioned above because even in this last case there is no reason why the proprietor of such a hostel should not be required to carry out his obligations. Besides this is actually the case in a

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Note (2) continued:

in this Part of the report is relevant; the other is the attempt to exempt from liability for non-performance or defective performance of the contractual obligations, which we discuss in Part IV, below.

126. The subject is extraordinarily complex, and the exact legal position of the travel agent is far from clear. He may be a principal agreeing to provide travel and accommodation for his customer. He may be an agent for the customer in contracting with transport undertakings, hotels and other travel agents. He may be an agent for the transport undertakings, hotels or other travel agents in contracting with the customer. He may act in one capacity in relation to some aspects of the travel and in other capacities elsewhere. The true legal analysis, which will determine the precise nature of his contractual obligations, will depend on the terms of the contract and the surrounding circumstances. As we have indicated, more than one travel agent may be involved; we suspect that members of the public do not always understand with whom they are contracting when their local travel agent offers them a package tour. In view of this complexity and uncertainty, we think that the general avoidance of exemption clauses would be inappropriate, and that the flexibility afforded by the reasonableness test in relation to liability for negligence will give the courts the powers they need to do justice in relation to these contracts. We understand that the Director General of Fair Trading has been instrumental in negotiating Codes of Practice with the Association of British Travel Agents, and in these circumstances we do not propose to make any special recommendations.

large majority of legal systems which do not have special rules governing contracts to provide accommodation except perhaps as regards liability for objects brought to the hotel.

In this context Mr. von Overbeck's suggestion to leave it to States to define ratione materiae the field of application of the future instrument seems to me to run counter to any effort towards unification as it allows each State to apply or not to apply the Convention to any particular situation.

The draft covers contracts made by a travel agency in the name of the guest ("travel intermediary" in the CCV terminology) but not contracts made by such an agency in the capacity of a "travel organiser". In the first case, the intervention of the agency must in no way change the relationship between the hotelkeeper and his guest. The representatives of hotelkeepers on the Working Committee declared more than once that their relationships with travel agencies acting as travel organisers were complex and delicate and should be the subject of a separate instrument or, as had also been proposed, be regarded as a third section to be added to the CCV and the instrument on the hotelkeepers' contract. One must not, at this stage, complicate matters again as would seem to be the upshot of Mr. Petré's intervention. If the draft were to be interpreted in this way it would also be impossible to understand why the hotelkeeper should, simply because of the behaviour of certain guests, be entitled to turn out other guests from his hotel, for the sole reason that their contracts of accommodation were made through the same travel agency and that these guests - in fact but not in law - appear to form part of a group. It is moreover evident that only the person in whose name the contract is concluded has a right to bring an action on the contract."

#### Article 2

Mr. WORTLEY

"The term "Contracting State" in Article 2 should read "State party to this Convention"."

Article 4

Mr. DAVID (Minutes of the 54<sup>th</sup> session, p. 14)

"..... expressed the opinion that the most important part of the draft concerned the liability of the hotelkeeper for personal injury suffered by the guest or for damage to the latter's property. He was less sure that there was any great interest in laying down detailed legal provisions concerning, for example, the circumstances in which the contract was concluded, as he considered that it was unlikely that a guest who was not given a room which he had reserved or one inferior to that he had requested would have recourse to a court of law. Nevertheless he recognised that the provisions proposed in the draft to deal with such situations might have some impact on the behaviour of hotelkeepers and guests..... He saw little merit in Article 4, paragraph 2, which laid down the general rule that failure by the hotelkeeper to reply to a request for accommodation should be considered as acceptance. Such a provision was, in his view, unrealistic. If a person requesting accommodation received no reply from the hotelkeeper his normal reaction would not be to assume that a room had been reserved for him and, if he then took accommodation elsewhere, he would, under Article 4, paragraph 2 as it presently stood, be bound by two hotelkeepers' contracts. Furthermore, there would be serious difficulties in proving that the letter requesting accommodation had ever been sent or received. He therefore proposed that the rule set out in Article 4, paragraph 2 be revised so that only actual acceptance by the hotelkeeper of an offer would give rise to a contract."

Mr. RECZEI (Minutes of the 54<sup>th</sup> session, p. 16)

"..... disagreed with the observations of Professor David concerning the rule in Article 4, paragraph 2 that the silence of the hotelkeeper in response to a request for accommodation should be deemed to be an acceptance. In his experience, hotels seldom replied to such requests although they normally kept rooms available in accordance with them. He considered that a hotelkeeper should, on receiving such a request, either reserve accommodation or reply indicating that it was not available. He therefore supported the maintaining of the rule set out in the first sentence of Article 4, paragraph 2, although he considered that the second sentence, which displaced the general rule when the guest expressly requested a reply, should be deleted as he believed that the need for the hotelkeeper to reply was all the more evident in such cases."

Mr. WORTLEY

"In paragraph 1, delete the words "as from the time"."

Mr. KEARNEY (Minutes of the 54<sup>th</sup> session, p. 18)

"As to the suggestion by some members of the Council that, outside the field of the hotelkeeper's liability for physical injury to the guest or loss of, or damage to, his property, the elaboration of legal rules governing the hotelkeeper's contract did not seem to present any great practical interest, he replied that an impressive number of legal decisions might be cited concerning cases in which persons, often of modest means, who had paid considerable sums for their holidays, had found no accommodation available for them on arrival."

Mr. LOEWE

"Unlike Mr. David, the Working Committee was of the opinion that the provisions on the formation of the contract are extremely important. The reason given by Mr. David, that it is unlikely for a guest who has not received what he was promised to appeal to a court, is not convincing because even if this is the case at present, this state of affairs stems mainly from the fact that national laws today are either silent as to the hotelkeeper's obligation or deal with it in an imprecise manner. Unsatisfied guests prefer to suffer the damage and then write furious letters to the professional associations and local tourist organisations (see Mr. von Overbeck remark; experience has shown that these bodies have no power or influence over a "bad" hotelkeeper). The aim of the future Convention, however, is precisely to ensure the guest's legal protection which is, at the moment, non-existent or very inadequate.

As for the interpretation of the silence of the hotelkeeper, a decision had to be taken one way or another. It was found that practice followed not the opinion put forward by Mr. David but rather that expressed by Mr. Réczoi. On the other hand if paragraph 2 were to be applied in cases where the guest prudently makes an express request for a reply, he would, for the reasons given by Mr. David, find himself in an awkward position seeing that, having received no answer from the hotelkeeper, he would either think that his letter had been lost or that the hotelkeeper who had not answered him as requested had equally not followed up his request for accommodation; the guest cannot therefore reasonably be bound by his offer in this type of case."



Article 5

Mr. RECZEI (Minutes of the 54<sup>th</sup> session, p. 16)

"With regard to Article 5, paragraph 2, which contained a reference to the internal regulations of the hotel, he expressed the view that it should further be provided in the text that the regulations could be invoked against the guest only when they had been brought to his attention."

Mr. LOEWE

"Mr. Réczei was in favour of introducing a provision in the draft providing that the hotelkeeper may only invoke the regulations against the guest if they have been brought to his attention. The provision is already the subject of Article 12."

Article 6

Mr. RECZEI (Minutes of the 54<sup>th</sup> session, p. 16)

"..... with respect to Article 6, he considered that this was not a case of cancellation for if it were impossible for the hotelkeeper to provide the accommodation owing to external causes, the contract would be avoided ipso facto. There was, in his view, no need to refer to force majeure in this context."

Mr. LOEWE

"Mr. Réczei considered that the cancellation of the contract should not be foreseen in a case of force majeure but rather it should be deemed to have been avoided ipso facto. This would not seem very desirable as the UNCITRAL Working Group on Sale has just altered the 1964 texts in order to eliminate all cases of ipso facto avoidance. Besides, how can one party, except in some obvious cases such as collapse of the hotel during the guest's stay, know about the fact preventing the other party from performance if it has not been brought to his attention? The least one can ask of the party to the contract unable to fulfil his obligations is to warn the other party so that the latter can make other arrangements in time."

Article 11

Mr. DAVID (Minutes of the 54<sup>th</sup> session, p. 14)

"..... also expressed some dissatisfaction with Article 11 which provided that, as a general rule, a deposit paid by the guest should only be considered as an advance payment towards the price of the accommodation and ancillary services to be provided under the contract. He considered that, in some circumstances at least, the hotelkeeper who risked suffering loss as a result of the "no-show" of the guest might benefit from a presumption that the deposit was to be regarded as a reasonable pre-assessment of the damage actually suffered by the hotelkeeper."

Mr. LOEWE

"The Working Committee considered that the régime proposed by Mr. David was unfair for both parties. Why should a hotelkeeper who has asked for a relatively modest deposit be treated less favourably than a colleague who has asked for no deposit at all? Why should the hotelkeeper have to calculate exactly the damage he might possibly suffer before being able to ask for a deposit? Quid if a guest who has made a reservation for 7 days and given a deposit equivalent to the price for 5 days, leaves - without a valid reason - after 4 days: does the hotelkeeper have no right to anything more (keeping the supplementary deposit for only one day) or should the guest be required to pay the price of the 4 days and leave the hotelkeeper a deposit which is equivalent to more than the three days during which the room could remain unoccupied? And should the guest have to estimate whether the sum he is going to leave as a deposit is greater than the damages he might be required to pay? All these questions show that the solution adopted in the draft is the only valid one."

Article 12

Mr. DAVID (Minutes of the 54<sup>th</sup> session, p. 15)

"..... entertained some doubts in relation to the possibilities for hotelkeepers to insert clauses limiting or excluding their liability and this especially in the internal regulations which were often brought to the attention of the guest only after the conclusion of the contract."

Mr. LOEWE

"Mr. David expresses some concern about the possibility for the hotelkeeper to insert in the contract clauses limiting or excluding his liability and this especially in the internal regulations which are often brought to the attention of the guest only after the conclusion of the contract. This concern does not seem to be justified in view of Article 24, paragraph 1. If even stipulations between the parties cannot bring about the exclusion or limitation of the hotelkeeper's liability as laid down in the draft, it goes without saying that internal regulations drawn up unilaterally by the hotelkeeper cannot have such effect whether they are duly brought to the attention of the guest or not. The article, therefore, only refers to the guest's behaviour at the hotel and in no way to the hotelkeeper's liability."

Article 15

Mr. DAVID (Minutes of the 54<sup>th</sup> session, p. 15)

"..... drew attention to certain difference between, on the one hand, the 1962 Convention on the Liability of Hotel-Keepers concerning the Property of their Guests, which had been ratified by a number of European States with important hotel industries, and which he had himself followed when drafting the section of the Ethiopian Civil Code dealing with the hotelkeeper's contract and, on the other, the corresponding provisions of the preliminary draft Convention elaborated by the Working Committee."

Mr. LOEWE

"The Working Committee was careful to avoid any contradiction with the 1962 Council of Europe Convention. Even the observers sent especially for this purpose by the above mentioned Organisation admitted that all the provisions of the draft were compatible with the Convention. It is therefore difficult to see the concrete problem behind Mr. David's remark. A few differences in the wording are due to the fact that the draft is intended to become a universal Convention and that the Working Committee was thus composed of persons some of whom were not nationals of a member State of the Council of Europe. These members of the Working Committee nevertheless showed great comprehension as regards the contents of the provisions for which they should be given full credit."

Article 16

Mr. MONACO (Minutes of the 54<sup>th</sup> session, p. 17)

"..... expressed some perplexity regarding the terminology used in Article 16, paragraph 2 where the adjective "dangerous" was used in connection with securities, money and valuable articles."

Mr. LOEWE

"Mr. Monaco's remark quite rightly calls attention to an error of presentation. Paragraph 2 should read as follows: "..... and valuable articles. He may only refuse to receive property if it is dangerous or if, having regard to the standing or amenities of the hotel, it is of excessive value or cumbersome."."

Article 19

Mr. RÉCZEI (Minutes of the 54<sup>th</sup> session, p. 16)

"..... with reference to Article 19, paragraph 3 of the draft, which concerned the existence of third party rights over property detained by the hotelkeeper in the exercise of his right of lien, he thought that there were circumstances in which the hotelkeeper's lien should prevail over other third party rights."

Mr. LOEWE

"The existence of a right of retention and rights of other persons over the same property gives rise to tricky questions to which legislations have given widely differing answers. Unlike Mr. Réczai, the Working Committee considered that it would be preferable to lay down a slightly more modest right of retention of the hotelkeeper but one which is universally recognised rather than to seek a more far-reaching degree of unification which might however come up against difficulties in a large number of States."

Article 22

Mr. MONACO (Minutes of the 54<sup>th</sup> session, pp. 16 and 17)

"..... considered that Article 22 of the draft, relating to questions of jurisdiction and enforcement, raised some difficulties. He noted that the set of provisions contained in the article was based essentially on that to be found in a number of European transport Conventions and while there might be some utility in paragraphs 1 and 2 dealing respectively with jurisdiction and exceptions pendente lite and res judicata, he considered that paragraphs 3 and 4 concerning enforcement of judgments were, if not superfluous, then at least pleonastic. He also recalled the difficulties inherent in making provision outside a regional context, for regulating the enforcement of judgments and in consequence considered that paragraphs 3 and 4, at least, of Article 22, should be deleted."

Mr. von OVERBECK (Minutes of the 54<sup>th</sup> session, p. 17)

"..... endorsed Professor Monaco's doubts concerning the introduction in the future instrument of detailed provisions on enforcement of judgments which was always a source of difficulty on a multinational plane. He further wondered whether there was any great interest in working out such provisions in connection with the hotel-keeper's contract in view of the small number of actions relating to them brought before courts. As a rule, complaints would be submitted rather to professional associations or local tourist organisations and he believed that the greatest utility of the rules under preparation would be to increase hotels' standards and thereby give certain guarantees to guests."

Mr. LOEWE

"The opinions expressed by Mr. Monaco and Mr. von Overbeck are those normally expressed by representatives from Scandinavia and non-European countries when faced, during negotiations at a universal level, with provisions on the recognition and enforcement of judgments. These rules have figured in all UNIDROIT drafts governing the liability of a certain profession and they have generally been accepted at a European level (CMR, CVR, final CVN draft) and refused at the world level (CCV by a very small majority; draft TCM). It would be regrettable if UNIDROIT were to change its position on this point even though one should not have too many illusions as to the fate of these provisions during the negotiations envisaged. If paragraphs 3 and 4 were

to be deleted then it would be necessary also to delete paragraphs 2 and 5 as it would be senseless as to prevent a court from assuming jurisdiction over a dispute merely because a similar case was pending before a foreign court, whose decision would not be recognised and enforced in the State of the second court seized of the case, and to exempt a foreign claimant from the payment of security for costs of proceedings where the decision dismissing his claim and ordering him to pay the costs incurred could not be enforced in the place where he has his belongings. Lastly, rules regarding jurisdiction (paragraph 1) without a guarantee of recognition or enforcement would be dangerous as they could prevent the claimant from bringing an action against the defendant in the country where he had his belongings and a decision given by a court in another State would be neither recognised nor enforced. These are the reasons why the Working Committee put the whole article and not just paragraphs 3 and 4 in square brackets."

Article 25

Mr. PETRÉN (Minutes of the 54<sup>th</sup> session, p. 15)

"..... noted the possibility for States to make a declaration under Article 25 (a) of the draft which would permit them to apply the provisions of the future instrument only to hotelkeepers' contracts between a hotelkeeper and a person whose principal place of business or habitual residence was not on the territory of the State where the accommodation and services were to be provided under the contract. A State availing itself of this declaration would thus create a dual régime on its territory between "national" and "international" contracts. If such a dual régime were to be set up, he wondered whether it would not be more convenient for the hotelkeeper if the international element were to consist in the contract having been concluded across frontiers, for otherwise the hotelkeeper, when concluding a contract inter praesentes, might be completely unaware of the residence of the future guest."

Mr. RÉCZEI (Minutes of the 54<sup>th</sup> session, p. 16)

"..... was, like Judge Petrén, unhappy about two separate régimes existing in a given State according to whether or not the contract was deemed to contain an international element. He preferred that the draft submitted to the Council be cast in the form not of an international Convention but of a model law which could be incorporated into internal law and applicable as one single régime governing all hotelkeepers' contracts."

Mr. von OVERBECK (Minutes of the 54<sup>th</sup> session, p. 17)

"..... also expressed his opposition to the idea of introducing a dual system into national legislation based upon the presence or absence of an international element in the hotelkeeper's contract and he stated his support for the view that the instrument should be cast in the form of a uniform law rather than in that of an international Convention."

Mr. KEARNEY (Minutes of the 54<sup>th</sup> session, p. 18)

"As to the point raised by Judge Petrón of the possibility of a dual régime being created by allowing States to restrict the application of the future instrument to contracts containing an international element, he stressed that this was merely a reservation, quite commonly to be found in international Conventions, upon which some States insisted so as to satisfy requirements of their legal system or constitution. He considered therefore that the declaration permitted by Article 25 (a) was an exception to the general principle laid down in Article 2 which provided that the Convention should apply to any hotelkeeper's contract, where the hotel in which the accommodation was to be provided was situated on the territory of a Contracting State. With regard to the idea that, if an international element were to be maintained, then the criterion of residence should be replaced by that of the contract itself being concluded over frontiers, he observed that very difficult problems of conflicts of law might arise."

Mr. LOEWE

"Mr. Petrón, Mr. Réczei and Mr. von Overbeck are opposed to the dual system which is made possible under paragraph 1 (a). It shall be recalled that it was the Hungarian member of the Working Committee who drew attention to the fact that a number of large countries such as, for example, the USSR, would probably never agree to modifying their laws governing the hotelkeeper's contract at a purely national level for the needs of an international Convention when foreign tourists were very much a minority. If this Convention is to have a chance of succeeding one will have to leave this possible reservation. On the other hand, if one applies a connecting factor such as the contract's being concluded other than inter praesentes, this would give rise to difficulties and above all to the possibility of abuse. All would depend on the place where the letter was posted and in practice, a letter of this kind is rarely sent by registered post. Once the dispute has started, the hotelkeeper could always say that the guest had not written to make his reservation but had come directly to the hotel; how

can the contrary be proved ? The same goes for reservations which are ever increasingly made by telephone even from foreign countries. It is to be feared that the application of the provisions of the future Convention only to cases in which there has been an international exchange of letters would result in the Convention's hardly ever being applied. On the other hand it should not be difficult for the hotel-keeper to realise that his guest is a foreigner. Hotel registration giving also the nationality of the guest is required almost everywhere by administrative regulation .

As to the form of the instrument (international Convention or a Convention providing a uniform law) this changes nothing as regards the contents of the solutions provided. The same rules can be laid down for either form. However, the constitutional procedure laid down in some countries (as in my own) require that a law be passed for the application of an instrument which has been drawn up in the form of a Convention providing a uniform law and this can delay ratification for 2 to 15 years whereas a simple Convention can be considered as being self-executing.

In short, my point of view coincides completely with those of the Working Committee and, apart from the error of presentation in Article 16, paragraph 2, I do not think that the draft should be changed in any way before being submitted to a Committee of Governmental Experts."